SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

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

MYNOR R. DELEON-VELASQUEZ,

Plaintiff,

- against -

NELSON J. DOVALE,

Defendant.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 2297/09
Motion Seq. No.: 01
Motion Date: 11/08/10
XXX

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**
Affirmation in Sur-Reply and Exhibit	**4**

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

The action arises from a motor vehicle accident involving a collision between a motor vehicle owned and operated by plaintiff and a motor vehicle owned and operated by defendant. The accident occurred at approximately 2:30 p.m. on November 29, 2007, at or near the intersection of Elwood Road and Cuba Hill Road, Huntington, County of Suffolk, State of New York. Plaintiff contends that, when stopped at a red light, his automobile was rear-ended by defendant's automobile. As a result of the accident, plaintiff claims that he sustained the

following injuries:

Posterior disc herniation at C4-C5;

Posterior disc herniation at C5-C6;

Posterior disc herniation at C6-C7;

Impingement on the anterior aspect of the spinal canal at C4-C5;

Abutting the anterior aspect of the spinal canal at C5-C6 and C6-C7;

Central subligamentous posterior disc herniation at L5-S1 impinging on the anterior aspect of the spinal canal;

Left carpal tunnel syndrom;

Cervical sprain/strain;

Lumbosacral sprain/strain.

Plaintiff also indicates that on February 11, 2008, he underwent a surgical procedure that, using aseptic technique, trigger points were injected in the left lumbar paraspinal area. A total of two cc's of 1% Lidocaine was injected into four different areas of the paraspinal muscles. On March 17, 2008, plaintiff underwent a surgical procedure that, using aseptic technique, trigger points were injected in the bilateral lumbar paraspinal area. A total of three cc's of 1% Lidocaine was injected into four different areas of the paraspinal muscles.

On or about February 10, 2009, plaintiff commenced this action by service of a Summons and Verified Complaint. Issue was joined on March 24, 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 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 defendant's motion. In support of his motion, defendant submits the pleadings, plaintiff's Verified Bill of Particulars, the affirmed report of Chandra M. Sharma, M.D., who performed an independent neurological medical examination of plaintiff on July 9, 2010, the affirmed report of S. Farkas, M.D., who performed an independent orthopedic medical examination of plaintiff on July 14, 2010, the affirmed report of Jacques Romano, M.D., who reviewed plaintiff's cervical spine and lumbar spine MRIs which were performed on February 1, 2008 and excerpts from the transcript of plaintiff's examination before trial ("EBT") 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 defendant's 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).

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 New York State Insurance Law § 5102(d). Dr. Chandra M. Sharma, a board certified neurologist, reviewed plaintiff's medical records and conducted a physical examination of the Plaintiff on July 9, 2010. *See* Defendant's Affirmation in Support Exhibit E. Dr. Sharma examined the plaintiff and performed quantified and comparative range of motion tests on plaintiff's cervical spine and lumbosacral spine. The results of the tests indicated no deviations from normal. Dr. Sharma also found that, in the supine posture, plaintiff's "leg elevation is 80 degrees on both sides....The movements of the neck are normal in all directions without pain. The movements of the

shoulders are normal without pain." Dr. Sharma's diagnosis was "[c]ervical and lumbar sprain/strain resolved. Normal neurological examination. There is no neurological disability. There are no neurological limitations to continuation of usual work and activities of daily living. There are no neurological manifestations of disc bulges or disc herniations." Dr. S. Farkas, a board certified orthopedic surgeon, reviewed plaintiff's medical records and conducted an independent orthopedic examination of plaintiff on July 14, 2010. *See* Defendant's Affirmation in Support Exhibit F. Said examination included an evaluation of the plaintiff's lumbar spine and cervical spine. Dr. Farkas's examination of the lumbar spine "[r]evealed no spasms or crepitus to palpitation during static positioning or active range of motion. The claimant can forward flex to approximately 5 degrees (90 degrees or more of forward flexion normal). Lateral bending was 5 degrees (30 degrees lateral bending normal). Rotation to the right and left is to 10 degrees (45 degrees of rotation to the right and left normal). The claimant complaints of pain to each and every area palpated. The claimant can toe and heel walk without difficulty. Deep tendon reflexes were normal at both the Achilles tendon and patellar tendon regions. Motor exam is 5+. Straight leg raising was negative. Babinski's test was negative. Lasegue's test was negative. Valsalva maneuver was equivocal. Cranial compression was positive. He ambulates without a limp." Dr. Farkas's examination of the cervical spine "revealed this individual to present with 10 degrees of rotation right and 5 degrees left (70 to 80 degrees rotation right and left is normal) and 10 degrees of flexion and 5 degrees of extension (30 to 50 degrees of flexion and extension is normal). The claimant follows me about during the examination, rotating the cervical spine at least 60 degrees and flexing at least 30 degrees with no indication of discomfort. The claimant offers no complaint of pain. There was no spasm or crepitus to palpation during the static positioning or active range of motion. Deep tendon reflexes are 2+ and motor examination is 5+. Tinel's sign was negative at the elbow and wrists bilaterally. There is negative Distraction test. Adson's test is negative. All measurements were performed using a goniometer." Based on his clinical findings and medical records review, Dr. Farkas diagnosed plaintiff with a resolved cervical sprain and resolved lumbar sprain and concluded "I find no orthopedic disability based on the physical examination at this time. The claimant may perform his usual duties of his occupation and may carry out the daily activities of living,

without restriction. There is no clinical correlation to any reported positive MRI findings. This individual is grossly exaggerating his symptoms. He robes and disrobes without difficulty. His decreased range of motion of the lumbar spine is total exaggeration proven by the fact that he stands and bends fully forward to remove his shoes with no indication of discomfort. His decreased range of motion of the cervical spine is without any clinical correlation. I believe this individual is fully recovered from any reported injuries and presents with no ongoing pathology."

Dr. Jacques Romano, conducted an independent film review of the MRIs of plaintiff's cervical spine and lumbar spine originally performed on February 1, 2008. *See* Defendant's Affirmation in Support Exhibit G. With respect to his review of the cervical spine MRI, Dr. Romano's findings were "[t]here is straightening of the cervical spine that may be positional in nature. The height and signal of the vertebral bodies are unremarkable. There are discal bulges at the C5/6 and C6/7. There is posterior protrusion at C4/5. There is no discal extrusion. The spinal canal is normal in size. The neural foramina are unremarkable. There is no paraspinal mass. The structures at the base of the brain are unremarkable." His impression was "[t]here are degenerative changes at C5/6 and C6/7. There is no discal extrusion. The findings are not suggestive of the sequelae of acute trauma." With respect to his review of the cervical spine MRI, Dr. Romano's findings were "[t]here is maintenance of the normal lumbosacral lordosis. The height and signal of the vertebral bodies are unremarkable. The spinal canal is normal in size. There is decreased T2 signal of the T11/T12 disc consistent with disc dessication. There are discal bulges at the T11/T12 and L4/5 levels. Incidental note is made of a fatty filum terminale. There is no disc herniation. The neural foramina are normal in appearance. There is no paraspinal mass. The conus is normally positioned at the T11/T12 level." His impression was "[t]here are mild degenerative changes at T11/T12 and L4/5. The findings are not suggestive of the sequelae of acute trauma."

Defendant also notes that said MRIs were performed two months after the subject accident.

With respect to plaintiff's 90/180 claim, defendant relies on the EBT testimony of plaintiff which indicates that plaintiff did not lose any time from work as a result of the

accident.

The burden now shifts to the plaintiff to come forward with evidence to overcome defendant's 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). In opposition to defendant's motion, plaintiff contends that defendant has failed to meet his burden of proof in establishing that plaintiff's injuries do not meet the definition of serious injury as defined in the insurance law.

Plaintiff further states, however, that " [s]hould this Court find that the defendant satisfies his initial burden of proof, it is submitted that the defendant's motion must still be denied since the plaintiff indeed sustained a 'serious injury' as defined by Section 5102(d) of the New York Insurance Law."

Plaintiff argues that he underwent extensive physical therapy and treatment for over two years on a consistent basis following the accident. His physicians treated him with various modalities, including physical therapy, electrical stimulation, ultra sound and trigger point injections. Plaintiff submits that "[o]bjective testing and clinical examinations were performed and revealed herniated discs in the cervical and lumbar spines and restricted ranges of motion all as a result of the subject automobile accident."

To support his burden, plaintiff submits an affirmation of Nunzio Saulle, M.D., a doctor who evaluated plaintiff on October 18, 2010. *See* Plaintiff's Affirmation in Opposition Exhibit A. Dr. Saulle performed a physical examination of plaintiff's neck and back as well as a neurological examination. Said examinations revealed restrictions in the cervical range of motion and the lumbar range of motion. Dr. Saulle's impression was "[c]ervical disc herniations. Lumbar disc herniation." Dr. Saulle's conclusion stated "[i]t is my opinion to a reasonable degree of medical certainty that this patient has sustained significant and permanent injury to the cervical and lumbar spine as a direct result of the motor vehicle accident which occurred 11/29/07. Despite a conservative course of treatment including trigger point injections to the lumbar spine and the passage of almost three years, the patient continues to experience neck and lower back pain with the lower back pain being the most severe. He states that the

back pain is aggravated with prolong sitting and he is not able to drive long distances because of the back pain. He also reports difficulty lifting heavy objects and difficulty being in one position for long periods of time because of his back pain. The patient was advised that his injuries are permanent and he will likely experience flare-ups of pain from time to time, especially with increasing levels of activity. He will also likely go on to develop arthritic changes at the affected joints of the cervical and lumbar spines as he ages which will further add to pain, limited motion and disability. The patient was advised that he might benefit from further trigger point injections or perhaps epidural steroid injections. However, if they are ineffective he may benefit from surgery removing the herniated disc material....The patient has sustained permanent injuries to the cervical and lumbar spine as a direct result of the accident which occurred on 12/29/07 and this has left him with a partial, permanent disability."

Plaintiff also submits the affirmation Dr. Richard J. Rizzuti, a radiologist with All County under whose auspices administered and supervised the administration and examination of the MRIs of plaintiff's cervical spine and lumbar spine performed on February 1, 2008. *See* Plaintiff's Affirmation in Opposition Exhibit B. With respect to the MRI of the cervical spine, "[t]he examination demonstrates posterior disc herniations at C4-5, C5-6 and at the C6-7 which impinges on the anterior aspect of the spinal canal at C4-5 and abutting the anterior aspect of the spinal cord at C5-6 and at C6-7. The remaining discs are unremarkable. No intrinsic spinal cord abnormality is demonstrated. There is no abnormality of alignment. No acute bony abnormality is demonstrated. There is no evidence of spinal stenosis." Dr. Rizzuti's impression was "[i]t is my opinion to a reasonable degree of medical certainty that the patient cervical MRI impression is that of: posterior disc herniations at C4-5, C5-6 and at C6-7 impinging on the anterior aspect of the spinal canal at C4-5 and abutting the anterior aspect of the spinal cord at C5-6 and at C6-7." With respect to the MRI of the lumbosacral spine, "[t]he examination demonstrates a central subligamentous posterior disc herniation at L5-S1 impinging on the anterior aspect of the spinal canal. The remaining discs are unremarkable. Increased signal is present in the filum terminale consistent with fatty changes. There is no abnormality of alignment. No acute bony abnormality is demonstrated. There is no evidence of spinal stenosis." Dr. Rizzuti's impression was "[i]t is my opinion to a reasonable degree of medical certainty that the patient lumbar MRI impression

is that of: central subligamentous posterior disc herniation at L5-S1 impinging on the anterior aspect of the spinal cant. Fatty changes in the Filum terminale."

In support of his 90/180 argument, plaintiff submits his own affidavit in which he states "[f]or two years following the accident I was unable to play with my kids and I still cannot pick them up. I cannot play soccer or wrestle with my kids. If I make a wrong move, my back pops out and my neck freezes. It is very painful. I am still unable to go to movies as I cannot sit or stand for a long time. I always fidget. I was also unable to do my yard and lawn work to my house (which was my fond interest) for about two years....I cannot lift heavy things like twenty pounds or more or I throw out my back."

In his Affirmation in Reply, defendant argues that "[i]t is notable that in his opposition papers, the only medical evidence that Plaintiff has submitted and relied upon are the October 18, 2010 affirmed report of Nunzio Saulle, M.D., regarding his examination of Plaintiff on October 18, 2010..., and the 'Physician's Affirmation' of Richard J. Rizzuti, M.D., dated November 10, 2010, regarding the February 1, 2008 cervical and lumbar MRI reports.... Plaintiff has not submitted or even referred to any records or reports from any previous visits with Dr. Saulle, or any other health care provider. Nor has he submitted any records from his physical therapist. Thus, Plaintiff has failed to submit *any* medical records or reports that are or were *contemporaneous* with the subject accident, which took place almost three years prior ro Dr. Saulle's October 18, 2010 examination. The unexplained failure to submit any contemporaneous medical records that indicate that Plaintiff sustained permanent or significant injuries as a result of the accident of November 27, 2007 is fatal to Plaintiff's claim.....Moreover, Dr. Rizzuti's Affirmation offers no opinion or conclusion whatsoever regarding the critical issue raised by Dr. Romano as to the pre-existing and degenerative–and non-casually-related nature of Plaintiff's alleged cervical and lumbar spine injuries. The mere assertion by Plaintiff's radiologist, Dr. Rizzuti, that MRI films depicted bulging or herniated discs, without more, is not sufficient to raise a triable issue of fact."

Plaintiff submitted a Sur-Reply consisting of the affirmed medical reports and records of plaintiff by his treating doctor from the time of the accident through the present. Plaintiff states that he submitted the sur-reply "[b]ecause it was noted that Plaintiff's BP/DI was annexed to

Defendant's motion was annexed without its enclosures of the medical reports of Plaintiff's treating doctor."

In a letter to the Court dated December 8, 2010 and with a copy sent to plaintiff's counsel, defendant objects to the service of plaintiff's Sur-Reply and requests that it not be considered by the Court. Defendant argues that "the service of the Sur-Reply Affirmation, by regular mail, the day before the return date of the motion, and, thus, of course calculated to be and actually received after the submission of the motion, was untimely (CPLR 2214(b)). Secondly, the very service of a Sur-Reply Affirmation is improper and unauthorized under the CPLR." Defendant adds that "[i]n addition, just as the law is clear that a moving defendant should not be allowed to cure any defects or deficiencies in his motion papers by the submission of new evidence or argument submitted for the first time in reply papers, and any such belatedly submitted evidence should not be disregarded by the Court...so, too, a plaintiff in opposition to the motion, should not be allowed to cure deficiencies in his opposition papers in a sur-reply." Defendant further argues that "it should be noted that Plaintiff's purported excuse for failing to furnish the contemporaneous medical records to the Court in his opposition papers is clearly deficient. Counsel asserts that the medical reports of Plaintiff's treating doctor are being submitted in sur-reply '[b]ecause it was noted that Plaintiff BP/DI annexed to Defendant's motion was annexed without its enclosures of the medical reports of Plaintiff's treating doctor." no indication is given as to when counsel noted this fact, and no explanation is offered as to why this was not noticed prior to the preparation and submission of Plaintiff's opposition papers, in which counsel clearly made the decision to rely solely upon Dr. Saulle's October 18, 2010 report and not any of his prior records or reports. Moreover, and in any event, the fact of the matter is that Plaintiff's Bill of Particulars and Response to Notice for Discovery and Inspection dated June 29, 2009 (served under a single legal back) did not have copies of any medical records annexed thereto."

The Court will not consider plaintiff's Sur-Reply insofar as such is not provided for in the CPLR and the Court did not give plaintiff permission to submit same.

Consequently, as plaintiff failed to submit in his affirmation in opposition any medical reports or records that are or were contemporaneous with the subject accident, the Court finds

plaintiff has failed to come forward with evidence to overcome defendant's submissions by demonstrating the existence of a triable issue of fact that serious injury was sustained. *See Srebnick v. Quinn,* 73 A.D.3d 637, 904 N.Y.S.2d 675 (2d Dept. 2010); *Posa v. Guerro*, 77 A.D.3d 898, 911 N.Y.S.2d 82 (2d Dept. 2010); *Torchon v. Oyezole*, 78 A.D.3d 929, 910 N.Y.S.2d 662 (2d Dept. 2010); *Pierson v. Edwards*, 77 A.D.2d 642, 909 N.Y.S.2d 726 (2d Dept. 2010).

Therefore, based upon the foregoing, defendant's motion dismissing the complaint against him and granting summary judgment is hereby granted.

This constitutes the decision and order of this Court.

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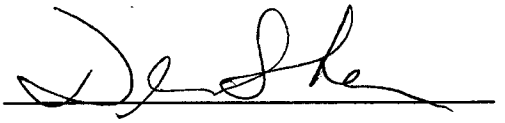

DENISE L. SHER, A.J.S.C.
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Dated: Mineola, New York
January 13, 2011