

Whitaker v Soumano
2009 NY Slip Op 33252(U)
September 18, 2009
Sup Ct, New York County
Docket Number: 110457/2007
Judge: Paul Wooten
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 22

ROBERT WHITAKER,

Plaintiff,

- v -

SAMBALY SOUMANO, BEECH TRANS CORP.,
and PRINCE YATES,

Defendants.

INDEX NO. 110457/2007

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. 153

The following papers, numbered 1 to 4 were read on this motion by defendants for summary judgment on the threshold "serious injury" issue.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits (Memo) _____

Replying Affidavits (Reply Memo) _____

Cross-Motion: Yes No

PAPERS NUMBERED
1, 2
FILED
4 SEP 24 2009
COUNTY CLERK'S OFFICE
NEW YORK

On January 22, 2007, plaintiff Robert Whitaker ("plaintiff"), while a passenger in a vehicle owned and operated by defendant Prince Yates, was involved in a motor vehicle accident with a vehicle owned by defendant Beech Trans Corp. ("Beech") and operated by defendant Sambaly Soumano. The accident occurred on 141st Street near the intersection of Seventh Avenue in New York 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 May 19, 2009. Defendants Soumano, Beech and Yates (collectively "defendants") now move for an order pursuant to CPLR 3212, granting summary judgment dismissing the complaint on the threshold issue of

2] "serious injury," pursuant to Insurance Law § 5102 (d).¹

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 right

¹Defendants Soumano and Beech filed their motion for summary judgment on August 22, 2008. Defendant Yates moved for summary judgment on October 7, 2008, adopting the same arguments.

shoulder, back and neck, which include anterosuperior labral tear, radiculopathy, herniated discs and cervical/lumbar spine strain and sprain (see Soumano & Beech motion, exhibit C, bill of particulars at ¶ 11). Within the bill of particulars, he claims a "serious injury" under the following relevant categories: (1) permanent loss; (2) permanent consequential limitation; (3) significant limitation; and (4) 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 claimed categories.

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.

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 surgeons Dr. Gregory Montalbano and Dr. Robert Israel; unaffirmed MRIs of the right shoulder and cervical spine; affirmed reports of radiologist Dr. A. Robert Tantleff interpreting MRIs of the right shoulder and lumbar spine; plaintiff's April 3, 2008 deposition; and the bill of particulars (*see Soumano & Beech motion*, exhibits C, D, E, F, G, H; *Yates motion*, exhibits C, D).

The MRI of the right shoulder performed two days after the accident on January 24, 2007 revealed findings consistent with supraspinatus tendinosis. The MRI of the cervical spine performed on January 31, 2007 was normal.

Dr. Tantleff reviewed the right shoulder MRI and concluded that it was normal and unremarkable. Dr. Tantleff also reviewed a February 22, 2007 MRI of the lumbar spine revealing advanced discogenic changes at L5/S1. His impression was that the discogenic

* 8]
changes were not causally related to the accident.

Dr. Montalbano conducted an independent medical examination ("IME") on July 18, 2008. Examination of plaintiff's lumbar spine revealed normal range of motion. Straight leg raising test was negative bilaterally. Lumbar lordosis was normal. There was no list or abnormal curvature. No muscle spasm or tenderness in the paraspinal muscles was noted. The cervical spine also revealed normal range of motion. Cervical lordosis was normal and there was no paraspinal spasm. Tenderness was absent in the cervical paraspinals and periscapular muscles. Examination of the thoracic spine showed normal thoracic kyphosis with no list or abnormal curvature or muscle spasm. There was no tenderness along the spinous processes or in the paraspinal region. Range of motion in the right shoulder was normal with the exception of internal rotation T 12 (normal is T 7), which Dr. Montablano opined was plaintiff's normal motion. There were four healed arthroscopic portals and no muscle atrophy. There was no heat, erythema, swelling or tenderness. Rotator cuff strength testing was 5/5 measured in scaption, abduction, external and internal rotation. Drop arm test was negative. Apprehensive and relocation test was negative for instability. Impingement signs were negative. Upper and lower neurologic examination showed deep tendon reflexes 2+ and symmetric bilateral biceps, triceps, brachioradialis, patella and Achilles. Hoffman and Babinski test were negative. Sensation to light touch was intact. Motor testing was 5/5. No muscle atrophy or fasciculations were noted.

Dr. Montalbano reviewed plaintiff's medical history in detail, including plaintiff's MRIs and a prior arthroscopic surgery of the right shoulder performed by Dr. Thomas Scilaris on May 15, 2007. Dr. Montalbano opined that plaintiff may have sustained a mild sprain of the right shoulder as a result of the accident, but that a labrum tear noted at the time of surgery was a sublabral hole that was likely a congenital condition and not caused by the accident. Dr. Montalbano additionally opined that plaintiff sustained a cervical and lumbar sprain/strain injury from the accident, and that disc herniation read on plaintiff's February 22, 2007 MRI of the

lumbar spine was not due to the accident. Dr. Montalbano concluded that there was no evidence of a permanent injury resulting from the accident.

Dr. Israel conducted an orthopedic IME on April 25, 2008. He indicated that range of motion testing was done using a visual scale and goniometer and utilizing AMA guidelines. Examination of the lumbar spine revealed range of motion within the normal range. The lordotic curve was normal and there were no spasms or tenderness over the paraspinal musculature on palpation. Sitting Lasegue's testing was bilaterally negative to 80 degrees (80 degrees being normal). Straight leg raising was bilaterally negative to 75 degrees (75 degrees being normal) in both the seated and supine positions. Bilateral patella and Achilles' deep tendon reflexes were symmetric. Proprioception was normal with no sensory deficit on light touch and pin prick. Muscle strength of both lower extremities was graded at 5/5. There was no atrophy in the muscles of both lower extremities. There was no radiation of pain, numbness or tingling. Examination of the right shoulder also revealed normal range of motion. There were three arthroscopic portals, well healed and nontender. There was no deltoid atrophy and no tenderness on palpation of the acromioclavicular joint or over the greater tuberosity. No instability was present. The drop arm, Yergason's, apprehension and speed tests were all negative. The impingement sign was negative. There was no winging of the scapula or atrophy. There was no sensory loss to light touch or pin prick. Dr. Israel's impression was: 1. Resolved sprain of the lumbar spine; and 2. SP arthroscopy of the right shoulder. Dr. Israel concluded that there was no orthopedic disability as a result of the accident.

In the bill of particulars, plaintiff asserts that he was confined to home and bed for one month following the accident (bill of particulars at ¶ 13). He testified at his deposition that he was confined to home and bed for 3 weeks (plaintiff's deposition at 41-42, 53). Plaintiff also testified that he was employed at the time of the accident, and missed 2 months of work (*id.* at 43, 45).

At the time of the deposition, plaintiff complained of pain in his back and shoulder and

indicated that he no longer had problems with his neck (*id.* at 38, 50). When asked about activities that he could do before the accident but could not do at all now, plaintiff stated that he could not play basketball pickup games, lift weights or move furniture around the house (*id.* at 40). He experienced pain when lifting 10 pounds (*id.* at 41).

Based on the foregoing, the Court finds that defendants have sustained their burden of establishing a prima facie case that plaintiff did not suffer a "serious injury" under the categories of 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 or neurological 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 sustained their initial burden of proof with regard to the 90/180-day category. A defendant can establish the nonexistence of a serious injury under the 90/180-day category 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 time period (see *Licari*, 57 NY2d at 236). Plaintiff's deposition indicates that he missed only 2 months of work due to his injuries. Plaintiff also asserts in his deposition and bill of particulars that he was confined to home and bed for just one month or less. These time periods are far

less than the 90/180 days required by the statute, and are sufficient to meet defendants' burden of establishing a prima facie case. (See *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] ["by submitting the plaintiff's deposition testimony that he missed only 15 days of work as a result of the accident, the defendants demonstrated that the plaintiff was able to perform 'substantially all' of the material acts constituting his customary daily activities for more than 90 days of the first 180 days subsequent to the accident"]; *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]).

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 (see *Gaddy*, 79 NY2d at 957).

In opposition to summary judgment, plaintiff submits, *inter alia*, the affirmation of treating physician Dr. Okon Umana dated October 23, 2008; plaintiff's October 1, 2008 affidavit; and the bill of particulars. (See plaintiff's affirmation in opposition, exhibits B, C, D.)

Dr. Umana's affirmation indicates that plaintiff came under Dr. Umana's care at Extensive Medical, P.C. ("Extensive Medical") on January 23, 2007. Dr. Umana indicates that spinal range of motion studies of the lumbar spine initially performed at Extensive Medical on April 19, 2007 revealed: "flexion 7 [60] 83% limitation; extension 3 [25] 88% limitation" (*id.*, exhibit C).² Plaintiff underwent right shoulder arthroscopic surgery with Dr. Scilaris on May 15, 2007, and continued treatment at Extensive Medical until July 12, 2007 without any gaps in

²The number in brackets represents the normal range.

treatment. Plaintiff completed 46 visits and it was determined that he reached maximum medical improvement. Plaintiff was again examined by Dr. Umana on October 21, 2008. Computerized range of motion studies of the lumbar spine performed on October 1, 2008 revealed: "flexion 29 [60] 52% limitation; extension 12 [25] 52% limitation" (*id.*) Dr. Umana also notes that there were painful restrictions and limitations in the ranges of motion of the back and right shoulder. However, Dr. Umana does not set forth any of the objective tests used to measure the range of motion findings.

With respect to the right shoulder, Dr. Umana diagnoses supraspinatus tendinosis and anterosuperior labral tear and impingement. The lumbar spine injuries are diagnosed as posterior disc herniation in contact with the thecal sac and encroaching upon the lateral neural foramina at L5-S1; bilateral radiculopathy L4-5; and acute traumatic strain/sprain of the lumbar paraspinal muscles and ligaments. Dr. Umana concludes that plaintiff has suffered permanent injures to his right shoulder and back resulting in a permanent partial impairment; that the accident was a competent producing cause of the injuries; and that plaintiff is not able to perform the physical rigors of his every day functions. Dr. Umana also indicates that plaintiff's pain is aggravated by prolonged standing, lifting and carrying weights, activities involving holding the right arm up for over 5 minutes and various strenuous physical activities.

Plaintiff asserts in his affidavit that he suffers from a permanent partial disability, and that he was unable to work for about 2 months. Prior to the accident, his activities included playing basketball, lifting weights and moving furniture around the house. He is unable to participate in these activities due to right shoulder and back pain, which is aggravated by prolonged standing, strenuous physical activities and sleeping on the right side. His right shoulder hurts every time he holds his arm up for over 5 minutes.

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 present sufficient objective medical evidence to establish a genuine issue of fact

sufficient to defeat defendants' summary judgment motion (*see Dembele v Cambisaca*, 59 AD3d 352 [1st Dept 2009]).

Plaintiff has not raised a triable issue of fact with respect to the first three claimed categories of "serious injury" because, to the extent that plaintiff alleges a serious injury based on cervical/lumbar sprain or sprain, 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]); *Rhind v Naylor*, 187 AD2d 498, 498 [2d Dept 1992]).

Although plaintiff asserts in his affidavit that he is permanently partially disabled, plaintiff's "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]).

Further, plaintiff 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 Dr. Umana's affirmation indicates that plaintiff was examined a day after the accident, Dr. Umana does not set forth any initial range of motion findings until three months later on April 19, 2007. (*See Valentin v Pomilla*, 59 AD3d 184, 185 [1st Dept 2009] [although plaintiff was examined days after accident, he failed to provide documentation regarding *that* visit or any contemporaneous evidence of limitations until two months after the accident] [emphasis in original]; *Thompson v Abbasi*, 15 AD3d 95, 98 [1st Dept 2005] ["despite the positive MRI findings as to plaintiff's cervical spine two months after the accident, there are no objective findings contemporaneous with the accident showing any initial range-of-motion restrictions on plaintiff's cervical spine"]; *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)).

Moreover, even though Dr. Umana sets forth some range of motion findings from April 19, 2007 and October 1, 2008, Dr. Umana fails to describe any of the objective tests used to measure such findings, or to provide any objective support for the conclusory opinion that plaintiff is permanently partially disabled as a result of the accident. (*See Delfino v Luzon*, 60 AD3d 196, 198 [1st Dept 2009] ["Although the expert listed specific numeric losses of range of motion for the left shoulder, he failed to describe what tests were used or provide any objective basis to substantiate his range of motion assessments, his opinion that the restrictions were causally linked to the accident, or his prognosis that plaintiff will never fully recover and might require further surgery. Those omissions in plaintiff's expert's affirmation are fatal to plaintiff's claim."]; *Smith v Cherubini*, 44 AD3d 520, 520 [1st Dept 2007] [expert failed to "identify any objective basis for the percentages attributed to the restricted ranges of motion, and did not objectively relate the MRI findings to plaintiff's current complaints"]; *Rodriguez v Abdallah*, 51 AD3d 590, 591-92 [1st Dept 2008]).

Dr. Umana also fails to refute Dr. Montalbano's substantiated opinion that plaintiff's shoulder injuries are due to a congenital condition, and not caused by the accident (*see Delfino*, 60 AD3d at 198 ["plaintiff's expert did not even address, let alone rebut, the objectively substantiated findings of defendant's experts that plaintiff's conditions are congenital and degenerative, and therefore did not raise a triable issue of fact as to causation"]; *Nickolson v Albishara*, 61 AD3d 542, 542 [1st Dept 2009]; *Valentin*, 59 AD3d at 186).

The Court additionally finds that plaintiff's submissions are insufficient to raise an issue of fact with regard to the 90/180-day category. Plaintiff has not established a sufficient limitation of "substantially all" of his customary and daily activities for the required 90/180-day time period. Plaintiff admits that he missed just 2 months of work and was only confined to home and bed for a month or less. In any event, the limitations of which he complains -- *i.e.*, limitations on activities such as playing basketball, lifting weights and moving furniture -- do not

constitute a curtailment of "substantially all" of his usual and customary daily activities sufficient to support a 90/180-day claim. (See *Alloway v Rodriguez*, 61 AD3d 591, 592 [1st Dept 2009] ["plaintiff's subjective claims of pain and a limitation on sports and exercise activities do not prove a restriction on her usual and customary daily activities for at least 90 days of the 180 days following the accident"]; *Burns v McCabe*, 17 AD3d 1111, 1111 [4th Dept 2005] [although there was evidence that plaintiff could not participate in some activities, such as gym class and dancing, plaintiff raised no triable issue as to 90/180-day claim where plaintiff returned to school after a week and to work after five weeks]; *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"]).

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 plaintiff did not sustain a "serious injury," and plaintiff failed to present a triable issue of fact sufficient to preclude summary judgment.

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

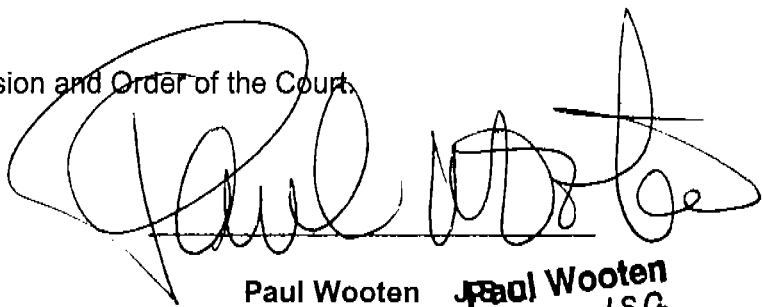
ORDERED that defendants' motion for summary judgment is granted; and it is further,

ORDERED that the Clerk of the Court is directed to enter judgment in favor of defendants, dismissing the complaint 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: September 18, 2009

SEP 18 2009

Paul Wooten ~~Paul~~ Wooten
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

FILED

SEP 24 2009

COUNTY CLERK'S OFFICE
NEW YORK