

Livia v Atkins

2011 NY Slip Op 31909(U)

June 29, 2011

Sup Ct, Nassau County

Docket Number: 24201/09

Judge: Denise L. Sher

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

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

ALEX LIVIA,

Plaintiff,

- against -

DAVID ATKINS and BEACH & BAY LEASING CORP.,

Defendants.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 24201/09
Motion Seq. No.: 01
Motion Date: 02/02/11

The following papers have been read on this motion:

	Papers Numbered
<u>Notice of Motion, Affirmation and Exhibits and Memorandum of Law</u>	<u>1</u>
<u>Affirmation in Opposition and Exhibits</u>	<u>2</u>
<u>Reply Affirmation</u>	<u>3</u>

Defendant Beach & Bay Leasing Corp. (“Beach”) moves, pursuant to CPLR § 3212 and Article 51 of the Insurance Law of the State of New York, for an order granting it 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 Beach’s motion. No papers were submitted by defendant David Atkins (“Atkins”).

This action arises from a motor vehicle accident involving a collision between a 2000 Mercury Mountaineer operated by plaintiff and a 1996 Chevrolet taxi cab owned by defendant Beach and operated by defendant Atkins. The accident occurred at approximately 3:15 a.m. on October 9, 2008, at the intersection of Lafayette Boulevard and West Market Street, Long Beach, New York. Plaintiff contends that, while he was traveling southbound on Lafayette

Boulevard, defendant Atkins drove through the stop sign on the corner of West Market Street and “broad-sided” the right passenger side of plaintiff’s vehicle. According to the Police Accident Report, defendant Atkins informed the responding police officer that he slid through the stop sign on slippery pavement due to the rain. *See* Plaintiff’s Affirmation in Opposition Exhibit A.

The Court notes that the certified Police Accident Report submitted by plaintiff as an Exhibit in his papers qualifies as an exception to the hearsay rule since it was an admission of a party/an admission against interest. *See Vaden v. Rose*, 4 A.D.3d 468, 771 N.Y.S.2d 670 (2d Dept. 2004); *Kemenyash v. McGoey*, 306 A.D.2d 516, 762 N.Y.S.2d 629 (2d Dept. 2003); *Guevara v. Zaharakis*, 303 A.D.2d 555, 756 N.Y.S.2d 465 (2d Dept. 2003).

Plaintiff states that the impact of defendants’ vehicle striking his vehicle was “hard.” As a result of the impact from defendants’ vehicle, plaintiff’s right knee hit the steering wheel column and he felt contact to his right shoulder and lower back. As a result of said accident, plaintiff claims that he sustained the following injuries:

Arthroscopy of the right knee consisting of synovectomy, partial lateral meniscectomy debridement of lateral meniscus performed by Dr. Dov Berkowitz on 06/05/09 at Day-Op Center of Long Island;

MRI findings of right knee consistent with tear in the posterior horn of the medial meniscus and posterior horn of the lateral meniscus extending into the interior articulating surfaces;

Disc degeneration with concentric annular tear at the level of L5-S1 with bulging of the discs, confirmed by MRI;

L5-S1 radiculopathy on the right, confirmed by EMG/NCV testing;

Tenosynovitis of the biceps tendon and small joint effusion, confirmed by MRI of the right shoulder;

Right knee sprain/strain;

Right knee internal derangement;

Right bicep tendonitis;

Lumbrosacral sprain/strain and myofascitis with radicular signs and symptoms;

Cervical, thoracic and lumbar ...dysfunction;

Post-traumatic thoracic sprain... See Defendant Beach's Affirmation in Support Exhibit

C.

On or about November 13, 2009, plaintiff commenced this action by service of a Summons and Verified Complaint. Issue was joined by defendant Beach on or about February 2, 2010. See Defendant Beach's Affirmation in Support Exhibits A and B.

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. Eycler*, 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 defendants 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). *See Defendant Beach's Affirmation in Support Exhibit C.*

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. *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. 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, the Court will now turn to the merits of defendant Beach’s motion. In support of its motion, defendant Beach submits the pleadings, plaintiff’s Verified Bill of Particulars, the transcript of plaintiff’s Examination Before Trial (“EBT”) testimony, the affirmed report of Jacquelin Emmanuel, M.D., who performed an independent

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orthopedic examination of plaintiff on June 24, 2010, the affirmed report of Maria Audrie DeJesus, M.D., who performed an independent neurologic examination of plaintiff on June 24, 2010 and the affirmed reports of A. Robert Tantleff, M.D., who reviewed plaintiff's lumbar spine MRI which was performed on December 23, 2008, plaintiff's right knee MRI which was performed on January 21, 2009 and plaintiff's right shoulder MRI which was performed on December 23, 2008.

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. Eylar*, 79 N.Y.2d 955, 582 N.Y.S.2d 990 (1992). Within the scope of the movants' burden, 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).

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

Dr. Jacquelin Emmanuel, a board certified orthopedist, reviewed plaintiff's medical records and conducted an examination of plaintiff on June 24, 2010. *See* Defendant Beach's Affirmation in Support Exhibit E. Dr. Emmanuel examined plaintiff and performed quantified and comparative range of motion tests on plaintiff's cervical spine, thoracic spine, lumbar spine, right shoulder and right knee. The results of the tests indicated no deviations from normal. Dr. Emmanuel's diagnosis was "[c]ervical, thoracic and lumbar spine sprains/strains, resolved.

Right shoulder sprain, resolved. Status post right knee arthroscopic surgery, resolved. After performing a thorough orthopedic examination, and taking into consideration the history of the claimant provided, it is my opinion, with a reasonable degree of medical certainty that Mr. Livia has recovered from any injury to the cervical spine, thoracic spine, lumbar spine, right shoulder and right knee that he may have sustained. Mr. Livia is not disabled at this time from an orthopedic point of view. The claimant can seek gainful employment and can perform activities of daily living with no restrictions. There is no need for orthopedic treatment, including physical therapy. There is no permanency or residuals noted.”

Dr. Maria Audrie DeJesus, a board certified neurologist, reviewed plaintiff’s medical records and conducted an examination of plaintiff on June 24, 2010. *See* Defendant Beach’s Affirmation in Support Exhibit F. Dr. DeJesus examined plaintiff and performed quantified and comparative range of motion tests on plaintiff’s cervical spine and thoracolumbar spine. The results of the tests indicated no deviations from normal. Dr. DeJesus’s diagnosis was “[s]tatus post cervical and thoracolumbar and lumbar spine sprains/strains, resolved. Normal neurologic examination. I defer complaints referable to the right shoulder and right knee to the appropriate specialist. After performing a thorough neurologic examination, and taking into consideration the history of the claimant provided, it is my opinion, with a reasonable degree of medical certainty that Mr. Livia has recovered from any injury to the cervical, thoracic and lumbar spine that he may have sustained. Mr. Livia is not disabled at this time from a neurologic point of view. Although there were complaints of pain in the lumbar spine the rest of the examination was within normal limits. The claimant can seek gainful employment and perform all activities of daily living without any restrictions or limitations from a neurological standpoint. There is no need for neurological treatment or diagnostic testing. There is no permanency or residuals noted.”

Dr. A. Robert Tantleff, a board certified radiologist, conducted an independent film review of the MRI of plaintiff’s lumbar spine originally performed on December 23, 2008. *See*

Defendant Beach's Affirmation in Support Exhibit G. With respect to his review of the lumbar spine MRI, Dr. Tantleff's findings were "[t]he examination reveals regional discogenic changes most pronounced at L5/S1 with a minimal atraumatic noncompressive degenerative disc bulge and associated degenerative annular fissure. The central canal, lateral recess and neural foramina are open, patent and adequate. The regional neural elements are well-demonstrated. There is no evidence of any definable or significant compressive change on the thecal sac, traversing or exiting neural elements. The lumbar lordosis is maintained. There is no evidence of acute or recent injury. Impression: Regional discogenic changes most pronounced at L5/S1 not inconsistent with the individual's age and unrelated to the date of incident."

Dr. Tantleff conducted an independent film review of the MRI of plaintiff's right knee originally performed on January 1, 2009. *See* Defendant Beach's Affirmation in Support Exhibit G. With respect to his review of the right knee MRI, Dr. Tantleff's findings were "[t]he examination reveals no evidence of any significant joint effusion. There is no evidence of acute or recent injury. There is minimal amount of normal physiologic fluid. The osseous alignment is anatomic. The regional ligaments, tendons and menisci are intact without evidence of traumatic tear or rupture. Impression: Unremarkable MRI of the right knee."

Dr. Tantleff also conducted an independent film review of the MRI of plaintiff's right shoulder originally performed on December 23, 2008. *See* Defendant Beach's Affirmation in Support Exhibit G. With respect to his review of the right shoulder MRI, Dr. Tantleff's findings were "[t]he examination is normal and unremarkable. The rotator cuff, glenoid labrum and biceps labral complex and biceps tendon are intact. There is no evidence of subacromial/subdeltoid bursitis. There is no evidence of acute or recent injury. Impression: Normal MRI of the right shoulder."

With respect to plaintiff's 90/180 claim, defendant Beach relies on the EBT testimony of plaintiff which indicates that he did not miss any time from attending school at Nassau Community College as a result of the accident, that he cannot play soccer with friends any more,

cannot run, and has difficulty doing chores around the house, such as picking up leaves.

The burden now shifts to plaintiff to come forward with evidence to overcome defendant Beach's submissions by demonstrating the existence of a triable issue of fact that serious injuries were 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 the chiropractor affidavit and records of Michael Guerriere, D.C., the chiropractor affidavit and records of Marc L. Jacobs, D.C., the affirmed reports of Josephine A. Brawner, M.D. dated January 12, 2009 and February 23, 2009, the affirmed reports of Walter Ploski, M.D. dated January 13, 2009 and March 3, 2009, the affirmed physical therapy and daily office visit notes from January 13, 2009 to March 25, 2009 of Lev Aminov, M.D., the acupuncture affidavit and records of Gerald Weir, LAC, the affirmed report of David N. Lifschutz, M.D. dated January 14, 2009, an MRI report for plaintiff's right shoulder and lumbosacral spine dated December 23, 2008, prepared by Lucille Taverna, M.D., an MRI report for plaintiff's right knee dated January 21, 2009, prepared by Lucille Taverna, M.D., the chiropractor affidavit and records of Steven Matrangolo, D.C., the affirmed report of Dov J. Berkowitz, M.D. dated May 7, 2009, the June 5, 2009 Operative Report of Dov J. Berkowitz and the affirmed report of David Benatar, M.D. dated November 10, 2010.

Plaintiff submitted the chiropractor affidavit and records of Michael Guerriere, D.C., who treated plaintiff from November 20, 2008 to January 5, 2009. *See Plaintiff's Affirmation in Opposition Exhibit C.* Said reports indicate that plaintiff presented to Dr. Guerriere with complaints of pain to his right knee, right shoulder and lower back and that said complaints continued throughout the course of plaintiff's treatment. At each visit, Dr. Guerriere performed quantified and comparative range of motion tests on plaintiff's cervical spine with the results of the tests indicating that the cervical range of motion was restricted.

Plaintiff submitted the chiropractor affidavit and records of Marc L. Jacobs, D.C., who treated plaintiff on January 12, 2009. *See Plaintiff's Affirmation in Opposition Exhibit D.* Dr.

Jacobs examined plaintiff and performed quantified and comparative range of motion tests on plaintiff's lumbar spine which indicated quantified limitations and abnormal findings. Dr. Jacob's diagnosis was "[l]umbar derangement. Vertebral subluxation complexes. Myofascial pain syndrome."

Dr. Josephine A. Brawner, a board certified physiatrist, reviewed plaintiff's medical records and conducted examinations of plaintiff on January 12, 2009 and February 23, 2009. *See* Plaintiff's Affirmation in Opposition Exhibit E. At the initial January 12, 2009 visit, Dr. Brawner performed a musculoskeletal examination of plaintiff's right shoulder and right knee. She also performed a neurological examination of plaintiff. Dr. Brawner's diagnosis was "[p]osttraumatic thoracic and lumbar sprain/strain. Right shoulder sprain. Right knee sprain, rule out medial meniscal tear....Based on the patient's history and physical examination, it can be stated within a reasonable degree of medical certainty that the patient's signs and symptoms are causally related to the accident that occurred on 10/9/08." At the follow-up visit on February 23, 2009, Dr. Brawner indicated that the "MRI right knee reports tear in the posterior horn of the medial and lateral meniscus. MRI right shoulder reports tenosynovitis of the biceps tendon with biceps tendon intact. MRI lumbar spine reports disc degeneration with concentric annular tear at the level of L5-S1 with minimal bulging of the discs." Dr. Brawner once again performed a musculoskeletal examination of plaintiff's right shoulder and right knee as well as a neurological examination of plaintiff. Dr. Brawner's diagnosis was, "[p]osttraumatic thoracic and lumbar sprain/strain. Disc bulging of the discs with concentric annular tear at the level of L5-S1. L5-S1 radiculopathy on the right, documented on EMG. Right knee meniscal tear of the medial and lateral meniscus. Right biceps tendonitis."

Dr. Walter Ploski, a board certified orthopedist, reviewed plaintiff's medical records and conducted examinations of plaintiff on January 13, 2009 and March 3, 2009. *See* Plaintiff's Affirmation in Opposition Exhibit F. At the initial January 13, 2009 visit, Dr. Ploski performed a physical examination of plaintiff's right shoulder and right knee. Dr. Ploski's diagnosis was

“[l]ow back derangement. Sprain/strain right shoulder, rule out internal derangement. Sprain/strain and synovitis right knee, rule out internal derangement. Mr. Livia is symptomatic as the result of injuries sustained in a motor vehicle accident on 10/9/08.” At the follow-up visit on March 3, 2009, Dr. Brawner indicated that “Mr. Livia continues to have pain at the right knee and lower back. He has pain at the right shoulder but not as severe as it was previously.”

Plaintiff submitted the affirmation and records of Lev Aminov, M.D., who administered physical therapy to plaintiff from January 13, 2009 to March 25, 2009. *See* Plaintiff’s Affirmation in Opposition Exhibit G. Said records reveal treatment to the subject body parts, in particular plaintiff’s right knee.

Plaintiff submitted the affidavit and records of Gerald Weir, LAC, who administered acupuncture treatment to plaintiff from January 14, 2009 to March 18, 2009. *See* Plaintiff’s Affirmation in Opposition Exhibit H. Said records indicate that plaintiff was treated for right knee pain, right shoulder pain and lower back pain.

Plaintiff submitted the affirmed report of David N. Lifschutz, M.D., a neurologist at Baldwin Medical, who administered an EMG/NCS of plaintiff’s lower extremities on January 14, 2009. *See* Plaintiff’s Affirmation in Opposition Exhibit I. Dr. Lifschutz’s affirmed report and test findings revealed evidence of a L5-S1 radiculopathy on the right.

Plaintiff submitted the affirmed reports of Dr. Lucille P. Taverna, a radiologist who administered the MRIs of plaintiff’s right shoulder and lumbosacral spine on December 23, 2008 and the MRI of plaintiff’s right knee on January 21, 2009. *See* Plaintiff’s Affirmation in Opposition Exhibit J. With respect to the MRI of the right shoulder, Dr. Taverna’s diagnosis was “[t]enosynovitis of the biceps tendon with the biceps tendon intact. Small joint effusion. Degenerative cyst of the greater tuberosity.” With respect to the MRI of the lumbosacral spine, Dr. Taverna’s diagnosis was, “[d]isc degeneration with concentric annular tear at the level of L5-S1 with minimal bulging of the discs.” With respect to the MRI of the right knee, Dr. Taverna’s diagnosis was, “[j]oint effusion. Cruciate ligaments intact. Findings compatible with

a tear in the posterior horn of the medial meniscus and posterior horn of the lateral meniscus extending into the inferior articulating surfaces.”

Plaintiff submitted the affidavit and records of Dr. Stephen Matrangelo, a chiropractor who visited Baldwin Medical facility on February 2, 2009 to perform a computerized physical performance test of plaintiff’s lumbar spine. *See* Plaintiff’s Affirmation in Opposition Exhibit K. In measuring various ranges of motion by computer and comparing to standard norms, said test results indicated quantified limitations and abnormal findings.

Dr. Dov J. Berkowitz, a board certified orthopedic surgeon, conducted an examination of plaintiff’s right knee on May 7, 2009. *See* Plaintiff’s Affirmation in Opposition Exhibit L. Dr. Berkowitz’s examination revealed, “[r]ight knee: Shows decreased flexion. He has marked joint line tenderness mostly medially. He has some lateral tenderness. The MRI report is positive for complex tearing of the medial meniscus as well as a tear of the lateral meniscus.” Dr. Berkowitz indicated that his assessment/plan was “[a]t this point the patient is significantly painful. He has positive findings on exam and MRI report. I am recommending an arthroscopic approach.” Dr. Berkowitz performed plaintiff’s right knee arthroscopic surgery on June 5, 2009 at the Day-Op Center of Long Island. *See* Plaintiff’s Affirmation in Opposition Exhibit M. Dr. Berkowitz’s Operative Report confirms a “tearing of the radial margin of the posterior horn of the lateral meniscus.”

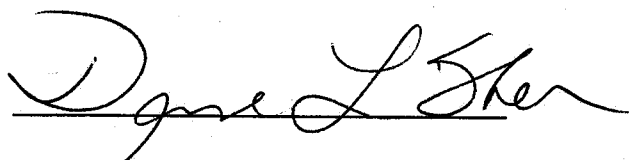
Dr. David Benatar, an orthopedist, reviewed plaintiff’s medical records and conducted an examination of plaintiff on November 10, 2010. *See* Plaintiff’s Affirmation in Opposition Exhibit N. Dr. Benatar performed quantified and comparative range of motion tests on plaintiff’s cervical spine, right shoulder and right knee. The test results indicated quantified limitations and abnormal findings. Dr. Benatar’s diagnosis was “[s]tatus post motor vehicle accident with: 1. Right knee meniscal tear requiring arthroscopy with partial meniscectomy. 2. Traumatic right shoulder impingement, resolved. 3. Cervical sprain/strain and lumbar disc bulging with lumbar sprain/strain.” Dr. Benatar added, “[i]f the accident history given is

accurate then an causal relationship exists with the accident of record. Mr. Livia is over two years from his accident. He is a year and five months from his surgery. It would be unreasonable to expect further improvement. His circumstances at this time should be considered his permanent circumstances. Permanency is evident based on the surgery he underwent and his chronic symptomatology. He obviously had some improvement with surgery but he has not returned to pre-injury status. Moreover, he remains symptomatic from the shoulder and moderately symptomatic from the lumbar spine. That is concerning, particularly at his young age.”

The Court concludes that the affirmations, affidavits and reports provided by plaintiff clearly raise genuine issues of fact as to injuries causally related to the October 9, 2008 accident. Consequently, defendant Beach’s motion for summary judgment is hereby **DENIED**.

This constitutes the Decision and Order of this Court.

ENTER:



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

Dated: Mineola, New York
June 29, 2011

ENTERED

JUL 01 2011

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**