Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IAS PART 6**
Justice

----------	Index No. 8172/08
DEON WILLIAMS,	
	Motion
Plaintiff,	Date June 29, 2010
-against-	Motion
	Cal. No. 61
FAVA CAB CORP., et al.,	
Defendants.	Motion
----------	Sequence No. 2

	PAPERS NUMBERED
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Upon the foregoing papers it is ordered that this motion by defendants, Fava Cab Corp. and Nadeem A. Awan; cross motion by defendants, Adam Alhaji U. Farook and Youn-Hyun Park and cross motion by defendants Staff Cab Corp. and Balandea N. Tripathi, for summary judgment dismissing the complaint of plaintiff, Deon Williams, pursuant to CPLR 3212, on the ground that plaintiff has not sustained a serious injury within the meaning of Insurance Law § 5102 is decided as follows:

This action arises out of an automobile accident that occurred on January 20, 2008. Moving defendants have submitted proof in admissible form in support of the motion for summary judgment, for all categories of serious injury. The defendants submitted, inter alia, affirmed reports from four independent examining and/or evaluating physicians (two orthopedists, a neurologist and a radiologist) and plaintiff's own examination before trial transcript testimony.

APPLICABLE LAW

Under the "no-fault" law, in order to maintain an action for personal injury, a plaintiff must establish that a "serious injury" has been sustained (*Licari v. Elliot*, 57 NY2d 230 [1982]). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to judgment as a matter of law (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Winegrad v. New York Univ. Medical Center*, 64 NY2d 851 [1985]). In the present action, the burden rests on defendants to establish, by the submission of evidentiary proof in admissible form, that plaintiff has not suffered a "serious injury" (*Lowe v. Bennett*, 122 AD2d 728 [1st Dept 1986] *affd* 69 NY2d 701, 512 NYS2d 364 [1986]). When a defendant's motion is sufficient to raise the issue of whether a "serious injury" has been sustained, the burden shifts and it is then incumbent upon the plaintiff to produce prima facie evidence in admissible form to support the claim of serious injury (*Licari v. Elliot, supra; Lopez v. Senatore*, 65 NY2d 1017 [1985]).

In support of a claim that plaintiff has not sustained a serious injury, a defendant may rely either on the sworn statements of the defendant's examining physician or the unsworn reports of plaintiff's examining physician (*Pagano v. Kingsbury*, 182 AD2d 268 [2d Dept 1992]). Once the burden shifts, it is incumbent upon plaintiff, in opposition to defendant's motion, to submit proof of serious injury in "admissible form". Unsworn reports of plaintiff's examining doctor or chiropractor will not be sufficient to defeat a motion for summary judgment (*Grasso v. Angerami*, 79 NY2d 813 [1991]). Thus, a medical affirmation or affidavit which is based on a physician's personal examination and observations of plaintiff, is an acceptable method to provide a doctor's opinion regarding the existence and extent of a plaintiff's serious injury (*O'Sullivan v. Atrium Bus Co.*, 246 AD2d 418 [1st Dept 1998]). Unsworn MRI reports are not competent evidence unless both sides rely on those reports (*Gonzalezz v. Vasquez*, 301 AD2d 438 [1st Dept 2003]; *Ayzen v. Melendez*, 749 NYS2d 445 [2d Dept 2002]). However, in order to be sufficient to establish a prima facie case of serious physical injury the affirmation or affidavit must contain medical findings, which are based on the physician's own examination, tests and observations and review of the record rather than manifesting only the plaintiff's subjective complaints. It must be noted that a chiropractor is not one of the persons authorized by the CPLR to provide a statement by affirmation, and thus, for a chiropractor, only an affidavit containing the requisite findings will suffice

(*see*, CPLR 2106; *Pichardo v. Blum*, 267 AD2d 441 [2d Dept 1999]; *Feintuch v. Grella*, 209 AD2d 377 [2d Dept 2003]).

In the event, the findings, which must be submitted in a competent statement under oath (or affirmation, when permitted) must demonstrate that plaintiff sustained at least one of the categories of "serious injury" as enumerated in Insurance Law § 5102(d) (*Marquez v. New York City Transit Authority*, 259 AD2d 261 [1st Dept 1999]; *Tompkins v. Budnick*, 236 AD2d 708 [3d Dept 1997]; *Parker v. DeFontaine*, 231 AD2d 412 [1st Dept 1996]; *DiLeo v. Blumberg*, 250 AD2d 364 [1st Dept 1998]). For example, in *Parker, supra*, it was held that a medical affidavit, which demonstrated that the plaintiff's threshold motion limitation were objectively measured and observed by the physician, was sufficient to establish that plaintiff has suffered a "serious injury" within the meaning of that term as set forth in Article 51 of the Insurance Law. In other words, "[a] physician's observation as to actual limitations qualifies as objective evidence since it is based on the physician's own examinations". Furthermore, in the absence of objective medical evidence in admissible form of serious injury, plaintiff's self-serving affidavit is insufficient to raise a triable issue of fact (*Fisher v. Williams*, 289 AD2d 288 [2d Dept 2001]).

DISCUSSION

A. *Defendants established a prima facie case that plaintiff did not suffer a "serious injury" as defined in Section 5102(d), for all categories.*

The affirmed report of defendants' independent examining orthopedist, Michael J. Katz, M.D., indicates that an examination conducted on March 30, 2009 revealed a diagnosis of: resolved cervical strain with radiculitis, resolved lumbosacral strain with radiculitis and status-post arthroscopy both shoulder successful. He opines that the plaintiff is currently not disabled and he shows no signs of permanence relative to the neck and back, and with regard to the shoulders, it is extremely unlikely for an individual to have injury to both shoulders at the same time in a motor vehicle accident, and the pathology is far more likely to have occurred from bodybuilding or weightlifting. He further opines that the plaintiff is currently not disabled. Dr. Katz concludes that plaintiff is capable of gainful employment as a salesperson and is capable of his daily activities. Dr. Katz also concludes that the MRI reports of the cervical and lumbar spine indicate preexisting degenerative changes and the MRI report of the left shoulder indicates a

partial tear, which is usually pathology that occurs over time.

The affirmed report of defendants' independent examining neurologist, Monette Basson, M.D., indicates that an examination conducted on March 30, 2009 revealed that plaintiff is entirely intact neurologically. Dr. Basson concludes that plaintiff is working full time and can continue to do so with no neurologic disability or need for tests or treatment.

The affirmed report of defendants' independent examining orthopedist, Gregory Montalbano, M.D., indicates that an examination conducted on May 1, 2009 revealed that plaintiff did not sustain any substantial or permanent injury to the cervical spine as the result of the accident, that plaintiff did not sustain any substantial or permanent injury to the lumbar spine as the result of the accident, that plaintiff did not sustain any substantial or permanent injury to the right shoulder as the result of the accident.

The affirmed report of defendants' independent examining radiologist, A. Robert Tantleff, M.D., indicates that an MRI of the lumbar spine taken on April 18, 2008 revealed discogenic changes at L4-4 and L5-S1. He opines that there are degenerative disc bulges. Dr. Tantleff concludes that there are regional discogenic changes unrelated to the date of incident and not inconsistent with the individual's age.

The affirmed report of defendants' independent examining radiologist, A. Robert Tantleff, M.D., indicates that an MRI of the right shoulder taken on April 10, 2008 revealed a normal MRI of the right shoulder.

The affirmed report of defendants' independent examining radiologist, A. Robert Tantleff, M.R., indicates that an MRI of the left shoulder taken on March 20, 2008 revealed that the left shoulder is benign without evidence of acute or recent trauma or traumatic tear or rupture of the rotator cuff or gleoid labrum.

Additionally, defendants established a prima facie case of the "90/180 days". The plaintiff's examination before trial testimony indicates: that plaintiff missed approximately 2 months of work following the accident. Such evidence shows that the plaintiff was not curtailed from nearly all activities for the bare minimum of 90/180 days, required by the statute.

The aforementioned evidence amply satisfied defendants' initial burden of demonstrating that plaintiff did not sustain a "serious injury". Thus, the burden then shifted to plaintiff to

raise a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law (*see, Gaddy v. Eyler*, 79 NY2d 955 [1992]). Failure to raise a triable issue of fact requires the granting of summary judgment and dismissal of the complaint (*see, Licari v. Elliott*, *supra*).

B. Plaintiff fails to raise a triable issue of fact

In opposition to the motion, plaintiff submitted: a attorney's affirmation, an unsworn police accident report, an unsworn narrative surgical report of plaintiff's surgeon, Harshad Bhatt, M.D., which details arthroscopic surgery of the right and left shoulders, a sworn affidavit of plaintiff's physical medicine and rehabilitation physician, David Mun, M.D., afifrmations of plaintiff's physician, Ayoob Khodadadi, M.D., unsworn MRI reports of plaintiff's cervical spine and left shoulder by Richard A. Heiden, M.D., an affirmation of plaintiff's physician, Mark Shapiro, M.D., and an affirmed MRI report of Marck Shapiro, M.D., taken of the lumbar spine, an affirmation of plaintiff's radiologist, Steve B. Losik, M.D., and a sworn narrative MRI report of plaintiff's right shoulder by Steve B. Losik, M.D.

Medical records and reports by examining and treating doctors that are not sworn to or affirmed under penalties of perjury are not evidentiary proof in admissible form, and are therefore not competent and inadmissible (*see, Pagano v. Kingsbury*, 182 AD2d 268 [2d Dept 1992]; *McLoyrd v. Pennypacker*, 178 AD2d 227 [1st Dept 1991]). Therefore, unsworn reports of plaintiff's examining doctors will not be sufficient to defeat a motion for summary judgment (*see, Grasso v. Angerami*, 79 NY2d 813 [1991]). The narrative surgical report of plaintiff's surgeon, Harshad Bhatt, M.D., which details arthroscopic surgery of the left shoulder, is unsworn and unaffirmed, therefore it is not competent and inadmissible. Additionally, the unsworn MRI reports of plaintiff's cervical spine and left shoulder by Richard A. Heiden, M.D., are not competent and inadmissible.

Furthermore, in his affirmation, Dr. Mun states that he reviewed MRI's of the cervical spine and left shoulder by other doctors and determined his diagnosis in part based on the MRI reports, however, no MRI reports of the cervical spine of the left shoulder have been submitted to the court in competent and admissible form. The probative value of Dr. Mun's affidavit is reduced by the doctor's reliance on MRI's that are not in the record before the court. Since Dr. Mun's conclusions improperly rested on another expert's work product, it is insufficient to raise a material triable factual issue (*see, Constantinou v.*

Surinder, 8 AD3d 323 [2d Dept 2004]; *Claude v. Clements*, 301 AD2d 432 [2d Dept 2003; *Dominguez-Gionta v. Smith*, 306 AD2d 432 [2d Dept 2003]; *Codrington v. Ahmad*, 40 AD3d 799 [2d Dept 2007]).

Also, the plaintiff has failed to come forward with sufficient evidence to create an issue of fact as to whether the plaintiff sustained a medically-determined injury which prevented him from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than 90 of the 180 days immediately following the underlying accident (*Savatarre v. Barnathan*, 280 AD2d 537 [2d Dept 2001]). The record must contain objective or credible evidence to support the plaintiff's claim that the injury prevented plaintiff from performing substantially all of his customary activities (*Watt v. Eastern Investigative Bureau, Inc.*, 273 AD2d 226 [2d Dept 2000]). When construing the statutory definition of a 90/180 day claim, the words "substantially all" should be construed to mean that the person has been prevented from performing his usual activities to a great extent, rather than some slight curtailment (*see, Gaddy v. Eyler*, 79 NY2d 955; *Licari v. Elliott*, 57 NY2d 230 [1982]; *Berk v. Lopez*, 278 AD2d 156 [1st Dept 2000], *lv denied* 96 NY2d 708 [2001]). Plaintiff fails to include experts' reports or affirmations which render an opinion on the effect the injuries claimed may have had on the plaintiff for the 180-day period immediately following the accident. As such, plaintiff's submissions were insufficient to establish a triable issue of fact as to whether plaintiff suffered from a medically determined injury that curtailed him from performing his usual activities for the statutory period (*Licari v. Elliott*, 57 NY2d 230, 236 [1982]). Accordingly, plaintiff's claim that his injuries prevented him from performing substantially all of the material acts constituting his customary daily activities during at least 90 of the first 180 days following the accident is insufficient to raise a triable issue of fact (*see, Graham v. Shuttle Bay*, 281 AD2d 372 [1st Dept 2001]; *Hernandez v. Cerda*, 271 AD2d 569 [2d Dept 2000]; *Ocasio v. Henry*, 276 AD2d 611 [2d Dept 2000]).

Furthermore, plaintiff's attorney's affirmation is not admissible probative evidence on medical issues, as plaintiff's attorney has failed to demonstrate personal knowledge of the plaintiff's injuries (*Sloan v. Schoen*, 251 AD2d 319 [2d Dept 1998]).

Moreover, plaintiff's self-serving affidavit is "entitled to little weight" and are insufficient to raise triable issues of fact (*see, Zoldas v. Louise Cab Corp.*, 108 AD2d 378, 383 [1st Dept 1985]; *Fisher v. Williams*, 289 AD2d 288 [2d Dept 2001]).

Therefore, plaintiff's submissions are insufficient to raise a triable issue of fact (*see, Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

Accordingly, the defendants' motion for summary judgment is granted in its entirety and the plaintiff's Complaint is dismissed as to all categories.

The clerk is directed to enter judgment accordingly.

Movant shall serve a cop of this order with notice of entry upon the other parties of this action and on the clerk. If this order requires the clerk to perform a function, movant is directed to serve a copy upon the appropriate clerk.

The foregoing constitutes the decision and order of this court.

Dated: September 7, 2010

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Howard G. Lane, J.S.C.