Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

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

CARLTON McCRIMMON,

Plaintiff,

-against-

CRYSTAL MANGAL, et al.,

Defendants.

Index No. 26804/10

Motion
Date April 24, 2012

Motion
Cal. No. 21, 22

Motion
Sequence No. 1, 2

	Papers Numbered
Notice of Motion #21-Affidavits-Exhibits...	1-4
Opposition.....	5-7
Reply.....	8-9
Notice of Motion #22-Affidavits-Exhibits...	1-4
Opposition.....	5-7
Reply.....	8-9

Upon the foregoing papers it is ordered that the motion by defendants Crystal Mangal and Hemwatie Mangal for summary judgment dismissing the complaint of plaintiff, Carlton McCrimmon and the motion by defendant, Gabrielle S. Rugato for summary judgment dismissing the complaint of plaintiff, Carlton McCrimmon, pursuant to CPLR 3212, on the ground that plaintiff has not sustained a serious injury within the meaning of the Insurance Law § 5102(d)are hereby consolidated solely for purposes of disposition of the instant motions and are decided as follows:

This action arises out of an automobile accident that occurred on May 18, 2010. Defendants have submitted proof in admissible form in support of the motion for summary judgment for all categories. Defendants have submitted inter alia, affirmed reports from two independent examining radiologists.

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) for all categories.*

The affirmed report of defendants' independent evaluating radiologist, Alan B. Greenfield, M.D., indicates that an MRI of the plaintiff's lumbar spine revealed an impression of: normal lordotic curvature; negligible degenerative disc bulging at L5-S1; no disc herniations at any level; and degenerative discopathy entirely unrelated to the subject accident.

The affirmed report of defendants' independent evaluating radiologist, Alan B. Greenfield, M.D., indicates that an MRI of the plaintiff's left shoulder revealed an impression of: no evidence of fracture or rotator cuff tear and a slight downsloping of the AC joint representing a normal anatomic variant.

The affirmed report of defendants' independent examining orthopedist, Salvatore Corso, M.D., indicates that an examination of plaintiff conducted on June 9, 2011 revealed a diagnosis of:

resolved cervical strain, resolved right and left shoulder sprain, and resolved lumbar strain. Dr. Corso concludes that there is no evidence of an orthopedic disability.

Additionally, the plaintiff's verified bill of particulars indicates that plaintiff was only confined to bed for one week and confined to home for one week. Such evidence shows that the plaintiff 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 plaintiffs did not sustain a "serious injury" for all categories. 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 raises a triable issue of fact for all categories except for the ninth category of "90/180 days".*

In opposition to the motion, plaintiff submitted: an attorney's affirmation; a sworn affidavit and sworn narrative report of plaintiff's chiropractor, Ronald P. Mazza, D.C.; an unsworn narrative report of plaintiff's chiropractor, Ronald P. Mazza, D.C., an affirmation of plaintiff's orthopedic surgeon, Alfred Faust, M.D.; an affirmation and sworn narrative report of plaintiff's physical medicine and rehabilitation physician, Ahmed Eleman, M.D.; a sworn affidavit and narrative reports of plaintiff's physical therapists, May Nunez, Bienvenido Ceballos Jr., and Leila M. Hisole-Ceballos; an affidavit of plaintiff's physical therapist, Isabel Yomtobian; an affirmation and sworn report of plaintiff's radiologist, John T. Rigney, 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 submitted medical proof that was contemporaneous with the accident showing range of motion limitations regarding the right shoulder, lumbar spine, and cervical spines (Pajda v. Pedone, 303 AD2d 729 [2d Dept 2003]). Plaintiff has established

a causal connection between the accident and the right shoulder, lumbar spine, and cervical spine injuries. The affirmation submitted by plaintiff's physician, Ahmed Eleman, MD 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 right shoulder, cervical spine, and lumbar spine. Dr. Eleman opines that the right shoulder, cervical spine, and lumbar spine injuries sustained by the plaintiff in the accident were causally related to the motor vehicle accident of May 18, 2010 and "are not the result of some degenerative condition". Additionally, plaintiff's radiologist, John T. Rigney, M.D., interpreted MRI films of plaintiff's left shoulder taken on July 28, 2010 and found an impression of: presence of impingement without a rotator cuff tear, bursal inflammation, or a joint effusion. Additionally, plaintiff's radiologist, John T. Rigney, M.D., interpreted MRI films of plaintiff's lumbar spine, taken on July 26, 2010 which revealed an impression of: straightening of lumbar curvature and slight posterior disc bulge at L5-S1. 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 and sworn narrative report of plaintiff's chiropractor, Ronald P. Mazza, D.C. provides that a recent examination by Dr. Mazza on February 15, 2012, sets forth the objective examination and tests which were performed to support his conclusion that the plaintiff suffers from significant injuries, to wit: loss of range of motion of the cervical spine and lumbar spine. Dr. Mazza opines that the injuries are permanent in nature and causally related to the motor vehicle accident of May 18, 2010. 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's doctor, Ronald P. Mazza, D.C. wherein he affirms that he treated plaintiff from July 14, 2010 until August 30, 2010 at which time his no fault benefits were cut off (see, Jules v. Barbecho, 55 AD3d 548 [2d Dept 2008]).

Since there are triable issues of fact regarding whether the

plaintiff sustained a serious injury to his cervical and lumbar spines, plaintiff 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]).

However, the plaintiff 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. The record must contain objective or credible evidence to support the plaintiff's claim that the injury prevented him form performing substantially all of his customary activities (Watt v. Eastern Investigative Bureau, Inc., 273 AD2d 226). The plaintiff's doctors fail to state any restriction of the plaintiff's daily and customary activities caused by the injuries sustained in the subject accident during the statutory period. Plaintiff's experts fail to render an opinion on the effect the injuries claimed may have had on the plaintiff for the 180 day period immediately following the accident. Plaintiff has not submitted any competent evidence from any treating physician confirming plaintiff's representations concerning the effects of the injuries for the statutory period. 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 unsubstantiated 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 [2001]; Hernandez v. Cerda, 271 AD2d 569 [2000]; Ocasio v. Henry, 276 AD2d 611 [2000]).

Therefore, plaintiff's submissions are sufficient to raise a triable issue of fact for all categories except for the ninth category of "90/180 days" (see, Zuckerman v. City of New York, 49 NY2d 557 [1980]).

Accordingly, the defendants' motions for summary judgment against plaintiff are denied as to all categories except for the category of "90/180 days".

The Clerk of the County of Queens 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 Office of the Clerk of the County of Queens. If this order requires the Clerk of the County of Queens 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 4, 2012

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Howard G. Lane, J.S.C.