Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

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

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| ---------- | Index No. 450/09 |
| JEFFREY A. DIBLASI, | |
| | Motion |
| Plaintiff, | Date November 30, 2010 |
| -against- | Motion |
| | Cal. No. 8 |
| ALESSIO SANTONIO and JULIO | |
| Defendant. | Motion |
| ---------- | Sequence No. 2 |

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion-Affidavits-Exhibits..... | 1-4 |
| Opposition..... | 5-7 |
| Reply..... | 8-9 |

Upon the foregoing papers it is ordered that this motion by defendant, Julio Donoso, for summary judgment dismissing the complaint of plaintiff, Jeffrey A. Diblasi, pursuant to CPLR 3212, on the ground that plaintiff has not sustained a serious injury within the meaning of Insurance Law § 5102(d) is decided as follows:

This action arises out of an automobile accident that occurred on March 1, 2008. Defendant has submitted proof in admissible form in support of the motion for summary judgment, for all categories of serious injury except for the category of "90/180 days". The defendant submitted, inter alia, affirmed reports from an independent examining physician (an orthopedist).

***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. Defendant established a prima facie case that plaintiff did not suffer a "serious injury" as defined in Section 5102(d), for all categories except for the category of "90/180-days."***

The affirmed report of defendant's independent examining orthopedist, Isaac M. Cohen, M.D., indicates that an examination conducted on April 6, 2010 revealed a diagnosis of: resolved thoracolumbar strain and resolved by history right and left shoulder contusion. He opines that the examination of the cervical, thoracolumbar and right and left upper extremities are completely unremarkable without any evidence of sequalae or permanency related to the accident or record. He further opines that the plaintiff had a completely normal neurological examination. Dr. Cohen concludes that plaintiff may continue to work without restrictions and no further treatment is indicated.

Defendant has 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]). Defendant's experts examined plaintiff more than 1 year after the date of plaintiff's alleged injury and accident. Defendant's expert 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 IME relied upon by defendant fail to discuss this particular category of serious injury and further, the IME 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, defendant has failed to meet its initial burden of proof and, therefore, has not shifted the burden to plaintiff to lay bare its evidence with respect to this claim. As defendant has failed to establish

a prima facie case with respect to the ninth category, it is unnecessary to consider whether the plaintiff's papers in opposition to defendant's motion on this issue were sufficient to raise a triable issue of fact (Manns v. Vaz, 18 AD3d 827 [2d Dept 2005). Accordingly, defendant is not entitled to summary judgment with respect to the ninth category of serious injury.

The aforementioned evidence amply satisfied defendant's initial burden of demonstrating that plaintiff did not sustain a "serious injury" for all categories except for "90/180 days". 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 for all categories except for 90/180 days" (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: an attorney's affirmation, plaintiff's own affidavit, an affirmation of plaintiff's physician, Nucaine Anderson, M.D., an unsworn narrative report of plaintiff's physician, M.A. Farescal, M.D., unsworn medical reports, and affirmations and sworn reports of plaintiff's radiologist, John S. Lyons, 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 plaintiffs' examining doctors will not be sufficient to defeat a motion for summary judgment (see, Grasso v. Angerami, 79 NY2d 813 [1991]).

Plaintiff has failed to establish a causal connection between the accident and the injuries. 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]). An examination on July 9, 2010, more than two years after the accident is insufficient to establish a causal connection between the accident and the injuries (see, Resek v. Morreale, 74 AD3d 1043 [2d Dept 2010]; Catalano v. Kopman, 73 AD3d 963 [2d Dept 2010]).

Furthermore, in his narrative report, Dr. Anderson states that he reviewed medical records and MRI's of other doctors, ie. Dr. Farescal and Dr. Demetrius, however such records are not

before the court in admissible form. The probative value of Dr. Anderson's affidavit is reduced by the doctor's reliance on MRI's and records that are not in the record before the court in admissible form. Since Dr. Anderson'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]).

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 for all categories except for the category of "90/180 days" (see, Zuckerman v. City of New York, 49 NY2d 557 [1980]).

Accordingly, the defendant's motion for summary is granted in part and the plaintiff's Complaint 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: January 21, 2011

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**Howard G. Lane, J.S.C.**