NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 16

Case Disposed	☐
Settle Order	☐
Schedule Appearance	☐

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

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PRAKASH BALKARAN

Index Nº. 7600/2007

-against-

Hon. LUCY BILLINGS J.S.C. Justice.

NATHAN SHAPIRO-SHELLABY and RICHARD SHAPIRO

----------X

The following papers numbered 1 to 32 Read on this motion, SJD
Noticed on Aug. 15, 2008 and duly submitted as No. ____ on the Motion Calendar of ____

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1-9	
Answering Affidavit and Exhibits	10-32	
Replying Affidavit and Exhibits		
____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this COURT denies defendants' motion for summary judgment except to the limited extent set forth in the accompanying decision. C.P.L.R. § 3212(b) and (e).

Motion is Respectfully Referred to:
Justice: ____
Dated: ____

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JUN 24 2009
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Dated: 6/15/09

Hon. Lucy Billings
J.S.C.

LUCY BILLINGS J.S.C.

MV

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 16

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PRAKASH BALKARAN, Index No. 7600/2007

Plaintiff

- against - DECISION AND ORDER

NATHAN SHAPIRO-SHELLABY and
RICHARD SHAPIRO,

Defendants

----------x

APPEARANCES:

For Plaintiff
Jeffrey S. Stillman Esq.
Stillman & Stillman, PC
2622 Tremont Avenue, Bronx, NY 10461

For Defendants
Nicole R. Kilburg Esq.
Stockschlaeder, McDonald & Sules, P.C.
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LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff sues to recover for personal injuries he sustained July 16, 2006, when a motor vehicle operated by defendant Shapiro-Shellaby and owned by defendant Shapiro collided with a motor vehicle operated and owned by plaintiff. Defendants move for summary judgment dismissing the complaint, C.P.L.R. § 3212(b), on the ground that plaintiff has not sustained a "serious injury" entitling him to recover for "non-economic loss." N.Y. Ins. Law §§ 5102(d), 5104(a). Upon oral argument April 2, 2009, for the reasons explained below, the court grants defendants' motion to the limited extent set forth, but otherwise

denies their motion. C.P.L.R. § 3212(b) and (e).

The most noteworthy issue is raised through an analysis of defendants' evidence supporting their motion. Their physicians assess plaintiff's range of motion at varying quantified, albeit normal, levels, so that comparison of one physician's assessment of plaintiff to the other physician's norm yields a significant loss of range of motion. Given the importance of accurately comparing plaintiff's range of motion with a baseline norm to determining whether plaintiff is significantly limited in functioning, these unexplained adjustments in the baseline undermine the assessments' reliability and permit varying inferences as to whether he is significantly limited. Thus, while plaintiff's evidence when compared to defendants' evidence raises a factual question regarding a significant limitation, the internal inconsistencies in defendants' own evidence themselves preclude summary judgment on this question.

II. SUMMARY JUDGMENT ON THE ABSENCE OF SERIOUS INJURY

To obtain summary judgment that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102(d), defendants must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence eliminating all material issues of fact that defendants caused plaintiff to sustain such an injury. C.P.L.R. § 3212(b); Shaw v. Looking Glass Assoc. LP, 8 A.D.3d 100, 102 (1st Dep't 2004); Chatah v. Iglesias, 5 A.D.3d 160 (1st Dep't 2004); Shinn v. Catanzaro, 1 A.D.3d 195, 197 (1st Dep't 2003). Only if

defendants satisfy this standard, does the burden shift to plaintiff to rebut that prima facie showing, by producing admissible evidence sufficient to require a trial of material factual issues as to whether he sustained a serious injury. Knoll v. Seafood Express, 5 N.Y.3d 817, 818 (2005); Franchini v. Palmieri, 1 N.Y.3d 536, 537 (2003); Lamb v. Rajinder, 51 A.D.3d 430 (1st Dep't 2008); Shaw v. Looking Glass Assoc. LP, 8 A.D.3d at 102. If defendants fail to meet their burden, the court must deny summary judgment regardless of any insufficiency in plaintiff's opposition. Caballero v. Fev Taxi Corp., 49 A.D.3d 387, 388 (1st Dep't 2008); Offman v. Singh, 27 A.D.3d 284, 285 (1st Dep't 2006); Nix v. Yang Gao Xiang, 19 A.D.3d 227 (1st Dep't 2005); Diaz v. Nunez, 5 A.D.3d 302 (1st Dep't 2004).

III. DEFENDANTS' CONFLICTING EVIDENCE

A. The Physicians' Findings

Defendants' orthopedic surgeon, S. Farkas M.D., based on his review of plaintiff's medical records, including diagnostic studies, and his examination of plaintiff April 2, 2008, found full range of motion in his cervical and lumbar spine and diagnosed resolved cervical and lumbar sprains causing no current orthopedic disability or restriction in his daily activities. Defendants' neurologist, Maria De Jesus M.D., based on her review of plaintiff's medical records, including diagnostic studies, and her examination of plaintiff April 17, 2008, including range of motion, motor, reflex, and sensory testing, found no limitations of functioning in his cervical or lumbar spine. Dr. De Jesus

diagnosed plaintiff with resolved cervical and lumbar strains or sprains that required no further treatment or testing. She found no other neurological abnormalities in his spine.

Among plaintiff's medical records that Dr. De Jesus reviewed was a lumbar magnetic resonance imaging (MRI) dated July 22, 2006, that showed two disc herniations in plaintiff's lumbar spine. Because Dr. De Jesus found no abnormal functioning of plaintiff's spine, however, her failure to comment on the MRI does not undermine her conclusion that plaintiff did not sustain a permanent or significant limitation of functioning from the collision. Onishi v. N & B Taxi, Inc., 51 A.D.3d 594, 595 (1st Dep't 2008); Santana v. Khan, 48 A.D.3d 318 (1st Dep't 2008); Style v. Joseph, 32 A.D.3d 212, 214 (1st Dep't 2006); Servones v. Toribio, 20 A.D.3d 330 (1st Dep't 2005).

B. Analysis of the Findings

Dr. De Jesus concluded that plaintiff had not lost range of motion by finding his ranges of motion equal to the normal ranges of motion set forth by the "A.M.A. 'Guides To The Evaluation Of Permanent Impairment,' fifth edition." Aff. of Nicole R. Kilburg, Esq., Ex. F at 2. Dr. Farkas drew a similar comparison, but used two other sets of guidelines along with an unspecified edition of the "American Medical Association Guidelines." Id., Ex. G at 2.

Consequently, Dr. De Jesus's normal cervical extension at which Dr. De Jesus assessed plaintiff was 60 degrees, compared to Dr. Farkas's norm of 50 degrees at which Dr. Farkas assessed

plaintiff. Comparing Dr. Farkas's assessment of plaintiff to Dr. Jesus's norm, however, yields a 16.7% loss of cervical extension. Similarly, Dr. De Jesus's normal cervical rotation at which Dr. De Jesus assessed plaintiff was 80 degrees, compared to Dr. Farkas's norm of 70 degrees at which Dr. Farkas assessed plaintiff, yielding a 12.5% loss when comparing Dr. Farkas's assessment to Dr. De Jesus's norm. Using Dr. De Jesus's normal lumbar extension of 25 degrees at which Dr. De Jesus assessed plaintiff, Dr. Farkas's assessment of plaintiff at 20 degrees, which was Dr. Farkas's norm, yields a 20% loss.

Conversely, Dr. Farkas's normal lumbar flexion at which Dr. Farkas assessed plaintiff was 90 degrees, compared to Dr. De Jesus's norm of 60 degrees at which Dr. De Jesus assessed plaintiff, yielding a 33.3% loss when comparing Dr. De Jesus's assessment to Dr. Farkas's norm. Using Dr. Farkas's normal lateral bending of 30 degrees at which Dr. Farkas assessed plaintiff, Dr. DeJesus's assessment of plaintiff at 25 degrees, which was Dr. De Jesus's norm, yields a 16.7% loss.

These discrepancies in the assessments by defendants' physicians may well be explainable. Different physicians may find that the same patient's ranges of motion vary on different dates or may assess different normal ranges of motion for the same patient through different methods of measurement, for example. The assessments by defendants' physicians were only 15 days apart, however, and did not just find varying ranges of motion as exhibited by plaintiff through Dr. Farkas's use of a

goniometer and Dr. De Jesus's use of visual means; the physicians also found that the normal ranges of motion for plaintiff varied, without explaining any basis for those differences.

Comparing the ranges of motion observed in plaintiff with a baseline norm and reaching an accurate "comparative quantification," Yasheyev v. Rodriguez, 28 A.D.3d 651, 652 (2d Dep't 2006), is critical to determining whether there are significant limitations on plaintiff's range of motion. Lattan v. Gretz Tr. Inc., 55 A.D.3d 449, 450 (1st Dep't 2008); McNair v. Lee, 24 A.D.3d 159, 160 (1st Dep't 2005); Wells v. Seckla, 11 A.D.3d 240, 241 (1st Dep't 2004). See Tuico v. Maher, 52 A.D.3d 201 (1st Dep't 2008); Gorden v. Tibulcio, 50 A.D.3d 460, 463 (1st Dep't 2008). These physicians' adjustments in the baseline, absent explanation, thus erode the reliability of the physicians' assessments, "leaving the court to speculate" as to their ultimate meaning. Bray v. Rosas, 29 A.D.3d 422, 423 (1st Dep't 2006); Manceri v. Bowe, 19 A.D.3d 462, 463 (2d Dep't 2005). At minimum, they permit varying inferences as to whether there are significant restrictions on plaintiff's functioning. Martinez v. Pioneer Transp. Corp., 48 A.D.3d 306, 307 (1st Dep't 2008); Noble v. Ackerman, 252 A.D.2d 392, 395 (1st Dep't 1998).

Inconsistencies in the findings by defendants' physicians raise factual issues that defeat defendants' motion for summary judgment, where, as here, the inconsistency is unexplained, and no connection or reference is made between Dr. De Jesus's later findings and Dr. Farkas's findings 15 days earlier. Martinez v.

Pioneer Transp. Corp., 48 A.D.3d at 307; Noble v. Ackerman, 252 A.D.2d at 395; Patterson v. Arshad, 209 A.D.2d 232, 233 (1st Dep't 1994); Williams v. Lucianatelli, 259 A.D.2d 1003 (4th Dep't 1999). See Nix v. Yang Gao Xiang, 19 A.D.3d 227; Abbadessa v. Rogers, 40 A.D.3d 665 (2d Dep't 2007); Coppage v. Svetlana Hacking Corp., 31 A.D.3d 366 (2d Dep't 2006); Browdame v. Candura, 25 A.D.3d 747, 748 (2d Dep't 2006). Their discrepant findings, each reaching the conclusion that, whatever the level of normal functioning might be, plaintiff met it, also suggest that their reports are tailored simply to elude the criteria for a serious injury. Munoz v. Hollingsworth, 18 A.D.3d 278, 279 (1st Dep't 2005); Simms v. APA Truck Leasing Corp., 14 A.D.3d 322 (1st Dep't 2005).

Thus, even though both Dr. Farkas and Dr. De Jesus found no underlying objective condition other than resolved sprains or strains in plaintiff's cervical and lumbar spine, their range of motion findings, considered together, reveal significant restrictions in both areas, which are not attributed to any cause other than the July 2006 vehicle collision. See Harris v. Ariel Transp. Corp., 55 A.D.3d 323, 324 (1st Dep't 2008); Lunkins v. Toure, 50 A.D.3d 399 (1st Dep't 2008); Yaqi v. Corbin, 44 A.D.3d 440 (1st Dep't 2007); Lopez v. Simpson, 39 A.D.3d 420, 421 (1st Dep't 2007). Nor are their diagnoses of sprains or strains supported by any objective diagnostic testing, such as an interpretation of MRIs, to rule out disc herniations, see Harris v. Ariel Transp. Corp., 55 A.D.3d at 324; Stevens v. Homiak

Transp., Inc., 21 A.D.3d 300, 302 (1st Dep't 2005); Colon v. Kempner, 20 A.D.3d 372, 374 (1st Dep't 2005); Munoz v. Hollingsworth, 18 A.D.3d at 279, or an electromyelogram or nerve conduction study, to rule out radiculopathy. See Wadford v. Gruz, 35 A.D.3d 258 (1st Dep't 2006); Rosario v. Universal Truck & Trailer Serv., 7 A.D.3d 306, 308-309 (1st Dep't 2004).

In sum, defendants' medical evidence, considered as a whole, reveals significant restrictions in plaintiff's spinal ranges of motion, identifies no cause other than the July 2006 collision, and fails to support the diagnoses of resolved sprains or strains with any diagnostic tests. These inconsistent and hence inconclusive findings thus fail to demonstrate that plaintiff did not sustain a serious injury in the category of a significant or permanent consequential limitation of functioning. Caballero v. Fev Taxi Corp., 49 A.D.3d 387; Offman v. Singh, 27 A.D.3d at 285; Nix v. Yang Gao Xiang, 19 A.D.3d 227. See McNair v. Lee, 24 A.D.3d 159, 160 (1st Dep't 2005); Abbadessa v. Rogers, 40 A.D.3d 665; Coppage v. Svetlana Hacking Corp., 31 A.D.3d 366; Kouvaras v. Hertz Corp., 27 A.D.3d 529, 530 (2d Dep't 2006).

C. Plaintiff's Admissions

As to the final category of serious injury plaintiff claims, he testified at his deposition that after the collision he was confined to his bed for only three weeks and to his home for only six weeks. Defendants thus meet their burden to demonstrate that he did not sustain a medically determined injury or impairment that prevented him from performing substantially all his daily

activities for 90 of the 180 days following the collision. Brantley v. New York City Transit Auth., 48 A.D.3d 313 (1st Dep't 2008); Alexander v. Garcia, 40 A.D.3d 274 (1st Dep't 2007); Thompson v. Abbasi, 15 A.D.3d 95, 96-97 (1st Dep't 2005); Flores v. Singh, 13 A.D.3d 203, 204 (1st Dep't 2004).

IV. PLAINTIFFS' REBUTTAL EVIDENCE

A. Significant or Permanent Consequential Limitation

Even if defendants' evidence raises no factual issues, and defendants have met their burden to demonstrate that plaintiff did not sustain a serious injury in the category of a significant or permanent limitation of functioning, he rebuts that showing. Based on MRIs from July 22, 2006, and nerve conduction velocity and electromyogram testing September 6, 2006, physiatrist and neurologist Aric Hausknecht M.D. diagnosed herniations at the C4-C5 and C5-C6 levels impinging on the spinal cord, radiculopathy at the C4-C5 level, and herniations at the L3-L4 and L4-L5 levels in plaintiff's cervical and lumbar spine. Based on examinations of plaintiff beginning three days after the collision, Dr. Hausknecht found restrictions in plaintiff's cervical lateral flexion of 40% on the right and 30% on the left and 11.1% restriction in his lumbar forward flexion. Although Dr. Hausknecht also found underlying osteoarthritis and degenerative joint disease in plaintiff's spine, Dr. Hausknecht found that the collision aggravated these conditions, which were asymptomatic before the collision.

Based on examinations of plaintiff also beginning three days

after the collision, chiropractor Mitchell Zeren further found restrictions in plaintiff's range of motion, from 25% to 44.5% in four planes of his cervical spine, and from 50% to 66.6% in three planes of his lumbar spine. At that time Dr. Zeren advised plaintiff to refrain from his work and from lifting, bending, pulling, and pushing.

Dr. Zeren found restrictions in plaintiffs' range of motion continuing as of August 27, 2008. In the planes that he assessed earlier, he found restrictions from 16% to 33.3% in the same four planes of plaintiff's cervical spine and from 22% to 33.3% in the same three planes of his lumbar spine.

Based on plaintiff's medical history, account of the collision, test results, and Dr. Zeren's examinations, Dr. Zeren found that the trauma of July 16, 2006, "weakened Mr. Balkaran's tissues and changed the mechanics of his spine." Aff. of Jeffrey S. Stillman, Ex. A ¶ 11 at 6. Dr. Zeren attributed plaintiff's continuing spinal condition to that trauma and concluded that due to "his traumatically deranged spine," his "restricted spinal motion will not improve." Id. at 7. Dr. Zeren further addresses any degenerative condition in plaintiff's spine:

> As Mr. Balkaran was asymptomatic, there is nothing to indicate . . . any disc injury before the motor vehicle accident on July 16, 2006, other than age-appropriate degeneration. . . . [W]hile there may be some degeneration . . . as a result of the aging process, which would have made Mr. Balkaran more susceptible to these injuries from trauma, he, as a direct result of the motor vehicle accident on July 16, 2006, sustained severe trauma to the spine, which resulted in a permanent partial disability . . . .

Id. ¶ 12 at 7.

At oral argument, defendants pointed to gaps in plaintiff's treatment from February to May 2007 and from February to May 2008. A gap in or cessation of treatment, if unexplained, would be fatal to plaintiff's claims of a significant or permanent consequential limitation. Baez v. Rahamatali, 24 A.D.3d 256 (1st Dep't 2005), aff'd, 6 N.Y.3d 868 (2006); Pommells v. Perez, 4 N.Y.3d 566, 574 (2005); Brown v. Singh, 52 A.D.3d 367 (1st Dep't 2008); Gorden v. Tibulcio, 50 A.D.3d at 464. See Toure v. Avis Rent A Car Sys., 98 N.Y.2d 345, 355 (2002); Turner-Brewster v. Arce, 17 A.D.3d 189, 190 (1st Dep't 2005). These intervals of three months between one scheduled visit for treatment and the next, however, are nowhere as long as even the minimum gaps that require further explanation. Seecoomar v. Ly, 43 A.D.3d 900, 902 (2d Dep't 2007). See, e.g., Baez v. Rahamatali, 24 A.D.3d 256, aff'd, 6 N.Y.3d 868; Dilone v. Tal Leu Cheng, 56 A.D.3d 397, 398 (1st Dep't 2008); Eichinger v. Jone Cab Corp., 55 A.D.3d 364 (1st Dep't 2008); Ning Wang v. Harget Cab Corp., 47 A.D.3d 777, 778 (2d Dep't 2008). Therefore the chiropractor's findings of persistent, quantified restrictions in plaintiff's cervical and lumbar ranges of motion, objectively supported by diagnoses of cervical and lumbar disc herniations and radiculopathy, Wadford v. Gruz, 35 A.D.3d at 259; McNair v. Lee, 24 A.D.3d at 160; Rosario v. Universal Truck & Trailer Serv., 7 A.D.3d at 309; Shinn v. Catanzaro, 1 A.D.3d at 198, raise factual issues whether plaintiff's impairments constitute a significant or permanent consequential limitation. Ferguson v. Budget Rent-A-Car, 21

A.D.3d 730, 731 (1st Dep't 2005); Sepulveda v. Reyes, 19 A.D.3d 297 (1st Dep't 2005); Seda v. Khabrane, 16 A.D.3d 118 (1st Dep't 2005); Soogrim v. Upgrade Contr. Corp., 8 A.D.3d 57 (1st Dep't 2004).

B. Findings of Degeneration by Plaintiff's Experts

Plaintiff, to support each of his serious injury claims, also must explain any findings insofar as they may indicate that his injuries were degenerative. Rivera v. Gelco Corp., 58 A.D.3d 477 (1st Dep't 2009); Becerril v. Sol Cab Corp., 50 A.D.3d 261, 262 (1st Dep't 2008); Brewster v. FTM Servo Corp., 44 A.D.3d 351, 352 (1st Dep't 2007). See Rose v. Citywide Auto Leasing, Inc., __ A.D.3d __, 875 N.Y.S.2d 471 (1st Dep't 2009); Levine v. Deposits Only, Inc., 58 A.D.3d 697, 698 (1st Dep't 2009); Lattan v. Gretz Tr. Inc., 55 A.D.3d at 450; Eichinger v. Jone Cab Corp., 55 A.D.3d at 365. Failure to address evidence of degeneration renders any finding that the injuries were caused by trauma purely conclusory or speculative. Delfino v. Luzon, __ A.D.3d __, 872 N.Y.S.2d 24, 25 (1st Dep't 2009); Valentin v. Pomilla, 59 A.D.3d 184, 186 (1st Dep't 2009); Saint-Hilaire v. PV Holding Corp., 56 A.D.3d 541 (1st Dep't 2008); Rodriguez v. Abdallah, 51 A.D.3d 590, 591 (1st Dep't 2008). See Marsh v. City of New York, __ A.D.3d __, 877 N.Y.S.2d 65, 66 (1st Dep't 2009); Rose v. Citywide Auto Leasing, Inc., 875 N.Y.S.2d at 472; Sky v. Tabs, 57 A.D.3d 235, 238 (1st Dep't 2008); Santana v. Khan, 48 A.D.3d 318 (1st Dep't 2008).

Plaintiff's chiropractor and his physiatrist and neurologist

find nothing in plaintiff's history that would have contributed to his disc herniations other than the July 2006 collision. Even if the herniations were a latent condition before the collision, these experts attest that it caused the condition to become symptomatic, as only after the collision did plaintiff suffer persistent spinal limitations despite a course of therapy. In concluding that trauma contributed to the abnormalities and limitations in functioning found in plaintiff's cervical and lumbar spine, these medical practitioners' diagnoses specifically exclude degeneration as a cause. Kasel v. Szczecina, 51 A.D.3d 872, 873 (2d Dep't 2008). See Rose v. Citywide Auto Leasing, Inc., 875 N.Y.S.2d at 472; Valentin v. Pomilla, 59 A.D.3d at 186. Plaintifff's experts, by explaining any degenerative condition in plaintiff's spine and ruling out degeneration as a cause of his injuries in reaching their diagnoses, bolster his rebuttal and demonstrate that their references to such a condition do not defeat his claims.

C. Inability to Perform Daily Activities for 90 Days

Plaintiff's medical evidence in rebuttal, however, including the findings by the chiropractor and the physiatrist and neurologist of significant limitations in plaintiff's cervical and lumbar spine, does not support the functional disability required to raise a factual issue of an impairment that prevented substantially all his daily activities for 90 days. Morris v. Cisse, 58 A.D.3d 455, 457 (1st Dep't 2009); Ayala v. Douglas, 57 A.D.3d 266, 267 (1st Dep't 2008); Lopez v. Simpson, 39 A.D.3d at

421; Uddin v. Cooper, 32 A.D.3d 270, 271-72 (1st Dep't 2006). Even if Dr. Zeren's advice to plaintiff July 19, 2006, to refrain from his work and from lifting, bending, pulling, or pushing, demonstrates he was prevented from substantially all his daily activities, Dr. Zeren does not indicate that he advised plaintiff against all those activities for at least 90 days. The next examination that Dr. Zeren recounts is not until August 2008, when he simply recites plaintiff's current complaints, that his "routines continue to be difficult," and "personal and social tasks frequently exacerbate his pain and cause spasms," but not that substantially all these activities are completely prevented. Stillman Aff., Ex. A ¶ 11 at 5.

Dr. Hausknecht concluded that plaintiff was "totally disabled" and advised him "to restrict his activities." Even if this conclusion were sufficiently specific as to encompass substantially all his daily activities, again this advice extended only until October 4, 2006, less than 90 days after the collision.

A "Disability Letter" bearing the signature of Mitchell M. Zeren dated October 31, 2006, also states:

> Currently, the level of impairment is as follows:
>
> Totally disabled, unable to work at this time.
>
> . . .
>
> Restrictions are as follows:
>
> Total; No participation at work.

Id., Ex. T at 3. Again, even if plaintiff's total disability or

restriction from his work demonstrated he was prevented from substantially all his daily activities, this letter is neither incorporated in Dr. Zeren's affidavit nor independently in admissible form. The unsworn letter is not certified, see C.P.L.R. §§ 3122-a(a) and (b), 4518(c), nor does any witness lay the foundation for the document's admissibility as a business record or other exception to the rule against hearsay. E.g., C.P.L.R. § 4518(a); People v. Mertz, 68 N.Y.2d 136, 147-48 (1986); Khalil v. Marion, 200 A.D.2d 500, 501 (1st Dep't 1994); Bronstein-Becher v. Becher, 25 A.D.3d 796, 797 (2d Dep't 2006); People v. Wojes, 306 A.D.2d 754, 757 (3d Dep't 2003). See Zuluaga v. P.P.C. Constr., LLC, 45 A.D.3d 479, 480 (1st Dep't 2007). Nor does the letter appear among the documents defendants present to support their motion, see Brown v. Achy, 9 A.D.3d 30, 31-32 (1st Dep't 2004); Chatah v. Iglesias, 5 A.D.3d at 161, or among the records Dr. Farkas or Dr. De Jesus relied on, see Williams v. Parke, 1 A.D.3d 240 (1st Dep't 2003; Toledo v. A.P.O.W. Auto Repair/Towing, 307 A.D.2d 233, 234 (1st Dep't 2003), permitting plaintiff to rely on the document regardless of its inadmissible form. Dembele v. Cambisaca, 59 A.D.3d 352 (1st Dep't 2009); Hernandez v. Almanzar, 32 A.D.3d 360, 361 (1st Dep't 2006).

V. CONCLUSION

Consequently, the court grants defendants' motion for summary judgment to the limited extent of dismissing plaintiff's claim of a serious injury under the 90 out of 180 days category,

but otherwise denies defendants' motion, for each of the reasons discussed above. C.P.L.R. § 3212(b) and (e); N.Y. Ins. Law § 5102(d); Alexander v. Garcia, 40 A.D.3d 274; Ferguson v. Budget Rent-A-Car, 21 A.D.3d at 731. See Thompson v. Ramnarine, 40 A.D.3d 360, 361 (1st Dep't 2007); Toussaint v. Claudio, 23 A.D.3d 268, 269 (1st Dep't 2005). This decision constitutes the court's order. The court will provide copies to the parties' attorneys.

DATED: June 5, 2009

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.