

**Stuppard v Admore**

2012 NY Slip Op 32891(U)

November 30, 2012

Sup Ct, Queens County

Docket Number: 700513/11

Judge: Howard G. Lane

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE**  
**Justice**

**IAS PART 6**

-----  
JOHANNE STUPPARD,  
  
                    Plaintiff,  
  
                    -against-  
  
THOMAS ADMORE,  
                    Defendant.  
-----

Index No. 700513/11  
  
Motion  
Date November 13, 2012  
  
Motion  
Cal. No. 11  
  
Motion  
Sequence No. 1

	<u>Papers Numbered</u>
HC - Notice of Motion.....	A
EF - Affirmation in Opposition.....	8

Upon the foregoing papers it is ordered that this motion by defendant for summary judgment dismissing the complaint of plaintiff, Johanne Stuppard 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 January 3, 2011. Defendant has submitted proof in admissible form in support of the motion for summary judgment. Defendant submitted, inter alia, affirmed reports from an independent examining neurologist and an independent evaluating 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. 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 Feuer, M.D., indicates that an examination of plaintiff on May 29, 2012 revealed a diagnosis of: a normal neurological examination. He opines that plaintiff demonstrates no neurological disability or permanency causally related to the accident. Dr. Feuer concludes that plaintiff is "able to engage in full active employment as a nurse, as well as the full activities of daily living without restriction."

The affirmed report of defendant's independent evaluating radiologist, Audrey Eisenstadt, M.D., indicates that an MRI of the Cervical Spine taken on February 7, 2011 revealed an impression of: normal cervical spine MRI. She opines that there are no bulging or disc herniations. Dr. Eisenstadt concludes that there are no posttraumatic changes causally related to the accident.

Additionally, defendant established a *prima facie* case for the category of "90/180 days". The plaintiff's own examination before trial transcript testimony indicates that plaintiff only remained out of work from the accident date of January 3 to the end of January and the month of February due to the accident. Such evidence shows that the plaintiffs were 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 plaintiffs did not sustain a "serious injury". Thus, the burden then shifted to plaintiffs 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; an unsworn medical report; plaintiff's own affidavit; an affirmation and sworn narrative report of plaintiff's radiologist, Vidya Malhotra, M.D.; and an affirmation and medical reports of plaintiff's physician, Raj Tolat, 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 regarding the existence and extent of a plaintiff's serious injury. (*O'Sullivan v. Atrium Bus Co.*, 246 AD2d 418, 688 NYS2d 167 [1<sup>st</sup> 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 treating physician, Dr. Raj Tolat, sets forth the objective examination, tests, and review of medical records which were performed contemporaneously with the accident to support his conclusion that the plaintiff suffered from significant injuries, to wit: "sprain of the cervical spine, sprain of the lumbar spine and episodic post-traumatic headaches". Dr. Tolat's affirmation details plaintiff's symptoms, including neck pain which radiated to both trapezius muscles with tingling of the left hand, low back pain, and episodic headaches. He further opines that the injuries sustained by the plaintiff in the accident were causally related to the motor vehicle accident of January 3, 2011. Additionally, plaintiff's radiologist, Vidya Malhotra, M.D., interpreted MRI films of plaintiff's cervical spine taken on February 7, 2011 and found "[s]mall posterior central bulging discs seen at C3-4, C4-5 and C5-6 disc space levels compressing the thecal sac". 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. Tolat provides that a recent

examination by Dr. Tolat on September 19, 2012 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: significant range of motion limitations to her cervical and lumbar spines. He further opines that the injuries are permanent in nature, significant, causally related to the motor vehicle accident of January 3, 2011, and result in a permanent limitation in the plaintiff's range of motion. 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 [1<sup>st</sup> Dept 1998]).

Also, 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 [1<sup>st</sup> Dept 2000], lv denied 96 NY2d 708 [2001]). Plaintiff includes an expert opinion of Dr. Tolat who renders an opinion on the effect the injuries claimed may have had on the plaintiff for the 180-day period immediately following the accident, stating that plaintiff was unable to work from January 26, 2011 to August 10, 2011 due to her injuries. 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]). 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 sufficient to raise a triable issue of fact.

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 motion is denied.

The foregoing constitutes the decision and order of this Court.

Dated: November 30, 2012

.....  
**Howard G. Lane, J.S.C.**