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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN Justice PART 22

LEROY THOMAS II and ANGELA SANTIAGO,

Plaintiffs,

- against -

VERIZON NEW YORK, INC. and HUGH O. WYNTER,

Defendants.

INDEX NO. 100843/2007

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

The following papers, numbered 1 to 3 were read on this motion by defendants for summary judgment on the threshold "serious injury" issue.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits (Memo)	2
Replying Affidavits (Reply Memo)	3

Cross-Motion: ☐ Yes ■ No

On June 17, 2005, plaintiffs Leroy Thomas II and Angela Santiago (collectively "plaintiffs") were involved in a motor vehicle accident with a vehicle owned by defendant Verizon New York, Inc. and operated by defendant Hugh O. Wynter (collectively "defendants"). The accident occurred while plaintiffs were traveling in a vehicle on 7th Avenue near West 141st Street in New York County, New York. Plaintiffs commenced this action to recover damages for alleged personal injuries suffered as a result of the subject motor vehicle accident. The parties completed discovery and a Note of Issue was filed on February 25, 2008. Defendants now move for an order pursuant to CPLR 3212, granting summary judgment dismissing the complaint on the threshold issue of "serious injury," pursuant to Insurance Law § 5102 (d).

SERIOUS INJURY THRESHOLD

Pursuant to the Comprehensive Motor Vehicle Insurance Reparation Act of 1974 (now Insurance Law § 5101 *et seq.* - the "No-Fault Law"), a party seeking damages for pain and suffering arising out of a motor vehicle accident must establish that he or she has sustained at least one of the nine categories of "serious injury" as set forth in Insurance Law § 5102 (d) (*see Licari v Elliott*, 57 NY2d 230 [1982]). Insurance Law § 5102 (d) defines "serious injury" as:

> a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system ["permanent loss"]; permanent consequential limitation of use of a body organ or member ["permanent consequential limitation"]; significant limitation of use of a body function or system ["significant limitation"]; or 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 ["90/180-day"].

"Serious injury" is a threshold issue, and thus, a necessary element of a plaintiff's prima facie case (*Licari*, 57 NY2d at 235; Insurance Law § 5104 [a]). The serious injury requirement is in accord with the legislative intent underlying the No-Fault Law, which was enacted to "'weed out frivolous claims and limit recovery to significant injuries'" (*Toure v Avis Rent A Car Sys., Inc.*, 98 NY2d 345, 350 [2002], quoting *Dufel v Green*, 84 NY2d 795, 798 [1995]). As such, to satisfy the statutory threshold, a plaintiff is required to submit competent objective medical proof of his or her injuries (*id.* at 350). Subjective complaints alone are insufficient to establish a prima facie case of a serious injury (*id.*).

Plaintiff Thomas claims that the motor vehicle accident resulted in permanent injuries to his right knee, neck, back, right elbow and right forearm, which include meniscus and posterior cruciate ligament tears, bulging discs, cervical/lumbar radiculopathy and right elbow and right forearm contusions (*see* defendants' motion, exhibit C, bill of particulars at ¶ 10). Plaintiff

Santiago alleges permanent injuries to her neck and back, including herniated and bulging discs (*see id.*). Within the bill of particulars, plaintiffs claim a "serious injury" under the following relevant categories: (1) permanent loss; (2) permanent consequential limitation; (3) significant limitation; and (4) 90/180-day (*see id.* at ¶ 21). The Court must determine whether, as a matter of law, plaintiffs have sustained a "serious injury" under at least one of the claimed categories.[1]

SUMMARY JUDGMENT ON SERIOUS INJURY

The issue of whether a claimed injury falls within the statutory definition of "serious injury" is a question of law for the Court, which may be decided on a motion for summary judgment (*see Licari*, 57 NY2d at 237). The moving defendant bears the initial burden of establishing, by the submission of evidentiary proof in admissible form, a prima facie case that the plaintiff has not suffered a "serious injury" as defined in section 5102 (d) *(see Toure*, 98 NY2d at 352; *Gaddy v Eyler,* 79 NY2d 955, 956-57 [1992]). Once the defendant has made such a showing, the burden shifts to the plaintiff to submit prima facie evidence, in admissible form, rebutting the presumption that there is no issue of fact as to the threshold question (*see Franchini v Palmieri*, 1 NY3d 536, 537 [2003]; *Rubensccastro v Alfaro*, 29 AD3d 436, 437 [1st Dept 2006]).

A defendant can satisfy the initial burden by relying on the sworn or affirmed statements of their own examining physician, the plaintiff's sworn testimony or the plaintiff's unsworn physician's records (*see Arjona v Calcano*, 7 AD3d 279, 280 [1st Dept 2004]; *Nelson v Distant*, 308 AD2d 338, 339 [1st Dept 2003]; *McGovern v Walls*, 201 AD2d 628, 628 [2d Dept 1994]). Reports by a defendant's own retained physician, however, must be in the form of sworn

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[1]Plaintiffs argue that the summary judgment motion is untimely. However, following a status conference on July 3, 2008, the Court granted defendants an extension of time to move for summary judgment until September 30, 2008, and their motion was filed on September 15, 2008. Even if the motion were deemed untimely, defendants have proffered sufficient "good cause" for a late filing (*see* CPLR 3212 [a]; *Brill v City of New York*, 2 NY3d 648 [2004]; *Vargas v Ahmed*, 41 AD3d 328 [1st Dept 2007]; *Pena v Women's Outreach Network, Inc.*, 35 AD3d 104 [1st Dept 2006]).

affidavits or affirmations because a party may not use an unsworn medical report prepared by the party's own physician on a motion for summary judgment (*see Pagano v Kingsbury*, 182 AD2d 268, 270 [2d Dept 1992]). Moreover, CPLR 2106 requires a physician's statement be affirmed (or sworn) to be true under the penalties of perjury.

A defendant can meet the initial burden of establishing a prima facie case of the nonexistence of a serious injury by submitting the affidavits or affirmations of medical experts who examined the plaintiff and opined that the plaintiff was not suffering from any disability or consequential injury resulting from the accident (*see Gaddy*, 79 NY2d at 956-57; *Brown v Achy*, 9 AD3d 30, 31 [1st Dept 2004]; *see also Junco v Ranzi*, 288 AD2d 440, 440 [2d Dept 2001] [defendant's medical expert must set forth the objective tests performed during the examination]). A defendant can also demonstrate that the plaintiff's own medical evidence does not indicate that the plaintiff suffered a serious injury and that the injuries were not, in any event, causally related to the accident (*see Franchini*, 1 NY3d at 537). A defendant can additionally point to the plaintiff's own sworn testimony to establish that, by the plaintiff's own account, the injuries were not serious (*see Arjona*, 7 AD3d at 280; *Nelson*, 308 AD2d at 339).

A plaintiff's medical evidence in opposition to summary judgment must be presented by way of sworn affirmations or affidavits (*see Pagano*, 182 AD2d at 270; *Bonsu v Metropolitan Suburban Bus Auth.*, 202 AD2d 538, 539 [2d Dept 1994]). However, a reference to unsworn or unaffirmed medical reports in a defendant's motion is sufficient to permit the plaintiff to rely upon the same reports (*see Ayzen v Melendez*, 299 AD2d 381, 381 [2d Dept 2002]). Submissions from a chiropractor must be by affidavit because a chiropractor is not a medical doctor who can affirm pursuant to CPLR 2106 (*see Shinn v Catanzaro*, 1 AD3d 195, 197 [1st Dept 2003]). Moreover, an expert's medical report may not rely upon inadmissible medical evidence, unless the expert establishes serious injury independent of said report (*see Friedman v U-Haul Truck Rental*, 216 AD2d 266, 267 [2d Dept 1995]; *Rice v Moses*, 300 AD2d 213, 213

[1st Dept 2002]).

In order to rebut the defendant's prima facie case, the plaintiff must submit objective medical evidence establishing that the claimed injuries were caused by the accident, and "provide objective evidence of the extent or degree of the alleged physical limitations resulting from the injuries and their duration" (*Noble v Ackerman*, 252 AD2d 392, 394 [1st Dept 1998]; *see also Toure*, 98 NY2d at 350). A plaintiff's subjective complaints "must be sustained by verified objective medical findings" (*Grossman v Wright*, 268 AD2d 79, 84 [2d Dept 2000]). Such medical proof should be contemporaneous with the accident, showing what quantitative restrictions, if any, the plaintiff was afflicted with (*see Nemchyonok v Ying*, 2 AD3d 421, 421 [2d Dept 2003]). The medical proof must also be based on a recent examination of the plaintiff, unless an explanation otherwise is provided (*see Bent v Jackson*, 15 AD3d 46, 48 [1st Dept 2005]; *Nunez v Zhagui*, 60 AD3d 559, 560 [1st Dept 2009]).

A medical affirmation or affidavit that is based on a physician's personal examination and observation of a plaintiff is an acceptable method to provide a physician's opinion regarding the existence and extent of a serious injury (*see O'Sullivan v Atrium Bus Co.*, 246 AD2d 418, 419 [1st Dept 1998]). "However, an affidavit or affirmation simply setting forth the observations of the affiant are not sufficient unless supported by objective proof such as X-rays, MRIs, straight-leg or Laseque tests, and any other similarly-recognized tests or quantitative results based on a neurological examination" (*Grossman*, 268 AD2d at 84; *see also Arjona,* 7 AD3d at 280; *Lesser v Smart Cab Corp.*, 283 AD2d 273, 274 [1st Dept 2001]). A physician's conclusory assertions based solely on subjective complaints cannot establish a serious injury (*see Lopez v Senatore*, 65 NY2d 1017, 1019 [1985]).

A plaintiff's medical proof of the extent or degree of a physical limitation may take the form of either an expert's "designation of a numeric percentage of a plaintiff's loss of range of motion"; or qualitative assessment of a plaintiff's condition, "provided that the evaluation has an

objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system" (*Toure*, 98 NY2d at 350). The medical submissions must specify when and by whom the tests were performed, the objective nature of the tests, what the normal range of motion should be and whether the plaintiff's limitations were significant (*see Milazzo v Gesner*, 33 AD3d 317, 317 [1st Dept 2006]; *Vasquez v Reluzco*, 28 AD3d 365, 366 [1st Dept 2006]).

Further, a plaintiff who claims a serious injury based on the "permanent loss" category has to establish that the injury caused a "total loss of use" of the affected body part (*see Oberly v Bangs Ambulance, Inc.*, 96 NY2d 295, 299 [2001]).

The "permanent consequential limitation" category requires a plaintiff to establish that the injury is "permanent," and that the limitation is "significant" rather than slight (*see Altman v Gassman*, 202 AD2d 265, 265 [1st Dept 1994]). Whether an injury is "permanent" is a medical determination, requiring an objective basis for the medical conclusion of permanency (*see Dufel*, 84 NY2d at 798). Mere repetition of the word "permanent" in the physician's affirmation or affidavit is insufficient. (*See Lopez*, 65 NY2d at 1019.)

The "significant limitation" category requires a plaintiff to demonstrate that the injury has limited the use of the afflicted area in a "significant" way rather than a "minor, mild or slight limitation of use" (*Licari*, 57 NY2d at 236). In evaluating both "permanent consequential limitation" and "significant limitation," "[w]hether a limitation of use or function is 'significant' or 'consequential' . . . relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part" (*Dufel*, 84 NY2d at 798). Moreover, a "'permanent consequential limitation' requires a greater degree of proof than a 'significant limitation,' as only the former requires proof of permanency" (*Altman*, 202 AD2d at 265).

The 90/180-day category requires a demonstration that a plaintiff has been unable to

perform substantially all of his or her usual and customary daily activities for not less than 90 days during the 180 days immediately following the injury *(see Licari*, 57 NY2d at 236). The words "substantially all" mean that the person has been "curtailed from performing his usual activities to a great extent rather than some slight curtailment" *(id.)*. A physician's statement that is too general and non-specific does not support a 90/180-day claim (*see e.g. Morris v Ilya Cab Corp.*, 61 AD3d 434, 435 [1st Dept 2009]; *Gorden v Tibulcio*, 50 AD3d 460, 463 [1st Dept 2008]).

Finally, "even where there is objective medical proof, when additional contributing factors interrupt the chain of causation between the accident and claimed injury--such as a gap in treatment, an intervening medical problem or a preexisting condition--summary dismissal of the complaint may be appropriate" (*Pommels v Perez*, 4 NY3d 566, 572 [2005]). Accordingly, a plaintiff is required to offer a reasonable explanation for any gaps in treatment *(id.* at 574; *Delorbe v Perez*, 59 AD3d 491, 492 [2d Dept 2009]; *DeLeon v Ross,* 44 AD3d 545, 545-46 [1st Dept 2007]; *Wadford v Gruz*, 35 AD3d 258, 258-59 [1st Dept 2006]; *Colon v Kempner*, 20 AD3d 372, 374 [1st Dept 2005]).

DISCUSSION

In support of the summary judgment motion, defendants submit, *inter alia*, affirmed medical reports of orthopedic surgeon Dr. Lester Lieberman pertaining to both plaintiffs; unaffirmed medical reports of Dr. Daniel J. Feuer relevant to both plaintiffs; plaintiffs' records from Harlem Hospital; plaintiffs' December 13, 2007 depositions; and the bill of particulars. (*See* defendants' motion, exhibits C, D, E, F, G, H, I, J, K.)

Dr. Feuer performed a neurological independent medical examination ("IME") on plaintiff Santiago on January 14, 2008, and on plaintiff Thomas on January 28, 2008. The attestation sections of Dr. Feuer's IME reports states only: "I hereby certify that this report is a full and truthful representation of my professional opinion with respect to the claimant's condition" (*id.*,

exhibits F, H).

With respect to plaintiff Santiago, Dr. Lieberman conducted an orthopedic IME on August 19, 2008. Dr. Lieberman reviewed plaintiff Santiago's medical history, including MRIs of the cervical spine and lumbar spine. Dr. Lieberman indicated that range of motion was tested with a goniometer and set forth range of motion findings for the neck and lower back which were compared to the normal range, and all were within normal limits. The cervical, thoracic and lumbar spines were in the midline. There was no undue depression or elevation. There was no spasm or tenderness. Straight leg raising was negative bilaterally at 90 degrees and bilateral straight leg raising was negative at 90 degrees both sitting and while lying. Dr. Lieberman diagnosed resolved cervical and lumbar sprain, and found no disability or causal relationship to the accident.

The Harlem Hospital records reveal that plaintiff Santiago underwent X-rays on June 17, 2005. The X-ray of the cervical spine was negative. The X-ray of the lumbosacral spine showed mild narrowing of L5 S1 disc space, and no spondylolisthesis or spondylolysis.

In the bill of particulars, plaintiff Santiago alleged that she was confined to bed for two weeks and to home for three months following the accident (bill of particulars at ¶ 11). She claimed total disability for three months (*id.* at ¶ 15).

At her deposition, plaintiff Santiago testified that she was self-employed on the date of the accident, and that she was unable to work for five months (Santiago deposition at 8-10). She also stated that she was confined to her home for eight months (*id.* at 39). When asked about activities that she could perform prior to the accident but could no longer do, she stated that she could not sit or stand for long periods, lift bags or run (*id.* at 36-37). She had difficulty bending down and picking up items for about a year after the accident (*id.* at 38). She discontinued treatment around November 2005 (*id.* at 33-35).

As to plaintiff Thomas, Dr. Lieberman performed an orthopedic IME on August 19, 2008. Dr. Lieberman reviewed plaintiff Santiago's medical history, including MRIs of the cervical

spine, lumbar spine and right knee. Dr. Lieberman indicated that range of motion was tested with a goniometer. Dr. Lieberman set forth range of motion findings for the neck, lower back, elbows and knees, which were compared to the normal range and were within normal limits. There was no spasm or tenderness in the cervicothoracic or lumbar spines. There was no undue depression or elevation. There was no medial, lateral or anterior posterior instability. There was no tenderness in the right knee. Apley grind, Apley release, McMurray, Lachman, Pivot shift and jerk tests were within normal limits. Dr. Lieberman diagnosed resolved cervical and lumbar strains and resolved right knee sprain. Dr. Lieberman concluded that there was a causal relationship between the accident and the right knee, cervical and lumbar sprains, but that a causal relationship of a torn meniscus to the accident was not established.

The Harlem Hospital records indicate that X-rays taken on June 18, 2005 of plaintiff Thomas' cervical spine and lumbosacral spine were negative.

In the bill of particulars, plaintiff Thomas asserted that he was confined to bed for one week and to home for three months following the accident (bill of particulars at ¶ 11). He alleged total disability for three months (*id.* at ¶ 15).

In his deposition, plaintiff Thomas testified that he missed two weeks of work as a result of the accident (Thomas deposition at 13). When asked if there were any activities that he could no longer perform since the accident, he stated that he could not play basketball (*id.* at 61-62). He had problems going up steps for about three or four months after the accident (*id.* at 62-63). He stopped treatment in August 2005 (*id.* at 43-44, 54).

Based on the foregoing, the Court concludes that defendants have sustained their initial burden of establishing a prima facie case that plaintiffs did not suffer a "serious injury" under the categories of permanent loss, permanent consequential limitation or significant limitation (*see* Insurance Law § 5102 [d]).

Dr. Feuer's IME reports are inadmissible as they are not properly affirmed. Dr. Feuer fails to comply with CPLR 2106, which requires a physician's statement to be affirmed "to be

true under the penalties of perjury" (CPLR 2106). Consequently, defendants may not rely upon Dr. Feuer's reports as competent proof of the nonexistence of a serious injury (*see Offman v Singh*, 27 AD3d 284, 284 [1st Dept 2006] [defendants did not establish prima facie entitlement to summary judgment on issue of serious injury where proffered medical reports failed to comply with requirement that a physician's statement be affirmed under penalty of perjury]; *Simms v APA Truck Leasing Corp.*, 14 AD3d 322, 322 [1st Dept 2005]; *Pagano*, 182 AD2d at 270).

Based on the remaining submissions, however, defendants have established a prima facie case. Defendants have proffered sufficient objective medical evidence demonstrating that both plaintiffs have normal ranges of motion and suffer from no orthopedic disability resulting from the accident. (*See Gaddy*, 79 NY2d at 956-57 [defendant established prima facie case "through the affidavit of a physician who examined [the plaintiff] and concluded that she had a normal neurological examination"]; *Gorden*, 50 AD3d at 462-63 [defendants met initial burden where affirmed reports of orthopedist and neurologist, made after a review of plaintiff's medical records and a personal examination, stated that plaintiff did not suffer from a neurologic or orthopedic disability and that the injuries were resolved]).

Defendants have also met their initial burden of proof under the 90/180-day category. A defendant can establish the nonexistence of a 90/180-day claim absent medical proof by citing to evidence, such as the plaintiff's own testimony, demonstrating that the plaintiff was not prevented from performing all of the substantial activities constituting his or her usual and customary daily activities for the prescribed period (*see Copeland v Kasalica*, 6 AD3d 253, 254 [1st Dept 2004]).

The Court finds that defendants have sufficiently demonstrated that the alleged injuries did not prevent plaintiffs from performing "substantially all" of their usual and customary daily activities for the requisite time period (*see Licari*, 57 NY2d at 236). In the bill of particulars, plaintiff Thomas asserted that he was confined to bed for only one week, and plaintiff Santiago

claimed confinement to bed for just two weeks. Although plaintiff Thomas also alleged confinement to home and total disability for three months, he testified at his deposition that he missed only two weeks of work due to the accident. Plaintiff Santiago made inconsistent assertions regarding her alleged confinement to home and inability to work (*see Cruz v Aponte*, 60 AD3d 431, 432 [1st Dept 2009] [plaintiff's assertions regarding 90/180-day claim were contradictory and appeared tailored to meet the statute]). She claimed confinement to home and total disability for three months in the bill of particulars. At her deposition, however, she stated that she was confined to home for eight months and unable to work for five months. The credible evidence sufficiently establishes time periods that are far less than the 90/180 days required by the statute (*see Copeland*, 6 AD3d at 254 [home and bed confinement for less than the prescribed period evinces lack of serious injury under 90/180-day category]); *Sanchez v Williamsburg Volunteer of Hatzolah, Inc.*, 48 AD3d 664, 664-65 [2d Dept 2008] [defendants made prima facie showing that plaintiff did not sustain a serious injury under 90/180-day category through plaintiff's deposition testimony that he missed only five weeks of work]; *Camacho v Dwelle*, 54 AD3d 706, 706 [2d Dept 2008]).

In addition, plaintiffs' alleged incapacity for three months or more is not determinative (*see Ortiz v Ash Leasing, Inc.*, 63 AD3d 556, 556 [1st Dept 2009] [defendants made prima facie showing that plaintiffs did not sustain a 90/180-day injury even those each missed more than 90 days of work, where two of the plaintiffs admitted in depositions that they had not been confined to bed or home and the third said nothing about being prevented from performing substantially all of his usual daily activities for the relevant time period]; *Uddin v Cooper*, 32 AD3d 270, 271 [1st Dept 2006] [while it was uncontested that the plaintiff missed three months of work within the first 180 days, his allegations did not mention any other daily activities that were substantially hindered due to the injury]).

Since the Court finds that defendants have sustained their initial burden of establishing prima facie entitlement to summary judgment, the burden shifts to plaintiffs to produce

evidentiary proof in admissible form establishing the existence of a genuine issue of fact (*see Gaddy*, 79 NY2d at 957).

In opposition to summary judgment, plaintiffs submit, *inter alia*, affirmed medical reports of their treating physician Dr. Gideon Hedrych; affirmations of radiologist Dr. Robert Diamond interpreting plaintiffs' MRI films; plaintiffs' affidavits dated November 4, 2008 and November 6, 2008; and no-fault insurance denial of claim forms for both plaintiffs. (*See* plaintiffs' affirmation in opposition, exhibits C, D, E, F, G, H, I, J.)

With respect to plaintiff Santiago, Dr. Hedrych conducted an initial examination on June 22, 2005. Examination of the cervicodorsal spine range of motion revealed pain with limitation of flexion to 25 degrees (normal is 45 degrees), extension to 10 degrees (normal is 45 degrees), lateral flexion to the right to 10 degrees (normal is 45 degrees), lateral flexion to the left to 5-10 degrees (normal is 45 degrees), rotation to the right to 25 degrees (normal is 80 degrees) and rotation to the left to 20-25 degrees (normal is 80 degrees). There was moderate to marked right and moderate left paravertebral muscle and trapezius muscle spasm from C3 to T4 with tenderness on the right. Examination of the dorsolumbar spine range of motion revealed pain with limitation of flexion to 30 degrees (normal is 80 degrees), extension to 5 degrees (normal is 20 degrees), lateral flexion to the right to 5-10 degrees (normal is 20 degrees), lateral flexion to the left to 5-10 degrees (normal is 20 degrees), rotation to the right to 10-15 degrees (normal is 30 degrees) and rotation to the left to 10 degrees (normal is 30 degrees). There was moderate to marked right and moderate left paravertebral muscle and infrascapular muscle spasm from T9 to S1 with tenderness over the paravertebral muscles bilaterally. Straight leg raising test was positive at 35-40 degrees on the right and revealed low back pain at 30-35 degrees on the left (normal is negative at 90 degrees bilaterally). Dr. Hedrych diagnosed: 1. Post-concussion syndrome; 2. Cervicodorsal spine derangement with traumatic myofascitis; 3. Cervical radiculopathy, consider cervical myelopathy; 4. Lumbosacral spine derangement with traumatic myofascitis, consider lumbar radiculopathy; and 5. Right

abdominal wall strain with traumatic myofascitis.

Plaintiff Santiago underwent MRIs on June 29, 2005. The MRI of the cervical spine revealed: 1. Straightening of the cervical lordosis; 2. C2/3 through C4/5 posterior disc bulges; 3. Central canal stenosis at C3/4 and C4/5; 4. C5/6 and C6/7 posterior disc herniations with ventral CSF impression, as well as central canal stenosis; and 5. Left maxillary sinus cyst or polyp. The MRI of the lumbar spine showed: 1. L2/3 through L4/5 posterior disc bulges; and 2. L5/S1 posterior disc herniation.

Dr. Hedrych performed a recent examination on plaintiff Santiago on September 29, 2008. Examination of the dorsolumbar spine range of motion revealed pain with limitation of flexion to 40-45 degrees (normal is 80 degrees), extension to 10-15 degrees (normal is 20 degrees), lateral flexion to the right to 15 degrees (normal is 20 degrees), lateral flexion to the left to 15 degrees (normal is 20 degrees), rotation to the right to 10-15 degrees (normal is 30 degrees) and rotation to the left to 10-15 degrees (normal is 30 degrees). There was moderate bilateral paravertebral muscle and infrascapular muscle spasms with tenderness bilaterally. Straight leg raising test revealed low back pain at 45-50 degrees bilaterally (normal is negative at 90 degrees bilaterally). Dr. Hedrych diagnosed: 1. Cervicodorsal spine derangement with disc herniations at C5-6 and C6-7 with central canal stenosis, bulging discs at C2-3 through C4-5 producing right C5-C6 cervical radiculopathy and probable cervical myelopathy, improved; 2. Lumbosacral spine derangement with disc herniation at L5/S1 and bulging discs at L2-3 through L4-5; and 3. Lumbar radiculopathy.

Dr. Hedrych opined that plaintiff Santiago's injuries were causally related to the accident. Dr. Hedrych also concluded that the injuries have caused limitations upon her activities of daily living; that she has a significant consequential limitation of motion and loss of use and function of her lumbosacral spine; and that she has a permanent impairment/disability due to the injuries sustained in the accident.

In her affidavit, plaintiff Santiago asserts that she was unable to work for 5½ months

immediately following the accident. She also claims that bending and sitting or standing for long periods of time causes great pain. She indicates that she discontinued treatment after five months when her no-fault benefits were terminated and she could not afford to pay for the treatment.

As to plaintiff Thomas, Dr. Hedrych performed an initial examination on June 22, 2005. Examination of the cervicodorsal spine range of motion revealed pain with limitation of flexion to 15 degrees (normal is 45 degrees), extension to 5-10 degrees (normal is 45 degrees), lateral flexion to the right to 10 degrees (normal is 45 degrees), lateral flexion to the left to 5 degrees (normal is 45 degrees), rotation to the right to 25-30 degrees (normal is 80 degrees) and rotation to the left to 30 degrees (normal is 80 degrees). There was moderate to marked right paravertebral muscle, trapezius muscle and suprascapular muscle spasm from C3 to T4-5, and moderate left paravertebral muscle and trapezius muscle spasm from C3 to T4 with tenderness on the right. Examination of the dorsolumbar spine range of motion revealed pain with limitation of flexion to 40 degrees (normal is 80 degrees), extension to 0-5 degrees (normal is 20 degrees), lateral flexion to the right to 5 degrees (normal is 20 degrees), lateral flexion to the left to 5 degrees (normal is 20 degrees), rotation to the right to 10 degrees (normal is 30 degrees) and rotation to the left to 10 degrees (normal is 30 degrees). There was nearly marked right and moderate to marked left paravertebral muscle and infrascapular muscle spasm from T8 to S1 with tenderness over the right paravertebral muscles. Straight leg raising test was positive at 30 degrees bilaterally (normal is negative at 90 degrees bilaterally). Examination of the right knee revealed anteromedial joint line tenderness with minimal swelling. There was pain on full extension (normal is 0 degrees) and on flexion at 110 degrees (normal is 135 degrees). There was pain in posterior drawer testing without laxity, with a positive McMurray's sign. Examination of the right elbow revealed tenderness over the olecranon process and over the medial and lateral epicondyles. There was pain on full extension (normal is 0 degrees) and on flexion at 105-100 degrees (normal is 135 degrees). Examination of the

right forearm showed tenderness over the proximal half of the dorsum. Dr. Hedrych diagnosed: 1. Post-concussion syndrome; 2. Cervicodorsal spine derangement with traumatic myofascitis; 3. Cervical radiculopathy, consider cervical myelopathy; 4. Lumbosacral spine derangement with traumatic myofascitis, consider lumbar radiculopathy; 5. Chest wall contusion; 6. Right elbow contusion/sprain, consider derangement; 7. Right forearm contusion with traumatic myofascitis; 8. Right knee derangement with traumatic tendinitis and probable torn meniscus; and 9. Right lower leg contusion with traumatic myofascitis.

Plaintiff Thomas underwent MRIs of the cervical spine and lumbar spine on August 2, 2005. The MRI of the lumbar spine revealed: 1. Straightening of the lumbar lordosis; and 2. L1/2 through L5/S1 posterior subligamentous disc bulges. The MRI of the cervical spine revealed: 1. Lingual tonsillar hypertrophy; and 2. C3/4 through C5/6 posterior subligamentous disc bulges. Plaintiff Thomas also underwent a MRI of the right knee on August 4, 2005 that revealed: 1. Synovial fluid; 2. Patellar tendinosis/tendinopathy; 3. Posterolateral proximal tibial bruising; 4. Possible avulsion fragment from the tibial apophysis into the distal patellar tendon is raised for consideration; 5. Plain film correlation may be of value; and 6. Partial tear posterior cruciate ligament noted with adjacent pericruciate fluid.

Dr. Hedrych performed a recent examination on September 29, 2008. Examination of the cervicodorsal spine range of motion revealed pain on flexion greater than 35-40 degrees (normal is 45 degrees), extension greater than 20 degrees (normal is 45 degrees), lateral flexion to the right greater than 15-20 degrees (normal is 45 degrees), lateral flexion to the left greater than 15-20 degrees (normal is 45 degrees), rotation to the right greater than 50 degrees (normal is 80 degrees) and rotation to the left greater than 45-50 degrees (normal is 80 degrees). There was moderate bilateral paravertebral muscle and trapezius muscle spasm. Examination of the dorsolumbar spine range of motion revealed pain on flexion greater than 60 degrees (normal is 80 degrees), extension greater than 10 degrees (normal is 20 degrees), lateral flexion to the right greater than 15 degrees (normal is 20 degrees), lateral flexion to the

left greater than 15 degrees (normal is 20 degrees), rotation to the right greater than 15-20 degrees (normal is 30 degrees) and rotation to the left greater than 20 degrees (normal is 30 degrees). There was moderate to marked right and moderate left paravertebral muscle and infrascapular muscle spasm. Straight leg raising test was positive at 45 degrees on the right (normal is negative at 90 degrees). Examination of the right knee revealed anteromedial joint line tenderness. There was pain on full extension (normal is 0 degrees) and on flexion at 120 degrees (normal is 135 degrees). There was a positive McMurray's sign. Dr. Hedrych diagnosed: 1. Post-concussion syndrome; 2. Cervicodorsal spine derangement with bulging discs at C3-4 through C5-6; 3. Cervical radiculopathy with probable cervical myelopathy; 4. Lumbosacral spine derangement with bulging discs at L1-2 through L5/S1, with probable lumbar radiculopathy; and 5. Right knee derangement with partial tear of posterior cruciate ligament and probable torn meniscus. Dr. Hedrych also noted that there was MRI evidence of a right knee partial tear of the posterior cruciate ligament and clinical evidence of a probable torn meniscus, which was attributable to the accident and that would probably require surgery in the future.

Dr. Hedrych opined that the diagnostic conditions were causally related to the injuries sustained in the accident. Dr. Hedrych also concluded that plaintiff Thomas was significantly injured in the accident; that the injuries have caused limitations upon his activities of daily living; that he would continue to have a significant consequential limitation of motion and loss of use and function of his cervicodorsal and lumbosacral spine and of his right knee; and that he had a permanent impairment/disability due to the injuries.

In his affidavit, plaintiff Thomas indicates that his injuries have caused difficulties with bending and walking. He also asserts that he discontinued treatment after four months when his no-fault benefits were terminated and he could not afford to pay for the treatment out of pocket.

In addition to the medical evidence, both plaintiffs submit no-fault insurance denial of

benefit claim forms. Plaintiff Thomas' form is dated September 26, 2005, and indicates that his benefits were denied based on the results of IMEs by three physicians (Dr. Levine, Dr Garofalo and Dr. Smits) on August 9, 2005, determining that no further treatment was necessary for the injuries sustained in the accident. Plaintiff Santiago's form is dated November 2, 2005, and states that benefits were denied for the same reason based on the results of an IME (Dr. Kramer) on October 27, 2005.

Considering the evidence in the light most favorable to plaintiffs (*see Kesselman v Lever House Restaurant*, 29 AD3d 302, 304 [1st Dept 2006]), the Court concludes that plaintiffs have failed to present sufficient objective medical evidence to raise a triable issue of fact sufficient to defeat defendants' summary judgment motion (*see Dembele v Cambisaca*, 59 AD3d 352 [1st Dept 2009]).

To the extent that plaintiff Thomas alleges a "serious injury" based on right elbow and right forearm contusions, such injuries do not, as a matter of law, constitute a serious injury (*see Maenza v Letkajornsook*, 172 AD2d 500, 500 [2d Dept 1991] ["allegations of sprains and contusions are insufficient to establish that the plaintiff sustained a 'serious injury' as defined in the statute"]). Plaintiffs also fail to proffer both recent *and* contemporaneous medical evidence with respect to plaintiff Thomas' elbow and forearm injuries, and for plaintiff Santiago's cervicodorsal spine injury (*see Nemchyonok*, 2 AD3d at 421; *Bent*, 15 AD3d at 48).

With regard to the remaining injuries, the Court finds that neither plaintiff has raised a triable issue of fact sufficient to defeat summary judgment under the categories of permanent loss, permanent consequential limitation or significant limitation (*see* Insurance Law § 5102 [d]). In support of their opposition, plaintiffs rely upon the medical reports of Dr. Hedrych and MRIs documenting the existence of bulging and herniated discs as to plaintiff Santiago, and a partial posterior cruciate ligament tear and bulging discs with respect to plaintiff Thomas. Even accepting that these injuries are medially verified by the MRIs, it is well settled that the mere existence of injuries such as bulging discs, herniated discs and ligament or meniscus tears is

not evidence of a "serious injury" in the absence of objective evidence of the extent of the alleged limitations resulting from the injuries and their duration (*see Patterson v N.Y. Alarm Response Corp.*, 45 AD3d 656, 656 [2d Dept 2007] ["The mere existence of a herniated or bulging disc, and even radiculopathy, is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the disc injury and its duration"]; *Gibbs v Hee Hong*, 63 AD3d 559, 559 [1st Dept 2009] ["a torn meniscus, standing alone, is not evidence of a serious injury"]; *Taylor v American Radio Dispatcher, Inc.*, 63 AD3d 407, 408 [1st Dept 2009]; *DeJesus v Paulino*, 61 AD3d 605, 608 [1st Dept 2009]; *Valentin v Pomilla*, 59 AD3d 184, 185 [1st Dept 2009]).

Here, plaintiffs have not submitted sufficient *objective* medical evidence demonstrating the extent and duration of their respective injuries. Although Dr. Hedrych's reports purport to set forth contemporaneous and recent range of motion limitations for plaintiff Santiago's dorsolumbar spine and for plaintiff Thomas' cervicodorsal spine, dorsolumbar spine and right knee, Dr. Hedrych fails to indicate the specific objective tests, if any, that he performed to measure plaintiffs' ranges of motion. Under First Department precedent, therefore, plaintiffs have failed to meet their burden of refuting defendants' prima facie case. (*See Parreno v Jumbo Trucking, Inc.*, 40 AD3d 520, 524 [1st Dept 2007] [failure of plaintiff's medical expert to demonstrate the objective tests performed to determine loss of range of motion rendered numerical findings insufficient to demonstrate serious injury]; *Nguyen v Abdel-Hamed*, 61 AD3d 429, 430 [1st Dept 2009] [summary judgment granted to defendants where plaintiff's chiropractor concluded that injuries were permanent and significant but "failed to set forth any objective basis for his findings, such as the tests he performed to measure plaintiff's range of motion"]; *Thompson v Ramnarine*, 40 AD3d 360, 361 [1st Dept 2007] [although report of plaintiff's expert "assigns specific percentages to plaintiff's limitations in range of motion, it does not indicate the specific tests conducted, and therefore fails to raise an issue of fact as to whether the reported limitations are permanent or significant"]; *Alicea v Troy Trans, Inc.*, 60

AD3d 521, 522 [1st Dept 2009] [affidavit of plaintiff's physician provided no specific objective evidence of how he arrived at his findings of limited range of motion or why he attributed the limitations to the accident]; *Rivera v Benaroti*, 29 AD3d 340, 342 [1st Dept 2006] [plaintiff's treating physician assigned specific percentages to range of motion limitations but did not indicate the specific tests that produced such percentages]; *Lloyd v Green*, 45 AD3d 373, 374 [1st Dept 2007] [report of plaintiffs' experts "fails to identify or describe the objective medical tests employed in measuring the alleged restrictions in range of motion"]; *Smith v Cherubini*, 44 AD3d 520, 520-21 [1st Dept 2007] [plaintiff's expert "failed to identify any objective basis for the percentages attributed to the restricted ranges of motion, and did not objectively relate the MRI finding to plaintiff's current complaints"]; *Gibbs*, 63 AD3d at 559-60; *Otero v 971 Only U, Inc.*, 36 AD3d 430, 431 [1st Dept 2007]; *Vasquez*, 28 AD3d at 366).

In addition, with respect to both plaintiffs, Dr. Hedrych repeatedly states a "range" of range of motion degrees rather than a specific numerical finding, which is insufficient to defeat defendants' motion. For instance, Dr. Hedrych indicates that the dorsolumbar spine range of motion findings from plaintiff Santiago's examinations on June 22, 2005 and September 29, 2008 revealed rotation to the right to 10-15 degrees (normal is 30 degrees). As to plaintiff Thomas, Dr. Hedrych indicates that the cervicodorsal spine range of motion found at the September 29, 2008 examination showed pain on lateral flexion to the right greater than 15-20 degrees (normal is 45 degrees). Dr. Hedrych's reliance upon such a "range" of degrees invites speculation as to the meaning of the range of motion findings, and is thus insufficient to establish a prima facie case *(see Kouros v Mendez*, 41 AD3d 786, 788 [2d Dept 2007] [plaintiff did not raise issue of fact where court was left to speculate as to meaning of range of motion figures]).

The Court further finds that plaintiffs' submissions are insufficient to raise an issue of fact under the 90/180-day category. Plaintiffs have failed to establish that they could not perform "substantially all" of their customary and daily activities for the required 90/180-day time

period (*see Licari*, 57 NY2d at 236). Both plaintiffs admit in the bill of particulars that they were confined to bed for no more than two weeks, and plaintiff Thomas conceded at his deposition that he missed only two weeks of work. Although plaintiffs also allege confinement to home for three months, there is no indication that such confinement was medically ordered (*see Rodriguez v Abdallah*, 51 AD3d 590, 592 [1st Dept 2008] [self-imposed absence based on plaintiff's subjective complaints of pain failed to establish 90/180-day claim]; *Glover v Capres Contracting Corp.*, 61 AD3d 549, 550 [1st Dept 2009] [plaintiff's self-serving deposition testimony regarding her inability to work for a period of time was insufficient to establish 90/180-day claim where bill of particulars alleged confinement to home or bed for a period of weeks but did not indicate that such confinement was medically ordered]).

Moreover, plaintiff Santiago's affidavit, which asserts an inability to work for 5½ months clearly contradicts the bill of particulars and her deposition testimony, and appears tailored to meet statutory requirements (*see Nguyen*, 61 AD3d at 430 ["To the extent plaintiff's opposition affidavit differs with her testimony regarding her alleged impairment during the 90/180-day period, the affidavit appears to have been tailored to avoid the consequences of her earlier testimony and is insufficient to defeat summary judgment."); *Alloway v Rodriguez*, 61 AD3d 591, 592 [1st Dept 2009]; *Cruz*, 60 AD3d at 432).

Although both plaintiffs allege limitations on their daily activities in their affidavits, their self-serving statements standing alone are insufficient to raise a triable issue of fact" (*Nelson*, 308 AD2d at 340 [plaintiff's claims that she could no longer dance, mop or walk like before was not supported by objective proof to establish serious injury]; *Depena v Sylla*, 63 AD3d 504, 506 [1st Dept 2009]). In any event, the limitations of which plaintiffs complain -- *i.e.*, limitations regarding activities such as walking, bending, running and playing basketball -- do not constitute a curtailment of "substantially all" of their usual and customary daily activities sufficient to support a 90/180-day claim (*see Gibbs*, 63 AD3d at 560 ["Plaintiff's statement that she could not run, go up stairs, or stand for very long do not constitute the loss of 'substantially

all' of plaintiff's usual activities required to make a showing of serious injury."]; *Cartha v Quin*, 50 AD3d 530, 530 [1st Dept 2008] [even if claim was medically substantiated, "minor curtailment" of plaintiff's usual activities during 90/180 day time frame does not satisfy the statute]; *Alloway*, 61 AD3d at 592).

Finally, the submissions reveal a three-year gap in treatment, which both plaintiffs attribute to a discontinuance of their no-fault insurance benefits and an inability to afford to pay for treatment (*see Pommels*, 4 NY3d at 572; *Jules v Barbecho*, 55 AD3d 548, 549 [2d Dept 2008]). In view of the foregoing findings, which are dispositive, the Court deems it unnecessary to reach the question of whether the gap in treatment has been adequately explained.

The Court recognizes that summary judgment is a drastic remedy since it deprives a litigant of his or her day in court (*see Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The Court nevertheless concludes that defendants are entitled to summary judgment because they established a prima facie case that plaintiffs did not sustain a "serious injury," and plaintiffs failed to present a triable issue of fact sufficient to preclude summary judgment.

For these reasons and upon the foregoing papers, it is,

ORDERED that defendants' motion for summary judgment is granted; and it is further,

ORDERED that the Clerk of the Court is directed to enter judgment in favor of defendants, dismissing the complaint against defendants in its entirety, with costs and disbursements to defendants as taxed by the Clerk; and it is further,

ORDERED that defendants shall serve a copy of this order, with notice of entry, upon plaintiffs.

This constitutes the Decision and Order of the Court.

FILED
JAN 22 2010
COUNTY CLERK'S OFFICE
NEW YORK

Dated: December 30, 2009

Paul Wooten
J.S.C.

Paul Wooten J.S.C.

Check one: ■ **FINAL DISPOSITION** ☐ **NON-FINAL DISPOSITION**

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