

Jian Xun Liang v Vanegas

2011 NY Slip Op 33127(U)

November 28, 2011

Supreme Court, Nassau County

Docket Number: 2833/10

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

JIAN XUN LIANG,

Plaintiff,

- against -

MYRIAM VANEGAS,

Defendant.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 2833/10
Motion Seq. Nos.: 02, 03
Motion Dates: 07/05/11
07/28/11

XXX

The following papers have been read on these motions:

	Papers Numbered
<u>Notice of Motion (Seq. No. 02), Affirmation and Exhibits</u>	<u>1</u>
<u>Notice of Motion (Seq. No. 03), Affirmation and Exhibits</u>	<u>2</u>
<u>Affirmation in Opposition to Motion Seq. No. 02 and Exhibits</u>	<u>3</u>
<u>Affirmation in Opposition to Motion Seq. No. 03</u>	<u>4</u>
<u>Reply Affirmation to Motion Seq. No. 02</u>	<u>5</u>
<u>Reply Affirmation to Motion Seq. No. 03</u>	<u>6</u>

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

Defendant moves (Seq. No. 02), 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.

Plaintiff moves (Seq. No. 03), pursuant to CPLR § 3212, for an order granting partial summary judgment as to the liability against defendant. Defendant opposes the motion.

This action arises from a motor vehicle accident which occurred on January 30, 2008, at approximately 8:15 a.m., at or near the intersection of Hempstead Turnpike and Locustwood

Boulevard, Elmont, Nassau County, New York. The accident involved a 2005 Suzuki Verona four-door sedan owned and operated by defendant. On that date, at that time, it was raining out and plaintiff, who is four feet ten inches tall, was holding an umbrella standing on the southwest corner of the aforementioned intersection waiting for the pedestrian light to change from red to green so she could cross Hempstead Turnpike. Plaintiff claims that she looked before crossing and did not see any vehicles on Locustwood Boulevard making a turn onto Hempstead Turnpike. Plaintiff further claims that, as she was crossing Hempstead Turnpike, she was struck in the rear, specifically her lower back, by the front of defendant's vehicle. As a result of the impact, plaintiff was thrown to the side. Plaintiff commenced this action by the filing and service of a Summons and Verified Complaint on or about August 26, 2009. Issue was joined on or about October 26, 2009.

In her motion for partial summary judgment (Seq. No. 03), plaintiff argues that defendant was negligent *per se* in violating New York State Vehicle and Traffic Law §§ 1146 and 1111(a)(1) and (3) by failing to keep a proper lookout, failing to see what was there to be seen and failing to use due care to avoid hitting a pedestrian. Plaintiff submits that “[a] pedestrian must be granted summary judgment if the plaintiff demonstrates that she was walking within a crosswalk, with the pedestrian signal in her favor, when the defendant's car failed to yield the right of way and struck her, and that the plaintiff exercised due care by looking to check for approaching vehicles before entering the intersection. Martinez v. Kreychmar, 84 A.D.3d 1037, 923 N.Y.S.2d 648 (2d Dept. 2011).” In support of her motion, plaintiff offers the Affidavit of Shawn Johnson, who witnessed the subject accident. *See* Plaintiff's Affirmation in Support Exhibit E. Mr. Johnson states, “[o]n January 30, 2008, at approximately 8:11 a.m., I was a pedestrian on the corner of Locustwood Blvd. and Hempstead Turnpike, preparing to cross Hempstead Turnpike in a northbound direction. An Asian woman, Ms. Jian-Xun Liang, was

crossing the street next to me in the same direction. As Ms. Liang was crossing the street with the green light in her favor, a gray compact, 4-door car made a sharp left turn from Locustwood Blvd. and hit Ms. Liang as she was walking in the crosswalk next to me.”

In opposition to plaintiff’s motion, defendant argues that “[p]laintiff pedestrian stated that she never saw the defendant’s vehicle prior to the accident. Defendant testified that plaintiff already crossed in front of her, but then due to wind catching her umbrella, plaintiff walked backwards into the defendants vehicle. Plaintiff denied that the wind turned her umbrella inside out. Clearly, the parties give conflicting testimony with regard to how the accident occurred and plaintiff is not entitled to summary judgment.” Defendant testified at her Examination Before Trial (“EBT”) that she observed plaintiff and a male pedestrian cross the street in front of her and, after plaintiff had crossed in front of her, the wind caught plaintiff’s umbrella, turned it inside out, causing plaintiff to walk backwards into defendant’s vehicle. *See* Plaintiff’s Affirmation in Support Exhibit D. Defendant further argues that the Affidavit of witness Shawn Johnson states that he was next to plaintiff at the time of the accident. Defendant stated at her EBT that the witness was behind the plaintiff. Defendant submits that plaintiff testified at her EBT that the witness was walking in front of her. Consequently, defendant claims that there is an issue of fact as to whether the witness actually saw the accident because, if he was in front of plaintiff, he would not have observed the accident take place. Defendant contends that plaintiff and defendant set forth two different versions as to how the accident occurred and that summary judgment is routinely denied in cases where the parties give conflicting testimony. Defendant adds that plaintiff testified that she did not see defendant’s vehicle prior to the accident and that plaintiff’s failure to observe defendant’s vehicle prior to the accident raised an issue of fact as to plaintiff’s comparative negligence.

In reply to defendant’s opposition, plaintiff submits that “[d]efendant’s opposition argues

that there is an issue of fact with respect to whether the wind, turning plaintiff's umbrella inside out, caused plaintiff to walk backwards into the defendant's vehicle. The plaintiff, however, testified that the umbrella was a small, one-person umbrella, and that it did not blow inside out at the time of the accident.... Therefore, the umbrella was not the cause of the accident. The witness stated that he witnessed the defendant's vehicle make a sharp left turn and hit the plaintiff as she was walking in the crosswalk.... The witness made no mention of an umbrella as a contributing factor to the accident. Except for the defendant's self-serving statement that plaintiff's umbrella opened, there is no other testimony or evidence to support that assertion. Clearly, this accident was caused by the defendant's failure to use reasonable care to avoid hitting the plaintiff."

Plaintiff further argues that the witness attested that he witnessed the accident, therefore, defendant's claim regarding the position of the witness in relation to plaintiff is insignificant and insufficient to overcome defendant's burden to create an issue of fact. Plaintiff adds that she fulfilled her obligation of looking before crossing inside a crosswalk with a green pedestrian signal and, therefore, was not comparatively negligent.

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). It is the existence of an issue, not its relative strength that is the critical and controlling consideration. *See Barrett v. Jacobs*, 255 N.Y. 520 (1931); *Cross v. Cross*, 112 A.D.2d 62, 491 N.Y.S.2d 353 (1st Dept. 1985). The evidence should be construed in a light most favorable to the party moved against. *See Weiss v. Garfield*, 21 A.D.2d 156, 249 N.Y.S.2d 458 (3d Dept. 1964).

Plaintiff, in her motion (Seq. No. 03), has demonstrated *prima facie* entitlement to summary judgment as a matter of law, by demonstrating that defendant was negligent in failing to yield the right of way to her while she was crossing a street within the crosswalk with the light in her favor. *See Cavitch v. Mateo*, 58 A.D.3d 592, 871 N.Y.S.2d 372 (2d Dept. 2009) (holding pedestrian established her *prima facie* entitlement to summary judgment on the issue of liability by submitting evidence that the driver failed to yield the right of way to her as she proceeded across a roadway in a crosswalk); *Voskin v. Lemel*, 52 A.D.3d 503, 859 N.Y.S.2d 489 (2d Dept. 2008); *Sulaiman v. Thomas*, 54 A.D.3d 751, 863 N.Y.S.2d 723 (2d Dept. 2008).

As stated previously, the burden now shifts to defendant to demonstrate an issue of fact which precludes summary judgment. *See Zuckerman v. City of New York, supra.*

After applying the law to the facts in this case, the Court finds that defendant met her burden to demonstrate an issue of fact which precludes summary judgment. As previously stated, in rendering a decision on a summary judgment motion, the Court is not to resolve issues of fact nor determine matters of credibility. The Court finds that the facts and circumstances surrounding the accident do indeed involve determining the credibility of the parties involved in said accident. The Court holds that the parties' conflicting versions of the accident, specifically whether the wind, turning plaintiff's umbrella inside out, caused plaintiff to go backwards into defendant's vehicle, raise a triable issue of fact.

Therefore, based upon the foregoing, plaintiff's motion (Seq. No. 03), pursuant to CPLR § 3212, for an order granting partial summary judgment as to the liability against defendant is hereby **DENIED**.

The Court will now address defendant's threshold motion (Seq. No. 02).

As a result of the subject accident described above, plaintiff claims that she sustained the following injuries:

Herniated disc at L4-5;

EMG Evidence of L4-5 radiculopathy;

Required lumbar epidural steroid injection under fluoroscopic guidance;

Disc bulge L3-L4 with a lumbar myofascial pain syndrome;

Contusion low back. *See Defendant's Affirmation in Support Exhibit D.*

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. Eyer, 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, she has sustained serious injuries as defined in § 5102(d) of the New York State Insurance Law 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'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. 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 her motion (Seq. No. 02), defendant submits the pleadings, plaintiff’s Verified Bill of Particulars, plaintiff’s Franklin Hospital Emergency Room records, the transcript of plaintiff’s EBT testimony, the affirmed report of Michael J. Katz, M.D., who performed an independent orthopedic medical examination of plaintiff on February 8, 2011 and the affirmed reports of Melissa Sapan Cohn, M.D., who reviewed plaintiff’s cervical spine MRI performed on February 15, 2008 and plaintiff’s left shoulder MRI performed on April 11, 2008.

Defendant submits that the clinical findings and diagnosis reported by the physician who examined plaintiff in the Franklin Hospital Emergency Room after the subject accident establish that plaintiff did not suffer any “serious injury” in the accident. *See Defendant’s Affirmation in Support Exhibit E*. When plaintiff arrived at the Emergency Room she was complaining of pain in her lower back. Upon examination, it was noted that plaintiff’s neck was supple and all extremities were normal. Plaintiff also had a normal musculoskeletal and neurological examination. The attending physician in the Emergency Room sent plaintiff for x-rays of her cervical spine, lumbosacral spine and pelvis, which were negative for fracture and dislocation. Plaintiff was diagnosed with “contusion lower back.” *See id.*

Defendant next asserts that, according to plaintiff's own EBT testimony, after the accident she saw her general practitioner, Dr. Jiang, and complained of pain in her back and all over her body. *See* Defendant's Affirmation in Support Exhibit F. Plaintiff next referred to Dr. Park, a physical therapist, who treated her for about one year. Plaintiff testified that she ceased treatment after she no longer felt any pain and Dr. Park advised her that she did not need to come to therapy anymore. Dr. Park referred plaintiff to Dr. Kaisman, whom she met with on four occasions and received epidural injections in her lower back. *See id.*

Dr. Michael J. Katz, a board certified orthopedic surgeon, conducted an examination of plaintiff on February 8, 2011. Said examination included an evaluation of plaintiff's cervical spine, lumbosacral spine and left shoulder. Range of motion testing, conducted by way of a goniometer, revealed normal findings. Based upon his clinical findings and medical record reviews, Dr. Katz diagnosed plaintiff with a resolved lumbosacral radiculopathy. Dr. Katz's ultimate diagnosis of plaintiff was that "[c]laimant is a 38-year-old female who alleges an injury of 01/30/08 as a pedestrian. The injury is diagnosed as lumbosacral radiculopathy. The treatment is consistent with the injuries diagnosed. The claimant's prognosis is excellent. Currently, she shows no signs or symptoms of loss of range of motion or power relative to the event of 01/30/08. She is currently not disabled. She is capable of gainful employment as a Costco membership worker. She is capable of her activities of daily living. She is capable of return to all pre-loss activity levels. There are no reported preexisting conditions." *See* Defendant's Affirmation in Support Exhibit G.

Dr. Melissa Sapan Cohn, a board certified radiologist, conducted an independent film review of the MRI of plaintiff's cervical spine MRI which was performed on February 15, 2008 and plaintiff's left shoulder MRI which was performed on April 11, 2008. *See* Defendant's

Affirmation in Support Exhibits H and I. With respect to her review of the cervical spine MRI, Dr. Sapan Cohn's findings were "[t]he normal cervical lordosis is maintained. There is no evidence for disc herniation or disc bulge. No central canal or neuralforaminal compromise is present. The marrow sign is normal. No intrinsic spinal cord abnormality is identified.

Impression: Unremarkable cervical spine MRI. Discussion: This is a normal appearing cervical spine MRI. There is no evidence of disc pathology or acute trauma related injury on the submitted study." See Defendant's Affirmation in Support Exhibit H.

With respect to her review of the left shoulder MRI, Dr. Sapan Cohn's findings were "[t]here is no evidence for rotator cuff tear. There is no fluid present within the subacromial-subdeltoid bursa or the glenohumeral joint space. The long biceps tendon is intact. There is no evidence for labral injury. The marrow sign is normal. Impression: Unremarkable left shoulder MRI. Discussion: This is a normal appearing left shoulder MRI. There is no evidence of rotator cuff tear or tendon or ligamentous injury. In my opinion, this is a normal left shoulder MRI. There is no evidence of pathology or acute trauma related injury on the submitted study." See Defendant's Affirmation in Support Exhibit I.

With respect to plaintiff's 90/180 claim, defendant relies on the EBT testimony of plaintiff to establish that plaintiff did not sustain an injury that prevented her from performing substantially all of the material acts that constituted her customary daily activities for at least 90 days of the 180 days immediately after the accident. Plaintiff testified that, at the time of the accident, she was unemployed and enrolled full time as a student at NYU Poly. Plaintiff testified that she missed two weeks from school after the accident. She was enrolled in four classes for the Spring 2008 semester, but only attended three of those classes when she returned after missing those two weeks. She explained that she corresponded with her professor from her fourth class

and was told that she could miss the first half of the semester and eventually she took a test after the semester to get credits for said class. *See* Defendant's Affirmation in Support Exhibit F.

Based upon this evidence, the Court finds that the 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).

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 her burden, plaintiff submits her Franklin Hospital Emergency Room records, the undated affirmation of Ki Y. Park, M.D. with the reports of plaintiff's treatment at Bayside Pain & Rehabilitation Medicine, P.C. d/b/a Dr. Park's Comprehensive Pain Clinic, the unsworn reports of Arden M. Kaisman, M.D., an MRI report of her lumbar spine prepared by Sung U. Kim, M.D., an MRI report of her cervical spine prepared by and prepared by Robert Peyster, M.D. and Sung U. Kim, M.D., an MRI report of her left shoulder prepared by Steven West, D.O. and Sung U. Kim, M.D. and a Disability Statement prepared by Ki Y. Park, M.D. on July 14, 2008.

Plaintiff submitted the affirmation and reports of her treating physician, Ki Y. Park, M.D. *See* Plaintiff's Affirmation in Opposition Exhibit B. Dr. Park first examined plaintiff on February 5, 2008 and performed quantified and comparative range of motion tests on her neck and trunk. The results of the tests indicated deviations from normal. Dr. Park's finding at the initial examination was that plaintiff "suffered from acute traumatic strain-sprain of the cervical, dorsal and lumbosacral paraspinal muscles and ligaments; cerebral contusion with headaches and

dizziness, contusion injury to the right lower anterior chest wall and post-traumatic stress syndrome.” Dr. Park’s records indicate that he treated plaintiff on “3/6/08, 4/3/08, 5/13/08, 6/12/08, 7/8/08, 8/12/08, 1/22/09, 3/3/09 and September 13, 2011.” Dr. Park states that “[i]n my subsequent examinations of Ms. Liang, she continued to have limitations in range of motion in the neck and trunk....I last treated Ms. Liang on September 13, 2011. During this visit my findings were that Ms. Liang suffered from herniated disc of the lumbar spine at L4-5, a disc bulge of the lumbar spine at L3-4, post-traumatic cervical-thoracic myofascitis, acute cervical musculo-ligamentous strain-sprain, Acute traumatic left L4-5 radiculopathy, acute lumbosacral musculo-ligamentous strain-sprain and acute thoracic musculo-ligamentous strain-sprain.” On September 13, 2011, Dr. Park again performed quantified and comparative range of motion tests on her neck and trunk. The results of the tests indicated deviations from normal. Dr. Park asserts that, “[i]n my opinion Ms. Liang’s injuries are causally related to the motor vehicle accident she was involved in on January 30, 2008. It is also my opinion within a reasonable degree of medical certainty that Ms. Liang will and has developed significant and permanent limitations in her cervical spine and lumbosacral spine. It is also my opinion that these conditions have become chronic and permanent in nature and are permanent consequential impairments on Ms. Liang’s working and living functional ability. The persistence of Ms. Liang’s limitations over three and a half years after the date of the accident lead me to opine within a reasonable degree of certainty that Ms. Liang has achieved maximum medical improvement and will not make a full recovery from the injuries she sustained as a result of the accident on January 30, 2008. Based upon my review of Ms. Liang’s complete medical file, including the medical records of Dr. Kaisman and Franklin Hospital, the history taken, the objective tests performed, the examinations and Medical observations conducted, Ms. Liang’s subjective complaints, the chronic nature of the injuries,

and the deficiencies in range of motion and pain to the affected areas, it is my opinion within a reasonable degree of medical certainty that Ms. Liang's back and neck injuries are causally and directly related to the accident of January 30, 2008. I additionally affirm that Jian-Xun Liang suffered a permanent consequential impairment as a direct result of the January 30, 2008 accident in the cervical spine and lumbar spine."

Plaintiff also submitted the unsworn medical reports of Arden M. Kaisman, M.D. in support of her opposition to defendant's motion. *See* Plaintiff's Affirmation in Opposition Exhibit C. However, as previously stated, said reports do not constitute competent admissible evidence in opposition to defendant's motion for summary judgment as unsworn reports of the plaintiff's examining doctors 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).

Plaintiff further submitted the unsworn MRI report of her lumbar spine prepared by Sung U. Kim, M.D., the unsworn MRI report of her cervical spine prepared by and prepared by Robert Peyster, M.D. and Sung U. Kim, M.D. and the unsworn MRI report of her left shoulder prepared by Steven West, D.O. and Sung U. Kim, M.D. *See* Plaintiff's Affirmation in Opposition Exhibit D. With respect to the MRI of plaintiff's lumbar spine, the impression was "[d]iffuse disc bulge L3-4. Central herniation with spinal stenosis at L4-5." With respect to the MRI of plaintiff's cervical spine, the impression was "[u]nremarkable MRI of the cervical spine." With respect to the MRI of plaintiff's left shoulder, the impression was "[u]nremarkable MRI of the left shoulder."

Plaintiff submitted a Disability Statement prepared on July 14, 2008 by Dr. Park, which, plaintiff contends, demonstrates that plaintiff was disabled six months after the subject accident. *See* Plaintiff's Affirmation in Opposition Exhibit E. Plaintiff argues that, since she has submitted

disability statements from her treating doctor issued after ninety days from the accident, said statements alone create an issue of fact as to whether she sustained an injury that qualifies as a “serious injury” under the 90/80 category. Plaintiff adds that she testified at her EBT that, for the three months following the subject accident, she could not perform the regular household activities she would perform prior to the accident. *See* Defendant’s Affirmation in Support Exhibit F.

In reply to plaintiff’s opposition, defendant argues that plaintiff testified at her EBT that she was unemployed at the time of the subject accident and instead was enrolled full time as a student at NYU Poly. *See* Defendant’s Affirmation in Support Exhibit F. Plaintiff testified that she missed two weeks from school after the accident. Defendant submits, “[t]hus, despite the doctor’s claim that plaintiff was disabled from work, plaintiff admittedly went to school two weeks post-Accident. Plaintiff’s testimony alone is sufficient to show that plaintiff did not sustain an injury that prevented her from attending her full time classes for 90 out of the first 180 days after the Accident.”

Defendant further argues that, in the Affirmation of Dr. Park submitted by plaintiff, Dr. Park provides no explanation for plaintiff’s gap in treatment from March 3, 2009 to September 13, 2011 and that said failure to explain the gap in treatment is fatal to the opposition.

Defendant adds, “[t]he submission of plaintiff’s MRI reports and the EMG report alone are insufficient to raise a triable issue of fact because the radiologists never set forth that the findings on the MRI studies were caused by the subject Accident.”

Defendant also argues that “[c]ounsel for plaintiff is incorrect in his opposition papers, in which he claims that defendant failed to make a prima facie showing because defendant’s expert did not review plaintiff’s lumbar spine MRI report. Such a claim is incorrect. As pointed out in

the original motion, positive MRI studies alone are insufficient to establish a 'serious injury.' ...Defendant made a prima facie showing of entitlement to summary judgment by coming forward with the affirmed report of Dr. Michael Katz, who found that plaintiff had full quantified range of motion of the lumbar spine with a negative straight leg raising test, despite the findings on the plaintiff's lumbar spine MRI study."

As previously stated, 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, supra*. The Court finds that neither plaintiff nor Dr. Park adequately explained the cessation of her treatment after March 3, 2009. *See Haber v. Ullah*, 69 A.D.3d 769, 892 N.Y.S.2d 531 (2d Dept. 2010); *Milosevic v. Mouladi*, 72 A.D.3d 1036, 898 N.Y.S.2d 870 (2d Dept. 2010); *Collado v. Abozeid*, 68 A.D.2d 912, 890 N.Y.S.2d 326 (2d Dept. 2009). Additionally, plaintiff did not provide the Court with evidence of any physical therapy she may or may not have been taking part in since the date of the accident. Also, there was no statement from any doctors that plaintiff had reached her maximum possible medical improvement and that further treatment was unnecessary.

Consequently, as plaintiff had an approximately two year gap in treatment and failed to adequately explain said cessation of treatment, the Court finds that these factors override plaintiff's objective medical proof of limitations and permits dismissal of plaintiff's Verified Complaint.

It is also further noted that the unsworn MRI reports of Sung U. Kim, M.D., Robert Peyster, M.D. and Steven West, D.O. do not constitute competent admissible evidence in

opposition to defendant's motion for summary judgment. In the absence of any opinion as to the causality of their findings, their reports are not competent medical evidence sufficient to present an issue of fact. *See Garcia v. Lopez*, 59 A.D.3d 593, 872 N.Y.S.2d 719 (2d Dept. 2009); *Knox v. Lennihan*, 65 A.D.3d 615, 884 N.Y.S.2d 171 (2d Dept. 2009); *Collins v. Stone*, 8 A.D.3d 321, 778 N.Y.S.2d 79 (2d Dept. 2004); *Betheil-Spitz v. Linares*, 276 A.D.2d 732, 715 N.Y.S.2d 435 (2d Dept. 2000). The same holds true for plaintiff's EMG report.

Additionally, plaintiff's subjective complaints of pain, without more, are insufficient to satisfy the burden of establishing a serious injury. *See Marshall v. Albano*, 182 A.D.2d 614, 582 N.Y.S.2d 220 (2d Dept. 1992).

Finally, plaintiff's deposition testimony does not establish that she was unable to perform substantially all of the material acts which constitute his usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury. Plaintiff attended school in a full time capacity shortly after the accident.

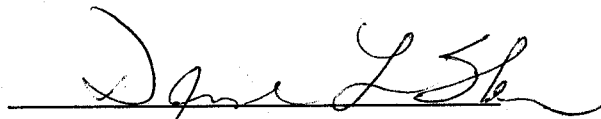
Based on the above, the Court finds that plaintiff has failed to establish by competent medical proof that she sustained a "permanent consequential limitation of use of a body organ or member," a "significant limitation of use of a body function or system" or "a medically determined injury or impairment 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." *See Insurance Law* § 5102(d).

Accordingly, defendant's motion (Seq. No. 02), 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) 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
November 28, 2011

ENTERED
NOV 30 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE