

**Zodan v Tucker**

2011 NY Slip Op 32503(U)

September 16, 2011

Sup Ct, Nassau County

Docket Number: 11293/09

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

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WALTER ZODAN,  
  
Plaintiff,  
  
- against -  
  
VALERIE TUCKER,  
  
Defendant.

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TRIAL/IAS PART 32  
NASSAU COUNTY  
  
Index No.: 11293/09  
Motion Seq. No.: 02  
Motion Date: 07/22/11  
**XXX**

**The following papers have been read on this motion:**

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

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 suffer a "serious injury" in the subject accident as defined by New York State Insurance Law § 5102(d). Plaintiff opposes the motion.

The above entitled action stems from personal injuries allegedly sustained by plaintiff as a result of an automobile accident with defendant which occurred on February 12, 2009, at approximately 2:00 p.m., at or near the intersection of 31<sup>st</sup> Avenue and 33<sup>rd</sup> Street, County of Queens, State of New York. The accident involved two vehicles, a 2002 Chevrolet van owned and operated by plaintiff and a 2004 Hyundai owned and operated by defendant.

Plaintiff contends that his vehicle was struck by plaintiff's vehicle as he was lawfully going through the aforementioned intersection. Plaintiff further contends that, as a result of the heavy impact from defendant's vehicle, the air bags in his vehicle deployed and came in contact with his face and chest and that his right hand and knees hit the dash board of his automobile. Plaintiff also alleges that he hit his head on the back of his seat. As a result of the collision, plaintiff claims that he sustained the following injuries:

Fracture of the right metacarpal thumb;

Subluxation of the prox phalanx of the right thumb;

Right ulnar collateral ligament instability;

Right vular capsular ligament instability;

C5-C6 central herniation with impingement on the neural canal;

Plantar fasciitis of the left foot;

Cervical sprain and strain. *See* Defendant's Affirmation in Support Exhibit D.

Plaintiff commenced the action by service of a Summons and Verified Complaint on or about May 29, 2009. Issue was joined on or about August 20, 2009. *See* Defendant's Affirmation in Support Exhibits B and C.

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, 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 (1<sup>st</sup> 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).

Whether plaintiff can demonstrate the existence of a compensable serious injury depends upon the quality, quantity and credibility of admissible evidence. *See Manrique v. Warshaw Woolen Associates, Inc.*, 297 A.D.2d 519, 747 N.Y.S.2d 451 (1<sup>st</sup> Dept. 2002).

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 fracture; (Category 4)
- 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).

See Defendant's Affirmation in Support Exhibit D.

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. Eycler*, 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 Rent-a-Car Systems, 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’s motion. In support of her motion, defendant submits the pleadings, plaintiff’s Verified Bill of Particulars, the North Shore University Plainview Hospital Department of Radiology Reports of plaintiff’s right hand dated February 13, 2009, the North Shore University Plainview Hospital Emergency Department Report dated February 12, 2009, the Orthopaedic & Sports Associates of Long Island MRI Report for plaintiff’s right hand dated March 12, 2009, the affirmed report of Dr. Joseph Gregorace, D.O. dated February 13, 2009, the transcript of plaintiff’s Examination Before Trial (“EBT”) testimony, the affirmed report of Dr. Lee M. Kupersmith, M.D. dated March 9, 2009, the affirmed report of Robert Israel, M.D., who performed an independent orthopedic examination of plaintiff on December 21, 2010, the affirmed report of Dr. Jeffrey Warhit, M.D., who reviewed plaintiff’s cervical spine MRI which was performed on March 17, 2009 and plaintiff’s employment records with Home Depot.

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. Eyles*, 79 N.Y.2d 955, 582 N.Y.S.2d 990 (1992). Within the scope of the movant’s burden, 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 is not required to disprove any category of serious injury which has not been properly pled by the plaintiff. *See Melino v. Lauster*, 82 N.Y.2d 828, 605 N.Y.S.2d 4 (1993). Moreover, even pled categories of serious injury may be disproved by means other than the submission of medical evidence by a defendant, including plaintiff's own testimony and his submitted exhibits. *See Michaelides v. Martone*, 186 A.D.2d 544, 588 N.Y.S.2d 366 (2d Dept. 1992); *Covington v. Cinnirella*, 146 A.D.2d 565, 536 N.Y.S.2d 514 (2d Dept. 1989).

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

With respect to plaintiff's contention that he sustained serious physical injury as defined in the fourth category of New York State Insurance Law § 5102(d); to wit, a fracture, defendant argues that plaintiff has presented no objective medical evidence to confirm that he has indeed suffered a fracture. Defendant submits that the clinical findings and diagnosis reported by the physician who examined plaintiff in the Emergency Room of North Shore University Plainview Hospital after his accident establish that plaintiff did not sustain a fracture in said accident as the report from the Department of Radiology at North Shore University Plainview Hospital states that the results of an x-ray taken of plaintiff's right hand were "negative for fracture or dislocation." *See* Defendant's Affirmation in Support Exhibit E. Defendant adds that the Emergency Room Report from North Shore University Plainview Hospital, prepared by the attending physician, states that the impression was that plaintiff only suffered a "right hand contusion" as a result of the accident. *See* Defendant's Affirmation in Support Exhibit F.

Defendant further argues that, on March 12, 2009, plaintiff's own physician, Dr. Lee Kupersmith, ordered an MRI on plaintiff's right hand and said MRI found that there was no fracture present. *See* Defendant's Affirmation in Support Exhibit G. Defendant claims that the only doctor to diagnose a right thumb fracture for plaintiff was Dr. Joseph Gregorace and, in his report, Dr. Gregorace writes that plaintiff has stated that the Emergency Room doctor told him he had a fracture and, thus, Dr. Gregorace's diagnosis was based solely on the history provided to him. *See* Defendant's Affirmation in Support Exhibit H. Defendant argues that, based on these facts, there is no objective medical evidence to confirm that plaintiff suffered a fracture.

With respect to plaintiff's contention that he sustained serious physical injury as defined in the seventh and eighth categories of New York State Insurance Law § 5102(d); to wit, a permanent consequential limitation of use of a body organ or member and a significant limitation of use of a body function or system, defendant argues that the objective medical evidence together with plaintiff's admissions at his EBT establish that he did not sustain a "serious injury" under these categories.

Defendant submits that when plaintiff arrived, on his own, at the Emergency Room of North Shore University Plainview Hospital after the subject accident, he complained of chest discomfort and right thumb pain. The attending physician examined plaintiff and reported that his head was atraumatic/normocephalic, his neck was supple, his back was nontender, both upper and lower extremities were negative for tenderness and swelling with normal ranges of motion and normal muscle tone and strength. Plaintiff's neurological examination was normal with no sensory or motor deficits and normal reflexes. *See* Defendant's Affirmation in Support Exhibit F.

Defendant next submits that the admissions of plaintiff at his EBT as to the minimal medial treatment that he sought and received for his alleged injuries show that plaintiff did not sustain a "serious injury" as defined in the seventh and eighth categories. Plaintiff testified that, following his discharge from the Emergency Room, he next sought treatment for his injuries the following day at Island South Physical Medicine & Rehabilitation, P.C. There he received

treatment consisting of physical therapy, electric stimulation, hot and cold packs, massages, paraffin baths and therapeutic exercises for approximately four months. This was the only treatment plaintiff sought and received for his alleged injuries, treatment that ceased in June 2009, nearly two years ago. *See* Defendant's Affirmation in Support Exhibit I

Defendant adds that plaintiff's EBT testimony as to his current physical condition shows that he does not have any permanent consequential or significant limitations in the use of his neck, back, right hand or left foot as a result of the subject accident. Plaintiff testified that the only physical complaints that he had, which he attributed to the accident, were that his right thumb began to hurt if he held an item, or wrote, for a period of time and sometimes, when he sits for a long period, he experiences a limp in his left foot for several steps at which point the limp would go away. *See id.* Defendant argues that said testimony, along with the Emergency Room records, demonstrate that plaintiff sustained nothing more than soft tissue injuries in the subject accident which have not resulted in any significant limitations of use of his neck, back, right hand or left foot.

Defendant further contends that the March 9, 2009 report of plaintiff's own physician, Dr. Lee M. Kupersmith, indicates that, with respect to plaintiff's left foot exam, "there are no signs of compartment syndrome and Tenderness (*sic*) is most consistently, specifically, and significantly notes over the region of the plantar fascia. the (*sic*) tenderness radiates along the fascia, but is most significant over the proximal origin. The functional range of motion is essential (*sic*) intact. There are no signs of infection. The skin is clear, dry, and intact. No masses are palpable. There is no gross evidence of sensory deprivation. There are no signs of active or impending compartment syndrome. There is no significant or apprecable (*sic*) swelling noted in the area of concern. Tenderness - Foot: Present at the base of the plantar fascia. Swelling: None....Deformity: No significant deformity. Stress Testing: Stress testing of the personal tendons indicates stability. Resisted posterior tibial tendon stretch is not painful....Forced dorsiflexion is not painful for plantar pain. Calcaneal cuboid pain is absent with stress testing.

Stress testing of the FHL causes no pain....Ankle dorsiflexion causes no plantar pain. The calf squeeze test indicates that the Achilles tendon is intact. Range of Motion: Normal.”

Dr. Robert Israel, a board certified orthopedist, reviewed plaintiff’s medical records and conducted an examination of plaintiff on December 21, 2010. *See* Defendant’s Affirmation in Support Exhibit K. Dr. Emmanuel examined plaintiff and performed quantified and comparative range of motion tests on plaintiff’s cervical spine, thoracic spine, lumbar spine and right wrist and hand. The results of the tests indicated no deviations from normal. Dr. Emmanuel’s diagnosis was “[r]esolved sprain of the cervical spine. Resolved sprain of the thoracic spine. Resolved sprain of the lumbar spine. Resolved sprain of the right wrist. Resolved sprain of the right hand. Resolved sprain of the right and left knee. Pre-existing arthroscopy of the right knee. No portal incision sites are visible (20 years ago). Based upon my examination from an orthopedic point-of-view, the claimant has no disability as a result of the accident of record.”

Dr. Jeffrey Warhit conducted an independent film review of plaintiff’s cervical spine MRI which was performed at United Diagnostic Imaging PC on March 17, 2009. *See* Defendant’s Affirmation in Support Exhibit L. Dr. Warhit’s findings were, “[d]egenerative changes throughout the cervical spine. In view of the associated degenerative changes the mild disc bulging noted at the C2/C3, C4/C5 and C5/C6 levels and the small disc herniations noted at the C3/C4 and C5/C6 levels, may well be on a degenerative basis. There is no evidence of a traumatic injury to the cervical spine.”

With respect to plaintiff’s 90/180 claim, defendant relies on plaintiff’s employment records from Home Depot which indicate that he missed less than seven weeks of work as a result of the accident.

The burden now shifts to plaintiff to come forward with evidence to overcome defendant’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 affirmed report of Mark Shapiro M.D., of United Diagnostic Imaging PC, who performed an MRI of plaintiff's cervical spine on March 17, 2009 and an affirmation of Joseph Gregorace, D.O., a diplomate with the American Board of Physical Medicine and Rehabilitation.

Dr. Mark Shapiro, a radiologist with United Diagnostic Imaging PC, administered and supervised the administration and examination of the MRIs of plaintiff's cervical spine performed on March 17, 2009. *See* Plaintiff's Affirmation in Opposition Exhibit A. Dr. Shapiro's diagnosis was, "[f]ocal central herniation at C5-6, creating impingement on the neural canal." However, Dr. Shapiro made no reference whatsoever to plaintiff's accident or whether or not the "[f]ocal central herniation at C5-6, creating impingement on the neural canal" was in any way causally related to plaintiff's automobile accident on February 12, 2009.

Plaintiff also submitted the affirmation of Joseph Gregorace, D.O. who examined plaintiff on February 13, 2009, continued to treat plaintiff until July 24, 2009 and then re-examined plaintiff on July 6, 2011. *See* Plaintiff's Affirmation in Opposition Exhibit B. Dr. Gregorace states that, at his initial examination of plaintiff, "[i]n his cervical and lumbar spine there was tenderness throughout with mid to low cervical and lumbar spine spasm. During range of motion testing he was exhibiting painful and restricted active range of motion in both his cervical and lumbar spine in all plains of motion. His right thumb was experiencing tenderness." Dr. Gregorace adds that, at his most recent examination of plaintiff on July 6, 2011, plaintiff, "continues to complain of lower neck pain and right thumb pain. I performed a physical examination on Mr. Zodan. In his cervical spine there remains spasm upon palpitation of the mid to lower cervical spine. I performed a range of motion testing at that time using a handheld goniometer. In his cervical spine at flexion he remains normal. However, at cervical extension he is restricted to 45 degrees when normal is 60 degrees. At right rotation he remains restricted at 64 degrees when normal is 80 degrees. His right thumb remains with tenderness in the right lateral aspect along the radial collateral ligament. There was pain with adduction deviation of the right

thumb. My diagnosis is that Walter Zodan experienced cervical sprain/strain with spasm, a herniated disc at C5-C6, right C6 radiculopathy and right thumb radial collateral ligament sprain with tear. His prognosis for a full and complete recovery is poor as he continues to be symptomatic with objective clinical findings consistent with cervical spine spasms with restrictions in passive cervical spine range of motion and with clinical findings suggestive of right thumb ligament pathology. As it is now more than 2 ½ years following the motor vehicle accident, his prognosis is poor. I believe his injuries are the direct result of the trauma he received in the motor vehicle accident of February 12, 2009.”

The Court notes that Dr. Gregorace’s affirmation (Plaintiff’s Affirmation in Opposition Exhibit B) and the report he prepared with respect to plaintiff’s initial visit to him (Defendant’s Affirmation in Support Exhibit H) fail to quantify range of motion measurements for his initial examination of plaintiff. Dr. Gregorace provided no objective basis for any of his conclusions concerning that initial examination. Furthermore, in his medical report and affirmation, Dr. Gregorace did not set forth the objective tests upon which he predicated his findings and conclusions and accordingly his report is insufficient to show whether plaintiff sustained serious injury under the permanent consequential limitation of use or significant limitation of use categories of New York State Insurance Law § 5102(d). *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). Failure to indicate which objective test was performed to measure the loss of range of motion is contrary to the requirements of *Toure v. Avis Rent-a-Car Systems, supra*. It renders the expert’s opinion as to any purported loss worthless and the Court can not consider such. *See Toure v. Avis Rent-a-Car Systems, supra*; *Powell v. Alade*, 31 A.D.3d 523, 818 N.Y.S.2d 600 (2d Dept. 2006). In *Goluld v. Ombrellino*, 57 A.D.3d 608, 869 N.Y.S.2d 567 (2d Dept. 2008), the Court held that a doctor’s affirmation, in a motion for summary judgment, was insufficient to show whether plaintiff

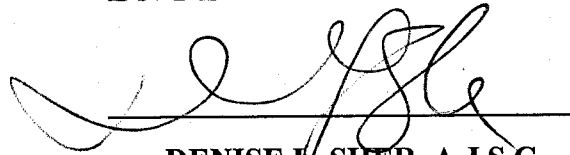
sustained serious injury under permanent consequential limitation of use or significant limitation of use categories of no-fault automobile insurance provision, when, although the doctor set forth range of motion tests results based on a recent examination that revealed limitations in plaintiff's lumbar spine, plaintiff did not proffer competent medical evidence that showed similar range of motion limitations in the lumbar spine that were contemporaneous with the subject accident.

The Court further notes that plaintiff failed to address or provide any evidence in support of his alleged fracture injury or his 90/180 argument.

Accordingly, in light of plaintiff's failure to raise any triable issue of fact, defendant's motion, 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 suffer a "serious injury" in the subject accident as defined by New York State Insurance Law § 5102 is hereby **GRANTED** and plaintiff's Verified Complaint is dismissed in its entirety.

This constitutes the Decision and Order of this Court.

ENTER:



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

Dated: Mineola, New York  
September 16, 2011

**ENTERED**  
SEP 20 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE