Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

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

ALICIA ASTUDILLO and NANCY LINARES,

Plaintiffs,

-against-

MV TRANSPORTATION INC., et al.,

Defendants.

Index No. 14603/07

Motion
Date January 19, 2010

Motion
Cal. No. 4

Motion
Sequence No. 2

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Notice of Motion-Affidavits-Exhibits.....	1-4
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Upon the foregoing papers it is ordered that defendants' motion and cross motion for summary judgment dismissing the complaint of plaintiffs, Alicia Astudillo and Nancy Linares, pursuant to CPLR 3212, on the ground that plaintiffs have not sustained a serious injury within the meaning of the Insurance Law § 5102(d)are decided as follows:

This action arises out of an automobile accident that occurred on September 4, 2006.

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 [3rd 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]).

I. Alicia Astudillo

Defendants have submitted proof in admissible form in support of the motion and cross motion for summary judgment, for all categories of serious injury. With respect to plaintiff Alicia Astudillo, the defendants submitted, inter alia, affirmed reports from three independent examining and/or evaluating physicians (a neurologist, an orthopedist and a radiologist) and plaintiff's own verified bill of particulars and plaintiff's own examination before trial transcript testimony.

In opposition to the motion and cross motion, plaintiffs submitted: an attorney's affirmation, pleadings, an affidavit of plaintiff herself, Alicia Astudillo, an affirmation of plaintiff's pain management and rehabilitation physician, Igor Cohen, MD, an affirmation of plaintiff's pain management and rehabilitation physician, Paolo Perrone, MD, an affirmation of plaintiff's physician, Paul M. Brisson, MD, and an affirmation of plaintiff's radiologist, Richard J. Rizzuti, MD.

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, Ravi Tikoo, MD, indicates that an examination conducted on September 17, 2008 revealed a diagnosis of: subjective complaints of headaches, history of cervical strain, history of lumbosacral strain, and history of soft tissue injuries. Dr. Tikoo opines that there is no objective findings to substantiate her subjective complaints and claimant does not

need any further treatment or diagnostic testing. He further opines that claimant is able to function in her normal capacity. Dr. Tikoo concludes that there is no disability from a neurological basis and a permanent injury has not been sustained.

The affirmed report of defendants' independent examining orthopedist, Barry M. Katzman, MD, indicates that an examination conducted on September 19, 2008 revealed a diagnosis of resolved: cervical strain, lumbar strain, right elbow strain, right and left knee strain. He opines that there is no need for causally-related orthopedic treatment, testing, or supplies. He further opines that claimant has no disability. Dr. Katzman concludes that claimant can seek gainful employment.

The affirmed report of defendants' evaluating radiologist, Audrey Eisenstadt, MD indicates that an MRI of the Left Knee taken on November 7, 2006 indicates an impression of: "tear, posterior horn of the medial meniscus with associated synovial popliteal cyst. No joint effusion. No ligamentous, tendinous or bony abnormality seen." She concludes that there is a "chronic medial meniscal tear."

The affirmed report of defendants' evaluating radiologist, Audrey Eisenstadt, MD, indicates that an MRI of the Lumbar Spine taken on October 31, 2006 revealed an impression of: "Dessication L2-3, L4-5, and L5-S1 levels. Asymmetric bulging L4-5 level, left greater than right. Bulging and small superimposed disc herniation J5-S1 intervertebral disc level." She notes pre-existing, degenerative disc disease.

The affirmed report of defendants' evaluating radiologist, Audrey Eisenstadt, MD, indicates that an MRI of the Cervical Spine taken on October 30, 2006 revealed a diagnosis of: "cervical straightening. Dessication, discogenic riding, and bulging C4-5 and C5-6 intervertebral disc levels. She notes evidence of degenerative disc disease.

Additionally, defendants established a prima facie case for the category of "90/180 days." The plaintiff's verified bill of particulars just indicates that plaintiff was "confined to bed" and was not confined to the home. The plaintiff's examination before trial transcript testimony indicates: that plaintiff was only confined to bed for about two weeks and confined to home for a month and a half. 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 fails to raise a triable issue of fact for all categories except for "90-180" days.

In opposition to the motion and cross motion, plaintiff submitted: an attorney's affirmation, pleadings, an affidavit of plaintiff herself, Alicia Astudillo, an affirmation of plaintiff's pain management and rehabilitation physician, Igor Cohen, MD, an affirmation of plaintiff's pain management and rehabilitation physician, Paolo Perrone, MD, an affirmation of plaintiff's physician, Paul M. Brisson, MD, and an affirmation of plaintiff's radiologist, Richard J. Rizzuti, MD.

There is a failure to rebut evidence of a pre-existing condition. Although defendants' independent radiologist concludes in her affirmed report that plaintiff's MRI films of the cervical and lumbar spines revealed evidence of preexisting degenerative disc disease, plaintiff's experts failed to indicate their awareness that plaintiff was suffering from such condition and failed to address the effect of these findings on plaintiff's claimed accident injuries (Francis v. Christopher, 302 AD2d 425 [2d Dept 2003]; Monette v. Keller, 281 AD2d 523 [2d Dept 2001]; Ifrach v. Neiman, 306 AD2d 380 [2d Dept 2003]). Hence, plaintiff failed to rebut defendants' claim sufficiently to raise a triable issue of fact (see, Pommells v. Perez, 4 NY3d 566 [2005] [where the court affirmed the trial court's granting of summary judgment where the defendant presented evidence that plaintiff had a pre-existing condition and plaintiff failed to rebut the defendant's allegation]).

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 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]).

The plaintiff has come forward with sufficient evidence to create an issue of fact as to whether the plaintiff sustained a medically-determined injury which prevented her from performing substantially all of the material acts which constituted her 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 includes experts' 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 sufficient to establish a triable issue of fact as to whether plaintiff suffered from a medically determined injury that curtailed her from performing her usual activities for the statutory period (Licari v. Elliott, 57 NY2d 230, 236 [1982]). Accordingly, plaintiff's claim that her injuries prevented her from performing substantially all of the material acts constituting her customary daily activities during at least 90 of the first 180 days following the accident is sufficient 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' motion and cross motion for summary judgment are granted in its entirety and the Complaint of plaintiff, Alicia Astudillo is dismissed as to all categories except for the category of "90/180" days.

II. Nancy Linares

With respect to plaintiff Nancy Linares, defendants have submitted proof in admissible form in support of the motion and cross motion for summary judgment, for all categories of serious

injury except for the category of "90/180" days, including, inter alia, affirmed reports from three independent examining and/or evaluating physicians (a neurologist, an orthopedist and a radiologist).

In opposition to the motion, plaintiff submitted: an attorney's affirmation, pleadings, plaintiff's own affidavit, an affidavit of plaintiff's physician, Harold James, MD, an affirmation of plaintiff's osteopath, Gregg M. Szerlip, DO, an affirmation of plaintiff's physician, Richard L. Parker, MD, an affirmation of plaintiff's radiologist, and an affirmation of plaintiff's physician, Richard J. Rizzuti, MD.

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 of serious injury except for the category for "90-180" days

The affirmed report of defendants' independent examining neurologist, Ravi Tikoo, MD, indicates that an examination conducted on November 12, 2008 revealed a diagnosis of: subjective complaints of headaches, history of cervical strain, history of lumbosacral strain, and history of soft tissue injuries. Dr. Tikoo opines that there is no objective findings to substantiate her subjective complaints and claimant does not need any further treatment or diagnostic testing. He further opines that claimant is able to work in her normal capacity. Dr. Tikoo concludes that there is no disability from a neurological basis and a permanent injury has not been sustained.

The affirmed report of defendants' independent examining orthopedist, Robert J. Orlandi, MD, indicates that an examination conducted on December 9, 2008 revealed a diagnosis of resolved cervical and lumbar strains and no clinical residuals post right shoulder arthroscopy. He opines that the claimant has sustained no permanent residuals and the prognosis is excellent. He further opines that claimant is not experiencing any significant pain syndrome. Dr. Orlandi concludes that there is no causally related disability.

The affirmed report of defendants' evaluating radiologist, Audrey Eisenstadt, MD, indicates that an MRI of the Lumbar Spine taken on October 11,2006 indicates an impression of: "Dessication and small central L5-S1 disc herniation." She notes that it is indicative of a pre-existing degenerative disease."

The affirmed report of defendants' evaluating radiologist, Audrey Eisenstadt, MD, indicates that an MRI of the Right Shoulder taken on October 12, 2006 revealed a diagnosis of: "mild hypertrophic disease of the acromioclavicular joint with a low-lying acromion both causing a narrowing of the subacromial space. Minimal tendinosis of the distal supraspinatus tendon. No rotator cuff tear or joint effusion seen."

The affirmed report of defendants' evaluating radiologist, Audrey Eisenstadt, M.D., indicates that an MRI of the Cervical Spine taken on October 13, 2006 revealed a diagnosis of: "Cervical straightening. Dessication to all cervical intervertebral discs. Small protrusions are seen at the C3-4, C4-5, C5-6 and C6-7 interverterbarl disc levels without thecal or neural impingement seen. She notes indications of pre-existing, degenerative disease.

Defendants have failed to raise a triable issue of fact as to the 90/180-day claim. 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, supra; Licari v. Elliott, 57 NY2d 230, supra; Berk v. Lopez, 278 AD2d 156 [2000], lv denied 96 NY2d 708 [2001]). Defendants' experts examined plaintiff more than 2 years after the date of plaintiff's alleged injury and accident on September 4, 2006. 2004. Defendants' experts failed to render an opinion on the effect the injuries claimed may have had on the plaintiff for the 180 day period immediately following the accident. The reports of the IMEs relied upon by defendant fail to discuss this particular category of serious injury and further, the IME's took place well beyond the expiration of the 180-day period Lowell v. Peters, 3 AD3d 778 [3d Dept 2004]). With respect to the 90/180-day serious injury category, defendants have failed to meet their initial burden of proof and, therefore, have not shifted the burden to plaintiff to lay bare its evidence with respect to this claim. As defendants have failed to establish a prima facie case with respect to the ninth category, it is unnecessary to consider whether the plaintiffs' papers in opposition to defendants' motion and cross motion on this issue were sufficient to raise a triable issue of fact (Manns v. Vaz, 18 AD3d 827 [2d Dept 2005]). Accordingly, defendants are not entitled to summary judgment with respect to the ninth category of serious injury.

B. Plaintiffs fail to raise a triable issue of fact

In opposition to the motion, plaintiffs submitted: an attorney's affirmation, pleadings, plaintiff's own affidavit, an affidavit of plaintiff's physician, Harold James, MD, an affirmation of plaintiff's osteopath, Gregg M. Szerlip, DO, an affirmation of plaintiff's physician, Richard L. Parker, MD, an affirmation of plaintiff's radiologist, and an affirmation of plaintiff's physician, Richard J. Rizzuti, MD.

There is a failure to rebut evidence of a pre-existing condition. Although defendants' independent radiologist concludes in her affirmed report that plaintiff's MRI films of the cervical and lumbar spines revealed evidence of preexisting degenerative disc disease, plaintiff's experts failed to indicate their awareness that plaintiff was suffering from such condition and failed to address the effect of these findings on plaintiff's claimed accident injuries (Francis v. Christopher, 302 AD2d 425 [2d Dept 2003]; Monette v. Keller, 281 AD2d 523 [2d Dept 2001]; Ifrach v. Neiman, 306 AD2d 380 [2d Dept 2003]). Hence, plaintiffs failed to rebut defendants' claim sufficiently to raise a triable issue of fact (see, Pommells v. Perez, 4 NY3d 566 [2005] [where the court affirmed the trial court's granting of summary judgment where the defendant presented evidence that plaintiff had a pre-existing condition and plaintiff failed to rebut the defendant's allegation]).

Furthermore, plaintiffs' 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 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, plaintiffs' 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 and cross motion for summary judgment are granted in their entirety and the Complaint of plaintiff, Nancy Linares is dismissed as to all categories except for the category of "90/180" days.

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 foregoing constitutes the decision and order of this Court.

Dated: February 11, 2010

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Howard G. Lane, J.S.C.