Sadeghi v Century Auto Leasing Corp.
2009 NY Slip Op 33210(U)
December 30, 2009
Supreme Court, New York County
Docket Number: 107194/2007
Judge: Paul Wooten
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SCANNED ON 1/22/2010

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 22

BABAK SADEGHI,

Plaintiff,

- against -

CENTURY AUTO LEASING CORP. and SALEEM MARWS,

Defendants.

INDEX NO. 107194/2007

MOTION DATE ____

MOTION SEQ. NO. 001

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.

FILED
JAN 22 2010
COUNTY CLERK'S OFFICE NEW YORK

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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 February 2, 2005, plaintiff Babak Sadeghi ("plaintiff") was involved in a rear-end collision with a vehicle owned by defendant Century Auto Leasing Corp. and operated by defendant Saleem Marws (collectively "defendants"). The accident occurred near the intersection of Jackson Avenue and 43rd Avenue in Queens County, New York. Plaintiff 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 November 6, 2009. 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 alleges that the motor vehicle accident resulted in permanent injuries to his neck, back, chest and right shoulder, which include herniated and bulging discs, radiculopathy, cervical and lumbar sprain/strain, chest wall contusion, right shoulder impingement syndrome and an inferior C5 osteophyte fracture (*see* defendants' motion, exhibit B, bill of particulars at ¶ 11). Within the bill of particulars, plaintiff claims a "serious injury" under the following categories: (1) significant disfigurement; (2) permanent loss; (3) permanent consequential

limitation; (4) significant limitation; and (5) 90/180-day (*id.* at ¶ 20). The Court must determine whether, as a matter of law, plaintiff has sustained a "serious injury" under at least one of the serious injury 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 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, plaintiff's sworn testimony, or 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 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.

[1]Although not claimed in the bill of particulars, the Court will also consider the fracture category since plaintiff alleges a fracture.

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 plaintiff and opined that 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 plaintiff's own medical evidence does not indicate that 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 plaintiff's own sworn testimony to establish that, by plaintiff's own account, the injuries were not serious (*see Arjona*, 7 AD3d at 280; *Nelson*, 308 AD2d at 339).

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 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 defendant's prima facie case, 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). 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, 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 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 plaintiff is an acceptable method to provide a physician's opinion regarding the existence and extent of plaintiff's 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]).

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 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 651).

The 90/180-day category requires a demonstration that 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 a "gap 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. Robert Israel and neurologist Dr. Charles Bagley; affirmed reports of radiologist Dr. A. Robert Tantleff interpreting plaintiff's MRIs of the cervical spine, lumbar spine and right shoulder; plaintiff's July 17, 2008 deposition; and the bill of particulars. (*See* defendants' motion, exhibits B, C, D, E, F.)

Dr. Israel performed an orthopedic independent medical examination ("IME") on August 22, 2008, measuring plaintiff's range of motion using a goniometer. The cervical spine, lumbar spine and right shoulder ranges of motion were compared to the normal range and all were within normal limits. Sitting Lasegue's testing was bilaterally negative to 80 degrees (80 degrees is normal). Straight leg raising was bilaterally negative to 75 degrees (75 degrees is normal) in both the seated and supine positions. The thoracic curvature was normal with no paraspinal spasm. The thoracic spine showed no tenderness to palpation over the trapezius proximal to the superior angle of the scapula, along the medial order and down to the inferior angle or over the spinous processes from T1 through T12. The chest was nontender to

palpation and there were no deformities. Dr. Israel concluded that the orthopedic examination was normal; that there is no permanency or residuals relative to the accident; and that plaintiff is capable of work activities and activities of daily living.

Dr. Bagley conducted a neurological IME on August 20, 2008. He measured plaintiff's range of motion visually and utilizing a goniometer. Cervical spine range of motion revealed flexion 45 degrees (50 degrees is normal), extension 45 degrees (60 degrees is normal) and bilateral lateral flexion 35 degrees (45 degrees is normal). Lumbar spine range of motion revealed flexion 60 degrees (90 degrees is normal). Straight leg raising test was negative to 80 degrees (80 degrees is normal). Dr. Bagley also noted that plaintiff voluntarily restricted range of motion, and that the observation of involuntary range of motion was within normal limits. The thoracic curvature was normal with no paraspinal spasm, and the thoracic spine showed no tenderness to palpation over inferior angle or over the spinous process from T1 through T12. Dr. Bagley concluded that the neurological examination was normal; that plaintiff is not disabled; that there is no evidence of permanency or a residual loss of motion; and that plaintiff can work and perform all of his normal daily activities without restrictions.

Dr. Tantleff reviewed plaintiff's MRIs taken on March 23, 2005 of the cervical and lumbar spines, and on May 12, 2005 of the right shoulder. Dr. Tantleff opined that the cervical and lumbar spine MRIs were incomplete examinations revealing regional discogenic changes without evidence of acute or recent injury. He found no definable abnormality in the right shoulder MRI.

In the bill of particulars, plaintiff asserted that he was confined to bed for 2 weeks and to home intermittently for 8 months following the accident (bill of particulars at ¶ 13). He claimed no incapacity from employment or lost wages.

Plaintiff testified at his deposition that he was freelancing as a photographers assistant and in antique restoration at the time of the accident (plaintiff's deposition at 7). He did not work since the accident and received disability benefits since December 2007 (*id.* at 8, 72).

When asked about activities that he could perform before the accident but could no longer do, plaintiff testified that he was a visual artist and that a lot of his creatively came to a halt (*id.* at 77). He was no longer painting, drawing or carving stone (*id.*). He had difficulty with sitting at a piano for more than 20 minutes (*id.* at 78). He could not lift heavy objects, ski, scuba dive, run, jump, walk long distances or play recreational sports such as basketball (*id.* at 78-79). He also had difficulty swimming, riding a bicycle and using the subway (*id.*).

Plaintiff additionally testified that after the accident he was informed by an emergency room physician at Mount Sinai Hospital that x-rays revealed a fracture to his neck (*id.* at 29, 31-32, 35, 39). He denied any prior injuries to his neck or back (*id.* at 11). Plaintiff was also the victim of an assault on January 10, 2006, and was involved in a second motor vehicle accident on September 26, 2006 (*id.* at 53-54, 61).

Based on the foregoing, defendants have sustained their initial burden of establishing a prima facie case that plaintiff did not suffer a "serious injury" under the categories of significant disfigurement, fracture, permanent loss, permanent consequential limitation or significant limitation (*see* Insurance Law § 5102 [d]). Defendants have proffered sufficient objective medical evidence demonstrating that plaintiff has normal range of motion and suffers 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"]; *Brown*, 9 AD3d at 31; *Gorden*, 50 AD3d at 462-63).

Defendants have also sustained their initial burden of proof with regard to 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]).

Defendants have sufficiently demonstrated that the injuries did not prevent plaintiff from performing substantially all of his usual and customary daily activities for the requisite 90/180-day time period (*see Licari*, 57 NY2d at 236). In the bill of particulars, plaintiff asserted that he was confined to bed for just 2 weeks, and he failed to specify any period of incapacity from employment or to claim lost wages (*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]).

Moreover, plaintiff's deposition testimony demonstrates that "substantially all" of his daily activities were not curtailed. Plaintiff testified to difficulties with activities such as creating art and music, exercising and playing sports. Such limitations indicate only a slight curtailment of his activities which, even had it occurred within the 90/180-day time frame, would not be sufficient to establish a serious injury (*see Licari*, 57 NY2d at 236).

Plaintiff's testimony alleging an inability to work after the accident and his claim that he was intermittently confined to home for 8 months is not determinative (*see 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]; *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]).

Since the Court finds that defendants have sustained their initial burden of establishing prima facie entitlement to summary judgment, the burden shifts to plaintiff to produce evidentiary proof in admissible form establishing the existence of a genuine issue of fact necessitating a trial (*see Gaddy*, 79 NY2d at 957).

In opposition to summary judgment, plaintiff submits, *inter alia*, an affirmation and medical report of Dr. R.C. Krishna; affirmed MRI reports of plaintiff's cervical spine, lumbar spine and right shoulder; certified medical records from 40th Street Medical, P.C. ("40th Street") and Harlem Hospital; and plaintiff's December 11, 2008 affidavit. (*See* plaintiff's affirmation in opposition, exhibits A, B, C, D, E.)

The 40th Street records document plaintiff's medical treatment between March 16, 2005 and June 1, 2005. Plaintiff was initially examined by Dr. Neal Mesnick, who noted that x-rays of the cervical spine taken at Mount Sinai Hospital three days after the accident showed a fracture at C2 at the spinous process. Copies of such x-rays were not submitted by plaintiff.

According to Dr. Mesnick's March 16, 2005 report, examination of the cervical spine revealed a restricted range of motion on rotation to the right at 30 degrees, left at 50 degrees with markedly increased muscle tone and tenderness in the upper trapezius and paraspinal muscles. Dr. Mesnick, however, did not compare any of the range of motion findings to the normal range or state the objective tests used to measure range of motion. Dr. Mesnick also noted that the upper extremities range of motion was within normal limits, but he did not specify any specific range of motion degrees. Examination of the thoracic spine showed increased muscle tone and tenderness in the paraspinal muscles with large trigger points over the bilateral scapula. Chest wall examination revealed tenderness over the left anterior chest just below the clavicle bone but no bruising or swelling. The right shoulder showed positive impingement signs. Dr. Mesnick diagnosed: 1. Cervical and lumbar sprain/strain, rule out radiculopathy and herniated disc; 2. Status post fracture spinous process C2; 3. Thoracic myofaciitis with trigger points; 4. Impingement syndrome right shoulder; and 5. Chest wall contusion. Dr. Mesnick ordered MRIs of the cervical and lumbar spine to rule out herniated discs and occult fracture, and an EMG to rule out radiculopathy.

The MRIs, which were taken on March 23, 2005 and May 12, 2005, are the same MRIs reviewed by defendants' radiologist. The cervical spine MRI revealed broad based central disc

protrusion, C5 C6, with moderate stenosis; and right lateral disc protrusion, C3 C4 with impingement at the right neural foramen. The lumbar spine MRI showed disc bulge, L4 L5. The right shoulder MRI revealed supraspinatus tendonopathy, subacromial subdeltoid bursitis and stress related changes of the acromioclavicular joint. None of the MRIs showed a fracture.

Also included in the 40th Street records is a neurological consultation report dated March 17, 2005 by Dr. Smelyansky. It was noted that a May 17, 2005 EMG study of all four limbs revealed mild, right C7 radiculopathy. Dr. Smelyansky made no range of motion findings and diagnosed mild right C7 radiculopathy and lumbar spondylosis.

The Harlem Hospital records pertain to injuries sustained in the assault and contain MRIs taken on January 25, 2006. The MRI of the lumbosacral spine showed mild degenerative disc disease and bulging discs at L4-5. The MRI of the cervical spine revealed degenerated, herniated discs at C5-6 with probable mild cord indentation.

Dr. Krishna conducted a recent examination on October 30, 2008. Cervical spine range of motion revealed flexion 40 degrees (50 degrees is normal), extension 50 degrees (60 degrees is normal), right lateral flexion 35 degrees (45 degrees is normal), left lateral flexion 25 degrees (45 degrees is normal), right rotation 60 degrees (80 degrees is normal) and left rotation 60 degrees (80 degrees is normal). Lumbosacral spine range of motion revealed flexion 50 degrees (60 degrees is normal), extension 20 degrees (25 degrees is normal), right lateral bending 20 degrees (25 degrees is normal) and left lateral bending 20 degrees (25 degrees is normal). There was a positive straight leg raising sign bilaterally at 45 degrees. Dr. Krishna diagnosed: 1. Post-traumatic cervical and lumbar bulging disc/disc protrusion resulting in a cervical and lumbar radiculopathy and a neuropathic pain syndrome; 2. Superimposed permanent restriction of range of motion of the cervical and lumbar spine; and 3. Right shoulder derangement. Dr. Krishna opined that the assault and second accident exacerbated the underlying cervical and lumbar disc pathology, but that the original accident made plaintiff more susceptible to more severe neurological injury by weakening the underlying structures.

Dr. Krishna concluded that plaintiff has a permanent partial disability; that he sustained permanent consequential limitation of his neurological and musculoskeletal system; that the injuries are causally related to the accident; and that the injuries significantly impacted plaintiff's activities of daily living. Dr. Krishna additionally noted that as of the time of the examination, plaintiff had reached maximum medical improvement and continued treatment on maintenance regime.

In his affidavit, plaintiff asserted that he was unable to work since the accident, and that he obtained social security disability benefits as a result of the accident (plaintiff's affidavit at ¶ 2.) He claimed that he could no longer carve stone, paint, draw, play the piano, ski, walk long distances, lift heavy objects or take the subway (*id.* at ¶ 11). He also had limitations with riding a bicycle, swimming and playing sports such as basketball or Frisbee (*id.*).

Plaintiff additionally stated in his affidavit that he received physical therapy from March 16, 2005 through June 1, 2005, and that he and his physician agreed that he had reached a plateau in his treatment (*id.* at ¶ 8). The No-Fault insurance was also cut off at that time (*id.*). He was approved for Medicaid after the accident (*id.* at ¶ 7).

Considering the evidence in the light most favorable to plaintiff (*see Kesselman v Lever House Restaurant*, 29 AD3d 302, 304 [1st Dept 2006]), the Court concludes that plaintiff has failed to raise a triable issue of fact sufficient to defeat summary judgment under the categories of significant disfigurement, fracture, permanent loss, permanent consequential limitation or significant limitation (*see* Insurance Law § 5102 [d]).

To the extent that plaintiff alleges a "serious injury" based on cervical and lumbar sprain/strain or chest wall contusion, such injuries do not, as a matter of law, constitute a serious injury (*see Lebron v Camacho*, 251 AD2d 295, 295 [2d Dept 1998] [mild sprains to the lumbar or cervical spine are insignificant within the meaning of Insurance Law § 5102 [d] and do not constitute a serious injury]; *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"]).

Nor has plaintiff raised an issue of fact under the fracture category. Although plaintiff alleges an inferior C5 osteophyte fracture in the bill of particulars and in his deposition testimony, he presents no objective evidence, such as sworn x-rays or MRIs, establishing the existence of a fracture. Dr. Mesnick's reference to Mount Sinai Hospital x-rays indicating a fracture at C2 at the spinous process is not supported by any objective proof and, in any event, Dr. Mesnick improperly relies upon inadmissible unsworn medical evidence (*see DeJesus v* Paulino, 61 AD3d 605, 607 [1st Dept 2009] [unsworn emergency room records and other reports had no probative value]). In the absence of objective proof of fracture, plaintiff cannot establish a serious injury under this category (*see O'Bradovich v Mrijaj*, 35 AD3d 274, 274 [1st Dept 2006] [although plaintiff's expert opined that accident caused a fracture, plaintiff failed to establish a serious injury where there was no admissible evidence that she was ever diagnosed by her treating physician with a fracture resulting from accident]; *Glover v Capres Contracting Corp.*, 61 AD3d 549, 550 [1st Dept 2009]; *Ali v Khan*, 50 AD3d 454, 455 [1st Dept 2008]).

With respect to the remaining injuries, plaintiff has failed to raise a triable issue of fact since he has not presented a *contemporaneous* medical report demonstrating the extent and duration of his alleged physical limitations resulting from the injuries (*see Patterson v N.Y. Alarm Response Corp.*, 45 AD3d 656, 656 [2d Dept 2007]; *Foley v Karvelis*, 276 AD2d 666, 667 [2d Dept 2000]; *Noble*, 252 AD2d at 394; *Arjona*, 7 AD3d at 289). Although plaintiff has proffered objective evidence of herniated and bulging discs, radiculopathy and impingement syndrome, in order to raise a triable issue of fact plaintiff's medical evidence "had to be accompanied by objective findings of either a specific percentage of the loss of range of motion or a sufficient description of the qualitative nature of plaintiffs' limitations based on the normal function, purpose and use of the body part" (*Vasquez*, 28 AD3d at 366; *see also Garcia v Solbes*, 41 AD3d 426, 427 [2d Dept 2007] [MRIs herniated and bulging discs and shoulder impingement did not, alone, establish serious injury]; *Otero v 971 Only U, Inc.*, 36 AD3d 430,

431 [1st Dept 2007]).

Dr. Smelyansky's report does not contain range of motion findings at all. Dr. Mesnick does set forth numerical range of motion findings for plaintiff's cervical spine from the March 16, 2005 examination; however, Dr. Mesnick completely fails to make the requisite comparison to what the normal range of motion should be, thereby leaving the Court to speculate as to the meaning of those figures (*see Vasquez*, 28 AD3d at 366 [plaintiff failed to meet burden of proving serious injury were medical submission set forth range of motions of plaintiffs' cervical and lumbosacral spines but failed to specify "what the normal range of motion should be"]; *Mickens v Khalid*, 62 AD3d 597, 597 [1st Dept 2009] [orthopedist failed to compare range of motion findings to normal range]; *Dembele v Cambisaca*, 59 AD3d 352, 352 [1st Dept 2009]; *Gorden*, 50 AD3d at 462]). Dr. Mesnick also fails to describe the objective tests used to measure the range of motion findings (*see Delfino v Luzon*, 60 AD3d 196, 198 [1st Dept 2009]; *Smith v Cherubini*, 44 AD3d 520, 520 [1st Dept 2007]; *Rodriguez v Abdallah*, 51 AD3d 590, 591-92 [1st Dept 2008]). In addition, both medical reports fail to address causation, permanency or the significance of plaintiff's limitations (*see Dufel*, 84 NY2d at 798; *Nagbe v Minigreen Hacking Group*, 22 AD3d 326, 327 [1st Dept 2005]; *Vasquez*, 28 AD3d at 366).

Consequently, there is no objective contemporaneous evidence of the extent and duration of the alleged limitations, and plaintiff has not met his burden of proof. (See *Singh v Mohamed*, 54 AD3d 933, 934-35 [2d Dept 2008] [plaintiff was unable to establish the duration of spinal injuries in the absence of contemporaneous findings of range-of-motion limitations in his spine]; *Thompson v Abbasi*, 15 AD3d 95, 98 [1st Dept 2005] ["there are no objective findings contemporaneous with the accident showing any initial range-of-motion restrictions on plaintiff's cervical spine"]).

The Court additionally finds plaintiff's submissions insufficient to raise an issue of fact with respect to the 90/180-day category. Plaintiff's claim that he could not perform "substantially all" of his customary and daily activities for the required 90/180-day time period is

not substantiated by competent medical evidence (*see 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]; *Mickens v Khalid*, 62 AD3d 597, 598 [1st Dept 2009]). The report of Dr. Krishna, who examined plaintiff one time over three years after the accident, is insufficient to raise an issue of fact (*see Uddin*, 32 AD3d at 272; *Valentin v Pomilla*, 59 AD3d 184, 186-87 [1st Dept 2009]).

As to plaintiff claims that he could not work after the accident and was confined to home for 8 months, there is no proof that his alleged inability to work was medically ordered (*see Glover*, 61 AD3d at 550 [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]; *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]).

Furthermore, plaintiff concedes that he was only confined to bed for 2 weeks, and the daily activity limitations of which he complains -- *i.e.*, limitations with activities such as creating art or music, exercising, playing sports, lifting heavy objects and taking the subway -- do not establish a sufficient curtailment of "substantially all" of his usual and customary daily activities to raise an issue of fact precluding summary judgment. (*See 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]; *Rennell v Horan*, 225 AD2d 939, 940 [3rd Dept 1996] ["even accepting that plaintiff had to curtail some of her activities and sports, the record failed to show that such restrictions were medically indicated or affected a significant portion of her usual activities"]; *Uddin*, 32 AD3d at 271-72; *Ortiz*, 63 AD3d at 557).

Lastly, there is an unexplained gap in treatment, which is fatal to plaintiff's claim of a

serious injury (*see Pommels*, 4 NY3d at 574; *see also Vasquez*, 28 AD3d at 366 [unexplained gaps in plaintiff's treatment was "fatal to his claim of serious injury"]; *Colon*, 20 AD3d at 374).

Plaintiff's evidence documents medical treatment between March 16, 2005 and June 1, 2005, and a recent examination over three years later on October 30, 2008. Although plaintiff's affidavit asserts that he and his physician agreed that he had reached a plateau in his treatment and that the No-Fault insurance was discontinued, plaintiff presents no evidence substantiating these assertions. Dr. Krishna's notation that plaintiff reached maximum medical improvement pertained to the time of Dr. Krishna's examination in 2008 *(see Yagi v Corbin*, 44 AD3d 440, 440 [1st Dept 2007] [expert's report, dated nearly three years after his last treatment of plaintiff, did not satisfactorily explain why plaintiff terminated treatment]).

Nor has plaintiff adequately explained the gap through his own testimony, as there is no corroborating proof that he discontinued treatment due to the cancellation of No-Fault insurance benefits (*see Francovig v Senekis Cab Corp.*, 41 AD3d 643, 644 [2d Dept 2007]). Notably, plaintiff indicated that he was approved for Medicaid after the accident.

Therefore, since plaintiff has failed to provide an adequate explanation for the cessation of his treatment in 2005, dismissal is required under *Pommels*. (*See Ponciano v Schaefer*, 59 AD3d 605, 606 [2d Dept 2009] [plaintiffs failed to explain gap of more than two and a half years between initial treatment in 2005 and more recent examination in 2007]; *Colon*, 20 AD3d at 374 [two and a half-year unexplained gap in treatment was fatal to claim of serious injury]; *Park v Champagne*, 34 AD3d 274, 277 [1st Dept 2006]; *Manon v Doucoure*, 59 AD3d 304, 304 [1st Dept 2009]; *Antonio v Gear Trans Corp.*, 65 AD3d 430 [1st Dept 2009]).

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 summary judgment is warranted here because defendants have established a prima facie case that plaintiff did not sustain a "serious injury," and plaintiff failed to present a triable issue of fact sufficient to preclude summary judgment.

[* 18]

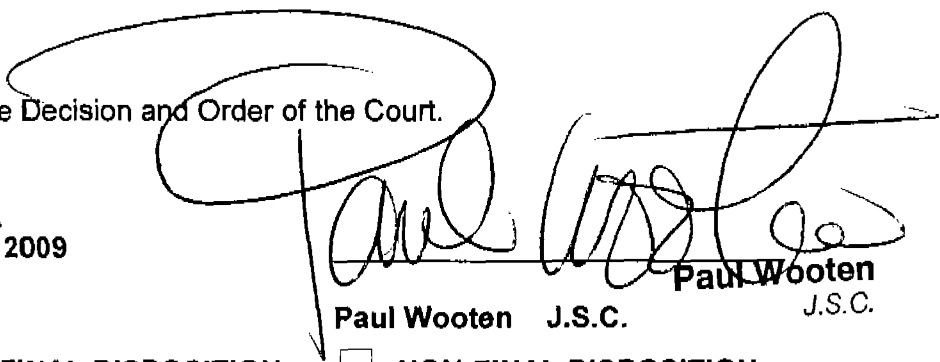
For these reasons and upon the foregoing papers, it is,

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 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 plaintiff.

This constitutes the Decision and Order of the Court.



Dated: December 30, 2009

Paul Wooten
J.S.C.

Paul Wooten J.S.C.

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