Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

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

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CYNTHIA ROWSON,

Plaintiff,

-against-

SYLVIO JEAN, MARIE ZOULETTE JEAN and WILL MCCOY,

Defendants.

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Index No. 29702/08

Motion Date March 22, 2011

Motion Cal. No. 34

Motion Sequence No. 1

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Upon the foregoing papers it is ordered that this motion by defendant, Will McCoy for summary judgment dismissing the complaint of plaintiff, Cynthia Rowson 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 December 20, 2007. Moving defendant has submitted proof in admissible form in support of the motion for summary judgment. The moving defendant submitted, inter alia, an affirmed report from an independent examining orthopedist and plaintiff's verified bill of particulars.

***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).***

The affirmed report of defendant's independent examining orthopedist, Stanley Ross, M.D., indicates that an examination of plaintiff on June 30, 2010 revealed a diagnosis of resolved thoracic spine sprain/strain and resolved lumbar spine sprain/strain. He opines that there is no evidence of disability. Dr. Ross concludes that the MRI findings prior to the accident (September 2007) are underlying pre-existing conditions, which conditions did not have an impact on the plaintiff's recovery.

Additionally, defendant established a prima facie case for the category of "90/180 days". The plaintiff's verified bill of particulars indicates: plaintiff was confined to bed for approximately 3 days and confined to house for approximately one month. 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 defendant's 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. Plaintiff fails to raise a triable issue of fact***

In opposition to the motion, plaintiff submitted: an attorney's affirmation, an affidavit purportedly signed by plaintiff Cynthia Rowson herself but erroneously states: "Oleg Levit, Esq., being duly sworn deposes and says:," a sworn affirmation of plaintiff's physical medicine and rehabilitation physician, Boris Kleyman, M.D., unsworn MRI reports of radiologist Robert Diamond, M.D. dated September 21, 2007 and March 31, 2008, unaffirmed narrative reports of plaintiff's physician, Hu-Nam Nam, M.D., an affirmed narrative report of Boris Kleyman, M.D., and a portion of plaintiff's own examination before trial transcript testimony.

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 submitted no proof of objective findings contemporaneous with the accident demonstrating causality. Plaintiff submits the affirmation and affirmed narrative report of plaintiff's physical medicine and rehabilitation physician, Boris Kleyman, M.D., which refers to a re-evaluation of plaintiff on February 24, 2011, more than 3 years after the accident. There is no evidence that he ever originally examined or treated the plaintiff at any time prior to that one exam. Plaintiff failed to submit any admissible medical proof that was contemporaneous with the accident showing any bulges, herniations, or range of motion limitations (Pajda v. Pedone, 303 AD2d 729 [2d Dept 2003]). 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 more than 3 years after the accident is insufficient to establish a causal connection between the accident and the injuries.

Furthermore, in his affirmation and narrative report, Dr. Kleyman states that he reviewed medical records and MRI's of

other doctors and affirms that he determined his diagnosis in part based on the medical records, however, no medical records or MRI reports have been submitted to the court in competent and admissible form. The probative value of Dr. Kleyman's affidavit is reduced by the doctor's reliance on medical records that are not in the record before the court. Since Dr. Kleyman'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]).

Also, the plaintiff has failed to 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 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]). Plaintiff fails 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, plaintiff's submissions were insufficient to establish a triable issue of fact as to whether plaintiff suffered from a medically determined injury that curtailed her from performing their usual activities for the statutory period (Licari v. Elliott, 57 NY2d 230, 236 [1982]). Accordingly, plaintiff's claims 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 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, 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]).

Furthermore, plaintiff's self-serving affidavit and deposition testimony 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, plaintiff's submissions are insufficient to raise a triable issue of fact (see, Zuckerman v. City of New York, 49 NY2d 557 [1980]).

Accordingly, the moving defendant's motion for summary is granted and the plaintiff's 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.

Dated: April 25, 2011

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