SCAN

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

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

TRIAL/IAS PART 32
NASSAU COUNTY

LUIS ALONSO FLORES,

Plaintiff,

- against -

INCORPORATED VILLAGE OF HEMPSTEAD and KEVIN D. BOONE,

Defendants.

Index No.: 9207/08
Motion Seq. No.: 02
Motion Date: 09/30/10
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 and Exhibits	3

Defendants, the Incorporated Village of Hempstead and Kevin D. Boone, move for an Order awarding them summary judgment dismissing plaintiff's complaint on the grounds that Luis Alonso Flores' injuries do not satisfy the "serious injury" threshold requirement of New York State Insurance Law §5102 (d). The motion is granted.

This action arises out of a motor vehicle accident that occurred on October 5, 2007, at approximately 3:30 p.m., at the intersection of Clinton Boulevard and Fulton Avenue in Hempstead, New York, when the motor vehicle owned by defendant Village of Hempstead and being operated by defendant Kevin D. Boone, struck the rear of the vehicle owned and being

operated by the plaintiff.

Following the accident, plaintiff was taken to Mercy Medical Center where he presented with complaints of pain to his head, neck, chest, back and bilateral shoulders. Plaintiff was discharged the same day with instructions to follow up with his doctors for his pain and injuries.

At the time of the accident, the 61-year old plaintiff was not working as he claims to have been on disability from hypertension and having a pacemaker placed three years prior to the accident. In his Verified Bill of Particulars, plaintiff claims that he was confined to his bed for two weeks and to his home for three months. *See* Defendants' Affirmation in Support Exhibit C- *Verified Bill of Particulars*, ¶28. Plaintiff also claims that as a result of this accident, he is no longer able to run, he does not have full movement of his body, and he cannot sit or stand for too long.

Specifically, as a result of this accident, plaintiff claims that he sustained, *inter alia*, posterior disc herniation at L4-L5 and at L5-S1 impinging on the spinal canal and nerve roots bilaterally; foraminal encroachments of the cervical spine; bilateral lumbar radiculitis; lumbar, cervical and thoracic myofascitis with radiculitis; lumbargo; spasm and tenderness in the trapezius, splenius capitis, semispinalis and legator scapulae bilaterally; tenderness to palpation at and pain at C4 through C7; tenderness and muscle spasms at L2 throughS1, T8-T10, L4-S2, T7-T11, and L3-S1; right rotator cuff tear; right shoulder sprain and impingement; radiculitis to the right and left shoulders; right knee and left knee internal derangment; right and left knee sprain; and medial joint line tenderness and pain in the right and left knee. *See* Defendants' Affirmation in Support Exhibit C- *Verified Bill of Particulars*, ¶8. Subsequently, in his Supplemental Bill of Particulars, plaintiff also claims, *inter alia*, the following injuries: lumbar

spine sprain/strain; fracture of the lower back bone; traumatic sacroilitis on the right side; decreased motor power of right hip; restricted range of motion of right ankle; and post traumatic right knee right sprain and strain. *See* Defendants' Affirmation in Support Exhibit D-*Supplemental Bill of Particulars*, ¶1.

In moving for summary judgment dismissal of the plaintiff's complaint on the grounds that he has not sustained a serious injury within the meaning of the New York State Insurance Law, defendants are not required to disprove any category of serious injury which has not been pled by the plaintiff. *See Melino v. Lauster*, 82 N.Y.2d 828, 605 N.Y.S.2d 4 (1993). Moreover, even pled categories of serious injury may be disproved by the defendants by means other than the submission of medical evidence, including the plaintiff's own testimony and their submitted exhibits. *See Michaelides v. Martone*, 186 A.D.2d 544, 588 N.Y.S.2d 366 (2d Dept. 1992); *Covington v. Cinnirella*, 146 A.D.2d 565, 536 N.Y.S.2d 514 (2d Dept. 1989).

Notably, plaintiff fails to identify the specific categories of the serious injury statute into which his injuries fall. Nevertheless, whether he can demonstrate the existence of a compensable serious injury depends upon the quality, quantity and credibility of the admissible evidence. *Manrique v. Warshaw Woolen Associates, Inc.*, 297 A.D.2d 519, 747 N.Y.S.2d 451 (1st Dept. 2002). Based upon a plain reading of the papers submitted herein, it is obvious that the plaintiff is not claiming that his injuries fall within the first five categories of "serious injury," to wit: death, dismemberment, significant disfigurement, a fracture or loss of a fetus.

Further, inasmuch as the plaintiff has failed to allege and claim that he has sustained a "total" loss of use of a body organ, member, function or system, it is clear that his injuries also do not satisfy the "permanent loss of use" category of Insurance Law §5102(d). *See Oberly v.*

Bangs Ambulance, Inc., 96 N.Y.2d 295, 727 N.Y.S.2d 378 (2001). Similarly, plaintiff's claims of serious injury under the 90/180 category of Insurance Law § 5102(d) are also contradicted by his own testimony wherein he states that he was only confined to his bed for two weeks as a result of this accident and that he is not curtailed in his usual activities "to a great extent rather than some slight curtailment." *See Licari v. Elliott*, 57 N.Y.2d 230, 455 N.Y.S.2d 570 (1982); *Sands v. Stark*, 299 A.D.2d 642, 749 N.Y.S.2d 334 (3d Dept. 2002). In light of these facts, this Court determines that plaintiff has effectively abandoned his 90/180 claim for purposes of defendants' initial burden of proof on a threshold motion. *See Joseph v. Forman*, 16 Misc.3d 743, 838 N.Y.S.2d 902 (Supreme Ct. Nassau County 2007).

Thus, this Court will restrict its analysis to the remaining two categories of Insurance Law §5102(d) to wit: permanent consequential limitation of use of a body organ or member and significant limitation of use of a body function or system.

In support of a claim that the plaintiff has not sustained a serious injury, defendants may rely either on the sworn statements of the defendants' examining physician or the unsworn reports of the plaintiff's examining physician. *See Pagano v. Kingsbury*, 182 A.D.2d 268, 587 N.Y.S.2d 692 (2d Dept. 1992). 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. *See also Pichardo v. Blum,* 267 A.D.2d 441, 700 N.Y.S.2d 863 (2d Dept. 1999).

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, in opposition to defendants' motion, to produce *prima facie* evidence in admissible form to support the claim for serious injury. *See Licari v. Elliot*, *supra*. 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 examinations, tests and observations and review of the record, rather than manifesting only the plaintiff's subjective complaints. However, unlike the movant's proof, unsworn reports of plaintiff's examining doctor or chiropractor 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). Otherwise, a medical affirmation or affidavit which is based upon the 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. *See Reid v. Wu*, 2003 WL 21087012, *citing O'Sullivan v. Atrium Bus Co.*, 246 A.D.2d 418, 668 N.Y.S.2d 167 (1st Dept. 1998).

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). However, even the MRI and CT scan tests and reports must be paired with the doctor's observations during his physical examination of the plaintiff. *See Toure v. Avis Rent A Car Systems, supra.*

On the other hand, even where there is ample objective proof of plaintiff's injury, the Court of Appeals held in *Pommells v. Perez,* 4 N.Y.3d 566, 797 N.Y.S.2d 380 (2005), that certain factors may override a plaintiff's objective medical proof of limitations and nonetheless

permit dismissal of plaintiff's complaint. Specifically, in *Pommels v. Perez*, the Court of Appeals held that additional contributing factors, such as gap in treatment, an intervening medical problem or a preexisting condition, would interrupt the chain of causation between the accident and the claimed injury. *See id.* The Court held that while "the law surely does not require a record for needless treatment in order to survive summary judgment, where there has been a gap in treatment or cessation of treatment, a plaintiff must offer some reasonable explanation for the gap in treatment or cessation of treatment." *Id.; Neugebauer v. Gill*, 19 A.D.3d 567, 797 N.Y.S.2d 541 (2d Dept. 2005).

To meet the threshold significant limitation of use of a body function or system or permanent consequential limitation, the law requires that the plaintiff's 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 Licari v. Elliot, supra*; *Gaddy v. Eyler,* 79 N.Y.2d 955, 582 N.Y.S.2d 990 (1992)*; Scheer v. Koubeck*, 70 N.Y.2d 678, 518 N.Y.S.2d 788 (1987). A minor, mild or slight limitation shall be deemed "insignificant" within the meaning of the statute. *See Licari v. Elliot, supra*; *Grossman v. Wright*, 268 A.D.2d 79, 707 N.Y.S.2d 233 (2d Dept. 2000).

When, as in this case, a claim is raised under the "permanent consequential limitation of use of a body organ or member" category or "significant limitation of use of a body function or system" category, in order to prove the extent or degree of the physical limitation, an expert's designation of a numeric percentage of plaintiff's loss of range of motion is acceptable. *See Toure v. Avis Rent A Car Systems, Inc., supra.* In addition, an expert's qualitative assessment of a plaintiff's condition is also probative, provided that: (1) the evaluation has an objective basis and (2) the evaluation compares the plaintiff's limitations to the normal function, purpose and

use of the affected body organ, member, function or system." *Id.*

With these guidelines in mind, this Court will now turn to the merits of defendants' motion at hand.

In support of their motion, the defendants, submits, *inter alia*, the following: the unsworn, un-affirmed report of plaintiff's physician, Dr. David Randall Dynof, M.D., who evaluated the plaintiff on October 24, 2007; the sworn "affirmation" of chiropractor Pierre H. Thoden P.C.; the sworn affirmed report of Dr. S. Farkas, M.D., who performed an independent orthopedic examination of the plaintiff on January 2, 2008; the sworn "affirmation" of acupuncturist Erik Koniger, M.S.T.C.M.; and, the sworn affirmed report of Dr. Lee M. Kupersmith, M.D., F.A.A.O.S., who performed an independent orthopedic examination of the plaintiff on August 10, 2010.

Initially, it is noted that chiropractor Pierre H. Thoden and acupuncturist Erik Koniger's attempts to affirm the contents of their reports concerning the plaintiff pursuant to CPLR § 2106 are without any probative value and do not constitute competent admissible proof in support of defendants' motion. *See* CPLR § 2106; *Kunz v. Gleeson*, 9 A.D.3d 480, 781 N.Y.S.2d 50 (2d Dept. 2004); *Santoro v. Daniel*, 276 A.D.2d 478, 713 N.Y.S.2d 699 (2d Dept. 2000).

Thus, the only admissible evidence submitted by the defendants is the sworn affirmed report of D. S. Farkas M.D., the sworn affirmed report of Dr. Lee M. Kupersmith, M.D., and the unsworn, un-affirmed report of plaintiff's physician, Dr. David Randall Dynof, M.D..

In that regard, while this Court notes that unsworn report of plaintiff's orthopedist, Dr. Dynof, who examined the plaintiff just nineteen days after the accident, notes a restricted range of motion in plaintiff's cervical, thoracic and lumbar spine, as well as the shoulder and upper extremities, in light of the fact that the defendants' examining physicians, Dr. Farkas and Dr.

Kupersmith, who evaluated the plaintiff less than three months following the date of the accident and approximately three years following the date of the accident, respectively, do not find any restricted range of motion as a result of the subject accident, this Court finds that the defendants have carried their initial *prima facie* burden of entitlement to judgment as a matter of law.

Having made a *prima facie* showing that the injured plaintiff did not sustain a "serious injury" within the meaning of the statute, the burden shifts to the plaintiff to come forward with evidence to overcome the defendants' submissions by demonstrating a triable issue of fact that a "serious injury" was sustained. *See Pommels v. Perez, supra*; *Grossman v. Wright, supra.*

In opposition, plaintiff submits, *inter alia*, his own affidavit; the sworn affirmation of Dr. Nizrali Visram, M.D. a physiatrist who first started treating the plaintiff on January 8, 2010 in relation to the injuries sustained a result of the subject accident on October 5, 2007 and the unsworn emergency room records from Mercy Medical Center.

Inasmuch as a plaintiff may not rely upon unsworn medical evidence to defeat defendants' summary judgment motion (*Migliaccio v. Miruku*, 56 A.D.3d 393, 869 N.Y.S.2d 24 (1st Dept. 2008), this Court will not consider the emergency room records from Mercy Medical Center.

Thus, the only proof that may be considered by this Court is the sworn affirmation of Dr. Visram. However, as it is clear that Dr. Visram only started treating the plaintiff in January 2010, *i.e.*, more than two years and two months following the date of this accident, plaintiff's proof falls short of raising a triable issue of fact. As stated above, medical evidence of an injury is required to establish a serious injury. *See Toure v. Avis Rent A Car Systems, Inc., supra.* Generally, the medical proof required should be contemporaneous with the accident, showing

qualitative evidence of what restrictions, if any, with which plaintiff was afflicted. *See Nemchyonok v. Peng Liu Ying*, 2 A.D.3d 421, 767 N.Y.S.2d 811 (2d Dept. 2003); *Pajda v. Pedone*, 303 A.D.2d 729, 757 N.Y.S.2d 452 (2d Dept. 2003). A failure to submit medical evidence contemporaneous with the injury, as in this case, requires summary judgment in defendant's favor. *See Nemchyonok v. Ying*, *supra*.

Therefore, in light of plaintiff's failure to raise any triable issue of fact, defendants' motion for summary judgment dismissal of plaintiff's complaint is hereby granted. The complaint is dismissed in its entirety.

This shall constitute the decision and order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.
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Dated: Mineola, New York
December 22, 2010