At an IAS Term, Part 50 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 29th day of July, 2008.

P R E S E N T:

HON. SYLVIA HINDS-RADIX,
Justice.

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WILLIE HOPKINS AND VENORA HOPKINS,

Plaintiffs,

- against - Index No.: 436/06

HIZAM M. ALI,

Defendant.

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The following papers numbered 1 to 4 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2
Opposing Affidavits (Affirmations)	3
Reply Affidavits (Affirmations)	4
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, defendant Hizam Ali (defendant), moves for an order, pursuant to CPLR 3212, granting summary judgment dismissing plaintiffs' complaint on the ground that plaintiff Willie Hopkins (Mr. Hopkins) did not sustain a "serious injury" as that term is defined by Insurance Law § 5102 (d).

Background

On December 29, 2004, Mr. Hopkins was allegedly injured as a result of a motor vehicle accident that occurred at the intersection of Kosciusko Street and Lewis Avenue in Brooklyn, New York, when the motor vehicle owned and operated by defendant Hizam Ali came into contact with another vehicle owned and operated by the plaintiff Willie Hopkins. Thereafter, plaintiffs commenced the instant action claiming that defendant's negligence proximately caused Mr. Hopkins injuries. As amplified in his bill of particulars, Mr. Hopkins claimed, inter alia, that he sustained "partial thickness tear of distal anterior ligament of left knee; central disc herniation at L4-L5 with compression of thecal sac; central disc herniation at L5-S1 with compression of thecal sac; subligamentous herniation disc at C6-C7; disc bulges at C3-C4 and C4-C5; narrowing of the C3-C4, C5-C6 and C6-C7 disc space; moderate narrowing of the L5-S1 intervertebral disc space; cervical spine sprain and strain; lumbar spine sprain and strain; cervical and lumbosacral radiculopathy; lumbosacral sprain and strain; internal derangement of left shoulder; injury to and involvement of surrounding nerves, tendons, blood vessels, ligaments, and connective tissue in and around the above set forth areas". Following joinder of issue and discovery, defendant moves for summary judgment dismissing the complaint on the ground that Mr. Hopkins claimed injuries do not meet the "serious injury" threshold under Insurance Law § 5102 (d).

Summary Judgment Law

A defendant seeking summary judgment dismissing a complaint based upon the lack of a serious injury "bears the initial burden to present competent evidence that the plaintiff has no cause of action" (*Brown v Achy*, 9 AD3d 30, 31 [2004]; *see also Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]). To succeed on the motion, defendant must first tender evidence that

eliminates any material issues of fact with respect to the "serious injury" threshold (*Gaddy v Eyler*, 79 NY2d 955 [1992]; *see also Ocasio v Henry*, 276 AD2d 611 [2000]; *Villalta v Schechter*, 273 AD2d 299 [2000]). When a defendant has satisfied this requirement, the burden shifts to the plaintiff and it is then incumbent upon the plaintiff to produce sufficient admissible evidence to raise a triable issue as to the existence of a statutory "serious injury" (*see Pommells v Perez*, 4 NY3d 566, 579 [2005]; *Gaddy,* 79 NY2d at 956-957; *Lopez v Senatore*, 65 NY2d 1017, 1020 [1985]; *see also Grossman v Wright*, 268 AD2d 79, 84 [2000]). "The court's function on a motion for summary judgment is not to resolve issues of fact or to determine matters of credibility but merely to determine whether such issues exist" (*Roth v Barreto*, 289 AD2d 557, 558 [2001]).

Defendant's Submission

In support of the motion for summary judgment, defendant submits the deposition transcript of Mr. Hopkins, the affirmed medical reports of Dr. Kenneth Falvo, M.D. and Dr. Willie Hopkins, M.D. Both doctors examined Mr. Hopkins on the behalf of the defendant.

In his report, Dr. Falvo stated that he reviewed Mr. Hopkins verified bill of particulars, MRI of the left knee, MRI of the lumbosacral spine, report of muscle testing, report of x-ray of the cervical and lumbar spines and chiropractic report. Dr. Falvo also stated that he conducted an independent orthopedic examination of Mr. Hopkins on August 27, 2007. Dr. Falvo noted that Mr. Hopkins had a work-related accident in 2002 to his lower back and that he never returned to gainful employment following the work-related accident. The doctor also noted that Mr. Hopkins was "symptomatic and was under active treatment for that condition at the time of the accident of December 29, 2004." According to Dr. Falvo, his examination of Mr. Hopkins

revealed that he had a normal range of motion in the cervical and lumbar spines and in both shoulders and knees. Dr. Falvo diagnosed Mr. Hopkins with resolved cervical sprain, resolved lower back sprain and a contusion of the left knee that has since healed. Dr. Falvo found that Mr. Hopkins had no disability and concluded that he was able to engage in activities of daily living and gainful employment.

Dr. Marlon Seliger stated that he reviewed Mr. Hopkins verified bill of particulars, MRI of the left knee, MRI of the lumbosacral spine, EMG and nerve conduction studies. Dr. Seliger performed an independent neurological examination of Mr. Hopkins on June 28, 2007. Based on his examination, Dr. Seliger determined that Mr. Hopkins had normal range of motion in his cervical spine, lumbar spine, both shoulders and the knees. He noted that straight leg raising test, extremities, motor, coordination and gait were normal. With regard to Mr. Hopkins medical history, Dr. Seliger stated that "there are no known predisposing injuries or significant medical conditions". Based on his examination, Dr. Seliger diagnosed Mr. Hopkins as having sustained cervical sprain, lower back sprain and contusion of the knee which have now resolved. Dr. Seliger concluded from a neurologic standpoint that Mr. Hopkins has made a good recovery and has no neurologic disability.

Defendant, by the foregoing submissions, have made a prima facie showing that Mr. Hopkins did not sustain a "serious injury," shifting the burden to plaintiffs to submit objective evidence that a "serious injury" was sustained and that it was causally related to the accident of December 29, 2004 (*Pommells*, 4 NY3d at 574; *Kravtsov v Wong*, 11 AD3d 516, 517 [2004]; *Tankersly v Szesnat*, 235 AD2d 1010, 1012 [1997]; *Attanasio v Lashley*, 223 AD2d 614, 614 [1996]). Accordingly, the burden shifts to plaintiffs to come forward with sufficient evidence to

raise a triable issue of fact (*Gaddy, 79 NY2d 955; Ocasio*, 276 AD2d 611; *Grossman*, 268 AD2d 79).

Plaintiff's Opposition

Plaintiffs argue that Mr. Hopkins sustained a "serious injury," as defined by Insurance Law § 5102 (d), in that he sustained: (1) a significant limitation of use of the cervical spine; lumbar spine, the left knee and shoulder and (2) a permanent consequential limitation of the cervical spine, lumbar spine and left knee and shoulder. In opposition to the defendant's motion for summary judgment, plaintiffs submit several unaffirmed and uncertified medical reports, including: reports of MRI of Mr. Hopkins cervical and lumbosacral spines conducted on January 25, 2005, and March 8, 2005 respectively; reports of x-rays of Mr. Hopkins cervical and lumbar spines conducted on January 13, 2005; report of MRI of the left knee conducted on January 19, 2005; and medical reports of Dr. Alex Rozenberg pertaining to the treatment of Mr. Hopkins.

Plaintiffs note that "all of plaintiff's medical records referred to by defendant's doctors are admissible as evidence in opposition to defendant's motion."

Plaintiffs also submit the transcript of Mr. Hopkins deposition in which he acknowledged that besides the December 29, 2004 accident, he had been involved in a work-related incident--he dislocated a disc in his back. Mr. Hopkins stated that the last time he held a job was in 2003. According to Mr. Hopkins, as a result of the December 29, 2004 accident, he was confined to bed for about two weeks and stayed home for about one month. He also stated that he was treated by his doctor for three months following the December 29, 2004 accident.

In reply, defendant takes issue with the admissibility of the unsworn and uncertified medical reports submitted by the plaintiffs in opposition to defendant's motion for summary

judgment. Defendant also contends that plaintiffs have failed to provide a satisfactory explanation for Mr. Hopkins almost three-year gap in treatment.[1]

Discussion

In the instant case, plaintiffs' opposition papers are patently insufficient to raise a triable issue of fact to rebut defendant's prima facie showing that Mr. Hopkins did not sustain a significant limitation or a permanent consequential limitation of use of a body organ, member, function or system so as to establish a "serious injury" under these categories as defined in Insurance Law 5102 (d). The court finds that the unaffirmed /uncertified medical records and reports submitted by the plaintiffs in opposition to the motion for summary judgment is not in proper evidentiary form and therefore lacks probative value (*see Claude v Clements*, 301 AD2d 555 [2003]). To the extent that Dr. Rozenberg's opinions are based on unsworn MRI and x-ray reports prepared by other doctors, such medical evidence is inadmissible (*Mahoney v Zerillo*, 6 AD3d 403 [2004] [plaintiff's physician impermissibly relied upon unsworn reports of other doctors]). Although defendant's medical experts listed the medical reports that they reviewed in connection with their independent examination of Mr. Hopkins, neither doctor stated or indicated that they relied on those medical reports in forming their conclusions. It is well settled that a plaintiff can only rely on unsworn MRI reports if defendant relies on them in the moving papers (see *Ayzen v. Melendez*, 299 AD2d 381 [2002]; *Toledo v. A.P.O.W. Auto Repair Towing*, 307 AD2d 233 [2003]). A review of the unsworn reports by defendant's expert did not open the door to plaintiffs' reliance on them (*see Hernandez v. Almanzar*, 32 AD3d 360 [2006]). Further,

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[1]After oral argument on the motion, the court allowed the plaintiffs and the defendant additional time to submit papers regarding the gap in treatment raised by the defendant in his reply affirmation.

this court notes that defendant did not submit plaintiffs' unsworn reports in support of the motion for summary judgment.

The court also finds that there has not been sufficient explanation for the three-year gap in Mr. Hopkins treatment. Mr. Hopkins began treatment by Dr. Rozenberg in January 2005 and terminated treatment in March 2005. Mr. Hopkins has not been treated since the cessation of his treatment in March 2005. Such a gap in treatment must be sufficiently explained on a basis that dispels any suggestion that during said period there was no condition that needed to be treated (*see Grossman,* 268 AD2d 79);(*see Pommells,* 4 NY3d 566, 574); *Kearse,* 16 AD3d at 45*; Bruce v New York City Transit Authority*, 16 AD3d 608 [2005]; *Howell v Reupke*, 16 AD3d 377 [2005]; *Jiminez v Kambli*, 272 AD3d 581 [2002]). Mr. Hopkins stated in his deposition that he discontinued his treatment after three months because he couldn't afford to pay for the treatments. Discontinuance of no-fault benefits is insufficient to explain a three-year gap; court required, at the very least, that plaintiff provide a letter from an insurance carrier as to when and why it discontinued coverage, an explanation from plaintiff as to why he could not have continued treatment through employee health benefits or why he could not have paid out-of-pocket]; *Saha v Sanandres,* 10 Misc 3d 1072A [2005] [no substantiation of claim that plaintiff stopped treatment because no-fault benefits were discontinued, no evidence submitted concerning plaintiff's actual financial ability], *citing Coyoc v New York City Housing Authority,* 2002 NY Slip Op 50231U, 2002 WL 1396031 [2002]).

Based on the foregoing, the court finds that plaintiffs have failed to come forward with evidence sufficient to prove a serious injury causally related to the subject accident of December 29, 2004.

Accordingly, defendant's motion for summary judgment is granted and the complaint herein is dismissed.

The foregoing constitutes the decision, order and judgment of this court.

E N T E R,

J. S. C.

HON. SYLVIA O. HINDS-RADIX J.S.C.