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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

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

PABLO SALCEDO,

Plaintiff,

- against -

MAGGIE FARAG and MOFIDA FARAG,

Defendants.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 15885/08
Motion Seq. No.: 03
Motion Date: 1/10/09

The following papers have been read on this motion:

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

Defendants, Maggie Farag and Mofida Farag, 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 on the ground that plaintiff did not sustain a "serious injury" in the subject accident as defined by New York State Insurance Law § 5102(d). Plaintiff opposes defendants' motion.

The action arises from a motor vehicle accident involving a collision between a motor vehicle owned and operated by plaintiff, Pablo Salcedo, and a motor vehicle owned by defendant Mofida Farag and operated by defendant Maggie Farag. The accident occurred at approximately 7:21 p.m. on November 21, 2007, at the intersection of North Franklin Street and Atlantic Avenue, Hempstead, County of Nassau, State of New York. On or about August 21, 2008, plaintiff commenced this action by service of a Summons and Verified Complaint. Issue was joined on September 30, 2008.

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 defendants' 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).

Plaintiff claims that as a consequence of the above described automobile accident with defendants, he has sustained serious injuries as defined in § 5102(d) of the New York State Insurance Law and which fall within the following statutory categories of injuries:

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

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

3) 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).

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 Tcure 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 their motion, the defendants submit the pleadings, the plaintiff's Verified Bill of Particulars, the affirmed report of Maria Audrie DeJesus, M.D., who performed an independent neurologic examination of plaintiff on July 23, 2009, the affirmed report of Michael J. Katz, M.D., who performed an independent orthopedic medical examination of plaintiff on July 24, 2009, plaintiff's date of accident emergency room reports from Winthrop University Hospital and the transcript of plaintiff's examination before trial testimony.

Based upon this evidence, the Court finds that the defendants have established a *prima facie* case that the plaintiff did not sustain serious injury within the meaning of Insurance Law § 5102(d). Dr. Katz examined the plaintiff, performed quantified and comparative range of motion tests on plaintiff's cervical and lumbar spine, left shoulder, right knee and leg and right foot and ankle using a goniometer. Dr. Katz diagnosed plaintiff with resolved cervical strain with radiculitis, resolved thoracolumbosacral strain, resolved left shoulder contusion, resolved right ankle contusion, a right leg contusion and a pre-existing history of fracture of the right ankle going back to 1985 and unrelated to the events of November 21, 2007. Dr. Katz concluded that plaintiff "shows no signs or symptoms of permanence relative to the musculosketal system and relative to 11/21/07. ...With regard to causal relationship, the mechanism of injury described is a competent causative mechanism for production of the soft tissue injuries that has resolved through the passage of time. It is significant that the MRI report of the cervical spine indicates preexisting degenerative changes, which may affect his recovery."

With respect to plaintiff's 90/180 claim, defendants rely of the deposition of the plaintiff which indicates there was virtually no diminution in the plaintiff's ability to work.

The burden now shifts to the plaintiff 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 his burden, plaintiff submits an affirmation of Paul Lerner, M.D., Assistant Clinical Professor of Neurology at the Albert Einstein College of Medicine of Yeshiva University who conducted a comprehensive neurological examination of plaintiff on January 6, 2010, an affirmation of Tonuca Basu, M.D., who treated plaintiff on November 27, 2007 and the affirmation of Eliot

Strauss, D.C., a chiropractor who has been treating plaintiff from November 26, 2007 to the present. All of the aforementioned affirmations and the medical reports accompanying same indicate that plaintiff had indeed incurred a serious injury.

The Court concludes that the affirmations provided by plaintiff clearly raise a genuine issue of fact as to injuries causally related to the November 21, 2007 accident. Consequently, defendants' motion for summary judgment is hereby denied.

This constitutes the decision and order of this Court.

ENTER:

DENISE L. SHER
A.J.S.C.

Dated: Mineola, New York
April 6, 2010