

**Chauvert v Anitei**

2011 NY Slip Op 33497(U)

December 21, 2011

Sup Ct, Queens County

Docket Number: 7688/09

Judge: Howard G. Lane

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE**  
**Justice**

**IAS PART 6**

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HUBERT CHAUVERT,  
  
Plaintiff,  
  
-against-  
  
CORNEL ANITEI and BOGDAN C. ANITEI,  
Defendants.  
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Index No. 7688/09  
  
Motion  
Date November 29, 2011  
  
Motion  
Cal. No. 9  
  
Motion  
Sequence No. 7

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Notice of Motion-Affidavits-Exhibits.....	1-4
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Upon the foregoing papers it is ordered that plaintiff's motion seeking leave to reargue this Court's order dated August 3, 2011, which order granted defendants' motion for summary judgment pursuant to Insurance Law § 5102(d) and dismissed plaintiff's Complaint, is granted and upon reargument, the decision/order of this Court dated August 3, 2011 is modified as follows:

Upon the foregoing papers it is ordered that this motion by defendants for summary judgment dismissing the complaint of plaintiff, Hubert Chauvert 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 June 27, 2008. Defendants have submitted proof in admissible form in support of the motion for summary judgment. Defendants submitted, inter alia, an affirmed report from an independent examining neurologist and plaintiff's own bill of particulars.

**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 [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 [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 [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 [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 [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 [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 [2d Dept 1999]; Feintuch v. Grella, 209 AD2d 377 [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 [1st Dept 1999]; Tompkins v. Budnick, 236 AD2d 708 [3d Dept 1997]; Parker v. DeFontaine, 231 AD2d 412 [1st Dept 1996]; DiLeo v. Blumberg, 250 AD2d 364 [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 did not suffer a "serious injury" as defined in Section 5102(d).**

The affirmed report of defendants' independent examining neurologist, Daniel J. Feuer, M.D., indicates that an examination conducted on November 30, 2010 revealed a diagnosis of a normal neurological examination. He opines that there is no objective

neurological disability or neurologic permanency causally related to the accident of June 27, 2008. Dr. Feuer concludes that plaintiff is neurologically stable and able to engage in full active employment as a school bus driver as well as full activities of daily living without restrictions.

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 raises a triable issue of fact***

In opposition to the motion, plaintiff submitted: an attorney's affirmation, unsworn medical records from Elmhurst Hospital Center, narrative reports of Lev Aminov, M.D. dated June 30, 2008 and July 30, 2008, an affirmation of plaintiff's physician, Lev Aminov, M.D. dated February 24, 2011, and plaintiff's own affidavit.

A medical affirmation or affidavit which is based upon a physician's personal examinations and observation 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, 688 NYS2d 167 [1<sup>st</sup> Dept 1980]). The causal connection must ordinarily be established by competent medical proof (see, Kociocek v. Chen, 283 AD2d 554 [2d Dept 2001]; Pommels v. Perez, 4 NY3d 566 [2005]). Plaintiff submitted medical proof that was contemporaneous with the accident showing bulges of the cervical and lumbar spines and tendinosis/tendonopathy of the left shoulder (Pajda v. Pedone, 303 AD2d 729 [2d Dept 2003]). Plaintiff has established a causal connection between the instant accident and the injuries. The affirmation submitted by plaintiff's treating physician, Lev Aminov, M.D., sets forth the objective examination, tests, and review of medical records which were performed contemporaneously

with the accident to support his conclusion that the plaintiff suffered from significant injuries, to wit: "bulging discs at C5-C6 and L5-S1" and tendinosis/tendonopathy of the left shoulder. Dr. Aminov's affirmation details plaintiff's symptoms, including neck pain, left shoulder pain, back pain, and pain in both knees. He further opines that the injuries sustained by the plaintiff in the accident were causally related to the motor vehicle accident of June 27, 2008. Furthermore, plaintiff has provided a recent medical examination detailing the status of his injuries at the current point in time (Kauderer v. Penta, 261 AD2d 365 [2d Dept 1999]). The affirmation of Dr. Aminov provides that a recent examination by Dr. Aminov on February 24, 2011 sets forth the objective examination, tests, and review of medical records which were performed to support his conclusion that the plaintiff suffers from significant injuries, to wit: range of motion limitations of the cervical and lumbar spines, left knee, and left shoulder. He further opines that the injuries are permanent in nature, significant, causally related to the motor vehicle accident of June 27 2008, and result in a permanent limitation in the plaintiff's range of motion. Clearly, the plaintiff's experts' conclusions are not based solely on the plaintiff's subjective complaints of pain, and therefore are sufficient to defeat the motion (DiLeo v. Blumber, supra, 250 AD2d 364, 672 NYS2d 319 [1<sup>st</sup> Dept 1998]).

Accordingly, the defendants' motion for summary is denied.

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: December 21, 2011

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Howard G. Lane, J.S.C.