Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

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

ILDA ESTEVEZ and DOMINGO ESTEVEZ,

Plaintiffs,

-against-

FRANCISCO MACIAS and SARA MACIAS,

Defendants.

Index No. 20045/08

Motion
Date March 15, 2011

Motion
Cal. No. 11

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 plaintiffs, Ilda Estevez and Domingo Estevez, pursuant to CPLR 3212, on the ground that plaintiffs have 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 April 25, 2007. Defendants have submitted proof in admissible form in support of the motion for summary judgment. The defendants submitted inter alia, affirmed reports from an independent examining 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. *Defendants established a prima facie case that plaintiffs did not suffer a "serious injury" as defined in Section 5102(d).*

The affirmed report of defendants' independent examining orthopedist, Robert L. Michaels, M.D., indicates that an examination of plaintiff Ilda Estevez on January 14, 2010 revealed a diagnosis of resolved cervical sprain and resolved lumbar sprain. He opines that plaintiff Ilda Estevez has no disability or permanency. He further opines that there are no limitations regarding work or activities of daily living. Dr. Michaels concludes that her prognosis is good.

The affirmed report of defendants' independent examining orthopedist, Robert L. Michaels, M.D., indicates that an examination of plaintiff Domingo Estevez on January 14, 2010 revealed a diagnosis of resolved cervical sprain and resolved lumbar sprain. He opines that plaintiff Domingo Estevez has no disability or permanence and that there is no objective clinical evidence of radiculopathy. He further opines that there are no limitations regarding activities of daily living and his prognosis is good.

The aforementioned evidence amply satisfied defendants' initial burden of demonstrating that plaintiff did not sustain a "serious injury." Thus, the burden then shifted to plaintiffs 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. Plaintiffs fail to raise a triable issue of fact

In opposition to the motion, plaintiffs submitted: an attorney's affirmation, plaintiffs' own examination before trial transcript testimony, sworn reports of plaintiff Ilda Estevez' chiropractor, Dominic Rubino, D.C. dated July 2, 2007 and August 20, 2010, a sworn report of plaintiff Ilda Estevez chiropractor, Jason J. Peloquin, D.C. dated May 2, 2007, sworn reports of plaintiff Ilda Estevez's chiropractor, Stephen Matringolo, D.C. dated May 21, 2007 and May 29, 2007, an affirmed report of plaintiff Ilda Estevez's physician, Nicholas M. Jones, D.O. dated June 12, 2007 and August 14, 2007, sworn MRI reports by plaintiff Ilda Estevez's radiologist, F. Scott Nowakowski, M.D., sworn MRI reports by plaintiff Ilda Estevez's radiologist, Robert Scott Schepp, M.D., sworn reports of plaintiff Domingo Estevez's radiologist Dominic Rubino, dated June 18, 2007, July 2, 2007, and August 15, 2007, and August 20, 2010, sworn MRI reports by plaintiff' Domingo Estevez's radiologist, F. Scott Nowakowski, M.D., sworn reports of plaintiff Domingo Estevez's chiropractor, Jason S. Bratner, D.C. dated May 2, 2007 and June 21, 2007, sworn MRI reports by plaintiff Domingo Estevez's radiologist, Steven Brownstein, M.D., and plaintiff's own affidavits.

There exists an unexplained gap or cessation in treatment. It is undisputed that plaintiff Ilda Estevez stopped receiving treatment from Dr. Rubino in July 2007 and did not return to the this provider for re-evaluation until August 2010. It is undisputed that plaintiff Domingo Estevez stopped receiving treatment from Dr. Rubino in August 2007 and did not return to the this provider for re-evaluation until August 2010. The Court of Appeals held in Pommells v. Perez, 4 NY3d 566 (2005), that a plaintiff who terminates therapeutic measures following the accident, while claiming "serious injury," must offer some reasonable explanation for having done so. Courts applying the *Pommels* standard have consistently held that in order for the explanation to be considered reasonable it must be "concrete and substantiated by the record." (Gomez v. Ford Motor Credit Co., 10 Misc 3d 900 [Sup Ct, Bronx County 2005]). The affirmed reports submitted by Dr. Rubino do not provide any information concerning an explanation for the more than 3-year gap between plaintiffs' medical treatment in 2007 and plaintiffs' re-evaluation by Dr. Rubino in August 2010 (Medina v. Zalmen Reis & Assocs., 239 AD2d 394 [2d Dept 1997]; Wang v. Harget Cab Corp., 47 AD3d 777 [2d Dept 2008]; Delgado v. Bernard, 23 Misc3d 1131A [Sup Ct, Bronx County 2009]; Peter v. Palencia, 2008 NY Slip Op 32862U [Sup Ct, Nassau County 2008]. Here, plaintiffs' doctors provide no explanation as to why plaintiffs failed to pursue any treatment

during the period from July/August 2007 - August 2010. In the instant case, plaintiffs themselves submit affidavits wherein they state that the reason they stopped receiving treatment was because the treatment they were receiving was not making them feel any better. However, plaintiffs' self-serving affidavits concerning their cessation in medical treatment without medical authorization is entitled to little weight and is insufficient to raise an issue of fact (see, Fisher v. Williams, 289 AD2d 288 [2d Dept 2001]; Zoldas v. Louise Cab Corp., 108 AD2d 378, 383 [1st Dept 1985]).

Also, the plaintiffs have failed to come forward with sufficient evidence to create an issue of fact as to whether the plaintiffs sustained a medically-determined injury which prevented them from performing substantially all of the material acts which constituted their 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 plaintiffs' claim that the injury prevented plaintiffs 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 his 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]). Plaintiffs fail to include experts' reports or affirmations which render an opinion on the effect the injuries claimed may have had on the plaintiffs for the 180-day period immediately following the accident. As such, plaintiffs' submissions were insufficient to establish a triable issue of fact as to whether plaintiff suffered from a medically determined injury that curtailed them from performing their usual activities for the statutory period (Licari v. Elliott, 57 NY2d 230, 236 [1982]). Accordingly, plaintiffs' claims that their injuries prevented them from performing substantially all of the material acts constituting their 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]).

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]).

Furthermore, plaintiffs' self-serving deposition testimony and affidavits are "entitled to little weight, and [are] certainly insufficient to raise a triable issue of fact" (see, Zoldas v. Louise Cab Corp., 108 AD2d 378, 383 [1st Dept 1985]).

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 for summary is granted and the plaintiffs' Complaint is dismissed.

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.

Plaintiff on the counterclaim's cross motion for an order pursuant to CPLR 3212 dismissing the counterclaim against plaintiff Ilda Estevez is denied inasmuch as said counterclaim sounds in contribution and indemnification, and as the plaintiffs' Complaint has been dismissed, the cross motion is hereby rendered moot.

This constitutes the decision and order of the Court.

Dated: March 28, 2011

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Howard G. Lane, J.S.C.