

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE IAS PART 22
Justice

-----	Index No. 19824/05
CARLOS MUNIZ,	Motion
Plaintiffs,	Date October 23, 2007
-against-	
	Motion
NEW YORK CITY TRANSIT AUTHORITY,	Cal. No. 6
GARY R. WOOLASTON, MODERN WASTE	
SERVICE CORP. and MARIO BARAHONA,	Motion
Defendants.	Sequence No. S002

The following papers numbered 1 to 15 read on this motion by defendants Modern Waste Service Corp. and Mario Barahona for summary judgment dismissing the complaint of plaintiff, Carlos Muniz, pursuant to CPLR 3212 on the ground that plaintiff has not sustained a serious injury within the meaning of Insurance Law § 5102(d); cross motion by defendants New York City Transit Authority and Gary R. Woolaston for the same relief.

	<u>PAPERS</u> <u>NUMBERED</u>
Notice of Motion-Affidavits-Exhibits.....	1-4
Cross Motion.....	5-8
Affirmation in Opposition.....	9-11
Reply Affirmations.....	12-15

Upon the foregoing papers it is ordered that the motion and cross motion are decided as follows:

This action arises out of an automobile accident that occurred on August 30, 2004. Defendants have failed to submit proof in admissible form in support of the motion and cross motion for summary judgment, for all categories except for the category of "90/180 days." The defendants submitted affirmed reports from two independent examining physicians (a neurologist and an orthopedist), plaintiff's bill of particulars which indicates that he was only confined to bed for approximately one week and home for approximately two weeks, and plaintiff's own examination before trial transcript testimony which indicates that he only missed one week of work after the accident.

In opposition to the motion, plaintiff submitted: an affirmed narrative report of plaintiff's independent examining ophthalmologist, Cheryl S. Kaufman, M.D., dated July 3, 2007, an affirmed narrative report of plaintiff's independent examining neuropsychologist, Richard P. DeBenedetto, PhD., dated April 30, 2007, an affirmed narrative report of plaintiff's independent examining neurologist, Moshi Ali, M.D., dated May 16, 2006, a sworn affirmation of plaintiff's independent examining physical and rehabilitative medicine specialist, Teodoro Pang, M.D., dated September 18, 2007, as well as Dr. Pang's medical records and reports for plaintiff, an attorney's affirmation, and plaintiff's own affidavit.

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 failed to establish a prima facie case that plaintiff did not suffer a "serious injury" as defined in Section

5102(d), for all categories except for the "90/180 days" category. Defendants established a prima facie case for the category of "90/180 days" through the submission of plaintiff's bill of particulars and plaintiff's examination before trial transcript testimony.

Defendants Modern Waste Service Corp. and Mario Barahona's examining neurologist and orthopedist, Drs. Feuer and Freeman, whose reports were adopted by the defendants New York City Transit Authority and Gary R. Woolaston, fail to address two of plaintiff's alleged serious injuries. First, plaintiff's bill of particulars alleges that the accident caused him to sustain "blunt trauma to left eye, orbit with internal bleeding; vision impairment," and in his affidavit and deposition, he maintains that he suffers from short distance vision as a result of the accident. But while both doctors indicated that they reviewed the plaintiff's bill of particulars and hospital records, both of which indicate a left eye injury, neither doctor examined plaintiff's left eye. Second, plaintiff's bill of particulars indicates head trauma, with cognitive deficits, and plaintiff also testified at his deposition that he had problems with focus, memory, and concentration. However, neither Dr. Feuer nor Dr. Freeman assesses or evaluates plaintiff's alleged cognitive deficits. While Dr. Feuer did perform a neurological examination, he admits that a comprehensive neuropsychological evaluation is beyond the scope of his examination. As these doctors' reports did not address plaintiff's major claims of a serious injury to plaintiff's left eye (neither doctor even indicated that he/she examined this part of the body) and head (ie. severe cognitive deficits), the plaintiff failed to meet his initial burden of establishing a *prima facie* case that plaintiff failed to sustain a "serious injury" pursuant to Insurance Law § 5102(d), for all categories except for that of "90/180 days." (see, *Loadholdt v. New York City Transit Authority*, 12 AD3d 352 [2d Dept 2004]; *Hughes v. Cai*, 31 AD3d 385 [2d Dept 2006]).

However, the defendants did establish a *prima facie* case for the category of "90/180 days." The plaintiff's bill of particulars reveals that plaintiff was only confined to bed for approximately one week and home for approximately two weeks, and plaintiff's examination before trial transcript testimony indicates that plaintiff missed one week from work. Such evidence shows that the plaintiff was not curtailed from nearly all activities for the bare minimum of 90/180, required by the statute.

For all categories except for the category of "90/180

days," the evidence submitted by defendants in support of the motion was insufficient to establish a *prima facie* case that the plaintiff had not sustained a serious injury as defined by Insurance Law § 5102(d) (see, CPLR 3212[b]; *Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986] ; *Oxford Paper Co. v. S.M. Liquidation Co, Inc.*, 45 Misc 2d 612 [Sup Ct., NY Cty 1965]; *Loadholdt, supra*; *Mariaca-Olmos v. Mizrhy*, 226 AD2d 437 [2d Dept 1996]; *Coscia v. 938 Trading Corp.*, 238 AD2d 538 [2d Dept 2001]). Since the defendants failed to establish a *prima facie* case that the plaintiff had not sustained a serious injury, the burden does not shift to the plaintiff to produce evidence in admissible form to support the claim of serious injury, for any category other than the category of "90/180 days." The motion must be denied as to these categories regardless of the sufficiency of the opposing papers (see, *Alvarez, supra*). The Court "need not consider whether the plaintiff's papers in opposition to the defendants' motion were sufficient to raise a triable issue of fact," for all categories except for that of "90/180 days." (See, *Loadholdt, supra*).

B. Plaintiff fails to raise a triable issue of fact for the category of "90/180 days."

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 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 his/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. Eycler*, 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 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]).

Accordingly, the defendants' motion and cross motion for summary judgment are partially granted in that the plaintiff's Complaint is dismissed only regarding the category of "90/180 days," and in all other respects, the motion is denied.

The clerk is directed to enter judgment accordingly.

The foregoing constitutes the decision and order of this Court.

Dated: November 5, 2007

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Howard G. Lane, J.S.C.