SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
JUSTICE TRIAL/IAS PART 20

_____X

OLIVER KELLMAN,

Plaintiff,

-against-

LINDA L. GITTELSON,

Defendant.

_____X

Index No. 021201/08
Motion Sequence...01
Motion Date... 03/22/10
XXX

Papers Submitted:
Notice of Motion.....x
Affirmation in Opposition.....x
Reply Affirmation.....x

Upon the foregoing papers, the motion by the Defendant, LINDA L. GITTELSON, seeking an Order of this Court awarding her summary judgment dismissing the Plaintiff's complaint on the grounds that the Plaintiff's injuries do not satisfy the "serious injury" threshold requirement of Insurance Law § 5102 (d) is determined as hereinafter provided.

This personal injury action arises out of an accident that occurred on September 21, 2008, at approximately 12:45 p.m at the intersection of Clinton Road and Meadow Street in Garden City, New York. Allegedly, the Plaintiff's vehicle was rear ended by the Defendant's vehicle.

At his oral examination before trial, the Plaintiff testified that he was removed from the accident scene by ambulance and taken to the emergency room at Winthrop University Hospital. He was discharged the same day. The Plaintiff also testified that at the time of his accident, he was retired. The Plaintiff claims that as a result of this accident, he was "confined to his bed and/or home, except for occasional airings and visits to his doctor, intermittently from September 21, 2008 to date and continuing" (Exhibit C attached to the Plaintiff's Notice of Motion [Bill of Particulars] ¶¶8-9).

The Plaintiff alleges that as a result of the subject accident, he sustained, *inter alia*, injuries to his head, including post concussion headache syndrome, cervical radiculopathy, lumbar sacral *(sic)* radiculopathy and bilateral knee trauma (Bill of Particulars, ¶6). The Plaintiff does not identify the specific categories of the serious injury statute into which his injuries fall. Nevertheless, whether he can demonstrate the existence of a compensable serious injury depends upon the quality, quantity and credibility of admissible evidence (*Manrique v. Warshaw Woolen Associates, Inc.*, 297 A.D.2d 519 [1st Dept. 2002]).

Based upon a plain reading of the papers submitted herein, it is obvious that the Plaintiff is not claiming that his injuries fall within the first five categories of "serious injury": to wit, death; dismemberment; significant disfigurement; a fracture; or loss of a fetus. Thus, this Court will restrict its analysis to the remaining four categories of Insurance Law § 5102(d); to wit, permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; 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.

In moving for summary judgment, the defendant must make a prima facie case showing that the plaintiff did not sustain a "serious injury" within the meaning of the statute. Once this is established, the burden shifts to the plaintiff to come forward with evidence to overcome the defendant's submissions by demonstrating a triable issue of fact that a "serious injury" was sustained (*see Pommels v. Perez,* 4 N.Y.3d 566 [2005]; *see also Grossman v. Wright,* 268 A.D.2d 79, 84 [2nd Dept. 2000]).

The defendant is not required to disprove any category of serious injury which has not been properly pled by the plaintiff (*Melino v. Lauster*, 82 N.Y.2d 828 [1993]). Moreover, even pled categories of serious injury may be disproved by means other than the submission of medical evidence by a defendant, including the plaintiff's own testimony and his submitted exhibits (*Michaelides v. Martone*, 186 A.D.2d 544 [2nd Dept. 1992]; *Covington v. Cinnirella*, 146 A.D.2d 565, 566 [2nd Dept. 1989]).

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 physician or the unsworn reports of the plaintiff's examining physician (*see Pagano v. Kingsbury*, 182 A.D.2d 268 [2nd Dept 1992]). However, unlike the movant's proof, unsworn reports of the plaintiff's examining doctor or chiropractor are not sufficient to defeat a motion for summary

judgment (*Grasso v. Angerami*, 79 N.Y.2d 813 [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 (2002), stated that the plaintiff's proof of injury must be supported by objective medical evidence, such as MRI and CT scan tests (*Toure v. Avis Rent A Car Sys.*, supra at 353). However, the MRI and CT scan tests and reports must be paired with the doctor's observations during his physical examination of the plaintiff (*see Toure v. Avis Rent A Car Systems,* supra). In addition, unsworn MRI reports are not competent evidence unless both sides rely on those reports (*see Gonzalez v. Vasquez*, 301 A.D.2d 438 [1st Dept. 2003]).

Even where there is ample objective proof of the plaintiff's injury, the Court of Appeals held in *Pommels v. Perez, supra*, that certain factors may nonetheless override a plaintiff's objective medical proof of limitations and permit dismissal of the plaintiff's complaint. Specifically, in *Pommels v. Perez*, the Court of Appeals held that 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 (*Pommels v. Perez*, supra).

"Permanent loss of use of a body organ, member, function or system"

A person bringing a claim for damages for personal injuries under the no-fault serious injury category of "permanent loss of use of a body organ, member, function or system" must prove that the permanent loss of use is a total loss of use (*Oberly v. Bangs*

Ambulance, Inc., 96 N.Y.2d 295 [2001]).

"Permanent consequential limitation of use of a body organ or member" and "significant limitation of use of a body function or system"

To meet the threshold regarding the significant limitation of use of a body function or system or permanent consequential limitation category, 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 (*Gaddy v. Eyler*, 79 N.Y.2d 955 [1992]; *Licari v. Elliot*, 57 N.Y.2d 230 [1982]; *Scheer v. Koubeck*, 70 N.Y.2d 678 [1987]). A minor, mild or slight limitation shall be deemed "insignificant" within the meaning of the statute (*Licari v. Elliot*, supra; *see also Grossman v. Wright*, 268 A.D.2d 79, 83 [2nd Dept. 2000]).

When a claim is 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, then, in order to prove the extent or degree of the physical limitation, an expert's designation of a numeric percentage of the plaintiff's loss of range of motion is acceptable (*see Toure v. Avis Rent A Car Systems, Inc.*, supra). In addition, an expert's qualitative assessment of a plaintiff's condition is also probative, provided that: (1) the evaluation has an objective basis, and, (2) the evaluation compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system" (*see id*).

90/180 days

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 again provide competent, objective medical proof of the cause of the alleged limitations on the plaintiff's daily activities (*Monk v. Dupuis*, 287 A.D.2d 187, 191 [3rd Dept. 2001]). Furthermore, the plaintiff must demonstrate that he has been "curtailed from performing his usual activities to a great extent rather than some slight curtailment" (*Licari v. Elliott*, supra at 236; *see also Sands v. Stark*, 299 A.D.2d 642 [2nd Dept. 2002]).

Unlike a claim of serious injury under the "significant limitation of use of a body function or system" category, a gap or cessation in treatment is irrelevant as to whether the plaintiff satisfied the 90/180 definition of serious injury (*Gomes v. Ford Motor Credit Co.*, 10 Misc. 3d 900, 904 [Sup. Ct. Bronx 2005]).

In support of her motion, the Defendant submits, *inter alia*, the affirmed report of Dr. Anthony Spataro, M.D., Diplomate, American Board of Orthopedic Surgery, who performed an independent orthopedic examination of the Plaintiff on May 27, 2009.

It is noted at the outset that the Defendant's counsel does not provide an affirmation or affirmed medical report of Dr. Spataro with his original signature; that is, his affirmed medical report contains either a computerized version or a photocopy of his signature. Nevertheless, in the absence of a statute (including the Insurance Law) prescribing otherwise, pursuant to CPLR § 2101(e), attorneys are permitted to file copies of affidavits with the Court. Therefore in keeping with the "quite liberal" approach of CPLR § 2101(e), this Court will

overlook its preference that an original affidavit or affirmation bearing an original signature be filed and will also overlook the Defendant's counsel's refusal to provide the Court with the medical report bearing Dr. Spataro's original signature (CPLR § 2101[e]; *Palumbo v. Ho*, 2002 WL 1461905 [Civ. Ct. New York 2002]; *cf. Campbell v. Johnson*, 264 A.D.2d 461 [2nd Dept. 1999]). Having deemed the photocopied affirmed medical report of Dr. Spataro proper, this Court examines the merits of the Defendant's motion for summary judgment.

Dr. Spataro's orthopedic evaluation conducted on May 27, 2009, eight months following the Plaintiff's accident, concludes, in pertinent part, as follows:

> EXAMINATION:
> * * *
> All range of motion measurements are made with a hand-held goniometer.
>
> CERVICAL SPINE-RANGE OF MOTION
>
	Observed	Normal
Flexion	45 degrees	45 degrees
Extension	45 degrees	45 degrees
Lateral Flexion (R)	45 degrees	30-45 degrees
Lateral Flexion (L)	45 degrees	30-45 degrees
Rotation (R)	60 degrees	60 degrees
Rotation (L)	60 degrees	60 degrees

> LUMBAR SPINE - RANGE OF MOTION
>
	Observed	Normal
Flexion	90 degrees	90 degrees
Extension	30 degrees	30 degrees
Lateral Flexion (R)	30 degrees	30 degrees
Lateral Flexion (L)	30 degrees	30 degrees
Rotation (R)	30 degrees	30 degrees
Rotation (L)	30 degrees	30 degrees

> KNEES - RANGE OF MOTION
>
	Observed	Normal
Right Knee	Zero-135 degrees	Zero-135 degrees
Left Knee	Zero-135 degrees	Zero-135 degrees

He has extensive burn scars of the right upper extremity. He said he has these from childhood.

DIAGNOSIS:
Status - post sprain cervical spine.
Status - post sprain lumbar spine.
Osteoarthritis left knee and right knee.

It should be noted the orthopedist when he first saw the claimant on 10/3/08 indicated the claimant had hurt his neck, back, buttocks, knees, elbows, hands, fingers and toes.

There is no need for further orthopedic treatment including physical therapy.

The claimant is not disabled. He is able to do his normal activities without restrictions. The injuries have resolved. The claimant does have osteoarthritis of the neck, back and knees due to his age and not the accident of 9/21/08. ***

Based on the foregoing, and based on the Defendant's remaining proof, including the Plaintiff's deposition testimony, this Court finds that the Defendant has submitted ample proof in admissible form that the Plaintiff did not sustain a serious injury within the meaning of the statute as a result of the subject accident.

In opposition to the Defendant's motion, the Plaintiff submits, *inter alia*, the sworn affidavit of the Plaintiff's treating Chiropractor, Howard Rosner, D.C., with incorporated records; the sworn affidavit of Dr. Mitchell Goldstein, M.D., a physician specializing in Orthopedic Surgery and associated with Orthopedic Surgery & Sports Medicine PC; the sworn affirmation of Linda Harkavy, M.D., a radiologist associated with Orlin & Cohen Orthopedic Associates LLP, together with unsworn MRI reports of the Plaintiff's lumbar and cervical spines; and the sworn affirmation of Dr. James M. Liguori, an osteopathic physician and a board certified neurologist, with incorporated records.

Initially, it is noted that the Plaintiff's reliance upon the "permanent loss of use"

category of serious injury law is herewith rejected as his claims for various back and neck injuries are not supported by any evidence of the requisite "total loss of use" of a body organ, member, function or system (*Oberly v. Bangs Ambulance, Inc.*, supra).

Further, it is noted that the sworn affidavits of Dr. Goldstein and Dr. Liguori are without any probative value as there is no indication whatsoever that they ever actually physically examined the Plaintiff in connection with this accident (*Toure v. Avis Rent A Car Systems*, supra; *Pommels v. Perez*, supra). In fact, Dr. Goldstein fails even to annex his own records to his sworn affidavit. Further, the records he relies upon in reaching his conclusion that "[i]f this history is correct, I can state with a reasonable degree of medical certainty that the injury to Mr. Kellman's lumbar spine and cervical spine are causally related to Mr. Kellman's motor vehicle accident of September 21, 2008, and are permanent" are unsworn and unaffirmed. Obviously, such proof is fatal to the Plaintiff's opposition (*Pommels v. Perez*, supra; *Pagano v. Kingsbury*, supra). Insofar as Dr. Liguori annexes "his" records relating to the treatment of the Plaintiff, such records also fail to raise a triable issue of fact. Dr. Liguori's medical records, being neither sworn nor affirmed are clearly presented in inadmissible form and are devoid of any probative value when relied upon by the Plaintiff in an attempt to defeat summary judgment (*Grasso v. Angerami*, supra; *see also Pagano v. Kingsbury*, 182 A.D.2d 268 [2nd Dept. 1992]). The Defendant's examining physician never relied upon Dr. Liguori's (or Dr. Goldstein's) records and accordingly, this Court cannot consider these records.

Similarly, the Plaintiff's reliance upon Dr. Harkavy's sworn affirmation also falls short of raising a triable issue of fact. Dr. Harkavy's findings rely upon the unsworn MRI

films which she presumably read. Again, in the absence of the Defendant having relied upon the uncertified and unsworn MRI reports by Dr. Harkavy, such evidence cannot be considered by this Court (*Toure v. Avis Rent A Cary Systems*, supra; *see also Flores v. Stankiewicz*, 35 A.D.3d 804 [2nd Dept. 2006]). Moreover, Dr. Harkavy never causally relates any of the MRI findings to the subject accident (*Munoz v. Koyfman*, 44 A.D.3d 914 [2nd Dept. 2007]; *Collins v. Stone*, 8 A.D.3d 321 [2nd Dept. 2004]).

Finally, it is noted that while Howard Rosner, D.C.'s affidavit is admissible under the guidelines of the CPLR (CPLR § 2106; *see also Pichardo v. Blum*, 267 A.D.2d 441 [2nd Dept. 1999]), and while his affidavit sets forth range of motion findings with respect to the Plaintiff's cervical and lumbar spine, and notes limitations in his spine based on an objective examination of the Plaintiff on August 28, 2009, more than eleven months after the date of the accident, the Plaintiff fails to proffer any competent medical evidence showing *initial* range of motion limitations in his spine that were contemporaneous with the subject accident (*Li v. Yun*, 27 A.D.3d 624 [2nd Dept. 2006]; *Bell v. Rameau*, 29 A.D.3d 839 [2nd Dept. 2006]).

Further, Dr. Rosner annexes to his sworn affidavit a copy of his records which he claims are "true and accurate." Said records include the unsworn MRI reports signed by Dr. Linda Harkavy M.D., from Orlin & Cohen Orthopedic Associates, LLP dated November 5, 2008 of the Plaintiff's cervical and lumbar spines, and the unsworn report of Dr. James Liguori, DO, dated October 2, 2008. Insofar as he relies upon the unsworn/unaffirmed medical reports and MRI reports, Dr. Rosner's affidavit does not have any probative value, *supra*.

Finally, in opposing this summary judgment motion, the Plaintiff relies solely upon the affirmation of his attorney, and the otherwise inadmissible medical evidence noted above. This does not supply the evidentiary showing necessary to successfully resist the Defendant's motion (CPLR § 3212[b]; *Rotuba Extruders v Ceppos*, 46 N.Y.2d 223, 229 [1978]).

The Plaintiff testified at his deposition that he was retired at the time of his accident. In light of the fact that he has also failed to establish a prima facie case that he has sustained a medically determined injury or impairment of a nonpermanent nature which prevented him from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury (*Letellier v. Walker*, 222 A.D.2d 658 [2nd Dept. 1995]), his subjective evidence or complaints of limitations unsupported by credible medical evidence or documentation is not enough to establish the threshold issue of serious injury.

Therefore, the Defendant's motion for summary judgment dismissing the Plaintiff's complaint is **GRANTED**.

This shall constitute the decision and order of this Court.

DATED: Mineola, New York
March 22, 2010

Hon. Randy Sue Marber, J.S.C.
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