Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

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

NOSHEEN A. SHAH and FAIZA A. SHAH,

Plaintiffs,

-against-

DAVE CAVALLO,

Defendant.

Index No. 3878/09

Motion
Date November 1, 2011

Motion
Cal. No. 17

Motion
Sequence No. 3

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Upon the foregoing papers it is ordered that the branch of the motion by defendant, Dave Cavallo for an order granting leave to file a late summary judgment motion is granted without opposition.

Pursuant to CPLR 3212, a motion for summary judgment "shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown". In the instant case, the record reveals that the Note of Issue was filed on December 20, 2010. Therefore, all summary judgment motions need have been made on or about April 20, 2011. It is undisputed that the instant motion for summary judgment motion was served on August 4, 2011. Any summary judgment motion made later than one hundred twenty days after the filing of the note of issue, requires court approval and a showing of "good cause". In Brill v. City of New York, the Court of Appeals held that: "'good cause' in CPLR 3212(a) requires a showing of good cause for making the delay in the motion - - a satisfactory explanation for the untimeliness - - rather than simply permitting meritorious, non judicial findings, however tardy." 2 NY3d 648 (NY 2004). "[S]tatuory time frames - like court-ordered time frames - are not options, they are requirements, to be taken

seriously by the parties. Reports, and hours of the courts, are taken up with deadlines that are simply ignored" (Micelli v. State Farm Automobile Insurance Company, 3 NY3d 725 [2004] [internal citations omitted]; see also, Dettmann v. Page, 18 AD3d 422 [2d Dept 2005; First Union Auto Finance, Inc. v. Donat, 16 AD3d 372 [2d Dept 2005]).

The Court finds that defendant has presented good cause shown for the delay in filing the late summary judgment motion. It is undisputed that at the time of the filing of the Note of Issue, significant discovery remained outstanding and plaintiff did not appear for her deposition until April 5, 2011 and her independent medical examination until May 18, 2011. The defendant made the instant motion shortly after the receipt of the doctor's IME report. The Court finds that defendant has provided good cause (Kunz v. Gleeson, 9 AD3d 480 [2d Dept 2004]; Brown v. The City of New York, 800 NYS2d 343 [Sup Ct, Bronx County 2005]; Gonzalez v. 98 Mag. Leasing Corp., 95 NY2d 124 [2000]).

Accordingly, defendant's motion for leave to serve a late summary judgment motion is granted without opposition.

Defendant, Dave Cavallo's motion and plaintiff on the counterclaim, Nosheen A. Shah's cross motion for summary judgment dismissing the complaint of plaintiff, Faiza A. Shah, pursuant to CPLR 3212, on the ground that plaintiff has not sustained a serious injury within the meaning of the Insurance Law § 5102(d)are decided as follows:

This action arises out of an automobile accident that occurred on November 8, 2007. Defendant and plaintiff on the counterclaim have submitted proof in admissible form in support of the motion and cross motion for summary judgment. Defendant and plaintiff on the counterclaim have submitted, inter alia, an affirmed report from an independent examining physician (an orthopedic surgeon) and plaintiff Faiza A. Shah's verified bill of particulars and 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 and plaintiff on the counterclaim established a prima facie case that plaintiff, Faiza A. Shah did not suffer a "serious injury" as defined in Section 5102(d).*

The affirmed report of defendant and plaintiff on the counterclaim's independent examining orthopedic surgeon, Stanley Ross, M.D., indicates that an examination conducted on May 18, 2011 revealed a diagnosis of: resolved cervical, thoracic, and lumbar spine sprain/strain and resolved right shoulder sprain/strain. Dr. Ross concludes that there is no objective evidence of a disability.

Additionally, defendant and plaintiff on the counterclaim established a prima facie case for the category of "90/180 days". The plaintiff, Faiza A. Shah's verified bill of particulars indicates that plaintiff, Faiza A. Shah was intermittently confined to her bed and home, and intermittently out of work. The plaintiff, Faiza A. Shah's examination before trial transcript indicates that plaintiff, Faiza A. Shah was not confined to bed for any period of time after the accident and she was only confined to her home for approximately three days.

The aforementioned evidence amply satisfied defendant and plaintiff on the counterclaim'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 fails to raise a triable issue of fact for all categories except for "90/180" days.

In opposition to the motion, plaintiff submitted: an attorney's affirmation, an affirmation of plaintiff's physician, Michael Tugetman, M.D., an affirmation of plaintiff's physician, Jamil Abraham, M.D., an affirmation and sworn MRI reports of plaintiff's radiologist, Charles DeMarco, M.D., plaintiff's own affidavit, and a sworn narrative report of plaintiff's physician, Michael Tugetman, M.D.

There exists an unexplained gap or cessation in treatment. It is undisputed that plaintiff stopped receiving treatment from Drs. Tugetman and Abraham in approximately the middle of 2008 and did not return for re-evaluation until 2011. 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 Drs. Tugetman and Abraham do not provide any information concerning an explanation for the over 2-year gap between plaintiffs' medical treatment in the middle of 2008 and plaintiff's re-evaluation by Dr. Tugetman in October 2011 (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, plaintiff's doctors provide no explanation as to why plaintiff failed to pursue any treatment during the period from approximately the middle of 2008 until October 2011. In the instant case, plaintiff herself has provided absolutely no explanation whatsoever for the gap or cessation of treatment in her affidavit.

However, 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 the expert report of Dr. Michael Tugetman who affirmed inter alia, that: "Ms. Shah was prevented from performing substantially all of her usual and customary daily activities for a period of ninety (90) days during the one hundred and eighty (180) days immediately following the accident. . . She was unable to perform her day-today activities because she could not bend or lift heavy objects without extreme pain and stiffness. She cannot sit for long periods of time with extreme pain and discomfort". 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 on all categories except for the category of "90/180" days (see, Zuckerman v. City of New York, 49 NY2d 557 [1980]).

Accordingly, the defendant's motion and plaintiff on the counterclaim's cross motion for summary judgment are granted as to all categories except for "90/180" days.

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: November 16, 2011

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Howard G. Lane, J.S.C.