Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

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

NICOLA MAHABIR and ADRIAN W. THOMAS,

Plaintiffs,

-against-

JOSEPH G. ARISTE, et al.,

Defendants.

Index No. 2565/09

Motion
Date October 19, 2010

Motion
Cal. No. 12, 13, 14

Motion
Sequence No. 1, 2, 3

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Upon the foregoing papers it is ordered that defendants' separate motions for summary judgment dismissing the complaint of plaintiff, Adrian W. Thomas, pursuant to CPLR 3212, on the ground that this plaintiff has not sustained a serious injury within the meaning of the Insurance Law § 5102(d) and plaintiffs' cross motion for summary judgment are hereby joined for purposes of disposition and are decided as follows:

This action arises out of an automobile accident that occurred on September 6, 2008. 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 two independent examining and/or evaluating physicians (a neurologist and a radiologist) and plaintiff's own verified bill of particulars.

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 (Gonzalez 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 any 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 limitations 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 neurologist, Edward M. Weiland, M.D., indicates that an examination conducted on November 12, 2009 revealed a diagnosis of: no evidence of any lateralizing neurological deficits at the present time. He opines that no further neurological studies or neurologic treatment is warranted. He further opines that plaintiff can perform activities of daily living and return to gainful employment, without limitations. Dr. Weiland concludes that there is no neurological residual or permanency related to the accident

The affirmed report of plaintiff's evaluating radiologist, Jessica F. Berkowitz, M.D., indicates that an MRI of the Cervical Spine dated October 3, 2008 indicates an unremarkable MRI of the cervical spine with no disc bulges or herniations present an no evidence of acute traumatic injury to the cervical spine.

The affirmed report of plaintiff's evaluating radiologist, Jessica F. Berkowitz, M.D., indicates that an MRI of the Lumbar Spine dated October 27, 2008 indicates an unremarkable MRI of the cervical spine with no disc bulges or herniations present and no evidence of acute traumatic injury to the cervical spine.

Additionally, defendants established a prima facie case for the category of "90/180 days". The plaintiff's examination before trial transcript testimony indicates: that plaintiff Adrian Thomas was confined to bed for 2 days, confined to home for 2 months, and was out of work for approximately 2 months. Such evidence shows that the plaintiff was not curtailed from nearly all activities for the bare minimum of 90/180, 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 raises a triable issue of fact as to all categories except for "90/180."

In opposition to the motion, plaintiff submitted: an attorney's affirmation, an unsworn police accident report, unsworn medical records, the examination before trial of plaintiff himself, an affirmation and sworn narrative reports of plaintiff's physical medicine and rehabilitation physician, Gautam Khakhar, M.D., sworn narrative reports of plaintiff's physical medicine and rehabilitation physician, Dorothy Miller, M.D., a sworn narrative report of plaintiff's physical medicine and rehabilitation physician, Dina Nelson, M.D., sworn narrative report of plaintiff's physical medicine and rehabilitation physician, Alexander Visco, M.D., plaintiff's own affidavit, a sworn affirmation and MRI report of plaintiff's radiologist, Richard J. Rizzuti, M.D.

A medical affirmation or affidavit which is based upon a physician's personal examinations and observation of plaintiff, is an acceptable method to provide a doctor's opinion regrading the existence and extent of a plaintiff's serious injury (O'Sullivan v. Atrium Bus Co., 246 AD2d 418, 688 NYS2d 167 [1st Dept 1980]). The causal connection must ordinarily be established by competent medical proof (see, Kociocek v. Chen,

283 AD2d 554 [2d Dept 2001]; Pommels v. Perez,4 NY3d 566 [2005]). Plaintiff submitted medical proof that was contemporaneous with the accident showing bulges and range of motion limitations (Pajda v. Pedone, 303 AD2d 729 [2d Dept 2003]). Plaintiff has established a causal connection between the accident and the injuries. The affirmation submitted by plaintiff's treating physical medicine and rehabilitation physician, Gautam Khakkar, M.D., sets forth the objective examination, tests, and review of medical records which were performed contemporaneously with the accident to support his conclusion that the plaintiff suffered from significant injuries, to wit: "disc bulges at L5-S1 and C5-C6 impinging the spinal canal. Dr. Khakkar's affirmation details plaintiff's symptoms, including neck pain and lower back pain. Additionally, plaintiff's radiologist, Richard J. Rizzuti, M.D. interpreted MRI films of plaintiff's cervical and lumbar spines taken on October 3, 2008 and October 27, 2008, respectively and found disc bulges of the cervical and lumbar spines. Furthermore, plaintiff has provided a recent medical examination detailing the status of her injuries at the current point in time (Kauderer v. Penta, 261 AD2d 365 [2d Dept 1999]). The affirmation of Dr. Khakkar provides that a recent examination by Dr. Khakkar on July 1, 2010 sets forth the objective examination, tests, and review of medical records which were performed to support his conclusion that the plaintiff suffers from significant injuries, to wit: "a cervical disc bulge and C5/C6 and lumbar disc bulge at L5/S1." He further opines that the injuries are permanent in nature, significant, and causally related to the motor vehicle accident of September 8, 2008, Clearly, the plaintiffs' experts' conclusions are not based solely on the plaintiff's subjective complaints of pain, and therefore are sufficient to defeat the motion (DiLeo v. Blumber, supra, 250 AD2d 364, 672 NYS2d 319 [1st Dept 1998]).

However, 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 her 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 her 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'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]).

Accordingly, the defendants' motions for summary judgment against plaintiff Adrian W. Thomas on threshold are denied as to all categories except for the category of "90/180".

The clerk is directed to enter judgment accordingly.

Movant shall serve a copy 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 motion by defendant, G. J. DeSilva for summary judgment pursuant to CPLR 3212 dismissing the complaint and all cross-claims as against him on the basis that the defendant didn't breach any duty owed is hereby granted.

Defendant, G. J. DeSilva established a prima facie case that on September 6, 2008, there was a rear-end collision in which defendant DeSilva's vehicle, while stopped, was struck in the rear by a vehicle operated by co-defendant, Joseph G. Ariste and allegedly owned by co-defendant Luboros Transportation, Inc. It is well established law that a rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence on the part of the driver of the rearmost vehicle, requiring the operator of that vehicle to proffer an adequate, non-negligent explanation for the accident (Reed v. New York City Transit Authority, 299 AD2 330 [2d Dept 2002]; see also, Velazquez v. Denton Limo, Inc., 7 AD3d 787 [2d Dept 2004], stating that: "[a] rear end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the driver of the moving vehicle, requiring the operator of that vehicle to come forward with a non-negligent explanation for the accident."

In opposition, defendants Joseph G. Ariste and Luboros

Transportation Inc. submit an uncertified police accident report, which is inadmissible hearsay, and an MV-104 report of Joseph G. Ariste which is uncertified and unsworn, and is also inadmissible hearsay. As such, said defendants failed to proffer an adequate, non-negligent explanation for the accident and so there are no triable issues of fact.

The cross motion by plaintiffs, Nicola Mahabir and Adrian W. Thomas for an order pursuant to CPLR 3212 granting summary judgment in favor of the plaintiffs on the basis that plaintiffs did not breach any duty owed and for judgment against the defendants is hereby granted.

Plaintiffs established a prima facie case that there are no triable issues of fact. There is no dispute that the plaintiffs were rear-seated passengers at the time of the accident. The testimony demonstrates that the defendants were negligent in following too closely, and there is no testimony or evidence that either plaintiff did anything to contribute to said accident.

In opposition, defendants fail to raise a triable issue of fact. Defendants submit, an uncertified police accident report which is inadmissible hearsay, and an MV-104 report of defendant Joseph G. Ariste which is uncertified and unsworn. Accordingly, a triable issue of fact has not been raised and a trial is not necessary.

The foregoing constitutes the decision and order of this Court.

Dated: December 1, 2010

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Howard G. Lane, J.S.C.