

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE IAS PART 22
Justice

JOCELYN JEAN and FRANTZ JEAN,

Plaintiffs,

-against-

NEW YORK CITY TRANSIT AUTHORITY, et
al.,

Defendants.

Index No. 25869/03

Motion
Date May 5, 2009

Motion
Cal. No. 11

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 the branch of defendants' motion for summary judgment dismissing the complaint of plaintiff, Jocelyne Jean, pursuant to CPLR 3212, on the ground that plaintiff, Jocelyne Jean 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 August 5, 2002. 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 physicians (an orthopedic surgeon and a neurologist) and plaintiff's own verified bill of particulars.

In opposition to this branch of the motion, plaintiff submitted: an attorney's affirmation, an affirmation and sworn narrative report of plaintiff's physical medicine and rehabilitation physician, Ali E. Guy, M.D., an affirmation and MRI reports of plaintiff's radiologist, Richard J. Rizutti, M.D., an affirmation and operative report of plaintiff's physician,

Albert Graziosa, M.D., the statutory hearing transcript testimony of plaintiff, Jocelyne Jean, and the examination before trial transcript testimony of plaintiff, Jocelyne Jean.

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

The affirmed report of defendants' independent examining orthopedic surgeon, Alan J. Zimmerman, M.D., indicates that an examination conducted on July 3, 2008 revealed a diagnosis of: resolved cervical and lumbar sprain/strain and resolved left shoulder sprain. He opines that: "[t]he left shoulder surgery was carried out for a non-causally related condition. . . . A bursa is a degenerative and not causally related. Impingement is a developmental condition, not a traumatic condition which was pre-

existing and not causally related. All of the cervical MRI findings are degenerative, pre-existing and not causally related as evident of the multiplicity of levels involved." He further opines that the prognosis is good and there is no need for orthopedic care, testing, or treatment. Dr. Zimmerman concludes that claimant has no disability or restriction of activities of daily living related to the accident and that she can continue to work at this time.

The affirmed report of defendants' independent examining neurologist, Sarasavani Jayaram, M.D., indicates that an examination conducted on July 3, 2008 revealed a diagnosis of: normal neurological evaluation with no focal deficits and resolved cervical and lumbo-sacral sprain and strain. He opines that there is no disability and that claimant is independent in all of her activities of daily living. He further opines that claimant can work at this time. Dr. Jayaram concludes that there is no need for treatment from a neurological perspective and that there is no need for testing, care, or supplies.

Additionally, defendants established a prima facie case for the category of "90/180 days." The plaintiff, Jocelyne Jean's, verified bill of particulars indicates: that plaintiff was only confined to bed and home for approximately one week following the incident. Such evidence shows that the plaintiff, Jocelyne Jean 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, Jocelyne Jean 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. Eycler*, 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 this branch of the motion, plaintiff submitted: an attorney's affirmation, an affirmation and sworn narrative report of plaintiff's physical medicine and rehabilitation physician, Ali E. Guy, M.D., an affirmation and MRI reports of plaintiff's radiologist, Richard J. Rizutti, M.D., an affirmation and operative report of plaintiff's physician, Albert Graziosa, M.D., the statutory hearing transcript testimony of plaintiff, Jocelyne Jean, and the examination before trial transcript testimony of plaintiff, Jocelyne Jean.

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]; *Pommells v. Perez*, 772 NYS2d 21 [1st Dept 2004]). An examination by Dr. Ali E. Guy more than six (6) years after the accident is insufficient to establish a causal connection between the accident and the injuries.

Additionally, plaintiff has failed to rebut evidence of a preexisting condition. Although defendant's independent examining radiologist concludes in his affirmed report that plaintiff suffered from, pre-existing, degenerative, and non-causally related conditions, 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, plaintiff failed to rebut defendant's claim sufficiently to raise a trial issue of fact (see, *Pommells v. Perez*, 4 NY3d [2005]).

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 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 her 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 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]).

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 [1st Dept 1985]; *Fisher v. Williams*, 289 AD2d 288 [2d Dept 2001]).

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, that branch of the defendants' motion for summary against plaintiff Jocelyne Jean is granted in its entirety and the plaintiff, Jocelyne Jean'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.

Accordingly, plaintiff, Jocelyne Jean's husband, Frantz Jean's, cause of action for loss of consortium is dismissed.

As the plaintiffs' complaint has been dismissed, that branch of defendants' motion for summary judgment dismissing the complaint of plaintiffs on the basis of liability is hereby rendered moot.

Dated: June 3, 2009

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Howard G. Lane, J.S.C.

