Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

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

MONA LIVAEL,

Plaintiff,

-against-

GABRIEL O. AGBAEZE and PARUEZ TAJBAL,

Defendants.

Index No. 19944/09

Motion Date October 18, 2011

Motion Cal. No. 12

Motion Sequence No. 1

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Upon the foregoing papers it is ordered that this motion by defendants for summary judgment dismissing the complaint of plaintiff, Mona Livael, 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 15, 2009. Defendants have submitted proof in admissible form in support of the motion for summary judgment. Defendants have submitted, inter alia, affirmed reports from three independent examining physicians (a neurologist, an orthopedist, and a radiologist) 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. *Defendants established a prima facie case that plaintiff did not suffer a "serious injury" as defined in Section 5102(d).*

The affirmed report of defendants' independent examining neurologist, Maria Audrie de Jesus, M.D., indicates that an examination conducted on June 13, 2011 revealed a diagnosis of: resolved alleged injury to the cervical and lumbar spine. She opines that there is no evidence of permanency or disability. Dr. DeJesus concludes that plaintiff can perform all activities of daily living and is able to work without boundaries.

The affirmed report of defendants' independent examining orthopedist, Lisa Nason, M.D., indicates that an examination conducted on May 19, 2011 revealed an impression of: resolved alleged injury to the cervical and lumbar spine and resolved alleged injury to the left knee. She opines that there is no evidence of residuals or permanency. Dr. Nason concludes that plaintiff can perform her usual activities of daily living and her usual occupation with no restrictions.

The affirmed report of defendants' independent examining radiologist, A. Robert Tantleff, M.D., indicates that an MRI of the Cervical Spine taken on August 11, 2009 indicates an impression of: normal MRI of the Cervical Spine.

The affirmed report of defendants' independent examining radiologist, A. Robert Tantleff, M.D., indicates that an MRI of the Lumbar Spine taken on August 18, 2009 indicates an impression of: normal MRI of the Lumbar Spine.

The affirmed report of defendants' independent examining radiologist, A. Robert Tantleff, M.D., indicates that an MRI of the Left Knee taken on August 17, 2009 indicates an impression of: normal and unremarkable MRI of the Left Knee.

The affirmed report of defendants' independent examining radiologist, A. Robert Tantleff, M.D., indicates that an MRI of the Left Shoulder taken on August 7, 2009 indicates an impression of: normal MRI of the Left Shoulder revealing no evidence of acute or recent injury.

Additionally, defendants established a prima facie case for the category of "90/180 days". The plaintiff's examination before trial transcript testimony indicates that plaintiff missed only one (1) week of work after the accident.

The aforementioned evidence amply satisfied defendants' 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 verified bill of particulars, unsworn medical records and reports, an affirmation of plaintiff's physician, Yan Q. Sun, M.D., plaintiff's own affidavit, sworn MRI reports of the cervical spine and lumbar spine by plaintiff's radiologist, Steve B. Losik, M.D., two affirmations of plaintiff's physician, Ayoob Khodadadi, M.D., and an unsworn MRI report of plaintiff's radiologist, Richard A. Heiden, 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,4 NY3d 566 [2005]). Plaintiff submitted medical proof that was contemporaneous with the accident showing range of motion limitations regarding the left knee (Pajda v. Pedone, 303 AD2d 729 [2d Dept 2003]). Plaintiff

has established a causal connection between the accident and the left knee injuries. The affirmation submitted by plaintiff's treating physician, Dr. Yan Q. Sun, 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: range of motion limitations in the left knee. Dr. Sun opines that the left knee injuries sustained by the plaintiff in the accident were causally related to the motor vehicle accident of June 15, 2009. 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. Sun provides that a recent examination by Dr. Sun on July 9, 2011, sets forth the objective examination and tests which were performed to support his conclusion that the plaintiff suffers from significant injuries, to wit: range of motion limitations of the left knee. He further opines that the left knee injuries are permanent in nature, significant, and causally related to the motor vehicle accident of June 15, 2009. 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]).

Additionally, despite defendants' 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: "seven months into [her] treatment, [her] no fault carrier terminated benefits. Therefore [she] ceased treatment because [she] could no longer afford it on [her] own." Such is a sufficient explanation (see, Jules v. Barbecho, 55 AD3d 548 [2d Dept 2008]).

Since there are triable issues of fact regarding whether the plaintiff sustained a serious injury to her left knee, plaintiff is entitled to seek recovery for all injuries allegedly incurred as a result of the accident (Marte v. New York City Transit Authority, 59 AD3d 398 [2d Dept 2009]).

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 defendants' motion for summary judgment is denied.

The foregoing constitutes the decision and order of this Court.

Dated: November 4, 2011

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Howard G. Lane, J.S.C.