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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IAS PART 6**
Justice

HUGH HICKS and ORVETTA JOHNSON,	Index No. 22826/09
Plaintiffs,	Motion Date March 6, 2012
-against-	Motion Cal. No. 12
JULIAN G. MANUZUETA and J&R TOURS, LTD.,	Motion
Defendants.	Sequence No. 3

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Upon the foregoing papers it is ordered that this motion by defendants for summary judgment dismissing the complaint of plaintiffs, Hugh Hicks and Orvetta Johnson, pursuant to CPLR 3212, on the ground that plaintiffs have 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 January 20, 2009. Defendants have submitted proof in admissible form in support of the motion for summary judgment for both plaintiffs for all categories except for the category of "90/180 days". Defendants have submitted, inter alia, affirmed reports from an independent examining orthopedist for both plaintiffs.

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 plaintiffs did not suffer a "serious injury" as defined in Section 5102(d) for all categories except for "90/180 days."

The affirmed report of defendants' independent examining orthopedist, Frank M. Hudak, M.D., indicates that an examination of plaintiff Hugh Hicks conducted on February 15, 2011 revealed a diagnosis of: status post cervical sprain and thoracic sprains resolved as well as status left shoulder sprain resolved and left contusion resolved. He opines that there are no objective findings to confirm any disability or permanency regarding the plaintiff's accident. Dr. Hudak concludes that: "the cervical sprain was superimposed upon preexisting degenerative disc disease at multiple levels of the cervical spine that predated the accident of 01/20/09", and that the plaintiff has reached pre-accident status.

The affirmed report of defendants' independent examining orthopedist, Frank M. Hudak, M.D., indicates that an examination of plaintiff Orvetta Johnson conducted on February 15, 2011 revealed a diagnosis of: "status post cervical sprain, left shoulder sprain, lumbar sprain, and left elbow sprain". He opines that plaintiff has returned to pre-accident status, and there is no permanency. He further opines that there are no objective findings to confirm any disability or permanency regarding the accident of January 20, 2009. Dr. Hudak concludes that plaintiff requires no further orthopedic care, physical therapy, or diagnostic testing, and can return to work full time as a Special Education teacher.

Defendants have failed to raise a triable issue of fact as to the 90/180-day claim for both plaintiffs. 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, supra; Licari v. Elliott, 57 NY2d 230, supra; Berk v. Lopez, 278 AD2d 156 [2000], lv denied 96 NY2d 708 [2001]). Defendants' expert examined plaintiffs on February 15, 2011, more than 2 years after the date of plaintiffs' alleged injury and accident on January 20, 2009. Defendants' expert failed to render an opinion on the effect the injuries claimed may have had on the plaintiffs for the 180 day period immediately following the accident. The reports of the IME's relied upon by defendants fail to discuss this particular category of serious injury and further, the IME's took place well beyond the expiration of the 180-day period (Lowell v. Peters, 3 AD3d 778 [3d Dept 2004]). With respect to the 90/180-day serious injury category, defendants have failed to meet their initial burden of proof and, therefore, have not shifted the burden to plaintiffs to lay bare their evidence with respect to this claim. As defendants have failed to establish a prima facie case with respect to the ninth category, it is unnecessary to consider whether the plaintiffs' papers in opposition to defendants' motion on this issue were sufficient to raise a triable issue of fact on this category (Manns v. Vaz, 18 AD3d 827 [2d Dept 2005). Accordingly, defendants are not entitled to summary judgment with respect to the ninth category of serious injury.

The aforementioned evidence amply satisfied defendants' initial burden of demonstrating that plaintiffs did not sustain a "serious injury" for all categories except for the category of "90/180 days". Thus, the burden then shifted to plaintiffs 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, Orvetta Johnson, raises a triable issue of fact.*

In opposition to the motion, plaintiff, Orvetta Johnson submitted: an attorney's affirmation; plaintiff's own affidavit; an affirmation and MRI report of plaintiff's radiologist, John S. Lyons, M.D. regarding plaintiff's cervical spine; a sworn narrative report of plaintiff's physician, Paul Lerner, M.D.; and an affirmation and sworn narrative reports of plaintiff's physician, Gerald Surya, M.D.

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 regrading the existence and extent of a plaintiff's serious injury (O'Sullivan v. Atrium Bus Co., 246 AD2d 418, 688 NYS2d 167 [1st 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, Orvetta Johnson submitted medical proof that was contemporaneous with the accident showing range of motion limitations regarding the lumbar and cervical spines (Pajda v. Pedone, 303 AD2d 729 [2d Dept 2003]). Plaintiff has established a causal connection between the accident and the lumbar and cervical spine injuries. The affirmation submitted by plaintiff's physician, Gerald Surya, M.D. sets forth the objective examination and tests which were performed contemporaneously with the accident to support his conclusion that the plaintiff suffered from significant injuries, to wit: range of motion limitations in the cervical and lumbar spines. Dr. Surya opines that the cervical and lumbar spine injuries sustained by the plaintiff Orvetta Johnson in the accident were causally related to the motor vehicle accident of January 20, 2009. Additionally, plaintiff's radiologist, John S. Lyons, M.D., interpreted MRI films of plaintiff's cervical spine taken on March 27, 2009 and found a disc bulge and acceleration-deceleration muscular injury. Furthermore, plaintiff has provided a recent medical examination detailing the status of her injuries at the current point in time (Kauderer v. Penta, 261 AD2d 365 [2d Dept 1999]). The affirmation of Dr. Paul Lerner provides that a recent examination by Dr. Lerner on March 17, 2011, sets forth the objective examination and tests which were performed to support his conclusion that the plaintiff suffers from significant injuries, to wit: cervical strain and lumbar strain with loss of range of motion. Dr. Lerner opines that the injuries are permanent in nature and causally related to the motor vehicle accident of January 20, 2009. 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 [1st Dept 1998]).

Additionally, despite defendants' contentions that there is an unexplained gap in treatment (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), the Court finds that the gap in treatment is adequately explained by plaintiff herself, in her affidavit, wherein she states that: "seven months into [her] treatment, [her] no fault carrier terminated benefits. Therefore [she] ceased treatment because [she] could no longer afford it on [her]

own". Such is a sufficient explanation (see, Jules v. Barbecho, 55 AD3d 548 [2d Dept 2008]).

Since there are triable issues of fact regarding whether the plaintiff, Orvetta Johnson sustained a serious injury to her cervical and lumbar spines, plaintiff, Orvetta Johnson is entitled to seek recovery for all injuries allegedly incurred as a result of the accident (Marte v. New York City Transit Authority, 59 AD3d 398 [2d Dept 2009]).

Therefore, plaintiff's submissions are sufficient to raise a triable issue of fact (see, Zuckerman v. City of New York, 49 NY2d 557 [1980]).

Accordingly, the defendants' motion for summary judgment against plaintiff, Orvetta Johnson is denied.

C. *Plaintiff Hugh Hicks fails to raise a triable issue of fact*

In opposition to the motion, plaintiff, Hugh Hicks submitted: an attorney's affirmation; plaintiff's own affidavit; an affirmation and MRI report of plaintiff's radiologist, Joseph Leadon, M.D. regarding plaintiff's cervical spine; an affirmation and sworn narrative reports of plaintiff's physician, Giovanni Angelino, M.D.; an affirmation and sworn narrative report of plaintiff's physician, Sebastian Lattuga, M.D.; affirmed narrative reports of plaintiff's physician, Paul Lerner, M.D.; and an affirmation and sworn narrative reports of plaintiff's physician, John J. McGee, D.O.

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 regrading the existence and extent of a plaintiff's serious injury (O'Sullivan v. Atrium Bus Co., 246 AD2d 418, 688 NYS2d 167 [1st 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 range of motion limitations regarding the left shoulder (Pajda v. Pedone, 303 AD2d 729 [2d Dept 2003]). Plaintiff has established a causal connection between the accident and the left shoulder injuries. The affirmation and sworn narrative reports submitted by plaintiff's physician, John J. McGee, D.O. set forth the objective examination and tests which were performed contemporaneously with the accident to support his conclusion that the plaintiff suffered from significant injuries, to wit: range of motion limitations in the

left shoulder. Dr. McGee opines that the left shoulder injuries sustained by the plaintiff Hicks in the accident were causally related to the motor vehicle accident of January 20, 2009. 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. Paul Lerner provides that a recent examination by Dr. Lerner on March 17, 2011, sets forth the objective examination and tests which were performed to support his conclusion that the plaintiff suffers from significant injuries, to wit: left shoulder strain. Dr. Lerner opines that the injuries are permanent in nature and causally related to the motor vehicle accident of January 20, 2009. 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 [1st Dept 1998]).

Since there are triable issues of fact regarding whether the plaintiff, Hugh Hicks sustained a serious injury to his left shoulder, plaintiff, Hugh Hicks is entitled to seek recovery for all injuries allegedly incurred as a result of the accident (Marte v. New York City Transit Authority, 59 AD3d 398 [2d Dept 2009]).

Therefore, plaintiff's submissions are sufficient to raise a triable issue of fact (see, Zuckerman v. City of New York, 49 NY2d 557 [1980]).

Accordingly, the defendants' motion for summary judgment against plaintiff, Hugh Hicks is denied.

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.

This constitutes the decision and order of the court.

Dated: May 3, 2012

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Howard G. Lane, J.S.C.