

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE IAS PART 22
Justice

-----	Index No. 24948/07
DEODAT MADRAMOTOO and BIBI H. MADRAMOTOO,	Motion
Plaintiffs,	Date April 14, 2009
-against-	Motion
NATHANIAL J.P. HAWLEY and RONALD P. HAWLEY,	Cal. No. 20
Defendants.	Motion
-----	Sequence No. 1

	<u>PAPERS 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 defendants for summary judgment dismissing the complaint of plaintiff is decided as follows:

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 [3d 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]).

I. Deodat Madramotoo

That branch of defendants' motion for summary judgment dismissing the complaint of plaintiff, Deodat Madramotoo, 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 May 20, 2006. Defendants have submitted proof in admissible form in support of the motion for summary judgment, for all categories of serious injury. The defendants submitted inter alia, affirmed reports from two independent examining and/or evaluating physicians (an orthopedic surgeon and a neurologist) and plaintiff, Deodat Madramotoo's own examination before trial transcript testimony.

DISCUSSION

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

The affirmed report of defendant's independent examining orthopedic surgeon, Michael J. Katz, M.D., indicates that an examination conducted on June 16, 2008 revealed a diagnosis of: resolved cervical strain with radiculitis, resolved lumbosacral strain with radiculitis, and resolved right shoulder contusion. He opines that plaintiff's prognosis is excellent, that plaintiff is not currently disabled, and that plaintiff shows no signs of permanence related to the accident. He further opines that plaintiff is capable of all pre-loss activities and of gainful employment. Dr. Katz concludes that MRI reports of the cervical and lumbosacral spine reveal "multi-level pre-existing disc changes."

The affirmed report of defendant's independent examining neurologist, Daniel J. Feuer, M.D., indicates that an examination conducted on June 17, 2008 revealed a diagnosis of nonfocal neurological examination. He opines that there is no neurological disability or permanency and that there is chronic atrophy of the right lower extremity. Dr. Feuer concludes that plaintiff can engage in full active employment, and full activities of daily living without restrictions.

Additionally, defendants established a prima facie case for the category of "90/180 days." The plaintiff's examination before trial transcript testimony indicates that plaintiff missed only 15 days of 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 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 fails to raise a triable issue of fact

In opposition to the motion, plaintiff submitted: unsworn narrative reports, unsworn and uncertified medical records and reports, an affirmation of plaintiff's internist, Muntaz Majeed, M.D., dated January 23, 2009, an affirmation of plaintiff's radiologist, Daniel Beyda, M.D., dated January 23, 2009 and an affirmation of Daniel Beyda, M.D., dated November 23, 2008, 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, *Pagano v. Kingsbury*, 182 AD2d 268 [2d Dept 1992]; *McLoyrd v. Pennypacker*, 178 AD2d 227 [1st Dept 1991]). Therefore, unsworn reports of plaintiffs' examining doctors will not be sufficient to defeat a motion for summary judgment (see, *Grasso v. Angerami*, 79 NY2d 813, 580 NYS2d 178 [1991]).

Plaintiff's medical evidence failed to raise issues of fact. Plaintiff failed to submit a medical affirmation detailing

a recent examination of plaintiff, a necessary requirement to rebutting defendants' prima facie case (see, *Sauer v. Marks*, 278 AD2d 301 [2d Dept 2000]; *Grossman v. Wright*, 268 AD2d 79 [2d Dept 2000]; *Kauderer v. Penta*, 261 AD2d 365 [2d Dept 1999]). The most recent medical evidence provided only dates back to July 2006 and the instant motion was made on September 25, 2008.

Moreover, there also exists an unexplained gap or cessation in treatment. The admissible medical evidence submitted makes no mention of treatment after May, 2006. 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 Cty 2005]). The affirmed reports submitted by Drs. Majeed and Beyda do not provide any information concerning an explanation for the more than 2-year gap or cessation between plaintiffs' medical treatment in May 2006 and the making of the instant motion in September 2008 (*Medina v. Zalmen Reis & Assocs.*, 239 AD2d 394 [2d Dept 1997]). Here, plaintiffs' doctors provide no explanation as to why plaintiff failed to pursue any treatment during the period from May 2006 - September 2008.

Additionally, plaintiff has failed to rebut evidence of a pre-existing condition. Although defendants' independent examining orthopedic surgeon concludes in his affirmed report that his examination of plaintiff revealed "multi-level degenerative disc changes" in both the cervical and lumbosacral spines, plaintiff's experts failed to indicate their awareness that plaintiff was suffering from such condition and failed to address the effect of these findings on plaintiff's claimed accident injuries (*Francis v. Christopher*, 302 AD2d 425 [2d Dept 2003]; *Monette v. Keller*, 281 AD2d 523 [2d Dept 2001]; *Ifrach v. Neiman*, 306 AD2d 380 [2d Dept 2003]). Hence, plaintiffs failed to rebut defendants' claim sufficiently to raise a trial issue of fact (see, *Pommells v. Perez*, 4 NY3d 566, 2005 WL 975859 [2005]).

Also, the plaintiffs have 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 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, plaintiffs' 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]).

Furthermore, plaintiffs' attorney's affirmation is not admissible probative evidence on medical issues, as plaintiffs' 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 is "entitled to little weight" and is insufficient to raise triable issues of fact (see, *Zoldas v. Louise Cab Corp.*, 108 AD2d 378, 383 [1st 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 is granted in its entirety and the plaintiff, Deodat Madramotoo's complaint is dismissed as to all categories.

The clerk is directed to enter judgment accordingly.

II. BiBi Madramotoo

That branch of defendants' motion for summary judgment dismissing the complaint of plaintiff, Bibi Madramotoo, 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:

Defendants have submitted proof in admissible form in support of the motion for summary judgment, for all categories of serious injury. The defendants submitted inter alia, affirmed reports from three independent examining and/or evaluating physicians (an orthopedic surgeon, a neurologist, and a radiologist) and plaintiff, Bibi Madramotoo's own examination before trial transcript testimony.

DISCUSSION

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

The affirmed report of defendants' independent examining orthopedic surgeon, Michael J. Katz, M.D., indicates that an examination conducted on June 16, 2008 revealed a diagnosis of: resolved cervical strain with radiculitis, resolved lumbosacral strain, resolved left shoulder contusion, and right ankle sprain. He opines that plaintiff's prognosis is excellent, that plaintiff is not currently disabled, and that plaintiff shows no signs of permanence related to the accident. He further opines that plaintiff is capable of all pre-loss activities and of gainful employment. Dr. Katz concludes that MRI reports of the cervical and lumbar spine and of the left shoulder reveal "pre-existing degenerative changes."

The affirmed report of defendants' independent examining neurologist, Daniel J. Feuer, M.D. indicates that an examination conducted on June 17, 2008 revealed a diagnosis of nonfocal neurological examination. He opines that there is no neurological disability or permanency which is causally related to the accident and that there is chronic atrophy of the right lower extremity. Dr. Feuer concludes that plaintiff can engage in full active employment, and full activities of daily living without restrictions.

The affirmed report of defendants' independent examining radiologist, Jessica F. Berkowitz, M.D., indicates that an MRI of

the cervical spine performed on August 4, 2006 revealed disc herniation and disc bulges, with the disc bulges being "chronic and degenerative in origin." Dr. Berkowitz concludes that there is: "no causal relationship between the claimant's alleged accident and the findings on the MRI examination."

The affirmed report of defendants' independent examining radiologist, Dr. Jessica F. Berkowitz, M.D., indicates that an MRI of the left shoulder performed on August 23, 2006 revealed "no evidence of acute traumatic injury to the shoulder such as fracture, bone marrow adema or musculotendinous tear." Dr. Berkowitz concludes that the MRI examination reveals "no definite causal relationship between the claimant's alleged accident and the findings on the MRI examination."

Additionally, defendants established a *prima facie* case for the category of "90/180 days." The plaintiff's examination before trial transcript testimony indicates that plaintiff missed only 15 days of 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 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 fails to raise a triable issue of fact

In opposition to the motion, plaintiff submitted: unsworn narrative reports, unsworn and uncertified medical records and reports, two unsigned affirmations of plaintiff's physical medicine and rehabilitation physician, Benjamin Bieber, M.D., an unsigned affirmation of plaintiff's radiologist, John Athas, M.D., an attorney's affirmation, 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, *Pagano v. Kingsbury*, 182 AD2d 268 [2d Dept 1992]; *McLoyrd v. Pennypacker*, 178 AD2d 227 [1st Dept 1991]). Therefore, unsworn reports of plaintiffs' examining 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 admissible medical proof of objective findings contemporaneous with 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]).

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 is "entitled to little weight" and is insufficient to raise triable issues of fact (see, *Zoldas v. Louise Cab Corp.*, 108 AD2d 378, 383 [1st 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 is granted in its entirety and the plaintiff, Bibi Madramotoo'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: May 15, 2009

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Howard G. Lane, J.S.C.