

Short Form Order

NEW YORK STATE SUPREME COURT – QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, Part 19  
Justice

CARLOS CUEVA, X Index No.: 7324/04  
Plaintiff, Motion Date: 6/08/05  
Motion Cal. No.: 11

-- against --

JOSHUA A. LEKHRAM, PETER J. ALZAPIEDI  
and PETER W. ALZAPIEDI,

Defendants.

X

The following papers numbered 1 to 14 read on this motion by defendants Peter J. Alzapiedi and Peter W. Alzapiedi, and on this cross motion by defendant Joshwa A. Lekhram, for summary judgment dismissing the complaint of plaintiff Carlos Cueva on the ground that he did not meet the statutory threshold of serious injury as defined in Insurance Law § 5102(d).

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	1 - 4
Notice of Cross-Motion-Affidavits-Exhibits.....	5 - 7
Affirmation in Opposition-Exhibits.....	8 - 10
Reply Affirmation (Lekhram).....	11 - 12
Reply Affirmation (Alzapiedi).....	13 - 14

Upon the foregoing papers, it is ordered that the motion and cross-motion for summary judgment are disposed of as follows:

This is an action to recover for personal injuries sustained by plaintiff Carlos Cueva (“plaintiff”), as a result of a motor vehicle accident that occurred on May 5, 2001. Defendants Peter J. Alzapiedi and Peter W. Alzapiedi (“Alzapiedi defendants”), the owner and operator of a vehicle that came into contact with the vehicle owned and operated by defendant Joshwa A. Lekhram (“Lekhram”), and defendant Lekhram move and cross move for summary judgment dismissing the complaint of plaintiff Carlos Cueva, on the ground that he failed to make a prima facie showing of a “serious injury” as defined by the New York Insurance Law § 5102(d). Section 5102(d) 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.

The issue of whether the injuries allegedly sustained by plaintiff fall within the definition of a “serious injury,” in the first instance, must be decided by the court. See, Licari v. Elliot, 57 N.Y.2d 230, 238 (1982). In order for a summary judgment motion to be granted by the court, the defendant must establish that there are no triable issues of facts in dispute. “The result of requiring a jury trial where the injury is clearly a minor one would perpetuate a system of unnecessary litigation, and subvert the intent of the Legislature [by] destroy[ing] the effectiveness of the statute.” Id., 57 N.Y. 2d at 237; see, Grossman v. Wright, 268 A.D.2d 79 (2000). Inherent in the court’s consideration of a motion for summary judgment for lack of serious injury is the requisite determination that there are no issues of fact with regard to the injuries sustained by a plaintiff. Thus, 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 defendant makes a prima facie showing that plaintiff did not sustain a serious injury.

When a defendant moves for summary judgment to dismiss the action, the burden is placed upon the defendant to prove, through admissible evidence, that the plaintiff failed to meet the statutory threshold of “serious injury.” Lagois v. Public Administrator of Suffolk County, 303 A.D.2d 644 (2003); Gaddy v. Eyster, 79 N.Y.2d 955 (1992). To satisfy this requirement, a defendant must make a prima facie showing that the plaintiff failed to sustain a serious injury within the purview of the statute through the submission of “affidavits or affirmations of medical experts who examined the plaintiff, and conclude that no objective medical findings support the plaintiff’s claim.” Grossman v. Wright, 268 A.D.2d 79 (2000). These affidavits and affirmations should contain the original signatures of the affiants. Moreover, any medical reports submitted as evidentiary proof must be sworn. See, Grasso v. Angerami, 79 N.Y. 2d 813 (1992); Williams v. Hughes, 256 A.D.2d 461 (1998); Fernandez v. Shields, 223 A.D.2d 666 (1996). Once the defendant has shown, prima facie, that the plaintiff did not sustain a serious injury, the burden shifts to the plaintiff who then must present a triable issue of fact through admissible evidence to successfully oppose defendant’s summary judgment motion. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986); Winegrad v. New York Univ. Medical Center, 64 N.Y.2d 851 (1985); Monette v. Keller, 281 A.D.2d 523 (2001); Ocasio v. Henry, 276 A.D.2d 611 (2000).

Plaintiff alleges that, as a result of the accident, he sustain, inter alia, central disc herniation at C6-C7, disc bulging at C3-C4 through C5-C6, radiculopathy, right rotator cuff tendonitis, and a right forearm contusion. Here, in support of the summary judgment motion and the assertion that plaintiff did not sustain a “serious injury,” defendants submitted documentary evidence in the form

of the sworn medical reports of Dr. Daniel Feuer, a neurologist, and Dr. Alan R. Miller, an orthopedist, each of whom examined plaintiff on January 18, 2005. Dr. Feuer reviewed plaintiff's medical records, including x-ray and MRI reports, conducted objective neurological examinations and tests, found "no objective neurological deficits" "referable to the central or peripheral nervous system," and concluded that the absence of deficits does not "support a diagnosis of cervical radiculopathy." Dr. Miller also reviewed plaintiff's medical records, including x-ray and MRI reports, conducted objective orthopedic examinations and tests, including range of motion and straight leg raising tests, and concluded that plaintiff's cervical and right shoulder sprains, and lower back pain had resolved. Defendants' evidence was sufficient to meet the burden of showing that plaintiff's alleged injuries did not satisfy the threshold requirements of "serious injury." Hernandez v. Taub, 19 A.D.3d 368 (2005); Kallicharan v. Sooknanan, 282 A.D.2d 573 (2001). The burden then shifted to plaintiff to raise a triable issue of fact as to whether he sustained a serious injury.

In opposition, plaintiff submitted his attorney's affirmation, with annexed exhibits, including copies of plaintiff's affidavit and his deposition testimony, copies of unsworn medical reports, and copies of the affirmation and medical report of Dr. Christopher Kyriakides. It is well settled that under these set of facts, "plaintiffs' attorney's affirmation is not entitled to any probative weight on the issue of whether [he] suffered a serious injury; therefore, it cannot be used to raise a triable issue of fact." Zoldas v. Louise Cabs Corp., 108 A.D.2d 378 (1985). Similarly, a plaintiff's deposition testimony 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 (1998).

Further, the medical submissions of plaintiffs are equally unavailing, as the proffered evidence of serious injury in the form of an unsworn doctor's report clearly is inadmissible. See, Grasso v. Angerami, 79 N.Y.2d 813 (1991); Puerto v. Omholt, 17 A.D.3d 650 (2005); Williams v. Hughes, 256 A.D.2d 461 (1998); Fernandez v. Shields, 223 A.D.2d 666 (1996). Plaintiff may not rely on unsworn medical reports to establish that he sustained a serious injury. See, Holder v. Brown, 18 A.D.3d 815 (2005); Luckey v. Bauch, 17 A.D.3d 411 (2005); Pagano v. Kingsbury, 182 A.D.2d 268 (1992). Nor is the medical report or affirmation of Dr. Christopher Kyriakides, based upon his May 16, 2005 examination, of probative value. He found that:

Mr. Cueva demonstrated positive trigger points in the cervical paraspinals with numerous somatic dysfunctions at C4-C5, rotated right, side bent right. There were also deficits noted to light touch in the right upper extremity in a C6 dermatomal pattern on the right side. The patient also demonstrated restricted range of motion where flexion was limited to 30 degrees and extension was 15 degrees and side bending was 15 to the right and 20 degrees to the left. The patient has rotation limited to 22 degrees to left and 25 degrees on the right. These were significantly reduced from the norms of range of motion, which were essentially 60 degrees of flexion, 45 degrees of extension and 45 degrees of side bending and rotation. He has persistency of abnormalities on the examination of May 16, 2005, which included a positive Spurling's maneuver to the right side.

Dr. Kyriakides concluded that “the patient clearly had been rendered partially, permanently disabled and his symptomologies precluded him from performing many of his usual activities and did not allow him to perform many of the physical actions that he would normally, usually and customarily perform.” Although plaintiff’s expert purported to quantify the limitations in plaintiff’s range of motion, he does not indicate the objective tests conducted to arrive at the results; medical opinions based on subjective complaints of pain or headaches are insufficient to establish “serious injury.” See 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, many of which were not attached to the opposition papers, and upon which plaintiff cannot rely. Puerto v. Omholt, 17 A.D.3d 650 (2005); Williams v. Hughes, *supra*.

Nor does Dr. Kyriades account for the more than four year “gap in treatment immediately preceding the submission of the report [see, Dimenshteyn v. Caruso, 262 A.D.2d 348, 694 N.Y.S.2d 66 (1999)].” Borino v. Little, 273 A.D.2d 262 (2000); See, Pommells v. Perez, 4 N.Y.3d 566 (2005). Additionally, the submissions do not establish a pattern of continuous treatment. See, Mejia v. Thom, 720 N.Y.S.2d 401 (2001) [finding the medical proof insufficient where there was a gap in treatment immediately preceding the submission of the report]. Furthermore, while plaintiff noted that he missed “some” time from work, no significant time had been lost as a result of the alleged injuries. See Ocasio v. Henry, 276 A.D.2d 611 (2000); see also Santoro v. Daniel, 276 A.D.2d 478 (2000). The evidence presented fails to raise a triable issue of fact as to whether plaintiff’s alleged injuries prevent him from performing substantially all of their customary and usual activities during at least 90 of the first 180 days following the accident. Doran v. Sequino, 17 A.D.3d 626 (2005); Frances v. Christopher II, 302 A.D.2d 425 (2003); Monette v. Keller, 281 A.D.2d 523 (2001). In sum, the affirmation of plaintiff’s physician, based on an examination more than four years after the subject accident, consisting of conclusory assertions tailored to meet statutory requirements, is insufficient to raise a triable issue of fact. See, Dyagi v. Newburgh Auto Auction, 251 A.D.2d 619 (1998).

Plaintiff thus has failed to meet his burden by submitting sufficient evidence to create a triable issue of fact with regard to his claims that he sustained a serious injury within the meaning of Insurance Law § 5102 (d). See, Ventura v. Moritz, 255 A.D.2d 506 (1998); Washington v. Mercy Home For Children, 232 A.D.2d 549 (1996); see, also, Gaddy v Eyler, 79 N.Y.2d 955 (1992). Accordingly, defendants’ motion and cross-motion for summary judgment are granted and the complaint hereby is dismissed.

Dated: August 26, 2005

---

J.S.C.