Murgai v Armeno

2011 NY Slip Op 31198(U)

April 27, 2011

Sup Ct, Nassau County

Docket Number: 2919/09

Judge: Denise L. Sher

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[* 1]

SCAN

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

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

DEPUTY MURGAI,

Plaintiff,

- against -

DINA ARMENO,

Defendant.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 2919/09
Motion Seq. No.: 01
Motion Date: 01/06/11

The following papers have been read on this motion:

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

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendant moves, pursuant to CPLR § 3212 and Article 51 of the Insurance Law of the State of New York, for an order granting her summary judgment 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 above entitled action stems from personal injuries allegedly sustained by plaintiff as a result of an automobile accident with defendant which occurred at approximately 1:20 p.m., on May 16, 2008, when plaintiffs' vehicle was exiting Northern State Parkway to Route 110 in

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Melville, County of Suffolk, State of New York. Plaintiff was operating a 2003 Lincoln Town Car which was owned by his employer Executive Limo. Defendant was the owner and operator of a 2001 Chevrolet. It is alleged that the automobile that was being driven by plaintiff was struck in the rear by the automobile being driven by defendant. Defendant claims that the impact was heavy and caused his glasses to fly off and his body to move back and forth inside the vehicle despite the fact that he was seat belted As a result of the accident, plaintiff claims that he sustained the following injuries:

Sprain of the anterior cruciate ligament/left knee;

Tear in the posterior horn of the medial meniscus of the left knee and may require future surgery;

Acromion impingement on the supraspinatous muscle of the left shoulder which may require future surgery;

Increased signal in the supraspinatous tendon consistent with tendonopathy/left shoulder;

Subligamentous posterior disc herniations at C3-4, C4-5, C5-6 impinging on the anterior aspect of the spinal canal at C3-4 and C4-5 and on the anterior aspect of the spinal cord at C5-6;

Subligamentous posterior disc herniations of the lumbosacral spine at L4-5 and L5-S1 impinging on the anterior aspect of the spinal canal, the neural foramina bilaterally and left nerve root at L4-5;

Moderate to sever stenosis from L3-L5;

Cervical, thoracic and lumbar myofascitis;

Lumbar and cervical radiculitis/radiculopathy;

Left bicepital tendonitis;

Left shoulder derangement;

Left knee derangement;

Left ankle sprain/strain;

Left foot contusion and left plantar fascitis;

Cervical sprain/strain;

Thoracic sprain/strain;

Lumbar sprain/strain;

Cervical acceleration/deceleration injury;

Myofascitis;

Bilateral ulnar motor neuropathy at elbows;

Borderline left median motor neuropathy;

Right, distal medial sensory neuropathy;

Bilateral ulnar sensory neuropathy;

Left rotator cuff sprain;

Decreased range of motion of the cervical spine;

Decreased range of motion of the left shoulder;

Myofascitis of the cervical, thoracic and lumbar spine;

Left supraspinatus tendinopathy and impingement.

Plaintiff commenced the action with service of a Summons and Verified Complaint on or about April 6, 2009. Issue was joined on or about April 30, 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. See *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, a 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, 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) 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

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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. *See 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.

With these guidelines in mind, this Court will now turn to the merits of defendant's motion. In support of her motion, defendant submits the pleadings, copies of photographs of the alleged damage to plaintiff's automobile, copies of the New York State Unified Court System Web Civil Case Details on plaintiff's prior automobile accident lawsuits, plaintiff's Verified Bill of Particulars for the May 16, 2008 accident, plaintiff's Verified Bill of Particulars for his February 11, 2005 accident, the transcript of plaintiff's examination before trial ("EBT") testimony for the May 16, 2008 accident, the transcript of plaintiff's EBT testimony for the February 11, 2005 accident, records of plaintiff's treating physician, Michele Reed, D.O., the

report of Sushil K. Sharma, M.D. who examined plaintiff on or about June 4, 2010, the records of plaintiff's treatment at Nassau County Pain Management, Rehabilitation & Medical Offices, P.C. and the affirmed report of Leon Sultan, M.D., who performed an independent orthopedic medical examination of plaintiff on August 3, 2010.

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).

Defendant submits that, in 2005, plaintiff was involved in a major motor vehicle accident for which he had seen a variety of medical providers and commenced a lawsuit for personal injuries arising out of said accident, with representation by the same attorneys who are representing him in the instant matter. Defendant further submits that "[i]n addition to that prior accident in 2005, the Plaintiff was involved in six other prior automobile accidents, for which he commenced a lawsuit each time. He was represented by the same counsel, Malillo and Grossman. Defendant adds "[t]he injuries claimed herein for the subject accident are set forth in the plaintiff's Bill of Particulars dated August 22, 2009....They include claims for injuries to his

left knee, left shoulder, cervical spine, lumbar spine, radiculopathy, and neuropathy. Similarly, in the Bill of Particulars dated July 13, 2006 and Supplemental Bill of Particulars dated August 29, 2007 for the Plaintiff's motor vehicle accident and lawsuit arising out of his accident on February 11, 2005, the claims are also for injuries to his left knee, left shoulder, cervical spine, lumbar spine, radiculopathy and neuropathy." Defendant argues, that in plaintiff's EBT testimony, he admitted that his automobile's air bag did not inflate, that he did not strike anything in the interior of the automobile and the he did not lose consciousness. Plaintiff also testified that, after the accident, he stood outside his car for approximately a half-hour before the police arrived and, when they did, he declined needing medical attention. Plaintiff then drove to his meeting in Melville and later returned home to Valley Stream. Defendant states that following the accident, plaintiff went for treatment to Dr. Lauren Stimler-Levy at New York Pain Management and Medical Services, P.C. Plaintiff had been a patient at New York Pain Management and Medical Services, P.C. since his accident in 2005. Plaintiff's treatment there continued there until 2007. Defendant argues that the treatment that plaintiff received at New York Pain Management and Medical Services, P.C. following the May 2008 accident was similar to the prior treatment that he received following his 2005 accident although he also had treatment on his left knee after the 2005 accident. In plaintiff's 2005 accident, he was driving a Town Car on the Van Wyck Expressway. Said car was totaled in the accident and plaintiff was knocked unconscious and had to be cut out of the automobile by firemen. As a result of the 2005 accident, plaintiff suffered injuries to his left knee, left foot, shoulders, back and neck. Plaintiff received medical treatment for approximately three years for these injuries, but claimed that all of his pains were gone before his accident in May 2008. Defendant contends that a review of plaintiff's EBT testimony with respect to his 2005 accident and his 2008 accident "reveals that

this plaintiff has claimed injuries to the same parts of his body for at least the two accidents in 2005 and the subject accident in 2008, and was involved in numerous other accidents for which he commenced seven different personal injury lawsuits." Defendant argues that plaintiff cannot establish the requisite causation through any legally admissible evidence that his current claims are proximately related solely to the accident of May 16, 2008. Defendant states that "[i]t is undisputed that the plaintiff had long-standing complaints with regard to his left shoulder, back, knees and neck. They are related to his prior accidents, as well as his pre-existing degenerative conditions, and his diabetes." Defendant argues that plaintiff's complaints alleged to be related to injuries sustained in the May 2008 accident are simply not proximately connected.

Dr. Leon Sultan, a board certified orthopedist, reviewed plaintiff's medical records and conducted a physical examination of plaintiff on August 3, 2010. *See* Defendant's Affirmation in Support Exhibit L. Dr. Cohen examined the plaintiff and performed quantified and comparative range of motion tests on plaintiff's cervical spine, left shoulder, thoracolumbar spine, left knee and left ankle/foot. The results of the tests indicated no deviations from normal. Dr. Cohen's diagnosis of plaintiff was "[t]his gentleman claims multiple injuries as described above following the occurrence of 5/16/08. Today's comprehensive orthopedic and orthopedic neurological examination in regard to this gentleman's cervical spine, left shoulder, both upper extremities, thoracolumbar spine, left knee, left ankle and left foot reveals him to be orthopedically stable and neurologically intact. Today's examination does not confirm any ongoing causally related orthopedic or neurological impairment in regard to the occurrence of 5/16/08 nor is there any clinical correlation between today's examination and the above-described multiple MRI and electrodiagnostic readings."

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

plaintiff which indicates that following he subject accident in May 2008 he did not miss any time for work at Executive Limo or his own company, that he had bed rest for only one day, that he continued his walking regimen after the accident-slowly returning to his one mile distance, five days per week, twice a day and that he engaged in his home exercises. Plaintiff also testified that he traveled to India in 2008, after the subject accident, and again in 2010. During the trip in 2008, plaintiff also stopped to visit Germany. Plaintiff additionally traveled to Las Vegas in 2008 after his accident.

Based upon this evidence, the Court finds that the defendant has established a *prima facie* case that the plaintiff did not sustain serious injury within the meaning of New York State Insurance Law § 5102(d).

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).

To support his burden, plaintiff submits his own affidavit, an affirmation from Lauren Stimler-Levy, M.D. who treated plaintiff beginning on May 21, 2008, an affidavit of Filippo Ragone, D.C., a chiropractor who treated plaintiff following his May 2008 accident, the affirmation of Sebastian Lattuga, M.D. a board certified orthopedist who examined plaintiff on April 27, 2009 and August 28, 2009 and the affidavit of Richard J. Rizzuti, a radiologist with All County Open MRI and Diagnostic Radiology under whose auspices administered and supervised the administration and examination of the MRIs of plaintiff's cervical spine and lumbosacral spine performed on July 26, 2008 and MRIs plaintiff's left shoulder and left knee performed on August 2, 2008.

As indicated above, plaintiff submitted the affirmation of Lauren Stimler-Levy, M.D. who treated plaintiff beginning on May 21, 2008. *See* Plaintiff's Affirmation in Opposition Exhibit B. In her affirmation, Dr. Stimler-Levy states that "[o]n May 21, 2008 Mr. Murgai presented himself to my office in regard to a motor vehicle accident he was involved in on May 16, 2008. I am aware that prior to this accident, Mr. Murgai was involved in a motor vehicle accident on February 11, 2005 wherein he sustained injuries to his lower back, cervical spine and mid back for which he underwent treatment until July of 2005 in the form of TENS unit and massage as well as physical therapy exercises. In regard to that accident, the patient underwent MRIS which revealed disc herniation at L5-S1 and L4-5 as well as disc bulges at L2-3, L3-4 and L1-2. Plaintiff indicated he had stopped treating in July 2005 as his pain and symptomology had abated. I was also advised by Mr. Murgai that he was also involved in a motor vehicle accident on April 10, 1989 as well as May 21, 2001 wherein he injured his cervical spine, thoracic spine and lumbar spine which I am informed by the patient that he treated with a chiropractor and acupuncturist through January of 2002. I was also informed of his February 1, 1994 accident." Dr. Stimler-Levy examined plaintiff and performed quantified and comparative range of motion tests on plaintiff's cervical spine, left shoulder and left knee. Dr. Stimler-Levy concluded "[i]t was my expert opinion that the injuries as diagnosed were causally related to the motor vehicle accident of May 16, 2008 and that said injuries were consistent with the clinical presentation in my office. It was further my expert medical opinion that the disc pathology diagnosed via MRI were injuries of a permanent nature in that bulging and herniated discs do not lend themselves to resolution and are therefore permanent. It was my expert medical opinion that the left shoulder and left knee pathology diagnosed via MRI were also injuries of a permanent nature and were causally related to the subject motor vehicle accident. It was my expert medical opinion that the

herniated discs at L4-5 and L5-S1 were exacerbated by the motor vehicle accident of May 21, 2008 and that the motor vehicle accident had caused the L4-5 herniation to impinge on the anterior aspect of the spinal canal and left root at L4-5. It was my expert opinion that the injuries diagnosed via MRI and the limitations of motion in the cervical and lumbar spine as well as the left knee and left shoulder would affect his ability to carry out normal activities of daily living such as head and neck movement, sitting, standing, walking, running, bending, lifting and other strenuous activities. It is my expert medical opinion that the limitation in ranges of motion in the cervical and lumbar spine as well as the left knee and left shoulder were significant and permanent in nature. Furthermore, my prognosis of the patient was guarded. It is also my expert opinion that the patient was totally disabled."

Dr. Stimler-Levy also examined plaintiff on December 31, 2010, in which plaintiff indicated that he had pain in his lower back that rated at a nine out of a possible ten. At that examination, plaintiff presented with numbness in his left thigh and burning in the right hip and leg area. His neck and upper back pain was at an intensity of eight out of ten....Plaintiff's left shoulder pain was continuing at an intensity of eight out of a possible ten. Plaintiff continued to present with limitations in his left shoulder range of motion and still experienced left knee pain. The pain in his knee was rated an eight out of possible ten. Dr. Stimler-Levy once again performed quantified and comparative range of motion tests on plaintiff's cervical spine, left shoulder and left knee. Dr. Stimler-Levy's diagnosis of plaintiff was, "exacerbation of the lower back; lumbar radiculitis; cervical radiculitis; left knee sprain of the anterior cruciate ligament; tear in the posterior horn of the medial meniscus of the left knee; left shoulder supraspinatus tendinopathy with impingement; disc herniation at C3-4. C4-5. C5-6; and exacerbated disc herniations at L4-5 and L5-S1. It is my expert medical opinion that the injuries as diagnosed are

casually related to the motor vehicle accident of May 16, 2008 and said injuries were consistent with the clinical presentation in my office. It is further my expert medical opinion that said limitations of motion in the cervical and lumbar spine as well as the left knee and left shoulder as they are still present some two and half years post accident can only be considered permanent as they continue to inhibit the patient's ability to carry out normal activities of daily living involving sitting, standing, bending, walking and/or strenuous physical activities. It is further my expert medical opinion that the injuries as diagnosed have resulted in a significant limitation of use of the patient's cervical and lumbar spine as well as the left knee and left shoulder. It is my expert opinion that the disc pathology diagnosed via MRI and the left knee and left shoulder pathology are injuries of a permanent nature. It is further my expert medical opinion that limited ranges of motion are permanent and have resulted in a significant limitation of use of the cervical and lumbar spine as well as the left knee and left shoulder."

Plaintiff also submitted the affidavit of Filippo Ragone, D.C., a chiropractor who examined plaintiff on May 16, 2008. *See* Plaintiff's Affirmation in Opposition Exhibit C. Dr. Ragone stated that he was aware of plaintiff's prior motor vehicle accidents and the injuries and treatments that resulted therefrom. Dr. Ragone's initial diagnosis was "cervical acceleration/deceleration injury; mid back pain; low back pain; left shoulder pain and derangement; and myofascitis." Dr. Ragone further states that "[i]t was my expert opinion that the injuries sustained by the patient were causally related to the motor vehicle accident of May 16, 2008 and said findings were consistent with the clinical presentation in my office. It was further my expert chiropractic opinion that the limitation of the motion of the cervical and lumbar spine were significant and permanent in nature." Plaintiff was last seen by Dr. Ragone on December 30, 2010 where he presented with the following complaints: "neck

pain, upper back pain, mid back pain and lower back pain accompanied by difficulty sleeping and fatigue and depression." Dr. Ragone performed quantified and comparative range of motion tests on plaintiff's cervical, thoracic and lumbar spine. Dr. Ragone's current diagnosis was "cervical disc herniations; clinical signs of cervical radiculopathy; thoracic disc bulges; lumbar disc herniations; lumbar stenosis; clinical signs of lumbar radiculopathy; and cervical, thoracic and lumbar intersegmental dysfunction. It is my expert chiropractic opinion that the injuries sustained by the patient are causally related to the motor vehicle accident of May 16, 2008 and said findings are consistent with the clinical presentation in my office."

Plaintiff additionally submitted the affirmation of Sebastian Lattuga, M.D. who examined plaintiff on April 27, 2009. Dr. Visram, board certified in orthopedics and spinal surgery performed quantified and comparative range of motion tests on plaintiff's cervical and thoracolumbar spine. *See* Plaintiff's Affirmation in Opposition Exhibit D. Dr. Lattuga's assessment was "cervical radiculopathy; cervical sprain; lumbar radiculopathy; lumbar sprain; disc herniations at C3-4, C4-5, C5-6; and exacerbated disc herniations at L4-5 and L5-S1....It is my expert medical opinion that the injuries as diagnosed are causally related to the motor vehicle accident of May 16, 20008 and the limitations in the ranges of motion as they are still present one year post accident and can only be considered permanent."

With respect to plaintiffs' submission of 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 lumbosacral spine performed on July 26, 2008 and MRIs plaintiff's left shoulder and left knee performed on August 2, 2008. Dr. Rizzuti's impression of the cervical spine was "[s]ubligamentous posterior disc herniations at C3-4, C4-5, C5-6 impinging on the anterior aspect of the spinal canal at C3-4

and C4-5 and on the anterior aspect of the spinal cord at C5-6." Dr. Rizzuti's impression of the lumbosacral spine was "[s]ubligamentous posterior disc herniations at L4-5 and at L5-S1 impinging on the anterior aspect of the spinal canal, the neural foramina bilaterally and the left root nerve at L4-5 and moderate to severe stenosis from L3 though L5." Dr. Rizzuti's impression of the left shoulder was "[a]cromion impingement on the supraspinatus muscle and increased signal in the supraspinatus tendon consistent with tendinopathy." Dr. Rizzuti's impression of the left knee was "[s]prain of the anterior cruciate ligament and findings consistent with a tear in the posterior horn of the medical meniscus." *See* Plaintiffs' Affirmation in Opposition Exhibit E.

In support of his 90/180 argument, plaintiff submits his own affidavit in which he states "[d]uring the first six months after the accident, I was unable to perform the following: food shopping; carrying groceries; exercising; participating in daily morning walks; maintaining my car; washing my car; spending time caring for grandchild; taking grandchild to park to go bike riding; enjoying social gatherings and parties with friends and family during the summertime; long drives to visit family; take (*sic*) care of chores outside; gardening; and dancing and enjoying myself with friends and family. Despite the prior accidents I was involved in, at the time of this accident of May 16, 2008, I was pain free and leading a full normal active lifestyle including going to work everyday as a limo driver." *See* Plaintiffs' Affirmation in Opposition Exhibit A.

The Court concludes that the affirmations and affidavits provided by plaintiff clearly raise genuine issues of fact as to injuries causally related to the May 17, 2008 accident. Consequently, defendant's motion for summary judgment is hereby denied.

The parties shall appear for Trial in Nassau County Supreme Court, Differentiated Case Management Part (DCM) at 100 Supreme Court Drive, Mineola, New York, on May 3, 2011, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

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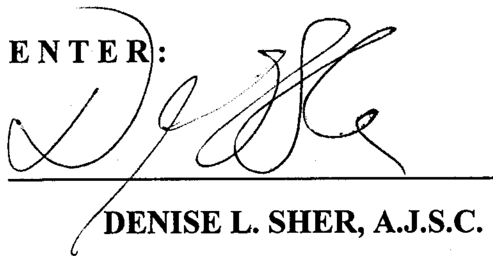

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
April 27, 2011

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