

Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19

Justice

-----X
DAPHNE SPENCE,

Plaintiff,

-against-

RAE MIKELBERG,

Defendant.
-----X

Index No: 20202/07
Motion Date: 9/17/08
Motion Cal. No: 22
Motion Seq. No: 2

The following papers numbered 1 to 10 read on this motion defendant, pursuant go CPLR §3212, for an order granting summary judgment dismissing the complaint of plaintiff upon the ground that the injuries claimed do not satisfy the “serious injury” threshold requirement of section 5102(d) of the Insurance Law.

	PAPERS NUMBERED
Notice of Motion-Affidavits--Exhibits.....	1 - 4
Affirmation in Opposition-Exhibits.....	5 - 8
Reply Affirmation-Exhibits	9 - 10

Upon the foregoing papers, it is hereby ordered that the motion is disposed of as follows:

This is an action for personal injury in which plaintiff Daphne Spence (“plaintiff”) alleges that she sustained serious personal injury on March 26, 2007, as a result of a motor vehicle accident that occurred at or near the intersection of Bay Street and Avenue M, Brooklyn, New York, when plaintiff, a pedestrian, was struck by the vehicle owned by defendant Rae Mikelberg (“defendant”). She claims that she sustained injuries to her back, right knee and right foot. Defendant moves for summary judgment on the ground that plaintiff failed to meet the “serious injury” threshold requirement of section 5102(d) of the Insurance Law. The aforementioned statute states, in pertinent part, that a “serious injury” is defined as:

a personal injury which results in ...significant disfigurement;
...permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent

nature which prevents the injured party from performing substantially all of the material acts which constitute such person customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

It is well established that summary judgment should be granted when there is no doubt as to the absence of triable issues. See, Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 231 (1978); Andre v. Pomeroy, 35 N.Y.2d 361, 364 (1974); Taft v. New York City Tr. Auth., 193 A.D.2d 503, 505 (1st Dept. 1993). As such, the function of the court on the instant motion is issue finding and not issue determination. See, D.B.D. Nominee, Inc., v. 814 10th Ave. Corp., 109 A.D.2d 668, 669 (2nd Dept. 1985). The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. See, Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position. See, Zuckerman v. City of New York, *supra*.

The issue of whether plaintiff sustained a serious injury is a matter of law to be determined in the first instance by the court. See Licari v. Elliott, 57 N.Y.2d 230 (1982). The burden is on the defendant to make a prima facie showing that plaintiff's injuries are not serious. Toure v. Avis Rent A Car Sys., 98 N.Y.2d 345 (2002). By submitting the affidavits or affirmations of medical experts, who, through objective medical testing, conclude that plaintiff's injuries are not serious within the meaning of Insurance Law § 5102(d), a defendant can meet his or her prima facie burden. See Margarin v. Krop, 24 A.D.3d 733 (2nd Dept. 2005); Karabchievsky v. Crowder, 24 AD3d 614 (2nd Dept. 2005). The threshold question in determining a summary judgment motion on the issue of serious injury is the sufficiency of the moving papers, with consideration only given to opposing papers once defendants, as the movants, make a prima facie showing that plaintiff did not sustain a serious injury. Toure v Avis Rent A Car Sys., 98 N.Y.2d 345 (2002).

In support of his motion, defendant submitted, inter alia, the affirmed medical report of Dr. Robert L. Michaels, an orthopedist, who conducted an independent orthopedic examination of plaintiff on May 22, 2008. Dr. Michaels reviewed a myriad of medical records, including MRI reports related to the right knee and the lumbar spine; medical reports of various medical providers, and hospital records. Dr. Michaels detailed the objective testing that he performed and concluded that plaintiff had full range of motion in the right knee, the thoracolumbar spine, and the cervical spine. He also conducted range of motion tests for the right and left knees, and found:

Examination of the right knee revealed positive tenderness with no swelling, effusion, or erythema. Range of motion of the right knee revealed flexion to be 130 degrees (claimant) /140 degrees (normal) and extension to be 0 degrees (claimant)/0(normal). There was a negative Anterior Drawer Sign, Lachman, McMurray's valgus

instability, quad atrophy, post drawer sign, pivot shift, tight lateral retinaculum, patella facet tenderness and varus instability. Negative crepitus.

Examination of the left knee revealed positive tenderness with no swelling, effusion, or erythema. Range of motion of the left knee revealed flexion to be 120 degrees (claimant) /140 degrees (normal) and extension to be 0 degrees (claimant)/0(normal). There was a negative Anterior Drawer Sign, Lachman, McMurray's valgus instability, quad atrophy, post drawer sign, pivot shift, tight lateral retinaculum, patella facet tenderness and varus instability. Negative crepitus.

His diagnosis was resolved right knee contusion/sprain, lumbar sprain and cervical sprain; and he concluded that plaintiff "exhibits no objective evidence of an orthopedic disability or permanency. The decreased range of motion is a subjective finding. She may work and perform activities of daily living without restrictions." He also opined that the MRI results were consistent with degenerative disease.

Through the submission of the affirmed medical report of his expert, who conducted a physical examination of plaintiff and found no abnormalities causally related to the accident, defendant's evidence was sufficient to make a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d). See, Pommells v. Perez, 4 N.Y.3d 566 (2005); Rodriguez v. Huerfano, 46 A.D.3d 794 (2nd Dept. 2007); Baez v. Rahamatali, 6 N.Y.3d 868 (2006); Zhang v. Wang, 24 A.D.3d 611 (2005); Burgos v Vargas, 33 A.D.3d 579 (2nd Dept. 2006); Batista v Olivo, 17 A.D.3d 494 (2nd Dept. 2005); Sainte-Aime v Ho, 274 A.D.2d 569 (2nd Dept. 2000). He thus established his entitlement to summary judgment dismissing the complaint insofar as asserted by plaintiff on the threshold issue. See, Baez v. Rahamatali, 6 N.Y.3d 868 (2006); Toure v. Avis Rent A Car Systems, Inc., 98 N.Y.2d 345 (2002); Gaddy v. Eyler, 79 N.Y.2d 955 (1992); Licari v. Elliott, 57 N.Y.2d 230 (1982); Djetoumani v. Transit, Inc., 50 A.D.3d 944 (2nd Dept. 2008). The burden then shifts to plaintiff to demonstrate the existence of a triable issue of fact as to whether she sustained a serious injury. See Gaddy v. Eyler, 79 N.Y.2d 955 (1992).

In opposition, plaintiff failed to provide an objective medical basis supporting the conclusion that she sustained a serious injury. See, Baez v. Rahamatali, 6 N.Y.3d 868 (2006). Plaintiff submitted her affidavit, her attorney's affirmation, and the affirmation of Dr. Dov Berkowitz, plaintiff's treating orthopedist, who treated her on April 16, 2007, May 14, 2007, June 21, 2007, following which her no fault coverage was terminated; and who reexamined her on August 14, 2008. It is well recognized that an attorney's affirmation that is not based upon personal knowledge is of no probative or evidentiary significance [(Zuckerman v. City of New York, 49 N.Y.2d 557, 563 (1980); Warrington v. Ryder Truck Rental, Inc., 35 A.D.3d 455 (2nd Dept. 2006)], and is insufficient to show that plaintiff sustained a serious injury caused by the accident since there was no objective medical evidence to demonstrate that she sustained a serious injury. See, Codrington v. Ahmad, 40

A.D.3d 799 (2nd Dept. 2007). Similarly, a plaintiff's deposition or affidavit consisting of merely subjective complaints of pain, also is insufficient to raise a triable issue of fact. See, Dyagi v. Newburgh Auto Auction, 251 A.D.2d 619 (2nd Dept. 1998).

The affirmation of Dr. Berkowitz set forth that when plaintiff presented to his office on April 16, 2007, she complained of "lower back pain radiating down her right leg as well as pain in her right knee. She was using a brace and a cane to help her walk because of her right knee." Although Dr. Berkowitz's affirmation indicates that his initial examination revealed limited ranges of motion, he neither outlined the objective tests performed nor quantified the alleged limitations. Although no confirmatory records were submitted, he affirmed that he referred her to physical therapy, took x-rays and recommended that MRI studies be performed. The failure of plaintiff's expert to quantify the limitations in plaintiff's range of motion or to indicate the objective tests conducted to arrive at the results is fatal; medical opinions based on subjective complaints of pain or headaches are insufficient to establish "serious injury." See, Budhram v. Ogunmoyin, 53 A.D.3d 640 (2nd Dept. 2008); Malloy v. Brisco, 183 A.D.2d 704 (1992); see also Zoldas v. Louise Cab Corp., 108 A.D.2d 378 (1985). Moreover, much of his diagnosis appears to have been based upon his review of an unsworn X-ray report and MRI report prepared by other doctors and unsworn reports of other doctors, none of which were attached to the opposition papers, and upon which plaintiff cannot rely. Malave v. Basikov, 45 A.D.3d 539 (2nd Dept. 2007); Puerto v. Omholt, 17 A.D.3d 650 (2005). He further affirmed that on subsequent visits, MRI results revealed disc bulges and herniations; the mere existence of a herniated or bulging disc, however, is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the disc injury and its duration. See, Pommells v. Perez, 4 N.Y.3d 566, 574 (2005); Byam v. Waltuch, 50 A.D.3d 939 (2nd Dept. 2008); Endzweig-Morov v. MV Transp., Inc., 50 A.D.3d 946 (2nd Dept. 2008); Wright v. Rodriguez, 49 A.D.3d 532 (2nd Dept. 2008); Patterson v. N.Y. Alarm Response Corp., 45 A.D.3d 656 (2nd Dept. 2007); Waring v. Guirguis, 39 A.D.3d 741 (2nd Dept. 2007); Iusmen v. Konopka, 38 A.D.3d 608 (2nd Dept. 2007). Consequently, his affirmation is insufficient to raise a triable issue of fact as to whether plaintiff sustained a serious injury without "objective evidence of the extent of alleged physical limitations resulting from the disc injury." Meely v 4 G's Truck Renting Co., 16 A.D.3d 26 (2nd Dept. 2005). Additionally, his conclusions of a traumatic causal nexus between her alleged injuries and the accident were speculative as they failed to address the findings of defendant's orthopedist that plaintiff's alleged injuries were a result of pre-existing degenerative changes. See, Saint-Hilaire v. PV Holding Corp., ___ A.D.3d ___, ___ N.Y.S.2d ___, 2008 WL 4889519 (2nd Dept. 2008); Cornelius v. Cintas Corp., 50 A.D.3d 1085 (2nd Dept. 2008); Abreu v Bushwick Bldg. Prods. & Supplies, LLC, 43 A.D.3d 1091 (2nd Dept. 2007); Phillips v Zilinsky, 39 A.D.3d 728 (2nd Dept. 2007); Albano v Onolfo, 36 A.D.3d 728 (2nd Dept. 2007).

Thus, plaintiff submitted no competent admissible medical evidence contemporaneous with the accident showing that she suffered from a loss of range of motion. See Ranzie v Abdul-Massih, 28 A.D.3d 447 (2nd Dept. 2006); Yeung v Rojas, 18 A.D.3d 863 (2nd Dept. 2005); Nemchyonok v Ying, 2 A.D.3d 421 (2nd Dept. 2003). Lastly, notwithstanding plaintiff's contentions to the contrary, plaintiff has failed to submit competent medical evidence that she was unable to perform substantially all of her daily and customary activities for not less than 90 of the first 180 days

subsequent to the subject accident. See, Cornelius v. Cintas Corp., 50 A.D.3d 1085 (2nd Dept. 2008); Daddio v Shapiro, 44 A.D.3d 699 (2nd Dept. 2007); Alexandre v Dweck, 44 A.D.3d 597 (2nd Dept. 2007); Elder v. Stokes, 35 A.D.3d 799 (2nd Dept. 2006); Felix v. New York City Transit Authority, 32 A.D.3d 527 (2nd Dept. 2006). Accordingly, defendant's motion for summary judgment is granted and the complaint hereby is dismissed.

Dated: November 17, 2008

J.S.C.