Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

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

ROBERT SULEYMANOV,

Plaintiff,

-against-

APPROVED STORAGE, MOSES VAZQUEZ,

Defendants.

Index No. 4144/09

Motion
Date January 18, 2011

Motion
Cal. No. 18

Motion
Sequence No. 1

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Upon the foregoing papers it is ordered that this motion by defendants for summary judgment dismissing the complaint of plaintiff, Robert Suleymanov, 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 November 30, 2007. 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, an affirmed report from an independent examining physician (an orthopedist) 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 (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).*

The affirmed report of defendants' independent examining orthopedist, Michael J. Katz, M.D., indicates that an examination conducted on November 5, 2009 revealed a diagnosis of: resolved cervical strain, resolved lumbosacral strain, status post arthroscopy, right knee, for preexisting degenerative changes. He opines that: plaintiff shows no signs or symptoms of permanence relative to the neck or the back. With regard to the right knee, he has undergone arthroscopic surgery, but the changes described by Dr. Manouel are related to preexisting degenerative changes and not to anything that occurred on November 30, 2007. He further opines that plaintiff is not currently disabled and is capable of gainful employment as a driver and has an excellent surgical outcome. Dr. Katz concludes that plaintiff is capable of his activities of daily living.

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 returned to work approximately one month after the accident working six to eight hours a day, five days per week. 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

In opposition to the motion, plaintiff submitted: an attorney's affirmation, an affirmation of plaintiff's physician, John J. McGee, D.O., an affirmation of plaintiff's physician, Mehran Manouel, M.D., sworn narrative reports of plaintiff's physician, John J. McGee, D.O., an unsworn narrative report of plaintiff's physician, John T. Rigney, M.D., unsworn medical records, an un-notarized narrative report of plaintiff's chiropractor, Albert Youssefi, D.C., and an un-notarized narrative report of plaintiff's acupuncturist, Huaqin Chen.

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 range of motion limitations for the cervical and lumbar spines (Pajda v. Pedone, 303 AD2d 729 [2d Dept 2003]). Plaintiff has established a causal connection between the accident and the injuries for the cervical and lumbar spines. The affirmation submitted by plaintiff's treating physical medicine and rehabilitation physician, Dr. John J. McGee, 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. Dr. McGee's affirmation details plaintiff's symptoms, including neck pain, mid back pain, and right knee pain. He further opines that the injuries sustained by the plaintiff in the accident were causally related to the motor vehicle accident of November 30, 2007. Furthermore, plaintiff has provided a recent medical examination detailing the status of his injuries at the current point in time Kauderer v. Penta, 261 AD2d 365 [2d Dept 1999]). The affirmation of Dr. McGee provides that a recent examination by Dr. McGee on July 21, 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: lumbar subluxation; lumbar spine sprain/strain. He further opines that the injuries are permanent in nature, significant, causally related to the motor vehicle accident of November 30, 2007, and result in a permanent limitation in the plaintiff's range of motion. Clearly, the plaintiff's 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]).

Since there are triable issues of fact regarding whether the plaintiff sustained a serious injury to her cervical and lumbar spines, plaintiff is entitled to seek recovery for all injuries allegedly incurred as a result of the accident. In the instant case, plaintiff is entitled to seek recovery for injuries to the right knee (Marte v. New York City Transit Authority, 59 AD3d 398 [2d Dept 2009]).

Accordingly, the defendants' motion for summary is denied.

The foregoing constitutes the decision and order of this Court.

Dated: February 23, 2011

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Howard G. Lane, J.S.C.