SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

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

TRIAL/IAS PART 32
NASSAU COUNTY

SIEWDATH KHADOO, MARY KHADOO and THOMAS KHADOO, an infant under the age of 14 years, by his father and natural guardian, SIEWDATH KHADOO,

Plaintiffs,

- against -

TREVER LALL and CHETRAM SOOKWAH,

Defendants.

Index No.: 14501/08
Motion Seq. No.: 02
Motion Date: 11/13/09
XXX

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion for Summary Judgment, Affirmation and Exhibits	1
Affidavit in Opposition, Affirmation and Exhibits	2
Reply Affirmation	3

Co- defendants Trever Lall ("Lall") and Chetram Sookwah ("Sookwah"), move pursuant to CPLR § 3212 and Article 51 of the Insurance Law of the State of New York for an order granting summary judgment to defendants by dismissing the complaint for alleged personal injuries sustained by plaintiffs Thomas Khadoo ("Thomas") and Siedath Khadoo ("Siewdath") on the ground that they did not sustain "serious injuries" in the subject accident as defined by New York State Insurance Law § 5102(d). Plaintiff opposes defendant's motion.

The action arises from a motor vehicle accident involving a collision between a motor vehicle owned and operated by plaintiff Siewdath and a motor vehicle owned by defendant Sookwah and operated by defendant Lall. The accident occurred on July 25, 2007 at approximately 3:07 p.m. on the Grand Central Parkway, County of Queens, State of New York.

At the time of the accident, plaintiff Thomas and his mother, plaintiff Mary Khadoo ("Mary"), were passengers in the back seat of the plaintiffs' vehicle. On or about July 2, 2008, the plaintiffs commenced this action by service of a Summons and Verified Complaint. Issue was joined on August 28, 2008, by service of the defendants' Verified Answer with Demands.

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital,* 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York,* 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. *See* CPLR § 3212 (b); *Olan v. Farrell Lines Inc.,* 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980), *supra*. When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957), *supra*. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. S*ee Gilbert Frank Corp. v. Federal Ins. Co.,* 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v.*

Johnson, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989).

Within the particular context of a threshold motion which seeks dismissal of a personal injury complaint, the movant bears a specific burden of establishing that the plaintiff did not sustain a "serious injury" as enumerated in Article 51 of the Insurance Law § 5102(d). *See Gaddy v. Eyler*, 79 N.Y.2d 955, 582 N.Y.S.2d 990 (1992). Upon such a showing, it becomes incumbent upon the non-moving party to come forth with sufficient evidence in admissible form to raise an issue of fact as to the existence of a "serious injury." *See Licari v. Elliott*, 57 N.Y.2d 230, 455 N.Y.S.2d 570 (1982).

In support of a claim that the plaintiff has not sustained a serious injury, the defendant may rely either on the sworn statements of the defendant's examining physicians or the unsworn reports of the plaintiff's examining physicians. *See Pagano v. Kingsbury*, 182 A.D.2d 268, 587 N.Y.S.2d 692 (2d Dept. 1992). However, unlike the movant's proof, unsworn reports of the plaintiff's examining doctors or chiropractors are not sufficient to defeat a motion for summary judgment. *See Grasso v. Angerami*, 79 N.Y.2d 813, 580 N.Y.S.2d 178 (1991).

Essentially, in order to satisfy the statutory serious injury threshold, the legislature requires objective proof of a plaintiff' s injury. The Court of Appeals in *Toure v. Avis Rent-a-Car* Systems, 98 N.Y.2d 345, 746 N.Y.S.2d 865 (2002), stated that a plaintiff's proof of injury must be supported by objective medical evidence, such as sworn MRI and CT scan tests. However, these sworn tests must be paired with the doctor's observations during the physical examination of the plaintiff. Unsworn MRI reports can also constitute competent evidence if both sides rely on those reports. *See Gonzalez v. Vasquez*, 301 A.D.2d 438, 754 N.Y.S.2d 7 [1st Dept. 2003).

Conversely, even where there is ample proof of a plaintiff's injury, certain factors may nonetheless override a plaintiff's objective medical proof of limitations and permit dismissal of a plaintiff's complaint. Specifically, additional contributing factors such as a gap in treatment, an intervening medical problem or a pre-existing condition would interrupt the chain of causation between the accident and the claimed injury. *See Pommells v. Perez,* 4 N.Y.3d 566, 797 N.Y.S.2d 380 (2005).

Plaintiffs claims that as a consequence of the above described automobile accident with

defendant, they have sustained serious injuries as defined in § 5102(d) of the New York State Insurance Law. New York State Insurance Law § 5102(d) defines serious injury to mean a personal injury which results in:

1) death; (Category 1)

2) dismemberment; (Category 2)

3) significant disfigurement; (Category 3)

4) a fracture; (Category 4)

5) loss of a fetus; (Category 5)

6) permanent loss of a body organ, member, function or system; (Category 6)

7) a permanent consequential limitation of use of a body organ or member; (Category 7)

8) a significant limitation of use of a body function or system; (Category 8)

9) a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.(Category 9).

Based upon the papers submitted, it is apparent that the plaintiffs' injuries do not fall within the first five categories of Insurance Law § 5102(d), just outlined. Further, since neither plaintiff claims to have lost permanent or total use of any of the body parts alleged in the Bill of Particulars, their injuries do not qualify under the sixth category, permanent loss of use of a body organ, member, function or system. *See Oberly v. Bangs Ambulance, Inc.*, 96 N.Y.2d 295, 727 N.Y.S.2d 378 (2001).

As previously stated, to meet the threshold regarding significant limitation of use of a body function or system or permanent consequential limitation of a body function or system, the law requires that the limitation be more than minor, mild or slight and that the claim be supported by medical proof based upon credible medical evidence of an objectively measured and quantified medical injury or condition. *See Gaddy v. Eyler,* 79 N.Y.2d 955, 582 N.Y.S.2d 990 (1992); *Licari v. Elliot*, 57 N.Y.2d 230, 455 N.Y.S.2d 570 (1982). A minor, mild or slight limitation will be deemed insignificant within the meaning of the statute. *See Licari v. Elliot, supra.* A claim raised under the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, can be made

by an expert's designation of a numeric percentage of a plaintiff's loss of motion, in order to prove the extent or degree of the physical limitation. *See Toure v. Avis, supra.* In addition, an expert's qualitative assessment of a plaintiff's condition is also probative, provided: (1) the evaluation has an objective basis and (2) the evaluation compares the plaintiff's limitation to the normal function, purpose and use of the affected body organ, member, function or system. S*ee id.*

Finally, to prevail under the "medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment" category, a plaintiff must demonstrate through competent, objective proof, a "medically determined injury or impairment of a non-permanent nature" (Insurance Law § 5102[d]) "which would have caused the alleged limitations on the plaintiff's daily activities." *See Monk v. Dupuis*, 287 A.D.2d 187, 734 N.Y.S.2d 684 (3d Dept. 2001). A curtailment of the plaintiff's usual activities must be "to a great extent rather than some slight curtailment." *See Licari v. Elliott, supra* at 236. Under this category specifically, a gap or cessation in treatment is irrelevant in determining whether the plaintiff qualifies. *See Gomez v. Ford Motor Credit Co.*, 10 Misc.3d 900, 810 N.Y.S.2d 838 (Sup. Ct., Bronx County, 2005).

With these guidelines in mind, this Court will now turn to the merits of the defendants' motion. In support of his motion, the defendants submit the pleadings, the plaintiffs' Verified Bill of Particulars, the April 23, 2009 depositions of Siewdath and Thomas and the sworn, affirmed reports of Barry M. Katzman, M.D., who performed Orthopedic Independent Medical Examinations of Siewdath and Thomas on June 11, 2009.

Based upon this evidence, the Court finds that the defendants have established a prima facie case that the plaintiffs, Siewdath and Thomas did not sustain serious injury within the meaning of Insurance Law § 5102(d). Dr. Katzman performed range of motion tests on each plaintiff using a goniometer. The results of the tests indicated no deviations from normal. Additionally, the deposition testimony of Siewdath establishes that following the accident, he missed only "a couple of weeks" at his workplace. Moreover, since the time of the accident he has obtained different employment for which he had to have medical examinations and the results of these physical examinations did not prevent him from obtaining the new

employment.

The burden now shifts to the plaintiffs to come forward with evidence to overcome the defendants' submissions by demonstrating the existence of a triable issue of fact that serious injury was sustained. *See Pommells v. Perez*, 4 N.Y.3d 566, 797 N.Y.S.2d 380 (2005); *Grossman v. Wright*, 268 A.D.2d 79, 707 N.Y.S.2d 233 (2d Dept., 2000). To support their burden the plaintiffs submit the sworn and notarized affidavit of Siewdath Khadoo, the affirmed affidavit of Nizarali Visram, M.D., a physiatrist, dated November 19, 2009, the medical records of Siewdath and the deposition testimony of Siewdath and Thomas. All medical records of Dr. Visram will be considered by the Court, as they are affirmed by the doctor, in accordance with CPLR § 2106. However, the August 15, 2007 MRI report of Siewdath's lumbosacral spine and the August 7, 2007 x-ray report of Siewdath's cervical and lumbar spines can not be considered, as they are not affirmed. The remaining medical records are illegible and unsworn and therefore can not be taken into account by this Court.

Based upon the allowable evidence, Siewdath has not sustained his burden. Dr. Visram's affidavit, although dated November 19, 2009 does not include a recent examination of this plaintiff. His last examination of Siewdath was on September 19, 2008 at which time the doctor concluded that the plaintiff "had reached the maximum medical improvements and as such physical therapy was discontinued." At that time Siewdath's full range of motion and rotation had not returned, and Dr. Visram concluded that the plaintiff "received these injuries and restrictions of his range of motion as a result of the accident that took place on July 25, 2007 and that they are permanent." The plaintiff fails however to submit a more recent exam documenting his present limitations, if any. Moreover, the plaintiff' s subjective complaints of pain, without more, are insufficient to satisfy the burden of establishing a serious injury. *See Marshall v. Albano*, 182 A.D.2d 614, 582 N.Y.S.2d 220 (2d Dept. 1992). Siewdath has therefore failed to establish by competent medical proof that he sustained a "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system." *See* Insurance Law § 5102[d]. Additionally, the plaintiff's deposition testimony does not establish that he was unable to perform substantially all of the material acts which constitute his usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury. The plaintiff went back to work shortly after the accident. The only activities that continue to be

restricted are heavy lifting and jogging. Presently he can only "lift very light" and once he begins to jog, the pain starts and he "has to take it very easy." These restrictions are not sufficient to establish that substantially all of the plaintiff' s usual and customary daily activities were affected.

Thomas has also failed to meet his burden of establishing serious injury. No medical evidence or affidavits/affirmations from his treating doctors or health care professionals have been submitted. Further, his deposition testimony does not establish that the restriction of activities or the month he missed from school in September 2007 were on the advice of his doctor.

Therefore, based upon the foregoing, the defendants' motion dismissing the complaint against them and granting summary judgment is granted.

This constitutes the decision and order of this Court.

ENTER:

DENISE L. SHER
A.J.S.C.
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Dated: Mineola, New York
February 25, 2010