

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE IAS PART 22
Justice

| | |
|-------------------------------------|------------------------|
| ----- | Index No. 12488/04 |
| ROI SMITH, | Motion |
| Plaintiff, | Date February 10, 2009 |
| -against- | Motion |
| NEW YORK CITY TRANSIT AUTHORITY and | Cal. No. 32 |
| FAZLU MIAH, | Motion |
| Defendants. | Sequence No. 2 |
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|---|-----------------|
| | <u>PAPERS</u> |
| | <u>NUMBERED</u> |
| Notice of Motion-Affidavits-Exhibits..... | 1-4 |
| Opposition..... | 5-7 |
| Reply..... | 8-9 |

Upon the foregoing papers it is ordered that this motion by defendant, New York City Transit Authority for summary judgment dismissing the complaint of plaintiff, Roi Smith, 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 April 16, 2003. Defendant has submitted proof in admissible form in support of the motion for summary judgment, for all categories of serious injury. The defendant submitted *inter alia*, affirmed reports from two independent examining physicians (an orthopedist and a neurologist), plaintiff's verified bill of particulars, and plaintiff's own examination before trial transcript testimony.

In opposition to the motion, plaintiff submitted: an affirmation of plaintiff's treating physical medicine and rehabilitation physician, Lauren Stimler-Levy, M.D., pleadings, unsworn MRI reports of the lumbar and cervical spine by plaintiff's radiologist, Melvin Leeds, M.D., a letter from plaintiff's employer, and an attorney's affirmation.

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]).

DISCUSSION

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

The affirmed report of defendant's independent examining orthopedist, Wayne Kerness, M.D., indicates that an examination conducted on May 17, 2007 revealed a diagnosis of: resolved cervical and lumbar sprain/strain. He opines that claimant does not need any treatment, testing, or medical supplies from an orthopedic perspective. He further opines that there are no permanent or residual injuries. Dr. Kerness concludes that there is no disability related to the accident, and that the claimant can continue to work at this time.

The affirmed report of defendant's independent examining neurologist, Sarasavani Jayaram, M.D., indicates that an examination conducted on May 17, 2007 revealed a diagnosis of: normal neurological examination, no focal deficits,

neurologically intact, resolved cervical, thoracic, and lumbo-sacral sprain and strain, subjective symptoms outweigh objective signs, all other complaints are deferred to the appropriate specialty. He opines that claimant does not need any treatment testing, or supplies from a neurological perspective. Dr. Jayaram further opines that there is no disability at this time and that the claimant can continue to work at full capacity. Finally, Dr. Jayaram concludes that there are no permanent or residual injuries.

Additionally, defendant established a *prima facie* case for the category of "90/180 days." The plaintiff's verified bill of particulars indicates that it is unknown at that time as to whether plaintiff was confined to bed, home, or hospital and plaintiff's examination before trial transcript testimony indicate that she did not lose any time from work as a result of the accident. 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*).

B. Plaintiff fails to raise a triable issue of fact

In opposition to the motion, plaintiff submitted: an affirmation of plaintiff's treating physical medicine and rehabilitation physician, Lauren Stimler-Levy, MD, pleadings, unsworn MRI reports of the lumbar and cervical spine by plaintiff's radiologist, Melvin Leeds, MD, a letter from plaintiff's employer, and an attorney's affirmation.

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 (*Pagano v. Kingsbury*, 182 AD2d 268 [2d Dept 1992]; *McLoyrd v. Pennypacker*, 178 AD2d 227 [1st Dept 1991]). Therefore, the unsworn reports of plaintiff's radiologist 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 treating physical medicine and rehabilitation physician, Lauren Stimler Levy, MD who attests that she treated plaintiff for one year after the accident of April 16, 2003 and then had a follow-up evaluation on October 14, 2008. 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]). In the instant case, no causal connection has been established.

Additionally, other than the initial treatment by Dr. Stimler-Levy for one year after the plaintiff's accident, and re-evaluation approximately 4½ years later, the record is devoid of any competent evidence of plaintiff's treatment or need for treatment.

There also exists an unexplained gap or cessation in treatment. It is undisputed that plaintiff stopped receiving treatment from Dr. Stimler-Levy for one year after the accident of April 16, 2003 and did not return to the this provider for re-evaluation until October 14, 2008. 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. Courts applying the *Pommells* standard have consistently held that in order for the explanation to be considered reasonable it must be "concrete and substantiated by the record." (*Gomez v. Ford Motor Credit Co.*, 10 Misc 3d 900 [Sup Ct, Bronx County 2005]). The affirmed reports submitted by Dr. Stimler-Levy does not provide any information concerning an explanation for the approximate 4½ year gap between plaintiff's medical treatment ending in April, 2004, and plaintiff's re-evaluation by Dr. Stimler-Levy in October, 2008 (*Medina v. Zalmen Reis & Assocs.*, 239 AD2d 394 [2d Dept 1997]). Here, plaintiff's doctor provides no explanation as to why plaintiff failed to pursue any treatment during the period from April 2004 - October 2008. Moreover, plaintiff's self-serving affidavit concerning her cessation in medical treatment without medical authorization is entitled to little weight and is insufficient to raise an issue of fact (see, *Fisher v. Williams*,

289 AD2d 288 [2d Dept 2001]; *Zoldas v Louise Cab Corp.*, 108 AD2d 378, 383 [1st Dept 1985]).

Furthermore, in her narrative report, Dr. Stimler-Levy states that she reviewed physical therapy and chiropractic notes, as well as prior diagnostic imaging of other practitioners, but plaintiff fails to include such notes and imaging in admissible form. No MRI reports have been submitted to the court in competent and admissible form. The probative value of Dr. Stimler-Levy's affidavit is reduced by the doctor's reliance on medical reports and records that are not in the record before the court. Since Dr. Stimler-Levy's conclusions improperly rested on other experts' work product, it is insufficient to raise a material triable factual issue (see, *Constantinou v. Surinder*, 8 AD3d 323, [2d Dept 2004]); *Claude v. Clements*, 301 AD2d 432 [2d Dept 2003]; *Dominguez-Gionta v. Smith*, 306 AD2d 432 [2d Dept 2003]).

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]).

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 defendant's motion for summary is granted in its entirety and the plaintiff's 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.

The foregoing constitutes the decision and Order of this Court.

Dated: February 26, 2009

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Howard G. Lane, J.S.C.