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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

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

BENNIE RHAMES and PHYLLIS RHAMES,

Plaintiffs,

- against -

YONARFRIIL MORAN,

Defendants.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 9322/09
Motion Seq. No.: 01
Motion Date: 07/20/10

The following papers have been read on this motion:

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

Defendant moves, pursuant to CPLR § 3212 and Article 51 of the Insurance Law of the State of New York, for an order granting summary judgment to defendant 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). Plaintiffs opposes defendant's motion.

The action arises from a motor vehicle accident involving a collision between a motor vehicle owned and operated by plaintiff Bennie Rhames ("BR") and a motor vehicle owned and operated by defendant. The accident occurred at approximately 2:30 p.m. on January 22, 2008, at or near the intersection of Baldwin Road and Downs Road, Hempstead, County of Nassau, State of New York. On or about April 21, 2009, plaintiffs commenced this action by service of a Summons and Complaint. Issue was joined on June 18, 2009.

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 defendants 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 BR claims that as a consequence of the above described automobile accident with defendant, he has sustained serious injuries as defined in New York State Insurance Law §

5102(d) and which fall within the following statutory categories of injuries:

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

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

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

4) 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).

For a permanent loss of a body organ, member, function or system to qualify as a "serious injury" within the meaning of No-Fault Law, the loss must be total. *See Oberly v. Bangs Ambulance, Inc.*, 96 N.Y.2d 295, 727 N.Y.S.2d 378 (2001); *Amata v. Fast Repair Incorporated*, 42 A.D.3d 477, 840 N.Y.S.2d 394 (2d Dept. 2007). 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 his motion, defendant submits the preliminary conference order and e-law printout, the pleadings, the plaintiffs' Verified Bill of Particulars, the affirmed report of Maria Audrie DeJesus, M.D, who performed an independent neurological medical examination of plaintiff on February 18, 2010, the affirmed report of Frank D. Oliveto, M.D, D-OS, who performed an independent orthopedic medical examination of plaintiff on February 16, 2010, the report of Audrey Eisenstadt, M.D., DABR who reviewed plaintiff's right shoulder and lumbar spine MRIs on June 6, 2010 and the transcript of plaintiff BR's examination before trial testimony.

When moving for dismissal of a personal injury complaint, the movant bears a specific burden of establishing that the plaintiff did not sustain a serious injury. *See Gaddy v. Eyler*, 79 N.Y.2d 955, 582 N.Y.S.2d 990 (1992). Within the scope of the movants' burden, a defendants' medical expert must specify the objective tests upon which the stated medical opinions are based, and when rendering an opinion with respect to the plaintiff's range of motion, must compare any findings to those ranges of motion considered normal for the particular body part. *See Gastaldi v. Chen*, 56 A.D.3d 420, 866 N.Y.S.2d 750 (2d Dept. 2008); *Malave v. Basikov*, 45 A.D.3d 539, 845 N.Y.S.2d 415 (2d Dept. 2007); *Nociforo v. Penna*, 42 A.D.3d 514, 840 N.Y.S.2d 396 (2d Dept. 2007); *Meiheng Qu v. Doshna*, 12 A.D.3d 578, 785 N.Y.S.2d 112 (2d Dept. 2004); *Browdame v. Candura*, 25 A.D.3d 747, 807 N.Y.S.2d 658 (2d Dept. 2006); *Mondi*

v. Keahan, 32 A.D.3d 506, 820 N.Y.S.2d 625 (2d Dept. 2006).

Applying the aforesaid criteria to the medical report submitted herein, the Court finds that the defendant has failed to establish his entitlement to summary judgment as a matter of law. *See Gaddy v. Eyler, supra.* In his medical report, Dr. Oliveto did not set forth the objective tests upon which he predicated his findings and conclusions and accordingly his report is insufficient to sustain the defendant's *prima facie* case. *See Valdes v. Timberger,* 41 A.D.3d 836, 837 N.Y.S.2d 579 (2d Dept. 2007); *Chiara v. Dernago,* 70 A.D.3d 746, 894 N.Y.S.2d 129 (2d Dept. 2010); *Mannix v. Lisi's Towing Service, Inc.,* 67 A.D.3d 977, 888 N.Y.S.2d 773 (2d Dept. 2009); *Smith v. Quicci,* 62 A.D.3d 858, 880 N.Y.S.2d 652 (2d Dept. 2009). Additionally, Dr. DeJesus' report indicated normal range of motions but does not indicate what her findings were nor does she compare them to what is considered normal range of motion.

Inasmuch as the defendant has failed to establish his *prima facie* entitlement to summary judgment, it is not necessary for this Court to consider the sufficiency of the plaintiffs' evidence offered in opposition. *See Smith v. Quicci, supra; Giammalva v. Winters,* 59 A.D.3d 595, 873 N.Y.S.2d 227 (2d Dept. 2009); *Coscia v. 938 Trading Corp.,* 283 A.D.2d 538, 725 N.Y.S.2d 349 (2d Dept. 2001).

All parties shall appear for trial in Nassau County Supreme Court, DCM Trial Part on November 4, 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
October 22, 2010