Marrero v Kovol
2012 NY Slip Op 31462(U)
May 15, 2012
Sup Ct, Nassau County
Docket Number: 15044/10
Judge: Denise L. Sher
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

[* 1]

SCAN

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

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

MARK A. MARRERO,

Plaintiff,

- against -

CHRISTOPHER A. KOVOL,

Defendant.

TRIAL/IAS PART 31
NASSAU COUNTY

Index No.: 15044/10
Motion Seq. No.: 01
Motion Date: 12/28/11
XXX

The following papers have been read on this motion:	
	Papers Numbered
Notice of Motion, Affirmation and Exhibits	1
Affirmation in Opposition and Exhibits and Memorandum of Law	2
Reply Affirmation	3

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

Defendant moves, pursuant to CPLR § 3212 and Article 51 of the Insurance Law of the State of New York, for an order granting 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 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 November 20, 2009, at approximately 7:51 p.m., at or near the intersection of Guinea Woods Road and Jericho Turnpike, Old Westbury, County of Nassau, State of New York. The accident involved a 2008 Chrysler owned and operated by plaintiff and a 2003 Volkswagen owned and operated by

defendant. Plaintiff commenced this action by the filing and service of a Summons and Verified Complaint on or about July 21, 2010. *See* Defendant's Affirmation in Support Exhibit B. Issue was joined on or about September 7, 2010. *See* Defendant's Affirmation in Support Exhibit C.

Briefly, it is plaintiff's contention that the accident occurred when defendant's vehicle struck plaintiff's vehicle in the aforementioned intersection when, defendant's vehicle, while speeding, made a left turn in the intersection and failed to yield the right of way.

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

T10-11 superiorly extruded right lateral recess disc herniation occupying the right lateral recess behind the T10 vertebral body, measuring roughly 6 mm;

Alight anterior displacement of the right aspect of the cord;

T11-12 slight disc dessication and bulge;

L2-3 degenerative disc bulge and facet hypertrophy resulting in moderate spinal stenosis;

L3-4 degenerative disc bulge and facet hypertrophy resulting in moderate spinal stenosis and right lateral recess and foraminal stenosis;

L4-5 degenerative disc bulge and facet hypertrophy resulting in mild spinal and right foraminal stenosis;

L5-S1 degenerative disc bulge and facet hypertrophy resulting in mild spinal and bilateral foraminal stenosis (worse on left side);

Pain in left side of neck and lower back;

Plaintiff underwent injection to left trapezius performed on January 19, 2010 by Arthur Farkash, M.D....;

Bilateral lumbosacral radiculopathy;

Prolonged right H reflex could reflect a S1 root disturbance;

Lower thoracic myelopathy;

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

[* 3]

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, 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, 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

[* 4]

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 (1st Dept. 2003).

Conversely, even where there is ample proof of a plaintiff's injury, certain factors may nonetheless override a plaintiff's objective medical proof of limitations and permit dismissal of a plaintiff's complaint. Specifically, additional contributing factors such as a gap in treatment, an intervening medical problem or a pre-existing condition would interrupt the chain of causation between the accident and the claimed injury. *See Pommells v. Perez,* 4 N.Y.3d 566, 797

N.Y.S.2d 380 (2005).

Plaintiff claims that, as a consequence of the above described automobile accident with defendant, he has sustained serious injuries as defined in New York State Insurance Law § 5102(d) and which fall within the following statutory categories of injuries:

1) a permanent consequential limitation of use of a body organ or member; (Category 7)

2) a significant limitation of use of a body function or system; (Category 8)

3) a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.(Category 9).

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. Eyler,* 79 N.Y.2d 955, 582 N.Y.S.2d 990 (1992); *Licari v. Elliot, supra.* 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, the January 22, 2004 report of Dr. Arthur Farkash, the report of plaintiff's lumbar spine MRI done on February 2, 2004, the Progress Notes and Reports of Dr. Arthur Farkash, the transcript of plaintiff's Examination Before Trial ("EBT") testimony, the affirmed report of Robert Israel, M.D., who performed an independent orthopedic examination of plaintiff on August 16, 2011 and the affirmed reports of Alan B. Greenfield, M.D., who reviewed plaintiff's lumbar spine MRI which was performed on December 10, 2009 and plaintiff's thoracic spine MRI which was performed on January 12, 2010.

When moving for dismissal of a personal injury complaint, the movant bears a specific burden of establishing that the plaintiff did not sustain a serious injury. *See Gaddy v. Eyler, supra*. 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 first argues that plaintiff's medical records establish that plaintiff had a pre-existing medical history of lower back pain that pre-dates and is unrelated to the subject accident. Defendant submits that, on January 22, 2004, almost six years prior to the subject accident, plaintiff went to Dr. Arthur Farkash with complaints of back pain from the proceeding year and admitted that the condition originated five to six years earlier. *See* Defendant's Affirmation in Support Exhibit E. Dr. Farkash diagnosed plaintiff with "recurrent low back syndrome" and, given the location of plaintiff's complaint of numbness, Dr. Farkash opined that a possible cause of plaintiff's described pain was that "he has meralgia paresthetica, which may be due to both diabetes and obesity." *See id.*

Defendant next submits that the MRI of plaintiff's lumbar spine done on February 2, 2004, five years prior to the subject accident, demonstrates that plaintiff has pre-existing degeneration at multiple levels of his lumbar spine. *See* Defendant's Affirmation in Support Exhibit F. Said MRI report states that the impression was "[m]ultilevel spondylosis, disc bulges most pronounced at L3/4 and L2/3. Right paracentral protrusion at L5/S1." *See id.*

Additionally, the MRI of plaintiff's lumbar spine done on May 2, 2005, four years prior to the subject accident, also demonstrated that plaintiff had pre-existing degeneration at multiple levels of his lumbar spine. The MRI was performed at the same facility as the 2004 MRI. Dr. Jeffrey C. Lee interpreted the 2005 MRI study and compared his findings to the 2004 MRI findings. Said MRI report states that the impression was "[d]isc bulge and facet hypertrophy at the L2-3 level resulting in moderate spinal stenosis. In addition there appears to be a small right paracentral disc fragment posterior to the L3 superior endplate. This is seen only on the sagittal

images and appears slightly larger when compared to the previous MRI of 2-2-04. Disc bulge and facet hypertrophy at the L3-4 level resulting in moderate spinal stenosis. There is also a small right lateral disc herniation with encroachment on the right lateral recess. This is unchanged from the previous exam. Mild spinal stenosis at the L4-5 level. Disc bulge at the L5-S1 level resulting in bilateral foraminal stenosis, worse on the left side. Right paracentral disc protrusion decreased from the previous exam. No significant thecal sac compression." *See* Defendant's Affirmation in Support Exhibit G.

Defendant adds that the medical records of plaintiff's treating physician, Dr. Farkash, further show that plaintiff had pre-existing limitations, lumbar stenosis and pain of his lumbar spine for which he was treating from 2004 through 2006 and again in 2009 prior to the subject accident. *See* Defendant's Affirmation in Opposition Exhibits H- K.

Dr. Robert Israel, a board certified orthopedist, reviewed plaintiff's medical records and conducted an examination of plaintiff on August 16, 2011. *See* Defendant's Affirmation in Support Exhibit M. Dr. Israel performed quantified and comparative range of motion tests on plaintiff's lumbar spine and right and left hip. Said range of motion testing, conducted by way of a goniometer, revealed no deviations from normal. Dr. Israel also performed other clinical tests and reported negative straight leg raising with no motor or sensory deficits and symmetrical deep tendon reflexes. Dr. Israel's diagnosis was "[r]esolved sprain of the lumbar spine. Resolved sprain of the right and left hip. Resolved sprain of the right and left leg. Based upon my examination from an orthopedic point-of-view, the claimant has no disability as a result of the accident of record....The claimant is capable of work activities and ADLs without restrictions." *See id.*

Dr. Alan B. Greenfield, a radiologist, conducted an independent film review of the MRI of plaintiff's lumbar spine originally performed on December 10, 2009. *See* Defendant's Affirmation in Support Exhibit N. With respect to his review of the lumbar spine MRI, Dr. Greenfield's findings were "[n]ormal lordosis. Diffuse degenerative disc disease, degenerative

disc bulging, and degenerative bone spur formation is seen along with multilevel degenerative hypertrophy of the ligamentum flavum and/or facet joints as indicated above. The constellation of the findings is clearly longstanding and degenerative in origin, is relatively extensive, however, evolve (*sic*) over a period of years, and is entirely unrelated to an accident occurring on 11/20/09. Coexistent disc herniations are present toward the right side at L2-L3 and L3-L4 as well as centrally at L5-S1. These can easily be explained on the basis of longstanding degenerative disc disease, culminating in degenerative disc herniations at these levels, and cannot be attributed to the accident in question with any reasonable degree of medical certainty, particularly based on the extensive multifocal degenerative findings at the involved levels as discussed above. Incidental note is made of an L4 vertebral hemangioma which is a benign entity, unrelated to trauma including the accident in question. In summary, there are no findings on this examination which can be attributed to an accident occurring on 11/20/09, with any degree of medical certainty." *See id.*

Dr. Greenfield also conducted an independent film review of the MRI of plaintiff's thoracic spine originally performed on January 12, 2010. *See* Defendant's Affirmation in Support Exhibit N. With respect to his review of the thoracic spine MRI, Dr. Greenfield's findings were "[d]iffuse degenerative disc disease is present at all thoracic disc levels and associated with multilevel degenerative bone spur to varying degrees from T9 distally. In addition, there is degenerative disc bulging at T11-T12 with flattening of the dural sac but without foraminal compromise. The constellation of the above noted findings is clearly longstanding and degenerative in origin, is relatively extensive, however, evolve over a period of years, and is entirely unrelated to an accident occurring on 11/20/09. There is no disc herniation at any level and no fracture present. There are no findings on the study which can be attributed to an accident occurring on 11/20/09, with any degree of medical certainty." *See id.*

With respect to plaintiff's 90/180 claim, defendant relies on plaintiff's testimony at his EBT, which indicated that, at the time of the subject accident, he worked for Trooper Foods and

do not miss any time from work after said accident.

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).

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, supra*; *Grossman v. Wright*, 268 A.D.2d 79, 707 N.Y.S.2d 233 (2d Dept. 2000).

To support his burden, plaintiff submits the Affirmation of his treating physician, Dr. Farkash, plaintiff's EBT testimony and Dr. Farkash's medical treatment records for plaintiff dated October 13, 2009 thought January 19, 2010.

Plaintiff submits that he was not under the care of any doctor at the time of the subject accident and, prior to said accident, the last time that he saw Dr. Farkash was on October 1, 2009 at which time he had no new complaints. Additionally, plaintiff testified at his EBT that the subject accident initially caused some soreness of his back that turned into intense pain. Said pain radiated to his right hip and thigh and pain into his leg. These radiating pains were not present for over three years prior to the subject accident. Plaintiff argues that the subject accident clearly exacerbated his prior condition concerning his bulging disc and created a completely new injury - the disc herniation at T10-11 and the disc bulge at T11-12. Plaintiff submits that he is still seeing Dr. Farkas for treatment and that his condition is so severe that he has consulted with a neurosurgeon who recommended surgery. Plaintiff allegedly stopped physical therapy because no-fault benefits were terminated and he could not afford to pay for the physical therapy sessions.

As mentioned, plaintiff submits an Affirmation from Dr. Farkash in support of his opposition. *See* Plaintiff's Affirmation in Opposition Exhibit B. Dr. Farkash confirms that his treatment of plaintiff for his lower back pain issues began as early as the late 1990s and that, in January 2004, plaintiff returned to his care due to a recurrence of said condition. It was in 2004

[* 11]

that Dr. Farkas referred plaintiff for an MRI of his lumbar spine. Dr. Farkash states that plaintiff "was last seen for his back condition on 03/13/2006 until he returned after involvement in a motor vehicle accident in November 2009." Dr. Farkash adds that "[o]n October 1, 2009, Mr. Marrero returned to my care complaining of memory issues. There were no complaints concerning his previous back problem....On December 8, 2009, the patient returned to my care complaining of lower back pain. He was referred for a (*sic*) thoracic and lumbar spine MRIs. The results of those MRIs as compared to the ones conducted prior to the accident evidenced new injuries. My earliest note following the November 20, 2009 motor vehicle accident indicates 'The patient was doing well until he was involved in a MVA on 11/20/2009. He originally noted some soreness that turned into intense pain...' 'He had radiating pain into his right hip and thigh and pain in his legs.' I recently examined Mr. Marrero on March 13, 2012, I found that he still had complaints of lower back pain. In addition, he exhibited decreased range of motion and parasthesias. It is my opinion within a reasonable degree of medical certainty that Mr. Marrero has sustained a significant limitation of use of the lumbar spine since the motor vehicle accident of November 20, 2009. I base this opinion on the history I obtained, my physical examination and objective findings including my review of the most recent MRI studies of Mr. Marrero's lumbar and thoracic spine dated December 10, 2009 and January 12, 2009, respectively. Given the fact that Mr. Marrero still has these lower back complaints more than two years after the motor vehicle (*sic*) without relief from medications and injections, his prognosis is poor and his injuries are permanent."

With respect to the 90/180 claim, plaintiff submits that he testified at his EBT that, due to the alleged injuries sustained in the subject accident, he stopped coaching his children's softball team, he cannot go on any rides with his children and when he bends down he is in tremendous pain. With respect to his employment, he testified that, while he did not lose any time from work following the subject accident, when he returned to work after said accident he was usually doing the work at his desk and that he is limited at work as he is prevented from working in his

warehouse loading and unloading trucks. Plaintiff testified that he cannot play golf anymore and has trouble doing his laundry since even bending down causes him pain. Prior to the subject accident, plaintiff had walked four miles a day and now he does not walk any distance. Finally, plaintiff claims that he is subject to significant pain when he stands or sits too long, walks too far or even when he twists the wrong way. *See* Plaintiff's Affirmation in Opposition Exhibit B.

As previously stated, 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). Therefore, the unsworn reports contained in Exhibit C of plaintiff's opposition papers are not sufficient to defeat defendant's instant motion. *See* Plaintiffs' Affirmation in Opposition Exhibit C.

Also as previously stated, under the no-fault statute, to meet the threshold significant limitation of use of a body function or system or permanent consequential limitation, 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 (emphasis added). *See Licari v. Elliot*, *supra*; *Gaddy v. Eyler*, *supra*; *Scheer v. Koubeck*, 70 N.Y.2d 678, 518 N.Y.S.2d 788 (1987).

The Court notes that Dr. Farkash's Affirmation (Plaintiff's Affirmation in Opposition Exhibit A) fails to set forth any objective findings contemporaneous with the subject accident, as well as fails to set forth any quantified range of motion findings based on a recent examination of plaintiff. Dr. Farkash provided no objective basis for any of his conclusions concerning his initial examination, nor for his most recent examination of plaintiff. Furthermore, in his Affirmation, Dr. Farkash did not set forth the objective tests upon which he predicated his findings and conclusions and accordingly his Affirmation 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).

Recently the Court of Appeals, in *Perl v. Meher*, 18 N.Y.3d 208, 936 N.Y.S.2d 655 (2011), held that a quantitative assessment of a plaintiff's injuries does not have to be made during an initial examination and may instead be conducted much later, in connection with litigation. *See id.* However, the *Perl v. Meher* decision does not help plaintiff with respect to the Affirmation of Dr. Farkash. In *Perl*, the Court of Appeals reconciled the need to require both quantitative proof of a "serious injury" and "contemporaneous" evidence of a "serious injury." *See id.* The *Perl* decision, however, did not eliminate the need to set forth any objective findings contemporaneous with the subject accident, only their need to be expressed quantitatively, as such findings are critical to the issue of causation. Additionally, the *Perl* decision did not eliminate the need to set forth quantified range of motion findings based upon a recent examination.

Absent any objective contemporaneous findings, plaintiff cannot establish the duration or cause of any limitations found by Dr. Farkash during his recent examination of plaintiff. *See Delarosa v. McLedo*, 74 A.D.3d 1012, 904 N.Y.S.2d 715 (2d Dept. 2010).

With respect to plaintiff's 90/180 claim, nowhere does plaintiff claim that, as a result of his alleged injuries, he was "medically" impaired from performing any of his daily activities (*Monk v. Dupuis*, 287 A.D.2d 187, 734 N.Y.S.2d 684 (3d Dept. 2001)) or that he was curtailed "to a great extent rather than some slight curtailment." *See Licari v. Elliott, supra. See also Sands v. Stark*, 299 A.D.2d 642, 749 N.Y.S.2d 334 (3d Dept. 2002). In light of these facts, this Court determines that plaintiff's injuries do not satisfy the "medically determined injury or impairment

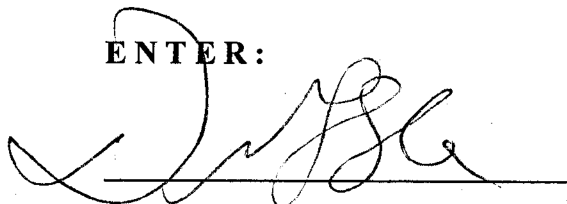
[* 14]

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 of Insurance Law. *See* New York State Insurance Law § 5102(d).

Accordingly, defendant's motion, pursuant to CPLR § 3212 and Article 51 of the Insurance Law of the State of New York, for an order granting him summary judgment and dismissing plaintiff's Verified Complaint is 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
May 15, 2012

ENTERED
MAY 17 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE