

<b>Hwang v Cunningham</b>
2011 NY Slip Op 33038(U)
November 16, 2011
Supreme Court, Nassau County
Docket Number: 8913/10
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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KEVIN HWANG,

Plaintiff,

- against -

JAMES CUNNINGHAM,

Defendant.

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TRIAL/IAS PART 32  
NASSAU COUNTY

Index No.: 8913/10  
Motion Seq. No.: 01  
Motion Date: 08/11/11  
**XXX**

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

	Papers Numbered
<u>Notice of Motion, Affirmation and Exhibits</u>	<u>1</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 him 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 did not submit any opposition to 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 April 8, 2010, on Interstate 495, County of Queens, State of New York. The accident involved two vehicles- a 2005 Honda operated by plaintiff and a 2008 Land Rover owned and operated by defendant.

As a result of the collision, plaintiff claims that he sustained the following injuries:

Partial tear of the supraspinatus tendon. Subacromial edema. (Left Shoulder);

Intervertebral disc herniation and central spinal canal stenosis at C5-6. Intervertebral disc bulge and mild encroachment of the neural foramina at C3-C4 and C4-5. (Cervical Spine);

Intervertebral disc herniation and central spinal canal stenosis at L4-5 and L5-S1. Intervertebral disc bulge at L3-L4. (Lumbar Spine). *See* Defendant's Affirmation in Support Exhibit D.

Plaintiff commenced this action by service of a Summons and Verified Complaint on or about April 29, 2010. Issue was joined on or about June 22, 2010. *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. 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 (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).

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)

*See* Defendant's Affirmation in Support Exhibit D.

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).

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. Eyley*, 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 his motion, defendant submits the pleadings, plaintiff's Verified Bill of Particulars, plaintiff's Elmhurst Hospital Center Emergency Room records from the date of the accident, medical records of S.J. Pahng, M.D., P.C., a chiropractor who treated plaintiff for injuries sustained in a motor vehicle accident two years prior to the instant accident, the transcript of plaintiff's Examination Before Trial ("EBT") testimony, the reports of plaintiff's motor and sensory nerve conduction studies and electromyograms conducted by Dr. Se Won Lee, the affirmed report of Michael J. Katz, M.D., who performed an independent orthopedic examination of plaintiff on February 11, 2011 and the affirmed reports of Alan B. Greenfield, M.D., D.A.B.R., who reviewed plaintiff's cervical spine, lumbar spine and left shoulder MRIs.

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 submits that the clinical findings and diagnosis reported by the physician who examined plaintiff in the Elmhurst Hospital Center Emergency Room after the subject accident reflect that, when plaintiff arrived at the Emergency Room he was complaining of “mild right sided pain.” The attending physician in the Emergency Room examined plaintiff and, based upon her clinical findings, found no medical necessity to send plaintiff for x-rays and concluded that plaintiff’s pain level at discharge was “0/10.” Plaintiff was diagnosed with a strain of the cervical spine. *See* Defendant’s Affirmation in Support Exhibit E.

Defendant further submits that plaintiff’s prior medical records establish the he had sustained injuries to his neck, back and left shoulder as a result of a prior motor vehicle accident. The medical records of Dr. S.J. Pahng, a chiropractor, establish that, two years prior to the subject accident, plaintiff was involved in a motor vehicle accident wherein he injured his neck, back and left shoulder and that said injuries were causally related to his August 2, 2008 motor vehicle accident. Additionally, eight months after the accident, Dr. Pahng examined plaintiff and reported that plaintiff was still suffering from injuries to his lumbar spine, cervical spine and left shoulder and that he had limitation of motion in same. *See* Defendant’s Affirmation in Support Exhibits F, G and H.

Defendant also contends that plaintiff’s admissions to the minimal medical treatment he sought and received for his alleged injuries show that he did not sustain a “serious injury” to his cervical spine, lumbar spine or left shoulder in the subject accident. *See* Defendant’s Affirmation in Support Exhibit I.

Defendant submits the negative results of motor and sensory nerve conduction studies performed by Dr. Se Won Lee on the nerves of plaintiff's upper and lower extremities constitute objective medical proof that plaintiff did not sustain a "serious injury" to his cervical spine, lumbar spine or left shoulder in the subject accident. *See* Defendant's Affirmation in Support Exhibit J. Defendant also submits the negative results of the electromyograms performed by on plaintiff's upper and lower extremities constitute objective medical proof that plaintiff did not sustain a "serious injury" to his cervical spine, lumbar spine or left shoulder in the subject accident. *See id.*

Dr. Michael J. Katz, a board certified orthopedic surgeon, conducted an examination of plaintiff on February 11, 2011. Said examination included an evaluation of plaintiff's cervical spine, lumbar spine, left shoulder and arm and right shoulder and arm. The range of motion testing was conducted by way of a goniometer which revealed normal findings. Based upon his clinical findings and medical record reviews, Dr. Katz diagnosed plaintiff with a resolved cervical strain, resolved thoracolumbosacral strain, resolved left shoulder derangement and resolved right shoulder contusion. Dr. Katz's ultimate diagnosis of plaintiff was that "[c]urrently she (*sic*) shows no signs or symptoms of permanence relative to the musculoskeletal system and relative to 04/08/10. Based on the examination, the records reviewed and the history provided by claimant, the accident of 04/08/10 appears to be related to the sites of the injury described. He is currently not disabled. He is capable of full time full duty work as an office worker. He is capable of his activities of daily living. He is capable of his pre-loss activity levels." *See* Defendant's Affirmation in Support Exhibit K.

Dr. Alan B. Greenfield, a board certified radiologist, conducted an independent film review of the MRI of plaintiff's cervical spine done on April 23, 2010, compared his findings to

the prior study on September 16, 2008 relating to plaintiff's prior motor vehicle accident and found evidence of degeneration with no trauma-related abnormality. *See* Defendant's Affirmation in Support Exhibits L and M. Dr. Greenfield also conducted an independent film review of the MRI of plaintiff's lumbar spine done on April 30, 2010, compared his findings to the prior study on September 18, 2008 relating to plaintiff's prior motor vehicle accident and reported findings consistent with degenerative disc disease, not any trauma-related abnormality. *See* Defendant's Affirmation in Support Exhibits N and O. Dr. Greenfield, also conducted an independent film review of the MRI of plaintiff's left shoulder done on April 16, 2010, compared his findings to the prior study on September 23, 2008 relating to plaintiff's prior motor vehicle accident and found no significant changes in comparison to the prior study. *See* Defendant's Affirmation in Support Exhibits P and Q.

With respect to plaintiff's 90/180 claim, defendant relies upon plaintiff's EBT testimony where he stated that, at the time of the subject accident, he worked for CME Solutions as a salesperson and was a student at Adelphi University. Plaintiff indicated that, as a result of the accident, he missed only three days of work, one day of school on the date of accident and missed school at times for doctors appointments and treatment after said accident.

As previously stated when the movant meets his specific burden of establishing that the plaintiff did not sustain a "serious injury" as enumerated in Article 51 of the Insurance Law § 5102(d), it then 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).

The Court finds that the moving defendant has established a *prima facie* case that the plaintiff failed to sustain a serious injury within the categories of permanent loss of a body organ,

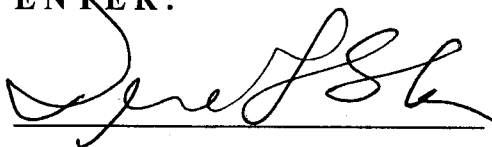
member, function or system (Category 6), a permanent consequential limitation of use of a body organ or member (Category 7), a significant limitation of use of a body function or system (Category 8) and a medically determined injury or impairment of a non-permanent nature which prevents the injured person 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 plaintiff failed to submit any opposition to defendant's instant motion, plaintiff therefore failed to raise an issue of fact through objective medical evidence or any other type of evidence.

Accordingly, defendant's motion, pursuant to CPLR § 3212 and Article 51 of the Insurance Law of the State of New York, which seeks dismissal of the Verified Complaint for alleged personal injuries sustained by plaintiff on the ground that he did not sustain a "serious injury" in the subject accident as defined by New York State Insurance Law § 5102(d) is hereby **GRANTED**.

This constitutes the Decision and Order of this Court.

ENTER:



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

XXX

Dated: Mineola, New York  
November 16, 2011

**ENTERED**

NOV 18 2011

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**