SCAN

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

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

JILLIAN ALEXANDER,

Plaintiff,

- against -

MORIELA MEDINA,

Defendant.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 9517/08
Motion Seq. No.: 02
Motion Date: 03/03/10

The following papers have been read on this motion:

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

Defendant moves, pursuant to CPLR § 3212, for an order granting summary judgment due to plaintiff's failure to meet the threshold limits set by New York State Insurance Law §§ 5102 and 5104. Plaintiff opposes defendant's motion.

The action arises from a motor vehicle accident involving a collision between a motor vehicle operated by plaintiff and a motor vehicle owned and operated by defendant. The accident occurred at approximately 4:00 p.m. on August 21, 2007, on West Merrick Road at its intersection with Rockaway Avenue, Valley Stream, New York. On or about May 21, 2008, plaintiff commenced this action by service of a Summons and Verified Complaint. Issue was joined on June 19, 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 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).

Plaintiff claims that as a consequence of the above described automobile accident with defendant, she 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 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 defendant's motion. In support of her motion, the defendant submits the pleadings, plaintiff's Verified Bill of Particulars, plaintiff's hospital records from treatment at the Franklin Hospital Medical Center Emergency Room , the report of plaintiff's treating physician, Dr. David Kim, the report of Dr. Robert Solomon of Island South Physical Medicine & Rehabilitation concerning the x-rays of plaintiff's cervical spine and lumbar spine, the affirmed report of Vartkes Khachadurian, M.D., who performed an independent orthopedic medical examination of plaintiff on November 19, 2009, the affirmed report of David A. Fisher, M.D., who reviewed plaintiff's cervical spine and lumbar spine MRIs and the transcript of plaintiff's examination before trial testimony.

Dr. Vartkes Khachadurian, a board certified orthopaedic surgeon, reviewed plaintiff's medical records and conducted a physical examination of plaintiff on November 19, 2009. *See* Defendant's Affirmation in Support Exhibit I. Based on his clinical findings and medical records review, Dr. Khachadurian's diagnosis of plaintiff was "[l]umbar sprain with no clinical evidence of neuromotor deficits, no clinical evidence of herniated discs, radiculitis or radicupathy. Resolved. Cervical sprain with no clinical evidence of neuromotor deficits, no clinical evidence of herniated discs, radiculitis or radicupathy. Resolved. Right Shoulder contusion with no clinical evidence of internal derangement. Resolved." Dr. Khachadurian used the following instruments during his examination: "[p]ercussion hammer, sensory pins, measuring tapes and visual." Dr. Khachadurian concluded "[i]t is my orthopedic opinion that the claimant has no evidence of orthopedic disability related to the accident of 8/21/07. The claimant's ranges of motion measurements were performed by active movement under the control of the claimant and passive movements by the examiner were not performed. The normal range of motion are within the normal limits, certified The New York State office of

temporary and disability assistance under AMA guidelines."

Dr. David A. Fisher conducted an independent film review of plaintiff's cervical spine MRI which was originally performed on October 3, 2007 at All County Open MRI. *See* Defendant's Affirmation in Support Exhibit J. As to the cervical spine, Dr. Fisher found "[t]he cervical vertebral bodies are normal in height and alignment. Disc spaces are well preserved. There is no evidence of disc herniation or annular disc bulge. The craniocervical junction and cervical cord are normal in appearance and there is no evidence of spinal stenosis or fracture." Dr. Fisher stated, "...I have reviewed an MRI of the cervical spine which was performed six weeks following the date of the accident. This is a normal study. There are no disc herniations or bulges present. There is no radiographic evidence of traumatic or causally-related injury to the cervical spine."

Dr. David A. Fisher conducted an independent film review of plaintiff's lumbar spine MRI which was originally performed on October 3, 2007 at All County Open MRI. *See* Defendant's Affirmation in Support Exhibit K. As to the lumbar spine, Dr. Fisher found "[t]he lumbar vertebral bodies are normal in height and alignment. There are degenerative changes at the L4/5 level. This is manifested by disc degeneration and disc space narrowing. There is an accompanying mild annular bulge that effaces the thecal sac. No herniations are seen. The remaining discs appear intact. The conus medullaris is normal in appearance. There is no evidence of spinal stenosis or fracture." Dr. Fisher stated "...I have reviewed an MRI of the cervical spine which was performed six weeks following the date of the accident. This is a normal study. There are no disc herniations or bulges present. There is no radiographic evidence of traumatic or causally-related injury to the cervical spine."

With respect to plaintiff's 90/180 claim, defendant relies on the deposition of the

plaintiff which indicates that, at the time of the accident, she was working as a cashier at Magic Bagels and that she missed approximately two weeks of work. Plaintiff also testified that, in October 2007, she began working one day a week at Vincent's Clam Bar in Carle Place, New York. Plaintiff further testified that she was enrolled as a full time student at Nassau Community College from September 2006 through May 2008 and that she missed one week of classes after the accident and several classes in the following months.

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).

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 her burden, plaintiff submits the affirmed reports of Joseph Gregorace, D.O., who began treating plaintiff in September 2007 (approximately two weeks after the alleged car accident), the affirmed report of Nizarali Visram, MD, FAAPMR, who conducted a pain consultation for plaintiff on November 5, 2007, an affirmation of Richard J. Rizzuti, M.D., who performed an MRI of plaintiff's cervical spine on October 3, 2007 and affidavit from plaintiff. All of the aforementioned affirmations and the medical reports accompanying same indicate that plaintiff had indeed incurred a serious injury.

Plaintiff came under the care of Dr. Joseph Gregorace, a board certified physician, for neck and lower back injuries as a result of the August 21, 2007 motor vehicle accident. Dr. Gregorace began treating plaintiff on September 5, 2007 and continued to do so until March

2008, when plaintiff's no-fault insurance denied her further treatment. Dr. Gregorace also examined plaintiff on February 12, 2010. *See* Plaintiff's Affirmation in Opposition Exhibit B. When Dr. Gregorace first examined plaintiff on September 5, 2007, he concluded '[t]here is tenderness throughout the cervical and lumbar spine with mid to low cervical spine and lumbar spine spasms. She exhibits painful and restricted active range of motion of both the neck and back in all planes of motion...If history is correct then there is a causal relationship between the above complaints and the motor vehicle accident from August 21, 2007." On September 26, 2007, Dr. Gregorace again examined plaintiff and concluded, "[t]here is tenderness throughout the cervical and lumbar spine with mid to low cervical and mid to low lumbar spasms. She exhibits painful and restricted active range of motion of the neck and back in all planes of motion." Dr. Gregorace's diagnosis was "[c]ervical strain/sprain, r/o intervertebral disc pathology. Right cervical radiculitis. Lumbar strain/sprain, r/o intervertebral disc pathology. Right lumbar radiculitis." On October 24, 2007, Dr. Gregorace examined plaintiff and concluded "[c]ervical strain/sprain. Lumbar strain/sprain. Bulging disc at C5/6. HNP L4/5, L5/S1." Dr. Gregorace's February 12, 2010 examination of plaintiff resulted in his diagnosis of [c]ervical strain/sprain. Bulging disc at C5/6. Right C6 radiculopathy. Lumbar spine strain/sprain. HNP L4/5, L5/S1. Right L4, 5 radiculopathies." Dr. Gregorace further states that "[the patient continues to have axial cervical spine pain as a result of the spinal strain/sprain and bulging disc, thus she is recommended to consider further interventional pain treatment options in the form of paravertebral steroid injections followed by a series of trigger point injections. In regard to her lumbar spine injury as she sustained significant lumbosacral spine discal pathology with persistent right lumbar radiculopathies, a series of three epidural lumbar spine steroid injections has been recommended to be performed by a Board Certified

anesthesiologist/physiatrist....Prognosis for full and complete recovery is poor as she continues to be symptomatic with correlative objective clinical findings almost two years post injury. If she were to proceed with epidural lumbar spine steroid injections and continue to have radicular pain, then she would be a surgical candidate for disketomy/laminectomy."

Dr. Nizarali Visram examined plaintiff on November 5, 2007. *See* Plaintiff's Affirmation in Opposition Exhibit C. His assessment of plaintiff was "[p]ost-traumatic cervical spine disc bulge at C5/6, with radicular symptoms. Post-traumatic lumbosacral spine disc herniation at L4/5 and L5/S1 with radicular symptoms. Post-traumatic cervical radiculopathy, as per electrodiagnostic studies. Post-traumatic lumbar radiculopathy, as per electrodiagnostic studies."

Dr. Richard J. Rizzuti conducted an MRI of plaintiff's cervical spine on October 3, 2007. *See* Plaintiff's Affirmation in Opposition Exhibit D. Dr. Rizzuti stated that "the MRI revealed the following impressions: Posterior disc bulge at C5-6 impinging on the anterior aspect of the spinal canal."

Plaintiff, in her affidavit, stated that "[a]t the time of the accident I was employed full-time as a cashier at Magic Bagels where I had been working since September 2006. I was unable to return to work in any capacity for two weeks following the accident. When I returned to work I was unable to carry the baskets of bagels I had previously been required to lift and couldn't stand for the long hours required by the job. My employer was kind enough to keep me part-time, about 18 hours per week, and relieve me of my obligation to carry anything heavy and to let me take breaks, sit and stretch as needed throughout my shift so that I could keep working. Even with the allowances for my condition made by my employer, I was physically unable to perform the work there and had to resign in August 2008. In addition to being unable to work

full-time and being unable to carry anything heavy I was also largely unable to take care of my household chores and needed help with such things as doing the laundry and getting groceries. I was twenty years old when this accident happened and never had any problems with my neck or back before this accident." *See* Plaintiff's Affirmation in Opposition Exhibit A.

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

All parties shall appear for trial in Nassau County Supreme Court, DCM Trial Part on June 17, 2010 at 9:30 a.m.

This constitutes the decision and order of this Court.

ENTER:

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

Dated: Mineola, New York
June 8, 2010

ENTERED
JUN 11 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE