Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

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

BEATRIZ RAMIREZ,

Plaintiff,

-against-

JUAN MEDRANO, SHANNA LATOYA DACON CHARLES DACON,

Defendants.

Index No. 30042/08

Motion Date November 23, 2010

Motion Cal. No. 10

Motion Sequence No. 2

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	1-4
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Upon the foregoing papers it is ordered that this motion by defendant, Juan Medrano for summary judgment dismissing the complaint of plaintiff, Beatriz Ramirez, pursuant to CPLR 3212, on the ground that plaintiff has not sustained a serious injury within the meaning of the Insurance Law § 5102(d)is decided as follows:

This action arises out of an automobile accident that occurred on January 12, 2008. Moving 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 three independent examining and/or evaluating physicians (a neurologist, an orthopedist and a radiologist).

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 neurologist, Ravi Tikoo, M.D., indicates that an examination conducted on December 21, 2009 revealed a diagnosis of: history of cervical strain, history of cervical strain, and history of soft tissue injuries. Dr. Tikoo opines that plaintiff does not need any further diagnostic treatment or testing and she is able to work in her normal capacity. Dr. Tikoo concludes that plaintiff is not disabled from a neurological basis and a permanent injury has not been sustained.

The affirmed report of defendant's independent examining orthopedist, Robert J. Orlandi, M.D., indicates that an examination conducted on January 19, 2010 revealed a diagnosis of cervical strain resolved but associated with a false loss of sensation into the entire right upper extremity; right shoulder strain resolved; and lumbar strain resolved but associated with a false loss of sensation in the entire left leg and a false restriction of lumbar forward flexion. He opines that the prognosis for plaintiff is excellent. Dr. Orlandi concludes that the plaintiff does not have a musculoskeletal disability and he cannot detect permanent residuals.

The affirmed report of plaintiff's evaluating radiologist,

Jessica F. Berkowitz, M.D., indicates that an MRI of the Cervical Spine dated February 21, 2008 indicates "[r]eversal of the normal cervical lordosis. . .Diffuse disc bulge or very small, very broad-based central disc herniation, C5-6. There is associated spondylosis which could confirm the chronic nature of the findings at this level. There is no evidence of acute traumatic injury to the cervical spine . . .Dr. Berkowitz concludes that there is no causal relationship between the plaintiff's alleged accident and the findings on the MRI examination.

The affirmed report of plaintiff's evaluating radiologist, Jessica F. Berkowitz, M.D., indicates that an MRI of the Lumbar Spine dated March 13, 2008 revealed an unremarkable MRI of the lumbar spine with no disc bulges or herniations present and no evidence of acute traumatic injury to the lumbar spine. Dr. Berkowitz concludes that there is no causal relationship between the plaintiff's alleged accident and the findings on the MRI examination.

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 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, 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 the ninth category

of "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 (see, Gaddy v. Eyler, 79 NY2d 955 [1992]) for all categories except for the ninth category of "90/180-days". 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 and sworn report's of plaintiff's physician, Alan S. Lubitz, M.D., a sworn narrative report of plaintiff's orthopedist, Shahid Mian, M.D., an affirmation and sworn surgical report of plaintiff's orthopedist, Shadid Mian, M.D., an affirmation and sworn narrative report of plaintiff's physician, Xiaoliang Zhang, MD, and unsworn reports.

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 7 months 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, 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.