Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

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

MARGARET ALFANO,

Plaintiff,

-against-

DONG YEONG AN,

Defendant.

Index No. 18710/09

Motion
Date June 7, 2011

Motion
Cal. No. 1

Motion
Sequence No. 4

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Upon the foregoing papers it is ordered that this motion by defendant for summary judgment dismissing the complaint of plaintiff, Margaret Alfano, 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 13, 2008. Defendant has submitted proof in admissible form in support of the motion for summary judgment. Defendant submitted, inter alia, an affirmed report 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. 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, Leon Sultan, M.D. indicates that an examination conducted on November 3, 2010 revealed that plaintiff is orthopedically stable and does not require any special treatment or testing for the occurrence of December 13, 2008. He opines that for the occurrence of December 13, 2008, his examination does not confirm any ongoing causally related orthopedic or neurological impairment. Dr. Sultan concludes that he notes bilateral knee osteorthritis, but a stable and neurologically intact cervical spine, thoracolumbar spine, and left shoulder.

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 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, plaintiff's own affidavit, a sworn narrative report of plaintiff's orthopedist, Mehran Manouel, M.D., a sworn narrative report of plaintiff's orthopedic surgeon, Donald I. Goldman, M.D., an affirmation of plaintiff's physician,

David Carmili, M.D., an affirmation of plaintiff's radiologist, Howard J. Gelber, M.D., an affirmation of plaintiff's physician, David R. Adin, D.O., 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 affirmation submitted by plaintiff's physician, David Carmili, M.D., sets forth the objective examination and tests which were performed contemporaneously with the accident to support his conclusion that the plaintiff suffered from significant injuries, to wit: "sprain and strain in her cervical spine, lumbar spine, and left shoulder". Dr. Carmili's affirmation details plaintiff's symptoms, including: pain and stiffness in her cervical spine, lumbar spine, and left shoulder. He opines that the injuries sustained by the plaintiff in the accident were causally related to the motor vehicle accident of December 13, 2008. 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. Donald I. Goldman provides that a recent examination by Dr. Goldman on February 14, 2011 sets forth the objective examination, tests, and medical records which were performed to support his conclusion that the plaintiff suffers from significant injuries, to wit: "left AC joint impingement syndrome with tear of the left biceps tendon". He opines that the injuries are permanent in nature and the injury to her left shoulder is causally related to the motor vehicle accident of December 13, 2008. 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 plaintiff herself, in her affidavit, wherein she states that she "stopped treating in large part because [her] no-fault benefits were cut off and [she] was afraid of owing [her] doctors large amounts of money" and "[i]f [she] had the ability to treat using [her] no fault insurance, [she] would have continued to do [so]". Such is a sufficient explanation (see, Jules v. Barbecho, 55 AD3d 548 [2d Dept 2008]).

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 foregoing constitutes the decision and order of this Court.

Dated: June 16, 2011

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Howard G. Lane, J.S.C.