Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

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

LOUVETTE FREIRE,

Plaintiff,

-against-

A. KARAMATZANIS,

Defendant.

A. KARAMATZANIS,

Third-Party Plaintiff,

-against-

JOHNNY J. FREIRE,

Third-Party Defendant.

Index No. 18252/09

Motion
Date August 16, 2011

Motion
Cal. No. 10 and 11

Motion
Sequence No. 3 and 2

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Upon the foregoing papers it is ordered that this motion by defendant/third-party plaintiff, A. Karamatzanis, for an order pursuant to CPLR 3124 directing the plaintiff, Louvette Freire, to produce the MRI films of the plaintiff's right knee taken by Dr. Andrew Caruthers on November 17, 2006 so that defendant and third-party plaintiff may have the films reviewed and for an order pursuant to CPLR 3126(2) directing the plaintiff Louvette Freire to produce the MRI film of her right knee or be precluded from offering any evidence at the trial of this action as to the

claimed pathology to her right knee and motion by defendant/third-party plaintiff, A. Karamatzanis, for summary judgment dismissing the complaint of plaintiff, Louvette Freire pursuant to CPLR 3212, on the ground that plaintiff has not sustained a serious injury within the meaning of the Insurance Law § 5102(d) and cross motion by third-party defendant, Johnny J. Freire for an order dismissing plaintiff's third-party Complaint and directing that summary judgment be entered in favor of third-party defendant, Johnny J. Freire, on the ground that no liability can be imputed to said third-party defendant or, in the alternative, pursuant to CPLR 3212 granting to the third-party defendant, Johnny J. Freire summary judgment and dismissing the plaintiff's Complaint for his failure to satisfy the no-fault threshold established by Insurance Law §§ 5102 and 5104 are hereby consolidated solely for purposes of disposition of the instant motions and cross motion and are decided as follows:

The motion by defendant/third-party plaintiff, A. Karamatzanis and the cross motion by third-party defendant, Johnny J. Freire for summary judgment dismissing the complaint of plaintiff, Louvette Freire 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 July 30, 2006. Defendant/third-party plaintiff and third-party defendant have submitted proof in admissible form in support of the motion for summary judgment. Defendant/third-party plaintiff and third-party defendant have submitted, inter alia, affirmed reports from two independent examining physicians (an independent examining orthopedic surgeon and an independent examining neurologist) and plaintiff's own verified bill of particulars 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 and third-party 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 and third-party defendant's independent examining orthopedic surgeon, Michael J. Katz, M.D. indicates that an examination conducted on August 30, 2010 revealed a diagnosis of resolved: cervical strain, thoracolumbosacral strain, right shoulder contusion, and right knee derangement. He opines that her prognosis is excellent. He further opines that it is significant that she had a prior motor vehicle accident on June 16, 2006 with injury to the neck, back, left shoulder, left elbow, right wrist, left wrist, left knee, left ankle and head. Dr. Katz concludes that plaintiff is not currently disabled, is capable of full time full duty work as a school administrator without restrictions, is capable of her activities of daily living, and is capable of all pre-loss activities without restrictions.

The affirmed report of defendant and third-party defendant's independent examining neurologist, Maria Audrie DeJesus, M.D. indicates that an examination conducted on November 22, 2010 revealed a diagnosis of: normal neurological examination. She opines that there is no objective evidence of any disability. Dr. DeJesus concludes that there is no need for treatment from a neurological standpoint.

Additionally, defendant and third-party defendant established a prima facie case for the category of "90/180 days." The plaintiff's examination before trial transcript testimony indicates that plaintiff missed just a week of classes and her job as a result of the accident. The plaintiff's verified bill of particulars indicates that plaintiff's confinement to bed and home is unknown at the time.

The aforementioned evidence amply satisfied defendant and third-party 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 fails to raise a triable issue of fact

In opposition to the motion, plaintiff submitted: an attorney's affirmation, a purported "affirmation" and initial narrative report of plaintiff's physician, Lev Bentsianov, M.D., an uncertified police accident report, a sworn MRI report of plaintiff's right knee by plaintiff's radiologist, Jeffrey Chess, M.D., a sworn narrative report of plaintiff's physician, Sanford R. Wert, M.D., a sworn narrative report of plaintiff's physician, R.C. Krishna, M.D., a portion of plaintiff's own examination before trial transcript testimony, and plaintiff's own affidavit.

As an initial matter, the Court notes that the purported "affirmation" and initial narrative report of plaintiff's physician, Lev Bentsianov, M.D. are inadmissible as Dr. Bentsianov has failed to allege that he is a physician, authorized by law to practice in this state, and has specifically crossed those words out of his affirmation, and as such his affirmation is inadmissible pursuant to CPLR 2106.

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 plaintiff's examining doctors will not be sufficient to defeat a motion for summary judgment (see, Grasso v. Angerami, 79 NY2d 813 [1991]).

Additionally, plaintiff submitted no proof of objective findings contemporaneous with the accident proving causation. The affirmed MRI report of plaintiff's radiologist, Jeffrey Chess, M.D., is completely silent as to causation. The remaining two experts fail to distinguish the presently alleged injuries from the injuries caused by plaintiff's prior automobile accident. Pursuant to plaintiff's examination before trial

transcript testimony, plaintiff suffered a prior injury to her right lower extremity in 2000, she had a prior motor vehicle accident just six (6) weeks prior to the subject accident which resulted in medical treatment and litigation, and she was still treating from the prior accident, when the subject accident occurred. Plaintiff's expert, Dr. Wert does not indicate any awareness of the prior accident. As Dr. Wert has failed to differentiate between plaintiff's presently alleged injuries and the injuries prior to the subject accident, Dr. Wert's opinion is insufficient to support the plaintiff's claim of serious injury (see, Pommels v. Perez, 4 NY3d 566 [2005]; Nikolopolous v. Brown, 704 NYS2d 129 [2d Dept 2000]; Stowe v. Simmons, 253 AD2d 422 [2d Dept 1998]). Moreover, as Dr. Wert failed to review the medical reports from the prior accidents, his opinion is insufficient to prove serious injury (see, Vidor v. Davila, 37 AD3d 826 [2d Dept 2007]). Additionally, Dr. Krishna has failed to differentiate between plaintiff's presently alleged injuries and the injuries prior to the subject accident, and as such, Dr. Krishna's opinion is insufficient to support the plaintiff's claim of serious injury (see, Pommels v. Perez, 4 NY3d 566 [2005]; Nikolopolous v. Brown, 704 NYS2d 129 [2d Dept 2000]; Stowe v. Simmons, 253 AD2d 422 [2d Dept 1998]). Dr. Krishna failed to review the medical reports from the prior accidents, and as such, his opinion is insufficient to prove serious injury (see, Vidor v. Davila, 37 AD3d 826 [2d Dept 2007]).

Furthermore, Dr. Krishna cannot establish causation since his report is based on an examination conducted on April 25, 2011, almost (5) five years after the subject accident. 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 almost five years after the accident is insufficient to establish a causal connection between the accident and the injuries (see, Thompson v. Abassi, 15 AD3d 95 [1st Dept 2005][stating 2½ years is not sufficiently contemporaneous]; Toulson v. Young Han Pae, 13 AD3d 317 [1st Dept 2004][stating 6 months is not sufficiently contemporaneous]).

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 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]).

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]).

Moreover, plaintiff's self-serving affidavit and deposition statements are "entitled to little weight" and are insufficient to raise triable issues of fact (see, Zoldas v. Louise Cab Corp., 108 AD2d 378, 383 [1st Dept 1985]; Fisher v. Williams, 289 AD2d 288 [2d Dept 2001]).

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 plaintiff's Complaint is dismissed as to all categories based upon a failure to satisfy the no-fault threshold.

As the plaintiff's Complaint has been dismissed on threshold grounds, the Court need not address the defendant/third-party plaintiff's motion to compel and/or preclude or the third-party

defendant's cross motion on liability grounds.

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: September 14, 2011

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Howard G. Lane, J.S.C.