Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

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

PRETA VEERASAMI,

Plaintiff,

-against-

REDGINE MANGURAT,

Defendant.

Index No. 891/09

Motion Date July 26, 2011

Motion Cal. No. 39

Motion Sequence No. 1

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Notice of Motion-Affidavits-Exhibits...	1-4
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Upon the foregoing papers it is ordered that this motion by defendant for summary judgment dismissing the complaint of plaintiff, Preta Veerasami, pursuant to CPLR 3212 on the ground that plaintiff has not sustained a serious injury within the meaning of Insurance Law § 5102(d) is decided as follows:

This action arises out of an automobile accident that occurred on September 20, 2008. Defendant has submitted proof in admissible form in support of the motion for summary judgment. Defendant submitted, inter alia, affirmed reports from two independent examining physicians (an independent examining neurologist and an independent examining 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. *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 neurologist, Daniel J. Feuer, M.D. indicates that an examination conducted on December 14, 2010 revealed a diagnosis of a normal neurological examination. He opines that there is no objective neurological disability or neurologic permanency causally related to the accident of September 20, 2008. Dr. Feuer concludes that plaintiff is neurologically stable and able to engage in activities of daily living without restriction.

The affirmed report of defendant's independent examining orthopedist, J. Mervyn Lloyd, M.D. indicates that an examination conducted on December 14, 2010 revealed a diagnosis of resolved cervical sprain; temporary irritation of pre-existing degenerative disc disease, cervical spine resolved; resolved lumbar sprain; and temporary irritation of pre-existing degenerative disc disease, lumbar spine, resolved.

Additionally, defendant established a prima facie case for the category of "90/180 days". The plaintiff's examination before trial transcript testimony indicates that plaintiff was not confined to bed after the accident and was only confined to home for two months. 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 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 for all categories except for the category of "90/180."

In opposition to the motion, plaintiff submitted: an attorney's affirmation, an affirmation of plaintiff's physician, Harold James, M.D., plaintiff's own examination before trial transcript testimony, plaintiff's own affidavit, unsworn medical records and reports, a sworn narrative report of plaintiff's physician, Yan Wang, M.D. dated September 30, 3008, a sworn narrative report of plaintiff's physician, Aric Hausknecht, M.D. dated December 8, 2008, a sworn MRI report of plaintiff's lumbar spine by Robert Diamond, M.D., a sworn MRI report of plaintiff's cervical spine by Robert Diamond, MD, and sworn narrative reports of defendants' independent examining doctors, Daniel J. Feurer, M.D. and J. Mervyn Lloyd, M.D.

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, 772 NYS2d 21 [1st Dept 2004]). Plaintiff submitted medical proof that was contemporaneous with the accident showing bulges and herniations (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 treating physician, Harold James, M.D., sets forth the objective tests which were performed contemporaneously with the accident to support his conclusion that the plaintiff suffered from significant injuries, to wit: "lumbar L5/S1 disc hydration loss with posterior disc herniation extending to eccentrically narrow the left foramina" and C5/6 posterior subligamentous disc bulge with central canal stenosis, C6/7 posterior disc bulge increasing on the left with ventral CSF impression and left paracentral canal stenosis". Dr. James' affirmation details plaintiff's symptoms, including neck, back, and head pain. He further opines that the herniations and bulges sustained by the plaintiff in the accident were formed most likely as a result of the accident of

September 20, 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 affirmation of Dr. James provides that a recent examination by Dr. James on April 11, 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: lumbar and cervical disc bulges and herniation. He further opines that the injuries are permanent in nature, chronic, and causally related to the motor vehicle accident of September 20, 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, 672 NYS2d 319 [1st Dept 1998]).

While defendant contends that there is a "gap in treatment," from August 2009 to April 2011, such a contention is misplaced as plaintiff has come forward with a proper explanation for the cessation of treatment. Dr. James states in his affirmation that physical therapy sessions terminated at the end of August, 2008 and: "[a]lthough further treatment would have benefitted Ms. Veerasami on a short term temporary basis, the herniation and bulges in her lumbar spine and cervical spine represent permanent injuries which cannot be cured by any long term physical therapy program" and "continued treatment would not cure the pain in her neck and back".

However, 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 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 fails to include experts' reports or affirmations which render an opinion on the effect the injuries claimed may have had on the plaintiff 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 her usual activities for the statutory period (Licari v. Elliott, 57 NY2d 230, 236 [1982]). Accordingly, plaintiff's claim 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]).

Therefore, plaintiff's submissions are insufficient to raise a triable issue of fact regarding the category of "90/180" (see, Zuckerman v. City of New York, 49 NY2d 557 [1980]).

Plaintiff's argument that defendant has failed to establish a prima facie case because Dr. Feuer and Dr. Lloyd contain differences in their range of motion finding and as to what constitutes normal is misplaced. Where there were different factual findings as to the extent of the plaintiff's range of motion and different expert opinions as to what is normal, a prima facie burden has been met by defendant (Layne v. Drouillard, 65 AD3d 1197 [2d Dept 2009]. The discrepancies in measurements do create an issue of fact for a jury to determine however (Auguste v. PTM Management Corp., 22 Misc 3d 1102A [Sup Ct, Kings County]).

Accordingly, the defendant's motion for summary judgment is denied as to all categories except for "90/180."

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: August 8, 2011

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Howard G. Lane, J.S.C.