SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

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

MONDRE TRAVERS,

Plaintiff,

- against -

OCEANSIDE INDUSTRIAL STORAGE, INC.,

Defendant.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 16509/09
Motion Seq. No.: 02
Motion Date: 01/20/11
XXX

The following papers have been read on this motion:

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

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendant moves, pursuant to CPLR § 3212 and Article 51 of the Insurance Law of the State of New York, for an order granting it summary judgment 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 defendant's motion.

The above entitled action stems from personal injuries allegedly sustained by the plaintiff as a result of an automobile accident with defendant which occurred on July 23, 2007, at Greenwich Street and Jerusalem Avenue, County of Nassau, State of New York. Plaintiff contends that his automobile was sideswiped by defendant from the rear passenger side to the

front when he was waiting at a light to make a turn. Plaintiff states that he hit his neck on the headrest due to the impact. As a result of the accident, plaintiff claims that he sustained the following injuries:

Central subligamentous posterior disc herniation at L5-S1 impinging on the anterior aspect of the spinal canal;

Bilateral S1 lumbar radiculopathy;

Lumbar sprain/strain;

Permanent consequential limitation of the lumbar spine;

Significant limitation of the lumbar spine;

Loss of range of motion of the lumbar spine;

Cervical sprain/strain;

Loss of normal cervical lordosis;

Cervical reflex muscle spasms;

Permanent consequential limitation of the cervical spine;

Significant limitation of the cervical spine;

Loss of range of motion of the cervical spine;

Right wrist sprain;

Right thumb tingling;

Permanent consequential limitation of the right wrist and hand;

Significant limitation of the right wrist and hand;

Loss of range of motion of the right wrist and hand.

Plaintiff commenced the action with service of a Summons and Verified Complaint on

August 17, 2009. Issue was joined on November 23, 2009.

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. See *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, a defendant may rely either on the sworn statements of the defendant's 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 defendant, he has sustained serious injuries as defined in New York State Insurance Law § 5102(d) 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.

With these guidelines in mind, this Court will now turn to the merits of defendant's motion. In support of its motion, defendant submits the pleadings, plaintiff's Verified Bill of

Particulars, the transcript of plaintiff's examination before trial ("EBT") testimony and the affirmed report of Isaac Cohen, M.D., who performed an independent orthopedic medical examination of plaintiff on October 27, 2010.

When moving for dismissal of a personal injury complaint, the movant bears a specific burden of establishing that the plaintiff did not sustain a serious injury. *See Gaddy v. Eyler*, 79 N.Y.2d 955, 582 N.Y.S.2d 990 (1992). Within the scope of the movants' burden, a defendant's medical expert must specify the objective tests upon which the stated medical opinions are based, and when rendering an opinion with respect to the plaintiff's range of motion, must compare any findings to those ranges of motion considered normal for the particular body part. *See Gastaldi v. Chen*, 56 A.D.3d 420, 866 N.Y.S.2d 750 (2d Dept. 2008); *Malave v. Basikov*, 45 A.D.3d 539, 845 N.Y.S.2d 415 (2d Dept. 2007); *Nociforo v. Penna*, 42 A.D.3d 514, 840 N.Y.S.2d 396 (2d Dept. 2007); *Meiheng Qu v. Doshna*, 12 A.D.3d 578, 785 N.Y.S.2d 112 (2d Dept. 2004); *Browdame v. Candura*, 25 A.D.3d 747, 807 N.Y.S.2d 658 (2d Dept. 2006); *Mondi v. Keahan*, 32 A.D.3d 506, 820 N.Y.S.2d 625 (2d Dept. 2006).

Based upon this evidence, the Court finds that the defendant has established a *prima facie* case that the plaintiff did not sustain serious injury within the meaning of New York State Insurance Law § 5102(d). Dr. Isaac Cohen, a board certified orthopedist, reviewed plaintiff's medical records and conducted a physical examination of plaintiff on October 27, 2010. *See* Defendant's Affirmation in Support Exhibit E. Dr. Cohen examined the plaintiff and performed quantified and comparative range of motion tests on plaintiff's cervical spine, upper extremities, lumbosacral spine, lower extremities and right wrist/hand. The results of the tests indicated no deviations from normal. Dr. Cohen's diagnosis of plaintiff was "Cervical strain, resolved. Right wrist/hand sprain, resolved. Lumbosacral strain, resolved." Dr. Cohen concluded, "[a]t the time

of this evaluation, Mr. Travers has no evidence of an active disability or permanency related to the accident of record, 7/23/07. He has completely normal functional capacity on examination of both the cervical and lumbosacral spine areas, as well as the right upper extremity....Mr. Travers was treated symptomatically with physical therapy for an extensive period of time, having been able to start work activities as a UPS driver, doing lifting without any restrictions, a few months after the accident of record. According to the records documented, he continued to perform this activity until present times. At the time of this evaluation, he has completely normal functional capacity of the musculoskeletal system without any evidence of sequelae or permanency related to the accident of record. In summary, it is my opinion that the claimant sustained mild soft tissue complaints as a consequence of this accident on 7/23/07 that resolved uneventfully with the passage of time. No evidence of sequella or permanency is documented and the claimant is capable of performing his normal activities in an unrestricted fashion with no evidence of active disability present."

With respect to plaintiff's 90/180 claim, defendant relies on the EBT testimony of plaintiff which indicates that plaintiff was not employed at the time of the accident, but took a job with UPS four months after said accident and maintained his employment with them for at least two and a half years. Defendant adds that "plaintiff sought relatively limited medical treatment after the subject occurrence and he failed to offer any evidence indicating that he was unable to perform his usual and customary daily activities to meet the threshold requirements."

The burden now shifts to the plaintiff to come forward with evidence to overcome defendant's 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). In opposition to

defendant's motion, plaintiff argues that defendant's motion must be denied since plaintiff can establish a *prima facie* case that he satisfied the serious injury threshold to maintain his action. Plaintiff states that "it is important to note that the Plaintiff did not have any prior or subsequent injuries to his lumbar spine, cervical spine, or right wrist, which he claims were seriously injured due to the July 23, 2007 motor vehicle accident....Nor is the Defendant claiming that his injuries were degenerative. Thus the only remaining issue is whether the injuries Mr. Travers sustained in the motor vehicle accident are serious."

To support his burden, plaintiff submits his own EBT testimony, an MRI report for plaintiff dated September 18, 2007, prepared by Richard Rizzuti, M.D, test results dated October 18, 2007 and certified by Joseph Gregorace, D.O., affirmed reports of Joseph Gregorace, D.O. dated July 30, 2007, August 14, 2007, August 28, 2007, September 17, 2007, October 8, 2007, October 18, 2007, December 3, 2007, January 25, 2010 and January 10, 2011, affirmed report of Nizarali Visram, M.D. dated November 16, 2007 and an affidavit from plaintiff, himself, dated December 28, 2010.

Plaintiff submitted the affirmation of Dr. Richard J. Rizzuti, a radiologist with All County under whose auspices administered and supervised the administration and examination of the MRIs of plaintiff's lumbosacral spine performed on September 18, 2007. *See* Plaintiff's Affirmation in Opposition Exhibit B. With respect to the MRI of the cervical spine, "[t]he examination demonstrates a central subligamentous posterior disc herniations at L5-S1 impinging on the anterior aspect of the spinal canal. The remaining discs are unremarkable. The cauda equina and visualized lower spinal cord are unremarkable. There is no abnormality of alignment. No acute bony abnormality is demonstrated. There is no evidence of spinal stenosis." Dr. Rizzuti's impression was "[c]entral subligamentous posterior disc herniation at L5-S1

impinging on the anterior aspect of the spinal canal."

Plaintiff also submitted the affirmations of Joseph Gregorace, D.O., who examined plaintiff on July 30, 2007, August 14, 2007, August 28, 2007, September 17, 2007, October 8, 2007, October 18, 2007, December 3, 2007, January 25, 2010 and January 10, 2011. *See* Plaintiff's Affirmation in Opposition Exhibit D. Said reports indicates that Dr. Gregorace performed quantified and comparative range of motion tests on plaintiff's cervical spine, lumbar spine lower extremities and right wrist. Dr. Gregorace's initial diagnosis on July 30, 2007 was "[c]ervical spine strain/strain. Right wrist sprain. Right median neuritis. Lumbar spine strain/sprain." Dr. Gregorace recommended plaintiff engage in a course of physical therapy.

Plaintiff additionally submitted the affirmation of Nizarali Visram, M.D. who examined plaintiff on November 16, 2007. Dr. Visram, a pain management specialist, also performed quantified and comparative range of motion tests on plaintiff's lumbar spine. Dr. Visram's assessment was "[p]ost-traumatic lumbar spine disc herniation at L5/S1 with myofascial pains. Post-traumatic sacral radiculopathies as per electrodiagnostic studies." Dr. Visram's recommendation was "[t]he patient was recommended lumbar epidural steroid injections in a series of three, three weeks' apart. The injections were discussed in detail, however, the patient prefers not to have those. The patient was recommended to continue with physical therapy and the pain medications."

In support of his 90/180 argument, plaintiff submits his own affidavit in which he states "[a]lthough I was unemployed at the time of the accident, the pain which this accident caused prevented me from working until four months later in November of 2007. During that four month period I was in constant pain and unable to sit up for extended periods of time, walk any distance, perform household chores, or lift items. To this day, as a result of my injuries and pain,

due to the accident, I have been unable to perform various activities that I pursued prior to the accident. They include but are not limited to the following: exercising, laundry, lifting weights, carrying grocery bags, playing basketball and most of all playing with my four children."

In its Affirmation in Reply, defendant argues that plaintiff has failed to offer an adequate explanation for the over two year gap in his treatment. Defendant states that "various New York courts have held that a lag in treatment between the date of Plaintiff's last treatment and the Plaintiff's most recent visit to his or her physician to obtain an examination and, presumably, an affidavit for the purposes of defeating a Motion for Summary Judgment, are insufficient....Pursuant to the records submitted in plaintiff's opposition papers, plaintiff ceased treatment with Joseph Gregorace, D.O. on December 3, 2007. It was not until more than two years later on January 25, 2010, after the filing of this lawsuit, that plaintiff returned to Dr. Gregorace for a consultation evaluation. He then return to Dr. Gregorace one year later on January 10, 2011, for a follow-up evaluation. There is no valid explanation give (*sic*) by the plaintiff in his affidavit or by Dr. Gregorace for this gap in treatment."

As previously stated, 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). The Court finds that neither plaintiff nor his doctors adequately explained the cessation of his treatment after December 2007. *See Haber v. Ullah*, 69 A.D.3d 769, 892 N.Y.S.2d 531 (2d Dept. 2010); *Milosevic v. Mouladi*, 72 A.D.3d 1036, 898 N.Y.S.2d 870 (2d Dept. 2010); *Collado v. Aboizeid*, 68 A.D.2d 912, 890 N.Y.S.2d 326 (2d Dept. 2009).

Additionally, plaintiff did not provide the Court with evidence of any physical therapy he may or may not have been taking part in since the date of his accident. Also, there was no statement from any doctors that plaintiff had reached his maximum possible medical improvement and that further treatment was unnecessary.

Consequently, as plaintiff had an over two year gap in treatment and failed to adequately explain said cessation of treatment, the Court finds that these factors override plaintiff's objective medical proof of limitations and permits dismissal of plaintiff's complaint.

Therefore, based upon the foregoing, defendant's motion for summary judgment and a dismissal of the complaint against it 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 30, 2011