Cruz v Vuolo
2011 NY Slip Op 32575(U)
September 20, 2011
Sup Ct, Nassau County
Docket Number: 1074/10
Judge: Denise L. Sher
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SCAN

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

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

JOSE A. CRUZ,

Plaintiff,

- against -

ANDREW J. VUOLO,

Defendant.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 1074/10
Motion Seq. No.: 01
Motion Date: 06/23/11
XXX

The following papers have been read on this motion:	Papers Numbered
Notice of Motion, Affirmation and Exhibits	1
Affirmation in Opposition and Exhibits	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 May 30, 2008, at approximately 7:35 a.m., at or near the intersection of Old Country Road and Sweet Hollow Road, Huntington, County of Suffolk, State of New York. The accident involved two vehicles, a 2005 Mitsubishi truck operated by plaintiff and owned by his employer, Anel Landscaping Inc.,

and a 2006 Chevrolet owned and operated by defendant.

Plaintiff contends that his vehicle was stopped for a red traffic signal at the aforementioned intersection and, when said traffic signal turned green for vehicles traveling eastbound through the intersection, plaintiff proceeded through said intersection. As plaintiff was driving through the intersection, defendant went through a red traffic light at the intersection and his vehicle collided with plaintiff's vehicle. As a result of the collision, plaintiff claims that he sustained the following injuries:

HEAD:

Post-concussion syndrome;

Vertigo;

LUMBAR SPINE:

L2/3 disc bulge with thecal sac effacement;

L3/4 disc bulge with bilateral neural foraminal narrowing;

L4/5 disc bulge with thecal sac effacement and bilateral neural foraminal narrowing;

L5/S1 disc bulge with bilateral neural foraminal narrowing;

Lumbar radiculopathy;

Lumbar spine intersegmental joint dysfunction;

Lumbar facet syndrome;

CERVICAL SPINE:

C5/6 radiculopathy;

MISCELLANEOUS:

Myofascial pain syndrome;

Cuts and abrasions. *See* Defendant's Affirmation in Support Exhibit D.

Plaintiff commenced the action by service of a Summons and Verified Complaint on or about January 7, 2010. Issue was joined on or about February 18, 2010. *See* Defendant's Affirmation in Support Exhibits B and C.

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

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980), *supra*. When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957), *supra*. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. *See Gilbert Frank Corp. v. Federal Ins. Co.,* 70 N.Y.2d 966, 525 N.Y.S. 2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the Court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989).

Within the particular context of a threshold motion which seeks dismissal of a personal injury complaint, the movant bears a specific burden of establishing that the plaintiff did not sustain a "serious injury" as enumerated in Article 51 of the Insurance Law § 5102(d). *See Gaddy v. 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).

Whether plaintiff can demonstrate the existence of a compensable serious injury depends upon the quality, quantity and credibility of admissible evidence. *See Manrique v. Warshaw Woolen Associates, Inc.*, 297 A.D.2d 519, 747 N.Y.S.2d 451 (1st Dept. 2002).

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*, 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 North Shore University Plainview Hospital Emergency Department Report dated May 30, 2008, the transcript of plaintiff's Examination Before Trial ("EBT") testimony, the affirmed report of Dr. Isaac Cohen, M.D., who performed an independent orthopedic examination of plaintiff on December 22, 2010 and the affirmed report of Dr. David A. Fisher, M.D., who reviewed plaintiff's lumbar spine MRI which was performed on August 11, 2008.

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).

Defendant is not required to disprove any category of serious injury which has not been properly pled by the plaintiff. *See Melino v. Lauster*, 82 N.Y.2d 828, 605 N.Y.S.2d 4 (1993). Moreover, even pled categories of serious injury may be disproved by means other than the submission of medical evidence by a defendant, including plaintiff's own testimony and his submitted exhibits. *See Michaelides v. Martone*, 186 A.D.2d 544, 588 N.Y.S.2d 366 (2d Dept. 1992); *Covington v. Cinnirella*, 146 A.D.2d 565, 536 N.Y.S.2d 514 (2d Dept. 1989).

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).

With respect to plaintiff's contention that he sustained serious physical injury as defined in the seventh and eighth categories of New York State Insurance Law § 5102(d); to wit, a permanent consequential limitation of use of a body organ or member and a significant limitation of use of a body function or system, defendant argues that the objective medical evidence together with plaintiff's admissions at his EBT establish that he did not sustain a "serious injury" under these categories.

Defendant argues that the clinical findings and diagnosis reported by the physician who

examined plaintiff in the Emergency Room ("ER") of North Shore Hospital at Plainview after the subject accident establish that plaintiff did not sustain any "serious injury" in said accident. *See* Defendant's Affirmation in Support Exhibit E. When plaintiff arrived at the ER he had complaints of neck pain and "mild pain low left back." The attending physician examined plaintiff and reported that he was alert, his head was atraumatic and normocephalic, his pupils were equal, round and reactive to light in accommodation, his back was nontender and he had full range of motions of his four extremities. *See id.* The attending physician sent plaintiff for a CT scan cervical spine which showed only mild reversal of the normal lordosis and a CT scan of the brain which was normal. The attending physician also sent plaintiff for a chest x-ray which was normal. Based upon these negative objective tests and his own clinical findings, the attending physician diagnosed plaintiff with nothing more than low back pain. *See id.*

Dr. Isaac Cohen, a board certified orthopedist, reviewed plaintiff's medical records and conducted a physical examination of plaintiff on December 22, 2010. *See* Defendant's Affirmation in Support Exhibit G. Dr. Cohen examined plaintiff and performed quantified and comparative range of motion tests on plaintiff's cervical spine, lumbosacral spine and left shoulder. The results of the tests indicated no deviations from normal. Dr. Cohen's diagnosis was, "[s]tatus post motor vehicle accident. Cervical and lumbosacral strains, resolved." *See id.* Dr. Cohen concluded. "[a]t the time of this evaluation, Mr. Jose Cruz has a satisfactory functional capacity of the musculoskeletal system including the cervical and lumbosacral spine areas as well as the upper and lower extremities. The objective examination today is unremarkable as documented including the neurological examination. He is not receiving any form of active care and none is indicated. Mr. Cruz has been working on an uninterrupted basis since the second week of June 2008, and may continue to do so without restrictions. In reviewing the medical records, there is indication that the claimant did have a prior No-Fault injury on 12/23/07, at which time he was evaluated for bulging discs in the lumbar spine as well as herniations in the cervical spine on MRI. Mr. Cruz did not report any preexistent history of

injuries. Nevertheless, at the time of this examination, he has no evidence of sequelae or any permanency related to this accident of 5/30/08. On completion of this examination, Mr. Jose Cruz offered no complaints as a result of this examinations and left the examination area stable and unchanged." *See id.*

Dr. David A. Fisher, conducted an independent film review of the MRIs of plaintiff's lumbar spine originally performed on August 11, 2008. *See* Defendant's Affirmation in Support Exhibit H. With respect to his review of the lumbar spine MRI, Dr. Fisher's findings were "[t]he lumbar vertebral bodies are normal in height and alignment. There are degenerative changes from the L2/3 through the L5/S1 levels. This is manifested by disc dehydration, disc space narrowing and endplate spurring. There are accompanying mild annular bulges at each of these levels. There is no significant mass effect on the thecal sac and no herniations are seen. Small Schmorl's nodes are noted in the superior endplates of L3 and L5 and a hemangioma is noted in the L4 vertebral body. The conus medullaris is normal in appearance. There is no evidence of spinal stenosis or fracture. Impression: Diffuse degenerative changes throughout the lumbar spine with multiple mild disc bulges. Summary: At your request, I have reviewed an MRI of the lumbar spine that was performed two months following the date of loss. There are degenerative changes throughout the lumbar spine in this 46 year-old. The disc bulges noted are compatible with the amount of degenerative change present. No herniations are seen. There is no radiographic evidence of traumatic or causally related injuries to the lumbar spine." *See id.*

Defendant further submits that, when plaintiff testified at his EBT, he testified that in December 2007, approximately five to six months before the subject accident, he was involved in a motor vehicle accident wherein he sustained an injury to his back. *See* Defendant's Affirmation in Support Exhibit F. Plaintiff testified that he treated with a chiropractor as a result of the prior accident. Plaintiff also testified that, the day after the accident, he went to see his attorney and that after said accident he received treatment with Dr. Ali E. Guy of Mid-Island Physical Medicine and Rehabilitation, P.C. and Dr. Jamie P. Skurka, D.C. *See id.*

With respect to plaintiff's 90/180 claim, defendant relies on plaintiff's EBT testimony in which he stated that, at the time of the subject accident, he was employed at Anel Landscaping as a landscaper and missed one week of work after the accident.

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 his burden, plaintiff submits the Police Accident Report, the un-affirmed report of Dr. Jamie P. Skurka, D.C., the report of Elizabeth W. Lazzara, M.D., of Next Generation Radiology, who performed an MRI of plaintiff's lumbar spine on August 11, 2008, un-affirmed reports of Dr. Ali E. Guy of Mid-Island Physical Medicine and Rehabilitation, P.C., an affirmed reports of Dr. Ali E. Guy of Mid-Island Physical Medicine and Rehabilitation, P.C. dated July 12, 2011 and an Affidavit of Dr. Ali E. Guy dated July 16, 2011.

Plaintiff submits that, after the subject accident, he was seen by Dr. Jamie P. Skurka, D.C, a chiropractor, for treatment of the injuries he sustained as a result of the motor vehicle accident on May 30, 2008. Dr. Skurka's un-affirmed report, dated June 4, 2008, indicates that Dr. Skurka's diagnosis was "1. Lumbosacral sprain/strain. 2. Intersegmental joint dysfunction, lumbar spine. 3. Lumbar radiculopathy. 4. Lumbar facet syndrome." *See* Plaintiff's Affirmation in Opposition Exhibit B.

Dr. Elizabeth W. Lazzara, a radiologist with Next Generation Radiology, administered the MRI of plaintiff's lumbar spine performed on August 11, 2008. *See* Plaintiff's Affirmation in Opposition Exhibit C. Dr. Lazzara's diagnosis was, "L2-3 through L5-S1 disc bulges with L3-4 mild segmental stenosis and L3-4 through L5-S1 mild bilateral neural foraminal narrowing." However, in this un-affirmed report, Dr. Lazzara made no reference whatsoever to whether or not the aforementioned diagnosis was in any way causally related to plaintiff's automobile accident on May 30, 2008.

Plaintiff also submitted an Affidavit dated July 16, 2011 from Dr. Ali E. Guy of Mid-Island Physical Medicine and Rehabilitation, P.C. (*see* Plaintiff's Affirmation in Opposition Exhibit N) along with an affirmed report from Dr. Guy dated July 12, 2011 (*see* Plaintiff's Affirmation in Opposition Exhibit M) and several un-affirmed reports and records of Dr. Guy (*see* Plaintiff's Affirmation in Opposition Exhibits D-L). Dr. Guy's Affidavit indicates that, "I performed a physical examination of Mr. Cruz's cervical and lumbar spine on August 19, 2008. Upon examination of Mr. Cruz's cervical and lumbar spine, range of motion for the neck and back was (½) the normal range of motion per goniometer with bilateral lower back pain and multiple trigger points present. Further, a straight leg raising test was positive at 75 degrees with bilateral lower back pain. I started Mr. Cruz on a course of Physical Therapy including hot packs, electrical stimulation, manual massage, myofascial release and special therapeutic exercise....Thereafter, on September 16, 2008 EMG studies of the lower extremities were performed which revealed electrical evidence of Left L5-S1 radiculopathy. Further, on September 30, 2008 EMG studies of the upper extremities were performed which revealed evidence of Left C5-6 radiculopathy. Mr. Cruz was given a prescription for Ultracet 1-2 tablets as needed for pain. Mr. Cruz subsequently began a course of treatment that included Paraspinal Injections....From August 18, 2008 though December 22, 2009 Mr. Cruz was seen in my office for examination, testing and physical therapy more than 50 times. On December 22, 2009 I discharged Mr. Cruz from further treatment to return for treatment as needed. On December 7, 2010 Mr. Cruz returned complaining of persistent treatment (*sic*) due to low back pain. Physical Therapy was restarted and I determined that Mr. Cruz was totally disabled at that time....I recently examined Mr. Cruz on May 31, 2011 (nearly 3 years post accident) at which time Mr. Cruz continued to complain of lower back pain radiating in the right lower extremity. Physical examination revealed moderate tenderness, spasm and multiple trigger points....Based upon the history obtained, clinical examinations and numerous physical examinations and testing I have concluded that Mr. Cruz has in the past and continues to suffer from a 50% loss of range of

motion in both the cervical and lumbar regions. Moreover, based upon the foregoing examinations, testing and treatment my diagnosis is that Mr. Cruz suffers from: bulging discs at L2 through S1 with thecal sac effacement and encroachment upon the neuroforamina; Traumatic left C5-6 cervical radiculopathy; Traumatic left L5-S1 radiculopathy and Traumatic myofascial pain syndrome as a result of the motor vehicle accident on May 30, 2008. Further, that Mr. Cruz has sustained a Permanent Partial Disability which will require medical treatment on an as need basis for the rest of his life."

Plaintiff argues that the respective reports of his treating physician, Dr. Guy, and Dr. Cohen, who, on behalf of defendant,.conducted an Independent Medical Examination, present conflicting medical evidence and opinion such that the question of whether plaintiff sustained a serious injury presents a question for the trier of facts.

In reply to plaintiff's opposition, defendant submits that the lumbar spine MRI report of Dr. Lazzara never sets forth that the findings on the MRI study were caused by the accident. Similarly, the EMG report of Dr. Guy does not state that the findings were caused by the accident. Furthermore, plaintiff did not see Dr. Guy for the first time until almost three months after the subject accident and, at that time, Dr. Guy never said plaintiff has to work light duty. Additionally, the September 16, 2008, September 30, 2008 and December 9, 2008 reports of Dr. Guy do not set forth quantified loss of range of motion as required. Defendant also argues that, at no time, does Dr. Guy or Dr. Skurka mention plaintiff's prior lumbar spine injury. Nor do these doctors discuss the finding of degeneration set forth by defendant's expert, Dr. Fisher. Plaintiff also had a nearly one year gap in treatment from December 22, 2009 though December 7, 2010. Defendant argues that "[t]he attempt by Dr. Guy to explain the gap in treatment by claiming that plaintiff reached maximum medical improvement is insufficient, where, as here, Dr. Guy states that plaintiff needs 'medical services on an add needed basis for the rest of his life,'"

With respect to September 16, 2008, September 30, 2008 and December 9, 2008 reports of Dr. Guy, said reports did not set forth the objective tests upon which Dr.Guy predicated his

findings and conclusions and, accordingly, his reports are 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). In *Goluld v. Ombrellino*, 57 A.D.3d 608, 869 N.Y.S.2d 567 (2d Dept. 2008), the Court held that a doctor's affirmation, in a motion for summary judgment, was insufficient to show whether plaintiff sustained serious injury under permanent consequential limitation of use or significant limitation of use categories of no-fault automobile insurance provision, when, although the doctor set forth range of motion tests results based on a recent examination that revealed limitations in plaintiff's lumbar spine, plaintiff did not proffer competent medical evidence that showed similar range of motion limitations in the lumbar spine that were contemporaneous with the subject accident.

Furthermore, Dr. Guy's conclusions that, "based upon the foregoing examinations, testing and treatment my diagnosis is that Mr. Cruz suffers from: bulging discs at L2 through S1 with thecal sac effacement and encroachment upon the neuroforamina; Traumatic left C5-6 cervical radiculopathy; Traumatic left L5-S1 radiculopathy and Traumatic myofascial pain syndrome as a result of the motor vehicle accident on May 30, 2008" are speculative in light of the fact that he failed to address or even acknowledge the fact that plaintiff had previously injured his lumbar spine in a prior car accident. *See Cervino v. Gladysz-Steliga*, 36 A.D.3d 744, 829 N.Y.S.2d 169 (2d Dept. 2007); *Moore v. Sarwar*, 29 A.D.3d 752, 816 N.Y.S.2d 503 (2d Dept. 2006); *Bennett v.*

Genas, 27 A.D.3d 601, 813 N.Y.S.2d 446 (2d Dept. 2006); *Allyn v. Hanley*, 2 A.D.3d 470, 767 N.Y.S.2d 885 (2d Dept. 2003).

It is also noted that the unsworn report of Dr. Lazzara does not constitute competent admissible evidence in opposition to this motion for summary judgment. In the absence of any opinion as to the causality of her findings, her report is 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 reports.

The reports of plaintiff's treating and examining physicians also failed to address the findings of defendant's radiologist, Dr. Fisher, with respect to degeneration, and thus, failed to raise a triable issue of fact. *See Larson v. Delgado*, 71 A.D.3d 739, 897 N.Y.S.2d 167 (2d Dept. 2010); *Singh v. City of New York*, 71 A.D.3d 1121, 898 N.Y.S.2d 218 (2d Dept. 2010); *Rodriguez v. Grant*, 71 A.D.3d 659, 896 N.Y.S.2d 143 (2d Dept. 2010).

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). Plaintiff has therefore failed to establish by competent medical proof that he sustained a "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system." *See* Insurance Law § 5102(d).

Finally, plaintiff's deposition testimony does not establish that he 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 went back to work shortly after the accident.

Accordingly, in light of plaintiff's failure to raise any triable issue of fact, 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 on the ground that plaintiff did not suffer a "serious

injury" in the subject accident as defined by New York State Insurance Law § 5102 is hereby **GRANTED** and plaintiff's Verified Complaint is dismissed in its entirety.

This constitutes the Decision and Order of this Court.

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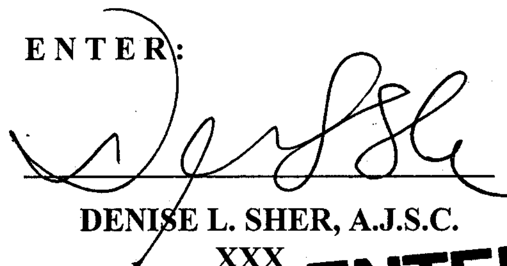

DENISE L. SHER, A.J.S.C.
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ENTERED
SEP 23 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE

Dated: Mineola, New York
September 20, 2011