SCAN

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

JOSE GALVAN,

Plaintiff,

- against -

DELMY L. BERMUDEZ and DELMY M. BERMUDEZ,

Defendants.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 13956/08
Motion Seq. No.: 01
Motion Date: 12/14/09
XXX

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion for Summary Judgment, Affirmation and Exhibits	1
Affirmation in Opposition and Exhibits	2
Reply Affirmation	3

Defendants, Delmy L. Bermudez ("DLB") and Delmy M. Bermudez ("DMB"), move, pursuant to CPLR § 3212 and Article 51 of the Insurance Law of the State of New York, for an order granting summary judgment to defendants on the ground that plaintiff did not sustain a "serious injury" in the subject accident as defined by New York State Insurance Law § 5102(d). Plaintiff opposes defendants' motion.

The action arises from a motor vehicle accident involving a collision between a bicycle owned and operated by plaintiff, Jose Galvan, and a motor vehicle owned by defendant DMB and operated by defendant DLB. The accident occurred at approximately 6:38 p.m. on August 18, 2006, at the intersection of Smith Street and Church Street, Freeport, County of Nassau, State of New York. On or about July 28, 2008, plaintiff commenced this action by service of a Summons and Verified Complaint. Issue was joined on August 21, 2008.

It is well settled that the proponent of a motion for summary judgment must make a

prima facie showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital,* 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York,* 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. *See* CPLR § 3212 (b); *Olan v. Farrell Lines Inc.,* 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980), *supra.* When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957), *supra.* Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. S*ee Gilbert Frank Corp. v. Federal Ins. Co.,* 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989).

Within the particular context of a threshold motion which seeks dismissal of a personal injury complaint, the movant bears a specific burden of establishing that the plaintiff did not sustain a "serious injury" as enumerated in Article 51 of the Insurance Law § 5102(d). *See Gaddy v. Eyler*, 79 N.Y.2d 955, 582 N.Y.S.2d 990 (1992). Upon such a showing, it becomes

incumbent upon the non-moving party to come forth with sufficient evidence in admissible form to raise an issue of fact as to the existence of a "serious injury." *See Licari v. Elliott*, 57 N.Y.2d 230, 455 N.Y.S.2d 570 (1982).

In support of a claim that the plaintiff has not sustained a serious injury, the defendant may rely either on the sworn statements of the defendants' examining physicians or the unsworn reports of the plaintiff's examining physicians. *See Pagano v. Kingsbury*, 182 A.D.2d 268, 587 N.Y.S.2d 692 (2d Dept. 1992). However, unlike the movant's proof, unsworn reports of the plaintiff's examining doctors or chiropractors are not sufficient to defeat a motion for summary judgment. *See Grasso v. Angerami*, 79 N.Y.2d 813, 580 N.Y.S.2d 178 (1991).

Essentially, in order to satisfy the statutory serious injury threshold, the legislature requires objective proof of a plaintiff's injury. The Court of Appeals in *Toure v. Avis Rent-a-Car* Systems, 98 N.Y.2d 345, 746 N.Y.S.2d 865 (2002) stated that a plaintiff's proof of injury must be supported by objective medical evidence, such as sworn MRI and CT scan tests. However, these sworn tests must be paired with the doctor's observations during the physical examination of the plaintiff. Unsworn MRI reports can also constitute competent evidence if both sides rely on those reports. *See Gonzalez v. Vasquez*, 301 A.D.2d 438, 754 N.Y.S.2d 7 (1st Dept. 2003).

Conversely, even where there is ample proof of a plaintiff's injury, certain factors may nonetheless override a plaintiff's objective medical proof of limitations and permit dismissal of a plaintiff's complaint. Specifically, additional contributing factors such as a gap in treatment, an intervening medical problem or a pre-existing condition would interrupt the chain of causation between the accident and the claimed injury. *See Pommells v. Perez,* 4 N.Y.3d 566, 797 N.Y.S.2d 380 (2005).

Plaintiff claims that as a consequence of the above described automobile accident with defendants, he has sustained serious injuries as defined in § 5102(d) of the New York State Insurance Law and which fall within the following statutory categories of injuries:

1) a permanent consequential limitation of use of a body organ or member; (Category 7)

2) a significant limitation of use of a body function or system; (Category 8)

3) a medically determined injury or impairment of a non-permanent nature which

prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.(Category 9).

As previously stated, to meet the threshold regarding significant limitation of use of a body function or system or permanent consequential limitation of a body function or system, the law requires that the limitation be more than minor, mild or slight and that the claim be supported by medical proof based upon credible medical evidence of an objectively measured and quantified medical injury or condition. *See Gaddy v. Eyler,* 79 N.Y.2d 955, 582 N.Y.S.2d 990 (1992); *Licari v. Elliot*, 57 N.Y.2d 230, 455 N.Y.S.2d 570 (1982). A minor, mild or slight limitation will be deemed insignificant within the meaning of the statute. *See Licari v. Elliot, supra.* A claim raised under the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories can be made by an expert's designation of a numeric percentage of a plaintiff's loss of motion in order to prove the extent or degree of the physical limitation. *See Toure v. Avis, supra.* In addition, an expert's qualitative assessment of a plaintiff's condition is also probative, provided: (1) the evaluation has an objective basis and (2) the evaluation compares the plaintiff's limitation to the normal function, purpose and use of the affected body organ, member, function or system. S*ee id.*

Finally, to prevail under the "medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment" category, a plaintiff must demonstrate through competent, objective proof, a "medically determined injury or impairment of a non-permanent nature" (Insurance Law § 5102[d]) "which would have caused the alleged limitations on the plaintiff's daily activities." *See Monk v. Dupuis*, 287 A.D.2d 187, 734 N.Y.S.2d 684 (3d Dept. 2001). A curtailment of the plaintiff's usual activities must be "to a great extent rather than some slight curtailment." *See Licari v. Elliott, supra* at 236. Under this category specifically, a gap or cessation in treatment is irrelevant in determining whether the plaintiff qualifies. *See Gomez v. Ford Motor Credit Co.,* 10 Misc.3d 900, 810 N.Y.S.2d 838 (Sup. Ct., Bronx County, 2005).

With these guidelines in mind, this Court will now turn to the merits of the defendants' motion. In support of their motion, the defendants submit the pleadings, the plaintiff's Verified Bill of Particulars, plaintiff's date of accident emergency room reports from South Nassau Communities Hospital, the transcript of plaintiff's examination before trial testimony and the affirmed report of Sol Farkas, M.D., who performed an independent orthopedic medical examination of plaintiff on June 17, 2009.

Based upon this evidence, the Court finds that the defendants have established a *prima facie* case that the plaintiff did not sustain serious injury within the meaning of Insurance Law § 5102(d). Dr. Farkas examined the plaintiff, performed quantified and comparative range of motion tests on plaintiff's cervical and lumbar spine, shoulders, elbows and rib cage using a goniometer. Dr. Farkas diagnosed plaintiff with resolved sprains of the lumbar spine, cervical spine, shoulder, elbow and a resolved contusion of the ribs. Dr. Farkas concluded that "I find no orthopedic disability based on the physical examination at this time. The claimant may carry out the daily activities of living without restriction."

Defendant also submits that he was unable to have the films of plaintiff's MRI reviewed because the facility where the MRI was conducted, Island Medical Open MRI, is out of business and the referring physician, Dr. Mazza, does not have the films, neither does plaintiff nor his counsel.

Additionally, the deposition testimony of plaintiff establishes that following the accident, he was confined to bed for two weeks and confined to his home from approximately one month. Plaintiff did not miss any work as he was unemployed at the time of the accident, having been so since the 1980s due to a pre-existing high blood pressure disorder. At said deposition, plaintiff admitted that there are no hobbies or activities that he can no longer do since the accident and that he is able to perform his household activities, such as cooking, cleaning and doing the laundry, without limitation.

The burden now shifts to the plaintiff to come forward with evidence to overcome the defendants' submissions by demonstrating the existence of a triable issue of fact that serious injury was sustained. *See Pommells v. Perez*, 4 N.Y.3d 566, 797 N.Y.S.2d 380 (2005); *Grossman v. Wright*, 268 A.D.2d 79, 707 N.Y.S.2d 233 (2d Dept. 2000). To support his burden, plaintiff submits an affirmation of John T. Rigney, M.D., a board certified radiologist who conducted plaintiff's MRI, and an affidavit of Adalberto Morales, Jr., D.C., a doctor of

chiropractic medicine who treated plaintiff from September 13, 2006 through February 21, 2007.

Based upon the allowable evidence, plaintiff has not sustained his burden. Dr. Morales' affirmation, although dated January 5, 2010, does not include a recent examination of plaintiff. His last examination of plaintiff was on February 21, 2007, at which time the doctor concluded that the plaintiff "continued to complain of pain and discomfort in his neck and lower back." Dr. Morales concluded that "it is my opinion to a reasonable degree of medical certainty that Jose Galvan sustained a permanent injury to his lower back as a direct result of his accident on August 18, 2006. Specifically, Mr. Galvan sustained a posterior bulge of the L5-S1, along with confirmed radiculopathy at those levels. Mr. Galvan's injuries will remain chronic sources of irritation and inflammation." Plaintiff fails however to submit a more recent exam documenting his present limitations, if any.

Dr. Rigney's affirmation, although dated December 15, 2009, also does not include a recent examination of this plaintiff. Additionally, Dr. Rigney's affirmation is insufficient to raise a triable issue of fact because he fails to conclude that plaintiff's conditions were causally related to the accident. *See Gilroy v. Duncombe*, 274 A.D.2d 548, 712 N.Y.S.2d 142 (2d Dept. 2000); *Greene v. Miranda*, 272 A.D.2d 441, 708 N.Y.S.2d 310 (2d Dept. 2000).

When examining medical evidence offered by a plaintiff on a threshold motion, the court must ensure that the evidence is objective in nature and that a plaintiff's subjective claims as to pain or limitation of motion are sustained by verified objective medical findings. *See Grossman v. Wright*, 268 A.D.2d 79, 707 N.Y.S.2d 233 (2d Dept. 2000). Further, in addition to providing medical proof contemporaneous with the subject accident, the plaintiff must also provide competent medical evidence containing verified objective findings based upon a recent examination wherein the expert must provide an opinion as to the significance of the injury. *See Kauderer v. Penta*, 261 A.D.2d 365, 689 N.Y.S.2d 190 (2d Dept. 1999); *Constantinou v. Surinder*, 8 A.D.3d 323, 777 N.Y.S.2d 708 (2d Dept. 2004); *Brown v. Tairi Hacking Corp.*, 23 A.D.3d 325, 804 N.Y.S.2d 756 (2d Dept. 2005); *Elgendy v. Nieradko*, 307 A.D.2d 251, 762 N.Y.S.2d 275 (2d Dept. 2003); *Castaldo v. Migliore*, 291 A.D.2d 526, 737 N.Y.S.2d 862 (2d Dept. 2002).

In the instant matter, given plaintiff's failure to provide competent medical evidence contemporaneous with the subject accident, plaintiff has failed to demonstrate the existence of

material issues of fact that he has sustained a significant limitation of use of a body function or system or a permanent consequential limitation of use of a body organ or member. *See Berson v. Rosada Cab Corp.*, 62 A.D.3d 636, 878 N.Y.S.2d 189 (2d Dept. 2009); *Grammatico v. Store Wide Delivery Co., Inc.*, 296 A.D.2d 379, 745 N.Y.S.2d 437 (2d Dept. 2002).

Additionally, the plaintiff's deposition testimony does not establish that he was unable to perform substantially all of the material acts which constitute his usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury. Furthermore, plaintiff fails to even address this issue in his affirmation is opposition and therefore raises no material issues of fact as to such.

Therefore, based upon the foregoing, defendants' motion dismissing the complaint against them and granting summary judgment is hereby granted.

This constitutes the decision and order of this Court.

ENTER:

DENISE L. SHER
A.J.S.C.
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Dated: Mineola, New York
March 31, 2010