Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

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

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DIANA Y. ALTIMIRANO,

Plaintiff,

-against-

SEOUG AEH SHIN,

Defendant.

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Index No. 11243/09

Motion
Date April 26, 2011

Motion
Cal. No. 1

Motion
Sequence No. 1

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Upon the foregoing papers it is ordered that this motion by defendant's motion for summary judgment dismissing the complaint of plaintiff, Diana Y. Altimirano, 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 June 19, 2007. Defendant has submitted proof in admissible form in support of the motions for summary judgment. Defendant submitted inter alia, affirmed reports from an independent examining orthopedist, independent examining neurologist, and an independent examining otolaryngologist 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. *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, Joseph Y. Margulies, M.D., PhD, indicates that an examination of plaintiff on August 20, 2010 revealed a diagnosis of: resolved cervical sprain and resolved left shoulder contusion He opines that there are no residual objective orthopedic findings and there is no medical need for further treatment or testing. Dr. Margulies concludes that plaintiff has no functional disability and may continue with activities of daily living and work activities.

The affirmed report of defendant's independent examining neurologist, R.C. Krsihna, M.D., indicates that an examination of plaintiff on August 20, 2010 reveals an impression of: resolved cervical spine injury and left shoulder injury, defer to appropriate specialist. He opines that from a neurological point of view, plaintiff requires no further diagnostic testing or treatment and there is no neurological indication of a disability or contraindication from obtaining or continuing a gainful employment status. Dr. Krishna concludes that plaintiff can perform activities of daily living and work activities.

The affirmed report of defendant's independent examining otolaryngologist, Sheldon P. Hersh, M.D., indicates that an examination of plaintiff conducted on November 19, 2010 revealed normal hearing and middle ear function in both ears. He concludes that there are no residual ear, nose, and throat issues

that need to be addressed at the current point in time and there are no issues that would negatively impact on plaintiff's routine day-to-day activities or professional responsibilities.

Additionally, defendant established a prima facie case for the category of "90/180 days". The plaintiff's examination before trial transcript testimony indicates: that she was a college student at the time of the accident, the accident occurred after the spring semester had ended, and she began the following fall semester on time and did not miss any time from school as a result of the accident. Additionally, the membership and attendance records provided by her gym revealed that she missed less than four weeks as a result of the accident. 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 raises a triable issue of fact***

In opposition to the motion, plaintiff submitted: an attorney's affirmation, an affirmation and sworn MRI reports of plaintiff's cervical spine and left shoulder by plaintiff's radiologist, Mark A. Shapiro, M.D., an affidavit of plaintiff's chiropractor, Ted Rusek, D.C., plaintiff's own affidavit, and plaintiff's own examination before trial transcript testimony.

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 (Pajda v. Pedone, 303 AD2d 729 [2d Dept 2003]). Plaintiff has established a causal connection between the accident and the injuries. The notarized affidavit submitted by plaintiff's chiropractor, Ted

Rusek, D.C., 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, to wit: cervical radiculopathy, lumbosacral radiculopathy, and brachial plexus syndrome as well as straightening of the cervical lordosis, focal bulge at C5-6 and evidence of tendinosis/tendinopathy of the supraspinatus tendon. Dr. Rusek's affidavit details plaintiff's symptoms, including: neck pain radiating to the left shoulder and persistent lower back pain. He further opines that the injuries sustained by the plaintiff in the accident were causally related to the motor vehicle accident of June 19, 2007. Additionally, plaintiff's radiologist, Mark A. Shapiro, M.D., interpreted MRI films of plaintiff's cervical spine and left shoulder taken on June 29, 2007 and found, inter alia, a bulge of the cervical spine. Furthermore, plaintiff has provided a recent medical examination detailing the status of her injuries at the current point in time (Kauderer v. Penta, 261 AD2d 365 [2d Dept 1999]). The affidavit of Dr. Rusek provides that a recent examination by Dr. Rusek on January 19, 2011 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: positive orthopedic and neurological limitations and decreased restricted range of motion in her cervical and lumbar spines. He further opines that the injuries are permanent in nature, significant, and causally related to the motor vehicle accident of June 19, 2007. 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 [1st Dept 1998]).

Additionally, despite defendant's contentions that there is an unexplained gap in treatment (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), the Court finds that the gap in treatment is explained by Dr. Rusek in his affidavit wherein he states that after five and one half (5½) solid months of medical and therapeutic treatment, "it was becoming apparent that the therapy provided by her office was not assisting her in any long term relief, and any further treatment would not have produced any significant benefit for the patient" and as such, he advised plaintiff to discontinue attending therapy sessions.

Also, the plaintiff has 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 her 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 includes an expert's affidavit which renders an opinion on the effect the injuries claimed may have had on the plaintiff for the 180-day period immediately following the accident in that plaintiff's chiropractor, Ted Rusek, D.C. indicates that he initially advised plaintiff not to work at all until July 23, 2007 and after subsequent evaluations, he extended that date until December 7, 2007. As such, plaintiff's submissions were sufficient to establish a triable issue of fact as to whether plaintiff suffered from a medically determined injury that curtailed her from performing her usual activities for the statutory period (Licari v. Elliott, 57 NY2d 230, 236 [1982]).

Therefore, plaintiff's submissions are sufficient to raise a triable issue of fact (see, Zuckerman v. City of New York, 49 NY2d 557 [1980]).

Accordingly, the defendant's motion for summary judgment is denied.

The Court notes that while papers denominated "cross motion" were submitted to the Court by the plaintiff, said moving papers were not properly filed with the Queens County Clerk's Office and paid for, and as such, they will only be considered as opposition papers to the instant summary judgment motion by defendant.

The foregoing constitutes the decision and order of this Court.

Dated: May 2, 2011

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