Gill v Fingerman
2018 NY Slip Op 32199(U)
August 28, 2018
Supreme Court, Suffolk County
Docket Number: 02334/2016
Judge: William B. Rebolini
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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Michael Gill, Plaintiff, -against- Brian Fingerman, Defendant.	Motion Sequence No.: 001; MG; CD Motion Date: 1/31/18 Submitted: 5/16/18 Index No.: 02334/2016 Attorney for Plaintiff: Pazer, Epstein, Jaffe & Fein, P.C. 20 Vesey Street, 7th Floor New York, NY 10007 Attorney for Defendant: Russo & Tambasco 115 Broad Hollow Road, Suite 300 Melville, NY 11747 Clerk of the Court

Upon the following documents numbered 1 to 409 read on this application by defendant Brian Fingerman for an order granting him summary judgment pursuant to CPLR 3212 dismissing the complaint on the ground that plaintiff did not sustain a serious injury under section 5102 (d) of the Insurance Law: Notice of Motion and supporting papers 1 to 141; Answering affidavits and supporting papers 142 to 385; Replying Affidavits and supporting papers 386 to 409; it is

ORDERED that the motion by defendant Brian Fingerman for summary judgment pursuant to CPLR 3212 dismissing the complaint is granted for the reasons set forth herein.

This is an action to recover damages for injuries allegedly sustained by the plaintiff Michael Gill as a result of a motor vehicle accident that occurred on April 16, 2015 on Route 25 at the intersection of Moriches Road, in the Town of Smithtown, County of Suffolk, State of New York.

Plaintiff commenced this action by the filing of a summons and verified complaint on March 4, 2016. Issue was joined on April 19, 2016. The verified bill of particulars alleges that plaintiff sustained various serious injuries and conditions, including disc herniation at C5-6, severe concussion, post-concussion syndrome, temporomandibular joint dysfunction, cervicalgia, cervical spasm, cervical radiculopathy, vertebrogenic encephalgia, cervical sprain/strain syndrome with paraspinal myofascitis, and thoracic sprain/strain syndrome with paraspinal myofascitis. The plaintiff was deposed on May 26, 2017[1] and thereafter an independent orthopedic examination and independent dental examination were conducted on plaintiff as well as an independent review of the MRI of plaintiff's cervical spine.

Defendant now moves for summary judgment seeking an order dismissing the complaint on the ground that the objective medical evidence establishes that none of the injuries claimed by plaintiff satisfy the "serious injury" threshold requirements of the No-Fault Law as defined in Insurance Law §5102 (d) and that plaintiff's claim for non-economic loss is barred by §5104 (a) of the Insurance Law. In support of his motion, defendant submits an affirmation of counsel, a copy of the pleadings, verified bill of particulars, transcript of the examination before trial of plaintiff, affirmed report of Dr. Raymond Shebairo dated August 3, 2017, the affirmed report of Dr. Donald Tanenbaum dated August 21, 2017, and the affirmed report of Dr. George Cavaliere dated September 19, 2017.

It has long been established that the "legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries (***Dufel v. Green***, 84 NY2d 795, 622 NYS2d 900 [1995]; *see also* ***Toure v. Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]). Therefore, the determination of whether or not a plaintiff has sustained a "serious injury" is to be made by the court in the first instance (*see* ***Licari v. Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Porcano v Lehman***, 255 AD2d 430, 680 NYS2d 590 [1988]; ***Nolan v Ford***, 100 AD2d 579, 473 NYS2d 516 [1984], *aff'd* 64 NYS2d 681, 485 NYS2d 526 [1984]).

Insurance Law § 5102 (d) defines "serious injury" as "a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; 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

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[1]Being that both parties rely upon plaintiff's certified yet unsigned deposition transcript and counsel for defendant has provided proof that the transcript was forwarded to plaintiff but was not signed within sixty (60) days, it is admissible on this motion for summary judgment (*see* ***Thomas v City of New York,*** 124 AD3d 872, 2 NYS3d 578 [2d Dept 2015] (certified yet unsigned deposition transcripts are admissible on a motion for summary judgment where their accuracy is not being challenged); ***Franzese v. Tanger Factory Outlet Centers, Inc.,*** 88 AD3d 763, 930 NYS2d 900 [2d Dept. 2011](transcript mailed to deponent for consideration and review and not signed or returned within sixty (60) days admissible).

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."

In order to recover under the "permanent loss of use" category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance***, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system" categories, either a specific percentage of the loss of range of motion must be ascribed, or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (*see* ***Perl v. Meher***, 18 NY3d 208, 936 NYS2d 655 [2011]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v. Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Cebron v. Tuncoglu***, 109 AD3d 631, 970 NYS2d 826 [2d Dept 2013]).

On a motion for summary judgment, the defendant has the initial burden of making a prima facie showing, through the submission of evidence in admissible form, that the injured plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) (*see* ***Gaddy v. Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Akhtar v..Santos***, 57 AD3d 593, 869 NYS2d 220 [2d Dept 2008]). The defendant may satisfy this burden by submitting the plaintiff's deposition testimony and the affirmed medical report of the defendant's own examining physician (*see* ***Moore v. Edison***, 25 AD3d 672, 811 NYS2d 724 [2d Dept 2006]; ***Farozes v. Kamran***, 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant's own witnesses, "those findings must be in admissible form, such as, affidavits and affirmations, and not unsworn reports" to demonstrate entitlement to judgment as a matter of law (***Pagano v. Kingsbury***, 182 AD2d 268, 270, 587 NYS2d 692 [1992]). A defendant may also establish entitlement to summary judgment using the plaintiff's deposition testimony and unsworn medical reports and records prepared by the plaintiff's own physicians (*see* ***Uribe v. Jimenez***, 133 AD3d 844, 20 NYS3d 555 [2d Dept 2015]; ***Elshaarawy v. U-Haul Co. of Miss.***, 72 AD3d 878, 900 NYS2d 321 [2d Dept 2010]; ***Fragale v. Geiger***, 288 AD2d 431, 733 NYS2d 901 [2001]; ***Grossman v. Wright***, 268 AD2d 79, 707 NYS2d 233 [2000]; ***Vignola v. Varrichio***, 243 AD2d 464, 662 NYS2d 831 [1997]; ***Torres v. Micheletti***, 208 AD2d 519, 616 NYS2d 1006 [1994]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v. New York Univ. Med. Ctr.***, *supra*; ***Boone v. New York City Tr. Auth.***, 263 AD2d 463, 692 NYS2d 731 [2d Dept 1999]; ***Burns v. Stranger***, 31 AD3d 360, 819 NYS2d 60 [2006]; ***Rich-Wing v. Baboolal***, 18 AD3d 726, 795 NYS2d 706 [2005]). Once defendant has met this burden, plaintiff must then submit objective and admissible proof of the nature and degree of the alleged injury in order to meet the threshold of the statutory standard for "serious injury" under New York's No-Fault Insurance Law (*see* ***Dufel v. Green***, 84 NY2d 795, 622 NYS2d 900 [1995]; ***Gaddy v. Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Beltran v. Powow Limo, Inc.***, 98 AD3d 1070, 951 NYS2d 231 [2d Dept 2012]; ***Tornabene v. Pawlewski***, 305 AD2d 1025, 758 NYS2d 593 [2003]; ***Pagano v. Kingsbury***, 182 AD2d 268, 587

NYS2d 692 [1992]).

Here, defendant has made a prima facie showing that the plaintiff did not sustain a serious injury within the meaning of section 5102 (d) of the Insurance Law through the affirmed reports of Doctors Raymond A. Shebairo, Dr. Donald R. Tanenbaum, and Dr. George J. Cavaliere and plaintiff's deposition testimony (*see* ***Sierra v. Gonzalez First Limo***, 71 AD3d 864, 895 NYS2d 863 [2d Dept 2010]; ***Staff v. Yshua***, 59 AD3d 614, 874 NYS2d 180 [2d Dept 2009]; ***Kelly v. Rehfeld,*** 26 AD3d 469, 809 NYS2d 581 [2d Dept. 2006]). The orthopedic report of Dr. Shebairo indicates that all range of motion measurements conducted on plaintiff's cervical spine and thoracic spine were normal. The report makes these findings through objective measurements using a hand-held goniometer, which were based upon published guidelines by the American Medical Association, 5th Edition. Dr. Shebairo opined that plaintiff's cervical and thoracic sprain/strains were resolved and there was no evidence of orthopedic disability. The radiology report of Dr. Cavaliere was based upon a review of the plaintiff's MRI conducted on May 4, 2015. Dr. Cavaliere opined that the MRI revealed straightening of the normal cervical lordosis, consistent with muscular spasm or patient positioning, disc desiccation at multiple levels and the right foraminal stenosis at C3-4 level, which are all "degenerative in etiology." Dr. Cavaliere further opined that the "disc herniation described by Dr. Mayerfield at C5-6 is not appreciated." The dental report of Dr. Tanenbaum indicated that plaintiff has no temporormandibular problem and no disability and/or impairment. Further, as indicated by defendant as to the "90/180 days" category, plaintiff testified that he was not prescribed any medication after the accident, that the MRI was conducted on May 4, 2015 almost three weeks after the accident, that plaintiff was seen by a chiropractor for approximately seven months, plaintiff was seen by a physical therapist for "a couple of months," and the last time plaintiff received treatment for his injuries was in 2015. As of the date of his deposition, plaintiff had no future medical appointments scheduled, did not seek the care of an eye doctor or a dentist in regards to the accident nor any mouth guards following the accident, and plaintiff has never been recommended for surgery. Plaintiff further testified that his jaw was hurting him "a little bit, but it went away pretty quickly." At the time of the accident, plaintiff testified that he was employed by Macy's and Gino's Pizzeria ("Gino's") and while he missed a few months at Macy's where he unpacked trucks, he only missed a couple of weeks at Gino's. Plaintiff further testified that he was a student at the time of the accident and missed two weeks of school. He is currently employed at Firecom as a fire alarm technician and has not missed any work as a result of the accident. Based upon the above evidence submitted, defendant established that plaintiff did not sustain a permanent loss, or a permanent consequential limitation of use of a body organ or member or significant limitation of use of a body function or system, and that he was not prevented from performing substantially all of his usual and customary daily activities for 90 of the first 180 days following the accident within the meaning of Insurance Law § 5102 (d) (*see* ***Pryce v. Nelson***, 124 AD3d 859, 2 NYS3d 214 [2d Dept 2015]; ***Strenk v. Rodas***, 111 AD3d 920, 976 NYS2d 151 [2d Dept 2013]; ***Beltran v. Powow Limo, Inc.***, 98 AD3d 1070, 951 NYS2d 231 [2d Dept 2012]; ***Gonzalez v. Green***, 24 AD3d 939, 805 NYS2d 450 [3d Dept 2005]).

Having made a prima facie showing that plaintiff did not sustain a serious injury under section 5102 (d) of the Insurance Law, the burden therefore shifted to plaintiff to raise a triable issue

of fact (*see* ***Gaddy v. Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]). Plaintiff's proof establishing serious injury, medical or otherwise, must not only be admissible, it must be objective as well (*see* ***Toure v. Avis Rent A Car Systems, Inc.,*** 98 NY2d 345, 746 NYS2d 865 [2002]; ***Andrews v. Slimbaugh,*** 238 AD2d 866, 656 NYS2d 561 [2d Dept. 1997]). A plaintiff claiming injury within the "limitation of use" categories must substantiate his or her complaints of pain with objective medical evidence showing the extent or degree of the limitation of movement caused by the injury and its duration (*see* ***Schilling v. Labrador***, 136 AD3d 884, 25 NYS3d 331 [2d Dept 2016]; ***Rovelo v. Volcy***, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]; ***McLoud v. Reyes***, 82 AD3d 848, 919 NYS2d 32 [2d Dept 2011]; ***Ferraro v. Ridge Car Serv.***, 49 AD3d 498, 854 NYS2d 408 [2d Dept 2008]; ***Mejia v. DeRose***, 35 AD3d 407, 825 NYS2d 772 [2d Dept 2006]; ***Laruffa v. Yui Ming Lau***, 32 AD3d 996, 821 NYS2d 642 [2d Dept 2006]). To prove significant physical limitation, a plaintiff must present either objective quantitative evidence of the loss of range of motion and its duration based on a recent examination of the plaintiff or a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (*see* ***Perl v. Meher***, 18 NY3d 208, 936 NYS2d 655 [2011]; ***Toure v. Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2002]; ***Rovelo v. Volcy***, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]; *see also* ***McEachin v. City of New York***, 137 AD3d 753, 756, 25 NYS3d 672, 675 [2d Dept 2016]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v. Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Cebron v. Tuncoglu***, 109 AD3d 631, 970 NYS2d 826 [2d Dept 2013]). Proof of a herniated or bulging disc, without additional objective medical evidence establishing that the accident resulted in significant physical limitations, is not sufficient to establish a "serious injury" within the meaning of the statute (*see* ***Pommells v. Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]; ***Hayes v. Vasilios***, 96 AD3d 1010, 947 NYS2d 550 [2d Dept 2012]; ***Scheker v. Brown***, 91 AD3d 751, 936 NYS2d 283 [2d Dept 2012]; ***Stevens v. Sampson***, 72 AD3d 793, 898 NYS2d 657 [2d Dept 2010]; ***Catalano v. Kopmann***, 73 AD3d 963, 900 NYS2d 759 [2d Dept 2010]; ***Casimir v Bailey***, 70 AD3d 994, 896 NYS2d 122 [2d Dept 2010]; ***Keith v. Duval***, 71 AD3d 1093, 898 NYS2d 184 [2d Dept 2010]). Sprains and strains are not serious injuries within the meaning of Insurance Law § 5102 (d) (*see* ***Rabolt v. Park***, 50 AD3d 995, 858 NYS2d 197 [2d Dept 2008]; ***Washington v Cross***, 48 AD3d 457, 849 NYS2d 784 [2d Dept 2008]; ***Maenza v. Letkajornsook***, 172 AD2d 500, 567 NYS2d 850 [2d Dept 1991]). A plaintiff seeking to recover damages under the "90/180-days" category of "serious injury" must prove the injury is "medically determined," meaning that the condition must be substantiated by a physician, and the condition must be causally related to the accident (*see* ***Pryce v. Nelson***, 124 AD3d 859, 2 NYS3d 214 [2d Dept 2015]; ***Strenk v. Rodas***, 111 AD3d 920, 976 NYS2d 151 [2d Dept 2013]; ***Beltran v. Powow Limo, Inc.***, *supra*). A plaintiff must demonstrate that his or her usual activities were curtailed to a "great extent rather than some slight curtailment" (*see* ***Licari v. Elliott***, 57 NY2d 230, 236, 455 NYS2d 570 [1982]). Subjective proof, such as complaints of pain, without more, are insufficient to defeat summary judgment and do not establish the existence of a serious injury (***Toure v. Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2002]). Furthermore, a plaintiff claiming serious injury who ceases treatment after the accident must offer a reasonable explanation for having done so (***Pommells v. Perez***, 4 NY3d 566, 574, 797 NYS2d 380 [2005]; *see also* ***Vasquez v. John Doe #1***, 73 AD3d 1033, 905 NYS2d 188 [2d Dept 2010]; ***Rivera v. Bushwick Ridgewood Props., Inc.***, 63 AD3d 712, 880 NYS2d 149

[2d Dept 2009]). Plaintiffs cannot establish a serious injury by reliance upon unsworn medical reports (*see* ***Malave v. Basikov,*** 45 AD3d 539 [2d Dept. 2007]) or unsworn medical records (*see* ***Sutter v. Yener,*** 65 AD3d 625 [2d Dept. 2009]) and a plaintiff's physician cannot rely upon unsworn medical reports in rendering his or her opinion (*see* ***Kreimerman v. Stunis,*** 74 AD3d 753 [2d Dept. 2010]; ***Mobley v. Riportella,*** 241 AD2d 443, 660 NYS2d 57 [2d Dept. 1997]).

Plaintiff opposes the motion by providing the uncertified records of St. Catherine of Siena Medical Center, the affidavit of Jay Riess, Doctor of Chiropractic medicine, the unsworn report of Dr. James D. Bruno, the affirmation of Dr. Samuel Mayerfield, and the unsworn records from TLC Physical Therapy, P.C. In his affidavit, Dr. Riess indicates that at the initial examination of plaintiff on April 21, 2015, he performed a "battery of range of motion tests to the cervical spine using an Arthrodial Protractor." His affidavit further indicates that he first performed flexion testing, which he opines showed limitations. Dr. Riess further indicates in his affidavit that he performed "orthopedic testing including foraminal compression, cervical compression, shoulder depression and soto hall on the right and left. Foraminal compression, cervical compression and shoulder depression were positive on the right and left. Soto hall testing was positive on the right and left at C5-T2. Deep digital palpation of the posterior cervical and upper thoracic musculature elicited moderate tenderness and spasms from C3-T [and] spinal percussion of the C5-T2 spinous process elicited moderate tenderness and pain." Dr. Riess opines that plaintiff suffers from "cervical sprain/strain syndrome with paraspinal myofascitis, thoracic sprain/strain syndrome with paraspinal myofascitis and vertebrogenic encephalgia....as a direct result of the April 16, 2015 motor vehicle accident." Dr. Riess performed the same tests on May 19, 2015, with the same or similar results. Dr. Riess indicates that he continued to treat plaintiff throughout 2017 and 2018. Dr. Riess most recently examined plaintiff on March 30, 2018 and indicated he performed the same tests on plaintiff as he had done previously. Dr. Riess opines that "more than two (2) years following the accident, my diagnosis is chronic cervical disc syndrome with paraspinal myalgia." In the affirmation of Dr. Mayerfield, he attests to the accuracy of the MRI report, in which he opines the impression revealed a "posterior central disc herniation C5/6 without cord contact or foraminal impingement." The report from Dr. James Bruno is from April of 2015 and not affirmed. There is no recent report from Dr. Bruno, indicating plaintiff has not been treated by Dr. Bruno since 2015. Plaintiff provides no evidence from any dentist to confirm any serious dental injuries, as alleged in his verified bill of particulars nor does plaintiff provide any evidence to refute or rebut the affirmed report of Dr. Tanenbaum and his opinion. Further, plaintiff's argument that the affirmed report of Dr. Shebairo should be discounted is not in accord with the Second Department case law, wherein it is well settled that a defendant's failure to mention MRI films indicating disc injury is not fatal if the defendant's medical evidence demonstrates the absence of a serious injury, such as full range of motion (*see* ***Kearse v. New York City Transit Authority,*** 16 AD3d 45, 789 NYS2d 281 [2d Dept. 2005]; ***Meely v. 4 G's Truck Renting Co., Inc.,*** 16 AD3d 26, 789 NYS2d 277 [2d Dept. 2005]).

Although there is are conflicting reports regarding the MRI of plaintiff's cervical spine, a herniation, by itself, is not a serious injury (*see* ***Pommells v. Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]; ***Toure v. Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2002]; ***Hayes v. Vasilios***, 96 AD3d 1010, 947 NYS2d 550 [2d Dept 2012]; ***Scheker v. Brown***, 91 AD3d 751, 936

NYS2d 283 [2d Dept 2012]; ***Stevens v. Sampson***, 72 AD3d 793, 898 NYS2d 657 [2d Dept 2010]; ***Catalano v. Kopmann***, 73 AD3d 963, 900 NYS2d 759 [2d Dept 2010]; ***Casimir v. Bailey***, 70 AD3d 994, 896 NYS2d 122 [2d Dept 2010]; ***Keith v. Duval***, 71 AD3d 1093, 898 NYS2d 184 [2d Dept 2010]). The affirmation of Dr. Samuel Mayerfield regarding the MRI by itself, therefore, is insufficient to establish the existence of a serious injury or a question of fact. As such, there is no conflicting medical evidence on the issue of a serious injury. The only other medical evidence presented by plaintiff consists of the affidavit of Jay Riess, D.C. In that affidavit, Dr. Riess does state that he performed range of motion tests to the plaintiff's cervical spine using an arthrodial protractor, however, he does not indicate the results of those tests, only the results of flexion testing, to which Dr. Riess does not indicate that he performed the flexion testing objectively, as required (*see* ***Toure,*** *supra*, 98 NY2d at 350; ***Schilling v. Labrador***, 136 AD3d 884, 25 NYS3d 331 [2d Dept 2016]; ***Rovelo v. Volcy***, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]; ***McLoud v. Reyes***, 82 AD3d 848, 919 NYS2d 32 [2d Dept 2011]; ***Ferraro v. Ridge Car Serv.***, 49 AD3d 498, 854 NYS2d 408 [2d Dept 2008]; ***Mejia v. DeRose***, 35 AD3d 407, 825 NYS2d 772 [2d Dept 2006]; ***Laruffa v. Yui Ming Lau***, 32 AD3d 996, 821 NYS2d 642 [2d Dept 2006]); ***Perl v Meher***, 18 NY3d 208, 936 NYS2d 655 [2011]; ***Toure v. Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2002]; ***Rovelo v. Volcy***, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]; *see also* ***McEachin v. City of New York***, 137 AD3d 753, 756, 25 NYS3d 672, 675 [2d Dept 2016]). The Court notes that the affidavit of Dr. Riess is inconclusive in regards to how the flexion testing was performed. In addition, while Dr. Riess' affidavit indicates the flexion testing normal ranges and plaintiff's range of motion, Dr. Riess, however, does not identify the authoritative guideline for the standard of normal ranges as compared to those of plaintiff, and without such, the opinions rendered are speculative (*see* ***Tinyanoff v. Kuna,*** 98 AD3d 501, 949 NYS2d 203 [2d Dept. 2012]; ***Quintana v. Arena Transport, Inc.,*** 89 Ad3d 1002, 933 NYS2d 379 [2d Dept. 2011]). Thus, the opinions rendered by Dr. Riess regarding the plaintiff's range of motion are speculative and not adequately quantified or qualified on an objective basis (*see* ***Toure v. Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2002]; ***Terranova v. Acosta,*** 136 AD3d 710, 24 NYS3d 697 [2d Dept. 2016]). Furthermore, Dr. Riess does not quantify the orthopedic test results and only states in cursory fashion that the tests were "positive on the right and left...and Soto Hall testing was positive on the right and left at C5-T2." As such, those results also are speculative and inconclusive.

Where, as here, the report of the treating chiropractic doctor does not indicate that the range of motion results were based upon any objective tests, the plaintiff has failed to produce reliable evidence in order to defeat summary judgment (*see* ***Pommells v. Perez,*** 4 NY3d 566, 797 NYS2d 380 [2005]: ***Toure v. Avis Rent A Car Systems, Inc.,*** 98 NY2d 345, 746 NYS2d 865 [2002]; ***Durand v. Urick,*** 131 AD3d 920, 15 NYS3d 475 [2d Dept. 2015]; *see also* ***Schilling v. Labrador,*** 136 AD3d 884, 25 NYS3d 331 [2d Dept. 2016]; ***Nemchyonok v. Ying,*** 2 AD3d 421, 767 NYS2d 811 [2d Dept. 2003]; ***Pajda v. Pedone,*** 303 AD2d 729, 757 NYS2d 452 [2d Dept. 2003]). As to the plaintiff's affidavit, the statements made by plaintiff contained therein contradict his prior deposition testimony and such statements will be disregarded by the court (*see* ***Hartman v. Mountain Valley Brew Pub, Inc.,*** 301 AD2d 570, 754 NYS2d 31[2d Dept. 2003]; ***Prunty v. Keltie's Bum Steer,*** 163 AD2d 595, 559 NYS2d 354 [2d Dept. 1990]). Self-serving affidavits will not be considered by the Court and cannot raise a triable issue of fact sufficient to defeat summary judgment (*see* ***Lupinsky***

v. Windham Construction Corp., 293 AD2d 317, 739 NYS2d 717 (1st Dept. 2002]). Moreover, without objective medical evidence, plaintiff's affidavit, by itself, is insufficient to raise a triable issue of fact regarding the "90/180-days" category of serious injury (*see* ***Pryce v. Nelson***, 124 AD3d 859, 2 NYS3d 214 [2d Dept 2015]; ***Strenk v. Rodas***, 111 AD3d 920, 976 NYS2d 151 [2d Dept 2013]; ***Beltran v. Powow Limo, Inc.***, *supra*). Indeed, subjective complaints do not qualify as a serious injury (*see* ***Licari v. Elliot,*** 57 NY2d 230, 455 NYS2d 570 [1982]). Competent objective medical evidence detailing the injury and the limitations caused by the injury is required but has not been provided herein (*see* ***Kaplan v. Vanderhans,*** 26 AD3d 468, 809 NYS2d 582 [2d Dept. 2006]; ***Ponce v. Magliulo,*** 10 AD3d 644, 781 NYS2d 703 [2d Dept. 2004]).

Accordingly, plaintiff has not raised a triable question of fact and defendant is entitled to summary judgment dismissing the complaint on the grounds that plaintiff has not sustained a serious injury within the meaning of section 5102 (d) of the Insurance Law.

Dated: August 28, 2018

HON. WILLIAM B. REBOLINI, J.S.C.

__X__ FINAL DISPOSITION _____ NON-FINAL DISPOSITION