SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

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

MARTA J. REYES,

Plaintiff,

- against -

PIETRO PISTONE,

Defendant.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 8250/10
Motion Seq. No.: 01
Motion Date: 05/31/11

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation and Exhibits	1
Affirmation in Opposition and Exhibits	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 the plaintiff as a result of an automobile accident with defendant which occurred on September 17, 2009, at approximately 10:55 p.m., on westbound Jericho Turnpike approximately fifty (50) feet east of Wellington Road, in the County of Nassau, Town of North Hempstead, State of New York. The accident involved two vehicles, a 2004 Honda operated by plaintiff and a 2004 Jeep owned and

operated by defendant.

At the time of the accident, plaintiff's vehicle was traveling westbound on Jericho Turnpike. Defendant's vehicle was also traveling westbound on Jericho Turnpike. Plaintiff contends that her vehicle was stopped in traffic in the left lane on Jericho Turnpike when the defendant's vehicle struck her from behind, pushing her car forward approximately one car length. Plaintiff further contends that, as a result of the heavy impact, her body was caused to move forward and backward in her vehicle and said impact caused her neck and back to strike the headrest and seat. As a result of the collision, plaintiff claims that she sustained the following injuries:

Posterior disc bulges at C3-C4, C-4-C-5 and C6-C7 impinging on the anterior aspect of the spinal canal;

Small joint effusion of the left knee;

Menisci and ligament/ right knee;

Posterior disc herniations at the L5-S1 impinging on the anterior aspect of the spinal canal and abutting the nerve roots bilaterally;

Decreased range of motion of the cervical and lumbar spine;

Decreased range of motion of the left knee;

Left knee pain/sprain;

Cervicalgia;

Lumbar disc herniation at L5-S1;

Pain in the limbs;

Neuropathy;

Cervical sprain and strain;

Lumbar sprain and strain;

Lumbargo;

Weakness in muscles *See* Defendant's Affirmation in Support Exhibit B.

Plaintiff commenced th action by service of a Summons and Verified Complaint on or about April 28, 2010. Issue was joined on or about June 21, 2010. *See* Defendant's Affirmation in Support Exhibit A.

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital,* 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York,* 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. *See* CPLR § 3212 (b); *Olan v. Farrell Lines Inc.,* 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980), *supra*. When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957),

supra. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. *See Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S. 2d 793 (1988). Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989).

Within the particular context of a threshold motion which seeks dismissal of a personal injury complaint, the movant bears a specific burden of establishing that the plaintiff did not sustain a "serious injury" as enumerated in Article 51 of the Insurance Law § 5102(d). *See Gaddy v. Eyler*, 79 N.Y.2d 955, 582 N.Y.S.2d 990 (1992). Upon such a showing, it becomes incumbent upon the non-moving party to come forth with sufficient evidence in admissible form to raise an issue of fact as to the existence of a "serious injury." *See Licari v. Elliott*, 57 N.Y.2d 230, 455 N.Y.S.2d 570 (1982).

In support of a claim that the plaintiff has not sustained a serious injury, the defendant may rely either on the sworn statements of the defendant's examining physicians or the unsworn reports of the plaintiff's examining physicians. *See Pagano v. Kingsbury*, 182 A.D.2d 268, 587 N.Y.S.2d 692 (2d Dept. 1992). However, unlike the movant's proof, unsworn reports of the plaintiff's examining doctors or chiropractors are not sufficient to defeat a motion for summary judgment. *See Grasso v. Angerami*, 79 N.Y.2d 813, 580 N.Y.S.2d 178 (1991).

Essentially, in order to satisfy the statutory serious injury threshold, the legislature requires objective proof of a plaintiff's injury. The Court of Appeals in *Toure v. Avis Rent-a-Car Systems*, 98 N.Y.2d 345, 746 N.Y.S.2d 865 (2002) stated that a plaintiff's proof of injury must be supported by objective medical evidence, such as sworn MRI and CT scan tests. However, these sworn tests must be paired with the doctor's observations during the physical examination of the plaintiff. Unsworn MRI reports can also constitute competent evidence if both sides rely on those

reports. *See Gonzalez v. Vasquez*, 301 A.D.2d 438, 754 N.Y.S.2d 7 (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 defendants he has sustained serious injuries as defined in New York State Insurance Law § 5102(d) and which fall within the following statutory categories of injuries:

1) permanent loss of a body organ, member, function or system; (Category 6)

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

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

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

See Defendant's Affirmation in Support Exhibit B.

For a permanent loss of a body organ, member, function or system to qualify as a "serious injury" within the meaning of No-Fault Law, the loss must be total. *See Oberly v. Bangs Ambulance, Inc.*, 96 N.Y.2d 295, 727 N.Y.S.2d 378 (2001); *Amata v. Fast Repair Incorporated*, 42 A.D.3d 477, 840 N.Y.S.2d 394 (2d Dept. 2007).

To meet the threshold regarding significant limitation of use of a body function or system or permanent consequential limitation of a body function or system, the law requires that the limitation be more than minor, mild or slight and that the claim be supported by medical proof based upon credible medical evidence of an objectively measured and quantified medical injury

or condition. *See Gaddy v. Eyler,* 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. S*ee 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 transcript of plaintiff's Examination Before Trial ("EBT") testimony, the affirmed report of Jacquelin Emmanuel, M.D., who performed an independent orthopedic

examination of plaintiff on January 13, 2011 and the affirmed reports of A. Robert Tantleff, M.D., who reviewed plaintiff's lumbar spine MRI which was performed on October 19, 2009 and plaintiff's cervical spine MRI which was performed on January 17, 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*, 79 N.Y.2d 955, 582 N.Y.S.2d 990 (1992). Within the scope of the movant's burden, defendant's medical expert must specify the objective tests upon which the stated medical opinions are based, and when rendering an opinion with respect to the plaintiff's range of motion, must compare any findings to those ranges of motion considered normal for the particular body part. *See Gastaldi v. Chen*, 56 A.D.3d 420, 866 N.Y.S.2d 750 (2d Dept. 2008); *Malave v. Basikov*, 45 A.D.3d 539, 845 N.Y.S.2d 415 (2d Dept. 2007); *Nociforo v. Penna*, 42 A.D.3d 514, 840 N.Y.S.2d 396 (2d Dept. 2007); *Meiheng Qu v. Doshna*, 12 A.D.3d 578, 785 N.Y.S.2d 112 (2d Dept. 2004); *Browdame v. Candura*, 25 A.D.3d 747, 807 N.Y.S.2d 658 (2d Dept. 2006); *Mondi v. Keahan*, 32 A.D.3d 506, 820 N.Y.S.2d 625 (2d Dept. 2006).

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).

Dr. Jacquelin Emmanuel, a board certified orthopedist, reviewed plaintiff's medical records and conducted an examination of plaintiff on January 13, 2011. *See* Defendant's Affirmation in Support Exhibit D. Dr. Emmanuel examined plaintiff and performed quantified and comparative range of motion tests on plaintiff's cervical spine, thoracic spine, lumbar spine, , left shoulder, right shoulder, left knee and right knee. The results of the tests indicated no deviations from normal. Dr. Emmanuel's diagnosis was "[c]ervical, lumbar spine sprains/strains by history, resolved. Left shoulder sprain by history, resolved. Left knee sprain/contusion by history, resolved. The claimant reports injuring her neck, back, left shoulder, left arm and left knee at the time of the accident. There are no records available in the immediate post accident

period from a treating physician documenting the initial complaints. It is noted that she did have an EMG performed on 10/28/09 with a diagnosis including cervical and lumbar strains, and MRI report of the lumbosacral spine dated 10/19/09, and there is a PT note of 10/30/09 which prior to receiving PT or having an MRI or EMG performed the claimant would have come under the care of a physician. However, I do not have any of these records to review. I would like to see the additional records prior to commenting further on causality. The claimant's prognosis is good. There is no objective evidence of limitations from an orthopedic standpoint. In my opinion, there will be no permanency or residuals. The left shoulder examination was objectively within normals limits as notes above with no swelling no impingement and normal neurological examination. The decreased motion is a subjective finding."

Dr. A. Robert Tantleff, a board certified radiologist, conducted an independent film review of the MRI of plaintiff's lumbar spine MRI which was performed on October 19, 2009 and plaintiff's cervical spine MRI which was performed on January 17, 2010. *See* Defendant's Affirmation in Support Exhibit E. With respect to his review of the lumbar spine MRI, Dr. Tantleff's findings were, amongst other things, "MRI examination of the Lumbar Spine reveals longstanding chronic degenerative discogenic disc disease and thoracolumbar spondylosis as described with advanced discogenic changes as detailed....At L5-S1, there is a focal central degenerative disc protrusion of no definable clinical significance. There is minimal impression on the thecal sac....Furthermore, the lumbar lordosis is normal and maintained as are the regional soft tissues. There is no evidence of prevertebral, perivertebral or posterior soft tissue swelling....There is no evidence of an acute disc herniation or acute exacerbatory change or evidence or recent trauma to the regional soft tissue structures including the cartilaginous endplates and regional osseous structures as detailed....The findings are consistent with the individual's age and not causally related to the date of incident of 9/17/2009, approximately one month prior to the performance of the MRI examination as the findings are chronic longstanding processes requiring years to develop as presented and are consistent with wear-and-tear of the

normal aging process."

With respect to his review of the cervical spine MRI, Dr. Tantleff's findings were "[t]he examination reveals degeneration and desiccation of the visualized intervertebral discs variable throughout the upper thoracic and cervical region consistent with spondylosis and longstanding chronic degenerative discogenic disc disease....There is no MRI evidence of asymmetry of the paraspinal musculature. There is no evidence of spasm or contusion. There is no evidence of edema, and specifically, there is no evidence of swelling or enlargement of the prevertebral soft tissue space. The is no evidence of abnormal or asymmetric contractions. Therefore, there is not evidence of muscle spasm of the deep muscles adjacent to the cervical spine....MRI examination of the Cervical Spine reveals longstanding chronic degenerative discogenic disc disease and cervical spondylosis. There is no evidence of thecal sac, cord, existing nerve or nerve root compression, displacement or deviation. Nor is there evidence of disc bulge, protrusion or herniation. There is no evidence of central canal, lateral recess or neural foraminal stenosis at any level. Nor is there evidence of mass effect on the cervical cord or exiting nerve roots. The anterior and posterior cerebral spinal fluid (CSF) spaces are maintained at all levels. The cervical alignment is maintained as are the soft tissues. Furthermore, the findings are consistent with and not unexpected findings for the individual's age; depicting normal age consistent wear and tear; unrelated to the date of incident."

With respect to plaintiff's 90/180 claim, defendant relies on the EBT testimony of plaintiff which indicates that she did not lose any time from work as a result of the accident. Plaintiff testified that she was not confined to bed, nor confined to home, for any length of time and that, since the accident, she visited Guatemala in November 2009, Columbia in December 2009 and Canada in 2010.

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 own affidavit dated June 14, 2011, the affidavit of Richard Grosso, D.C., dated June 24, 2011, medical reports by Eric Jacobson, M.D., dated May 20, 2011, operative reports by Clifton Burt, M.D. and Richard Grosso, M.D., dated November 21, 2009 and November 28, 2009, an MRI report of the lumbosacral spine and cervical spine prepared by Richard J. Rizzuti, M.D and an MRI report of the left knee prepared by John Himelfarb, M.D.

Plaintiff submitted her own affidavit in opposition to defendant's motion. *See* Plaintiff's Affirmation in Opposition Exhibit A. Plaintiff states, "[a]t the time of the accident I was employed as a secretary for B& R Autobody. As a result of the accident I did not miss any time from work as I could not afford to stay home. However, as my job required prolonged sitting I took frequent brakes to alleviated the pain to my neck and back. Until the present time I am still employed for the above facility and still need to take brakes. From the date of the accident until the present time I have difficulties performing the tasks associated with daily living. At the present time I have difficultly standing and sitting for long periods of time, walking long distances and lifting heavy objects. Until the present time, I still experience constant pain and discomfort in my neck and back which is made worse with certain activities and the weather."

Plaintiff submitted the affidavit of Richard Grosso, D.C. who examined plaintiff on September 23, 2009 and continued to see her for chiropractic treatment until January 11, 2011. *See* Plaintiff's Affirmation in Opposition Exhibit B. Dr. Grosso examined plaintiff and performed quantified and comparative range of motion tests on her cervical spine and lumbar spine. The results of the tests indicated deviations from normal. Dr. Grosso states, "[m]y initial diagnosis was as follows: lumbar spine sprain/strain; cervical spine vertebral subluxation complex; lumbar spine vertebral subluxation complex; thoracic spine vertebral subluxation complex; and thoracic sprain/strain. It was my expert chiropractic opinion that the injuries sustained by the patient were causally related to the motor vehicle accident of September 17,

2009 and said finding were consistent with clinical presentation in my office. It was further my expert chiropractic opinion that the limitation of motion of the cervical and lumbar spine were significant and permanent in nature. It was further my expert chiropractic opinion that the injuries as diagnosed would inhibit the patient's ability to carry out normal activities of daily living such as sitting, standing, bending lifting and other strenuous activities....It is my expert chiropractic opinion that the disc pathology diagnosed via MRI are causally related to the subject motor vehicle accident as the findings are consistent with the clinical presentation in my office and further said injuries are of a permanent nature and not subject to resolution without surgery. It is my expert chiropractic opinion that as the patient is still exhibiting limitation of motion in the lumbar spine some one and a half years post accident said injuries can only be considered permanent and significant as the injuries diagnosed will continue to inhibit the patient's ability to carry out her normal activities of daily living consistent with sitting, standing, bending, walking, lifting, recreational activities and household duties. As such, it is my expert chiropractic opinion that the injuries as diagnosed are permanent in nature. It is my expert chiropractic opinion that the prognosis of the patient is poor. It is my expert chiropractic opinion that the spinal manipulations under anesthesia were necessitated as a result of the subject motor vehicle accident. It is further my expert chiropractic opinion that surgery cannot be ruled out in the future with regard to her cervical spine and lumbar spine injury."

Plaintiff submitted the unsworn medical reports of Eric Jacobson, M.D., dated May 20, 2011, and the unsworn operative reports by Clifton Burt, M.D. and Richard Grosso, M.D., dated November 21, 2009 and November 28, 2009, in support of her opposition to defendant's motion. *See* Plaintiff's Affirmation in Opposition Exhibit C. However, 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 also submitted the unsworn reports of Dr. Richard J. Rizzuti, a radiologist with

All County under whose auspices administered and supervised the administration and examination of the MRIs of plaintiff's lumbosacral spine performed on October 19, 2009 and plaintiff's cervical spine performed on January 7, 2010. *See* Plaintiff's Affirmation in Opposition Exhibit D. Plaintiff also submitted the unsworn report of Dr. John Himelfarb, a radiologist with All County under whose auspices administered and supervised the administration and examination of the MRIs of plaintiff's left knee performed on January 9, 2010. *See id.* While it is true that both Dr. Rizzuti and Dr. Himelfarb are board certified radiologists who read the actual MRI films, in the absence of any opinion as to the causality of their findings, their respective reports are not competent medical evidence sufficient to present an issue of fact. *See 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).

Even though some of the evidence presented by plaintiff did not constitute competent admissible evidence in opposition to defendant's motion for summary judgment, the Court concludes that the affidavits of plaintiff, herself, and Dr. Grosso raise genuine issues of fact as to injuries causally related to the September 17, 2007 accident. Consequently, defendant's motion for summary judgment is hereby **DENIED**.

The parties shall appear for Trial in Nassau County Supreme Court, Differentiated Case Management Part (DCM) at 100 Supreme Court Drive, Mineola, New York, on September 15, 2011, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

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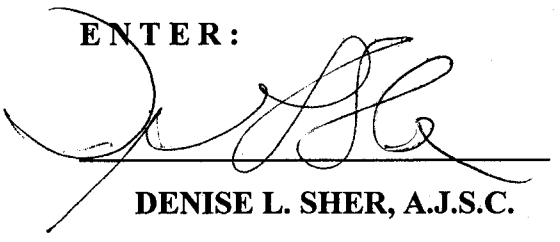

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
August 22, 2011