Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

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

ROMAN SADYKOV,

Plaintiff,

-against-

AIGBOKHAE A. OGBEIDE and MOSES TAXI INC.,

Defendants.

Index No. 23323/10

Motion
Date March 8, 2013

Motion
Cal. No. 86

Motion
Sequence No. 1

	Papers Numbered
Notice of Motion-Affidavits-Exhibits...	1-4
Opposition.....	5-7
Reply.....	8-9

Upon the foregoing papers it is ordered that this motion by defendants for summary judgment dismissing the complaint of plaintiff, Roman Sadykov 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 March 20, 2010. Defendants have submitted proof in admissible form in support of the motion for summary judgment. Defendants submitted, inter alia, affirmed reports from an independent evaluating radiologist and an independent examining orthopedist, and plaintiff's own verified bill of particulars.

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 evaluating radiologist, A. Robert Tantleff, M.D., indicates that an MRI of the Lumbar Shoulder taken on April 28, 2010 reveals an impression of: unremarkable and normal MRI examination of the left shoulder with no evidence of acute or recent injury.

The affirmed report of defendants' independent evaluating radiologist, A. Robert Tantleff, M.D., indicates that an MRI of the left knee taken on May 5, 2010 reveals an impression of: unremarkable and normal MRI examination of the left knee with no evidence of acute or recent injury or post-traumatic abnormality correlative to the date of the incident.

The affirmed report of defendants' independent evaluating radiologist, A. Robert Tantleff, M.D., indicates that an MRI of the lumbar spine taken on April 21, 2010 revealed "longstanding and advanced discogenic changes with an associated degenerative disc herniation".

The affirmed report of defendants' independent evaluating radiologist, A. Robert Tantleff, M.D., indicates that an MRI of the cervical spine taken on April 14, 2010 revealed an impression of: advanced discogenic changes of the cervical spine at C5-6 which required years and decades to develop and is unrelated to the current incident, no evidence of acute or recent exacerbatory changes, and regional discogenic changes at the remaining levels

of no significance.

The affirmed report of defendants' independent examining orthopedist, Christopher J. Cassels, M.D., indicates an analysis and impression of: plaintiff may have sustained a minor sprain/strain of the cervical spine, but that this has resolved and plaintiff has fully recovered, the plaintiff did not sustain any significant or permanent injury to the right shoulder as a result of the subject accident, plaintiff may have sustained a minor sprain/strain of the lumbar spine, but that this is resolving and he will fully recover with home exercises, and plaintiff suffered no significant or permanent injury to the left knee as a result of the accident.

Additionally, defendants established a prima facie case for the category of "90/180 days". The plaintiff's verified bill of particulars indicates that plaintiff was not confined to any hospital and it provides no time in which plaintiff was confined to bed or home. 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 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 as to all categories except for "90/180 days."

In opposition to the motion, plaintiff submitted: an attorney's affirmation; an affirmation of plaintiff's physician, Mark Kostin, M.D.; plaintiff's own affidavit; unsworn MRI Reports; a sworn narrative report of plaintiff's physician, Lester Nadel, M.D.; and unsworn medical reports.

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 range of motion limitations of the cervical and lumbar spines (Pajda v. Pedone, 303 AD2d 729 [2d Dept 2003]). Plaintiff has established a causal connection between the accident and the cervical and lumbar spine injuries. The affirmation submitted by plaintiff's treating physician, Lester Nadel, M.D. 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 injury to the cervical and lumbar spines. Dr. Nadel's affirmation details plaintiff's symptoms, including constant severe neck pain and constant severe low back pain. He further opines that the injuries sustained by the plaintiff in the accident were causally related to the motor vehicle accident of March 20, 2010. Furthermore, plaintiff has provided a recent medical examination detailing the status of his injuries at the current point in time (Kauderer v. Penta, 261 AD2d 365 [2d Dept 1999]). The affirmation of Dr. Kostin, provides that a recent examination by Dr. Kostin on January 18, 2013 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: cervical and lumbar radiculopathy. He further opines that the cervical and lumbar injuries are permanent an progressive in nature, causally related to the motor vehicle accident of March 20, 2010 and superimposed upon the pre-exiting condition of his body. 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]).

Since there are triable issues of fact regarding whether the plaintiff sustained a serious injury to his cervical and lumbar spines, 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]).

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 him from performing substantially all of the material acts which constituted his 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 his 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 him from performing his usual activities for the statutory period (Licari v. Elliott, 57 NY2d 230, 236 [1982]). Accordingly, plaintiff's claim that his injuries prevented him from performing substantially all of the material acts constituting his 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 sufficient to raise a triable issue of fact for all categories except for that of "90/180 days" (see, Zuckerman v. City of New York, 49 NY2d 557 [1980]).

The foregoing constitutes the decision and order of this Court.

Dated: April 10, 2013

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