

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE IAS PART 22  
Justice

-----	Index No. 12817/06
GLORIA MARTINEZ and MIGUEL VIDAL,	Motion
Plaintiffs,	Date September 23, 2008
-against-	Motion
SNORAC, INC. and ANTHONY CAMILO,	Cal. No. 20
Defendants.	Motion
-----	Sequence No. 2

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Upon the foregoing papers it is ordered that the motion by defendant Snorac, Inc. and the cross motion by Anthony Camilo for summary judgment dismissing the complaint of plaintiffs, Gloria Martinez and Miguel Vidal pursuant to CPLR 3212, on the ground that plaintiffs Gloria Martinez and Miguel Vidal have not sustained serious injuries within the meaning of the Insurance Law § 5102(d) is decided as follows:

**I. 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, 487 NYS2d 316 [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, 511 NYS2d 603 [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, 494 NYS2d 101 [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, 587 NYS2d 692 [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, 580 NYS2d 178 [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, 668 NYS2d 167 [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, 700 NYS2d 863 [2d Dept 1999]; *Feintuch v. Grella*, 209 AD2d 377, 619 NYS2d 593 [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, 686 NYS2d 18 [1st Dept 1999]; *Tompkins v. Budnick*, 236 AD2d

708, 652 NYS2d 911 [3rd Dept 1997]; *Parker v. DeFontaine*, 231 AD2d 412, 647 NYS2d 189 [1st Dept 1996]; *DiLeo v. Blumberg*, 250 AD2d 364, 672 NYS2d 319 [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]).

## **II. DISCUSSION WITH RESPECT TO DEFENDANT'S MOTION AND CROSS MOTION TO DISMISS THE COMPLAINT OF PLAINTIFF GLORIA MARTINEZ**

**A. Defendant established a prima facie case that plaintiff Gloria Martinez did not suffer a "serious injury" as defined in Section 5102(d), for all categories.**

This action arises out of an automobile accident that occurred on March 13, 2005. Defendants have submitted proof in admissible form in support of the motion and cross motion for summary judgment, for all categories of serious injury. The defendants submitted *inter alia*, affirmed reports from two independent examining physicians (a neurologist and an orthopedist), plaintiff, Gloria Martinez's verified bill of particulars which indicates: that she was only confined to the hospital for approximately one (1) day and confined to bed/home for approximately thirty (30) days and intermittently thereafter and continuing.

In opposition to the motion, plaintiff Gloria Martinez submitted: an unsworn an uncertified police accident report, unsworn medical records and reports, an unsworn MRI report of the cervical spine, a sworn narrative report of plaintiff's physical medicine and rehabilitation physician, Frida Goldin, M.D., unsworn No-Fault Insurance Law Records, plaintiff's own examination before trial transcript testimony, and plaintiff's own affidavit.

The affirmed report of defendant's independent examining neurologist, Monette G. Basson, M.D., indicates that an

examination conducted on February 6, 2008 revealed that plaintiff is intact neurologically and that there is no objective evidence of neurologic disability or permanency and no evidence of a head injury to cause headache. She opines that plaintiff "has fully recovered from any cervical and lumbar sprains she may have sustained." Dr. Basson concludes that while there is a causal relationship between the accident and resolved cervical and lumbar sprains, there is no objective neurologic findings at present.

The affirmed report of defendant's independent examining orthopedist, Edward A. Tioriello, M.D. indicates that an examination revealed a diagnosis of: "resolved cervical hyperextension injury, resolved low back strain, resolved right shoulder strain." He opines that there is no objective evidence of orthopedic disability or permanency. Dr. Tioriello concludes that there is no need for orthopedic treatment.

Furthermore, although plaintiff alleges a miscarriage in her verified bill of particulars, plaintiff does not make any complaints to Dr. Basson that she suffered a miscarriage.

Additionally, defendants established a prima facie case for the category of "90/180 days" for the plaintiff Gloria Martinez. The plaintiff's verified bill of particulars indicates: that she was only confined to the hospital for approximately one (1) day and confined to bed/home for approximately thirty (30) days and intermittently thereafter and continuing. 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, Gloria Martinez fails to raise a triable issue of fact**

In opposition to the motion, plaintiff Gloria Martinez submitted: an unsworn and uncertified police accident report, unsworn medical records and reports, an unsworn MRI report of the cervical spine, a sworn narrative report of plaintiff's physical

medicine and rehabilitation physician, Frida Goldin, M.D., unsworn No-Fault Insurance Law Records, plaintiff's own examination before trial transcript testimony, and plaintiff's own affidavit.

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 also, Pagano v. Kingsbury*, 182 AD2d 268 [2d Dept 1992]). Therefore, unsworn records of plaintiff's examining and treating doctors will not be sufficient to defeat a motion for summary judgment (*see, Grasso v. Angerami*, 79 NY2d 813, 580 NYS2d 178 [1991]).

Plaintiff submitted no proof of objective findings contemporaneous with the accident. The only admissible medical proof submitted by plaintiff is the affirmed narrative report of plaintiff's physical medicine and rehabilitation physician, Frida Goldin, M.D., who evaluated plaintiff only one time, on July 9, 2008, more than three (3) years after the accident. Plaintiff failed to submit any admissible medical proof that was contemporaneous with the accident showing any bulges, herniations, or range of motion limitations (*Pajda v. Pedone*, 303 AD2d 729 [2d Dept 2003]). 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*, 772 NYS2d 21 [1st Dept 2004]). An examination more than three (3) years after the accident is insufficient to establish a causal connection between the accident and the injuries. Additionally, other than the initial evaluation examination of plaintiff more than three (3) years after the accident, the record is devoid of any competent evidence of plaintiff's treatment or need for treatment.

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 [1<sup>st</sup> 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 defendants' motion for summary judgment against plaintiff Gloria Martinez is granted in its entirety and the complaint of plaintiff, Gloria Martinez is dismissed as to all categories.

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.

**III. DISCUSSION WITH RESPECT TO DEFENDANT'S MOTION AND CROSS MOTION TO DISMISS THE COMPLAINT OF PLAINTIFF MIGUEL VIDAL**

**A. Defendant established a prima facie case that plaintiff did not suffer a "serious injury" as defined in Section 5102(d), for all categories for plaintiff Miguel Vidal.**

Defendants have submitted proof in admissible form in support of the motion and cross motion for summary judgment, for all categories of serious injury. The defendants submitted, *inter alia*, affirmed reports from two independent examining physicians (a neurologist and an orthopedist), plaintiff, Miguel Vidal's verified bill of particulars which indicates that he was not confined to the hospital and was confined to bed/home for approximately thirty (30) days and intermittently thereafter and continuing. Such evidence shows that the plaintiff was not curtailed from nearly all activities for the bare minimum of 90/180, required by the statute.

In opposition to the motion, plaintiff Miguel Vidal submitted: an unsworn and uncertified police accident report, unsworn medical records and reports, a sworn MRI report of the left knee, an unsworn MRI report of the cervical spine, unnotarized reports of plaintiff's chiropractor, Charles M. Terranova, D.C., a sworn narrative report of plaintiff's physical medicine and rehabilitation physician, Frida Goldin, M.D., unsworn No-Fault Insurance Law Records, an attorney's affirmation, plaintiff's own examination before trial transcript testimony and plaintiff's own affidavit.

The affirmed report of defendant's independent examining neurologist, Monette G. Basson, M.D., indicates that an examination conducted on February 6, 2008 revealed that plaintiff is intact neurologically and that he has no neurologic symptoms whatsoever. She opines that he has recovered from any cervical sprain he may have sustained. Dr. Basson concludes that while there is a causal relationship between the accident and resolved cervical sprain, there are no objective neurologic findings at present.

The affirmed report of defendant's independent examining orthopedist, Edward A. Tiorriello, M.D. indicates that an examination on January 2, 2008 revealed a diagnosis of: "resolved cervical hyperextension injury, resolved left knee sprain." He opines that there is no objective evidence of an orthopedic disability and no permanence. He further opines that the claimant has a preexisting history of degenerative changes of the

left knee which may account for his subjective complaints. Dr. Toriello concludes that: the examination of the left knee was completely normal, that there is no need for orthopedic treatment, and that claimant can work with no restrictions.

Additionally, defendant, Miguel Vidal established a prima facie case for the category of "90/180 days". The plaintiff's verified bill of particulars indicates that he was not confined to the hospital and was confined to bed/home for approximately thirty (30) days and intermittently thereafter and continuing. 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 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*).

In opposition to the motion, plaintiff Miguel Vidal submitted: an unsworn and uncertified police accident report, unsworn medical records and reports, a sworn MRI report of the left knee, an unsworn MRI report of the cervical spine, unnotarized reports of plaintiff's chiropractor, Charles M. Terranova, D.C., a sworn narrative report of plaintiff's physical medicine and rehabilitation physician, Frida Goldin, M.D., unsworn No-Fault Insurance Law Records, an attorney's affirmation, plaintiff's own examination before trial transcript testimony, and plaintiff's own affidavit.

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 also, *Pagano v. Kingsbury*, 182 AD2d 268 [2d Dept 1992]). Therefore, unsworn records of plaintiff's examining and treating doctors will not be sufficient to defeat a motion for summary judgment (see, *Grasso v. Angerami*, 79 NY2d 813, 580 NYS2d 178 [1991]).

The unnotarized reports of plaintiff's chiropractor, Charles M. Terranova, D.C. is inadmissible, as 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, 700 NYS2d 863 [2d Dept 1999]; *Feintuch v. Grella*, 209 AD2d 377, 619 NYS2d 593 [2d Dept 2003]).

Plaintiff submitted no proof of objective findings contemporaneous with the accident, that established a causal connection between the accident and the injuries. The only admissible medical proof submitted by plaintiff is the affirmed narrative report of plaintiff's physical medicine and rehabilitation physician, Frida Goldin, M.D., who evaluated plaintiff only one time, on July 9, 2008, more than three (3) years after the accident and a sworn MRI of the left knee. Plaintiff, Miguel Vidal failed to submit any admissible medical proof that was contemporaneous with the accident showing any bulges, herniations, or range of motion limitations for all injuries other than that of the left knee (*Pajda v. Pedone*, 303 AD2d 729 [2d Dept 2003]). For all injuries, 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*, 772 NYS2d 21 [1st Dept 2004]). An examination more than three (3) years after the accident is insufficient to establish a causal connection between the accident and the injuries and, while the MRI of the left knee was taken contemporaneously with the accident, it does not establish causality between the accident and the injury. Additionally, other than the initial evaluation examination of plaintiff more than three (3) years after the accident, the record is devoid of any competent evidence of plaintiff's treatment or need for treatment.

Also, the plaintiff, Miguel Vidal 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 his 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 him from performing her 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]).

Accordingly, the defendants' motion for summary judgment against plaintiff Miguel Vidal is granted in its entirety and the complaint is dismissed as to all categories.

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.

As the complaint of both plaintiffs has been dismissed, that branch of the motion by defendant Snorac for an order pursuant to CPLR 3211 and/or 3212, dismissing an/or granting summary judgment on all claims as against Snorac, Inc. as the Federal Transportation Equity Act precludes any such claims against Snorac, Inc., is hereby rendered moot.

Dated: December 3, 2008

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