Perez v Vasquez
2009 NY Slip Op 33335(U)
September 30, 2009
Sup Ct, New York County
Docket Number: 102524/2007
Judge: Paul Wooten

4

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN Justice PART 22

VICTOR PEREZ,

Plaintiff,

- against -

PEDRO A. VASQUEZ and FRANK LIVERY SERVICE, INC.,

Defendants.

INDEX NO. 102524/2007

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO. 79

The following papers, numbered 1 to 3, were read on this motion by defendants for summary judgment on the threshold "serious injury" issue.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits (Memo)	2
Replying Affidavits (Reply Memo)	3

Cross-Motion: ☐ Yes ☒ No

On October 25, 2006, plaintiff Victor Perez ("plaintiff"), was involved in a two-vehicle collision with a vehicle owned by defendant Frank Livery Service, Inc. and operated by defendant Pedro A. Vasquez (collectively "defendants"). The accident occurred on Broadway near West 165th Street in New York County, New York. Plaintiff commenced this action to recover damages for alleged personal injuries suffered as a result of the subject motor vehicle accident. The parties completed discovery and a Note of Issue was filed on July 14, 2008. Defendants now move for an order pursuant to CPLR 3212, granting summary judgment dismissing the complaint on the threshold issue of "serious injury," pursuant to Insurance Law § 5102 (d).

SERIOUS INJURY THRESHOLD

Pursuant to the Comprehensive Motor Vehicle Insurance Reparation Act of 1974 (now Insurance Law § 5101 *et seq.* - the "No-Fault Law"), a party seeking damages for pain and

suffering arising out of a motor vehicle accident must establish that he or she has sustained at least one of the nine categories of "serious injury" as set forth in Insurance Law § 5102 (d) (*see Licari v Elliott*, 57 NY2d 230 [1982]). 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 loss"]; permanent consequential limitation of use of a body organ or member ["permanent consequential limitation"]; significant limitation of use of a body function or system ["significant limitation"]; or 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 ["90/180-day"].

"Serious injury" is a threshold issue, and thus, a necessary element of a plaintiff's prima facie case (*Licari*, 57 NY2d at 235; Insurance Law § 5104 [a]). The serious injury requirement is in accord with the legislative intent underlying the No-Fault Law, which was enacted to "'weed out frivolous claims and limit recovery to significant injuries'" (*Toure v Avis Rent A Car Sys., Inc.*, 98 NY2d 345, 350 [2002], quoting *Dufel v Green*, 84 NY2d 795, 798 [1995]). As such, to satisfy the statutory threshold, a plaintiff is required to submit competent objective medical proof of his or her injuries (*id.* at 350). Subjective complaints alone are insufficient to establish a prima facie case of a serious injury (*id.*).

Plaintiff alleges that the motor vehicle accident resulted in permanent injuries to his right knee, back and neck, which include a meniscus tear requiring surgery and herniated and bulging discs (*see* defendants' motion, exhibit C, bill of particulars at ¶ 11). He claims a "serious injury" under the following relevant categories: (1) significant disfigurement; (2) permanent loss; (3) permanent consequential limitation; (4) significant limitation; and (5) 90/180-day (*see id.* at ¶ 20; affirmation in opposition at ¶¶ 45-47). The Court must determine whether, as a matter of law, plaintiff has sustained a "serious injury" under at least one of the

claimed categories.

SUMMARY JUDGMENT ON SERIOUS INJURY

The issue of whether a claimed injury falls within the statutory definition of "serious injury" is a question of law for the Court, which may be decided on a motion for summary judgment (*see Licari*, 57 NY2d at 237). The moving defendant bears the initial burden of establishing, by the submission of evidentiary proof in admissible form, a prima facie case that plaintiff has not suffered a "serious injury" as defined in section 5102 (d) *(see Toure*, 98 NY2d at 352; *Gaddy v Eyler,* 79 NY2d 955, 956-57 [1992]*)*. Once the defendant has made such a showing, the burden shifts to the plaintiff to submit prima facie evidence, in admissible form, rebutting the presumption that there is no issue of fact as to the threshold question (*see Franchini v Palmieri*, 1 NY3d 536, 537 [2003]; *Rubensccastro v Alfaro*, 29 AD3d 436, 437 [1st Dept 2006]).

A defendant can satisfy the initial burden by relying on the sworn or affirmed statements of their own examining physician, plaintiff's sworn testimony, or plaintiff's unsworn physician's records (*see Arjona v Calcano*, 7 AD3d 279, 280 [1st Dept 2004]; *Nelson v Distant*, 308 AD2d 338, 339 [1st Dept 2003]; *McGovern v Walls*, 201 AD2d 628, 628 [2d Dept 1994]). Reports by a defendant's own retained physician, however, must be in the form of sworn affidavits or affirmations because a party may not use an unsworn medical report prepared by the party's own physician on a motion for summary judgment (*see Pagano v Kingsbury*, 182 AD2d 268, 270 [2d Dept 1992]). Moreover, CPLR 2106 requires a physician's statement be affirmed (or sworn) to be true under the penalties of perjury.

A defendant can meet the initial burden of establishing a prima facie case of the nonexistence of a serious injury by submitting the affidavits or affirmations of medical experts who examined plaintiff and opined that plaintiff was not suffering from any disability or consequential injury resulting from the accident (*see Gaddy,* 79 NY2d at 956-57*; Brown v Achy*,

9 AD3d 30, 31 [1st Dept 2004]; *see also Junco v Ranzi*, 288 AD2d 440, 440 [2d Dept 2001] [defendant's medical expert must set forth the objective tests performed during the examination]). A defendant can also demonstrate that plaintiff's own medical evidence does not indicate that plaintiff suffered a serious injury and that the injuries were not, in any event, causally related to the accident (*see Franchini*, 1 NY3d at 537). A defendant can additionally point to plaintiff's own sworn testimony to establish that, by plaintiff's own account, the injuries were not serious (*see Arjona*, 7 AD3d at 280; *Nelson*, 308 AD2d at 339).

Plaintiff's medical evidence in opposition to summary judgment must be presented by way of sworn affirmations or affidavits (*see Pagano*, 182 AD2d at 270; *Bonsu v Metropolitan Suburban Bus Auth.*, 202 AD2d 538, 539 [2d Dept 1994]). However, a reference to unsworn or unaffirmed medical reports in a defendant's motion is sufficient to permit plaintiff to rely upon the same reports *(see Ayzen v Melendez,* 299 AD2d 381, 381 [2d Dept 2002]). Submissions from a chiropractor must be by affidavit because a chiropractor is not a medical doctor who can affirm pursuant to CPLR 2106 (*see Shinn v Catanzaro*, 1 AD3d 195, 197 [1st Dept 2003]). Moreover, an expert's medical report may not rely upon inadmissible medical evidence, unless the expert establishes serious injury independent of said report (*see Friedman v U-Haul Truck Rental*, 216 AD2d 266, 267 [2d Dept 1995]; *Rice v Moses*, 300 AD2d 213, 213 [1st Dept 2002]).

In order to rebut a defendant's prima facie case, plaintiff must submit objective medical evidence establishing that the claimed injuries were caused by the accident, and "provide objective evidence of the extent or degree of the alleged physical limitations resulting from the injuries and their duration" (*Noble v Ackerman*, 252 AD2d 392, 394 [1st Dept 1998]; *see also Toure*, 98 NY2d at 350). Plaintiff's subjective complaints "must be sustained by verified objective medical findings" (*Grossman v Wright*, 268 AD2d 79, 84 [2d Dept 2000]). Such medical proof should be contemporaneous with the accident, showing what quantitative restrictions, if any, plaintiff was afflicted with (*see Nemchyonok v Ying*, 2 AD3d 421, 421 [2d

Dept 2003]). The medical proof must also be based on a recent examination of plaintiff, unless an explanation otherwise is provided (*see Bent v Jackson*, 15 AD3d 46, 48 [1st Dept 2005]; *Nunez v Zhagui*, 60 AD3d 559, 560 [1st Dept 2009]).

A medical affirmation or affidavit that is based on a physician's personal examination and observation of plaintiff is an acceptable method to provide a physician's opinion regarding the existence and extent of plaintiff's serious injury (*see O'Sullivan v Atrium Bus Co.*, 246 AD2d 418, 419 [1st Dept 1998]). "However, an affidavit or affirmation simply setting forth the observations of the affiant are not sufficient unless supported by objective proof such as X-rays, MRIs, straight-leg or Laseque tests, and any other similarly-recognized tests or quantitative results based on a neurological examination" (*Grossman*, 268 AD2d at 84; *see also Arjona*, 7 AD3d at 280; *Lesser v Smart Cab Corp.*, 283 AD2d 273, 274 [1st Dept 2001]). A physician's conclusory assertions based solely on subjective complaints cannot establish a serious injury (*see Lopez v Senatore*, 65 NY2d 1017, 1019 [1985]).

Plaintiff's medical proof of the extent or degree of a physical limitation may take the form of either an expert's "designation of a numeric percentage of a plaintiff's loss of range of motion"; or qualitative assessment of a plaintiff's condition, "provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system" (*Toure*, 98 NY2d at 350). The medical submissions must specify when and by whom the tests were performed, the objective nature of the tests, what the normal range of motion should be and whether plaintiff's limitations were significant (*see Milazzo v Gesner*, 33 AD3d 317, 317 [1st Dept 2006]; *Vasquez v Reluzco*, 28 AD3d 365, 366 [1st Dept 2006]).

Further, a plaintiff who claims a serious injury based on the "permanent loss" category has to establish that the injury caused a "total loss of use" of the affected body part (*see Oberly v Bangs Ambulance, Inc.*, 96 NY2d 295, 299 [2001]).

The "permanent consequential limitation" category requires a plaintiff to establish that the injury is "permanent," and that the limitation is "significant" rather than slight (*see Altman v Gassman*, 202 AD2d 265, 265 [1st Dept 1994]). Whether an injury is "permanent" is a medical determination, requiring an objective basis for the medical conclusion of permanency (*see Dufel*, 84 NY2d at 798). Mere repetition of the word "permanent" in the physician's affirmation or affidavit is insufficient. (*See Lopez*, 65 NY2d at 1019.)

The "significant limitation" category requires a plaintiff to demonstrate that the injury has limited the use of the afflicted area in a "significant" way rather than a "minor, mild or slight limitation of use" (*Licari*, 57 NY2d at 236). In evaluating both "permanent consequential limitation" and "significant limitation," "[w]hether a limitation of use or function is 'significant' or 'consequential' . . . relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part" (*Dufel*, 84 NY2d at 798). Moreover, a "'permanent consequential limitation' requires a greater degree of proof than a 'significant limitation,' as only the former requires proof of permanency" (*Altman*, 202 AD2d at 265).

The 90/180-day category requires a demonstration that plaintiff has been unable to perform substantially all of his or her usual and customary daily activities for not less than 90 days during the 180 days immediately following the injury *(see Licari*, 57 NY2d at 236). The words "substantially all" mean that the person has been "curtailed from performing his usual activities to a great extent rather than some slight curtailment" (*id.)*. A physician's statement that is too general and non-specific does not support a 90/180-day claim (*see e.g. Morris v Ilya Cab Corp.*, 61 AD3d 434, 435 [1st Dept 2009]; *Gorden v Tibulcio*, 50 AD3d 460, 463 [1st Dept 2008]).

Finally, "even where there is objective medical proof, when additional contributing factors interrupt the chain of causation between the accident and claimed injury--such as a gap

in treatment, an intervening medical problem or a preexisting condition--summary dismissal of the complaint may be appropriate" (*Pommels v Perez*, 4 NY3d 566, 572 [2005]). Accordingly, a plaintiff is required to offer a reasonable explanation for a "gap in treatment" *(id.* at 574; *Delorbe v Perez*, 59 AD3d 491, 492 [2d Dept 2009]; *DeLeon v Ross*, 44 AD3d 545, 545-46 [1st Dept 2007]; *Wadford v Gruz*, 35 AD3d 258, 258-59 [1st Dept 2006]; *Colon v Kempner*, 20 AD3d 372, 374 [1st Dept 2005]).

DISCUSSION

In support of the summary judgment motion, defendants submit, *inter alia*, affirmed reports of radiologist Dr. David A. Fisher affirming his review of plaintiff's MRIs; an affirmed report of orthopedic surgeon Dr. Edward T. Habermann; plaintiff's December 12, 2007 deposition; and the bill of particulars. (*See* defendants' motion, exhibits B, C, D, E.)

Dr. Fisher reviewed MRIs of plaintiff's right knee, lumbar spine and cervical spine that were taken two months after the accident on December 22, 2006. He opined that the MRI of the right knee and lumber spine were normal. He further opined that the MRI of the cervical spine revealed degenerative changes at C4/5, C5/6 and C6/7; mild disc bulges that were compatible with the amount of degenerative change; and no disc herniations. Dr. Fisher concluded that there was no radiographic evidence of traumatic or causally related injury to the right knee, lumbar spine or cervical spine.

Dr. Habermann conducted an orthopedic independent medical examination on January 28, 2008. He reviewed plaintiff's prior medical records and noted that plaintiff's history included an arthroscopic surgery for a meniscus tear of his right knee on February 13, 2007.[1] Examination of plaintiff's knee motions revealed active extension to 0 degrees (normal is 0 degrees) and active flexion to 145 degrees bilaterally (normal is 120 to 160 degrees). There

[1]Included among the records reviewed by Dr. Habermman, which were appended to his report, were Dr. Fisher's MRI reports; copies of the original MRI reports revealing a right knee meniscus tear and herniated and bulging discs; and a Lenox Hill Hospital operative report pertaining to the knee surgery indicating a diagnosis of a meniscus tear of the right knee.

was no instability, effusion or joint line tenderness. There was negative McMurray, pivot shift and Lachman maneuver bilaterally. There were healed arthroscopy scars in the right knee. There was no pain on motion and normal motor power in both knees. Plaintiff could straight leg raise and double leg hold for 45 degrees (normal is 40 to 80 degrees). Lasegue and Patrick test were negative. Range of motion of the cervical spine lateral left and right was 50 degrees (normal is 40 to 60 degrees). On flexion his chin touched his chest and extension was 45 degrees (normal is 30 to 60 degrees). There was no paracervical muscle spasm or local trigger points. There was no pain in the thoracic or lumbar area, and no paralumbar or parathoracic muscle spasm or trigger points. Plaintiff could forward flex so his fingertips came five inches from the floor (normal is 4" to 12"). Extension was 40 degrees (normal is 30 to 60 degrees), lateral bending 40 degrees (normal is 35 to 65 degrees) to each side and rotary motions 70 degrees (normal is 65 to 80 degrees) to each side. Dr. Habermann's impression was that plaintiff was status post arthroscopy of the right knee; and that his back, neck and both knees were within normal range. He also noted that there was no reported pathology to explain the findings reportedly seen during plaintiff's knee surgery. Dr. Habermann concluded that there was no objective evidence of any permanent injury of the knee, back or cervical spine, and that plaintiff was capable of engaging in normal activities of daily life.

At his deposition, plaintiff testified that he was confined to home and bed for a week and missed one week of work following the accident (plaintiff's deposition at 9, 69-70, 90). After undergoing the knee surgery on February 13, 2007, he was confined to home for two weeks and did not return to work before being terminated in June 2007 (*id.* at 69-71). Activities that were limited after the accident included engaging in basketball, sports, working out at the gym, sleeping, playing with his daughter and walking and standing long periods (*id.* at 85-88).

Based on the foregoing, the Court finds that defendants have established a prima facie case that plaintiff did not suffer a "serious injury" under the categories of significant

disfigurement, permanent loss, permanent consequential limitation or significant limitation (*see* Insurance Law § 5102 [d]). Defendants have submitted sufficient objective medical evidence demonstrating that plaintiff has normal range of motion and suffers from no orthopedic disability resulting from the accident. (*See Gaddy*, 79 NY2d at 956-57 [defendant established prima facie case "through the affidavit of a physician who examined [the plaintiff] and concluded that she had a normal neurological examination"]; *Gorden*, 50 AD3d at 462-63 [defendants met initial burden where affirmed reports of orthopedist and neurologist, made after a review of plaintiff's medical records and a personal examination, stated that plaintiff did not suffer from a neurologic or orthopedic disability and that the injuries were resolved]).

Defendants have also sustained their initial burden of proof with regard to the 90/180-day category. A defendant can establish the nonexistence of a serious injury under this category absent medical proof by citing to evidence, such as the plaintiff's own testimony, demonstrating that the plaintiff was not prevented from performing all of the substantial activities constituting his or her customary daily activities for the prescribed period (*see Copeland v Kasalica*, 6 AD3d 253, 254 [1st Dept 2004]).

Defendants have sufficiently demonstrated that the injuries did not prevent plaintiff from performing "substantially all" of his usual and customary daily activities for the requisite time period (*see Licari*, 57 NY2d at 236). Plaintiff's deposition testimony indicates that he was confined to home for no more than one or two weeks, and that he returned to work just one week after the accident. These time periods are far less than the 90/180 days required by the statute, and are sufficient to meet defendants' initial burden of establishing a prima facie case. (*See Copeland*, 6 AD3d at 254 [home and bed confinement for less than the prescribed period evinces lack of serious injury under 90/180-day category]; *Camacho v Dwelle*, 54 AD3d 706, 706 [2d Dept 2008] ["by submitting the plaintiff's deposition testimony that he missed only 15 days of work as a result of the accident, the defendants demonstrated that the plaintiff was able to perform 'substantially all' of the material acts constituting his customary daily activities for

more than 90 days of the first 180 days subsequent to the accident"]; *Sanchez v Williamsburg Volunteer of Hatzolah, Inc.*, 48 AD3d 664, 664-65 [2d Dept 2008]).

Since the Court finds that defendants have sustained their initial burden of establishing prima facie entitlement to summary judgment, the burden shifts to plaintiff to produce evidentiary proof in admissible form establishing the existence of a genuine issue of fact necessitating a trial (*see Gaddy*, 79 NY2d at 957).

In opposition to summary judgment, plaintiff submits, *inter alia*, an affidavit of Dr. Thomas M. Kolb certifying the accuracy of plaintiff's December 22, 2006 MRIs; an affirmation and certified records of orthopedic surgeon Dr. Mark S. McMahon; certified records from Uptown Chiropractic and Lenox Hill Hospital; uncertified records from New York Presbyterian Hospital; plaintiff's October 24, 2008 affidavit; and plaintiff's deposition.[2] (*See* plaintiff's affirmation in opposition, exhibits A, B, C, D, E, F, G, H.)

The MRIs were the same MRIs that were reviewed by defendants' radiologist. The MRI of the right knee revealed a tear of the posterior horn of the medial meniscus, a partial tear of the anterior cruciate ligament and joint effusion. The MRI of the lumbar spine revealed disc bulges at L4-5 and L5-S1. The MRI of the cervical spine showed multiple disc herniations at the C3-4, C4-5, C5-6 and C6-7 levels which impinged upon the thecal sac, and narrowing of the left C5-6 and bilateral C6-7 neural foramina.

The Uptown Chiropractic records document physical therapy and chiropractic treatment by Dr. Mark Heyligers' office between November 2, 2006 and April 11, 2007. Dr. Heyligers referred plaintiff to Dr. McMahon for an orthopedic consultation and an initial examination occurred on January 25, 2007. Dr. McMahon reviewed plaintiff's MRI films and opined that the cause of plaintiff's knee injury and herniated and bulging discs was the trauma he sustained in

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[2]The Court will consider the Lenox Hill Hospital records without regard to whether they are properly certified because defendants relied upon Lenox Hill Hospital records in support of the summary judgment motion (*see Ayzen*, 299 AD2d at 381; *Navedo v Jaime*, 32 AD3d 788, 789-90 [1st Dept 2006]). The New York Presbyterian Hospital records are unsworn and will not be considered.

the accident. Plaintiff had full range of motion of the knee, but the knee was unstable and producing pain which was consistent with the MRI findings. Dr. McMahon noted that the pain interfered with plaintiff's activities of daily living, including exercising, crouching, kneeling, using stairs and prolonged walking. Dr. McMahon diagnosed a medial meniscus tear and recommended surgery.

On February 13, 2007, Dr. McMahon performed arthroscopic surgery on plaintiff's right knee at Lenox Hill Hospital. The tear of the medial meniscus was visualized and determined to be irreparable. Accordingly, part of the medial meniscus was removed resulting in permanent alteration of the load distribution of the knee that would affect plaintiff's ability to sustain the load of walking, running or other activities.

Plaintiff was again examined by Dr. McMahon on October 6, 2008. Plaintiff had healed scars where the portals were placed for the surgery that were permanent. Knee range of motion was restricted to 0 to 115 degrees (normal is 0 to 130 degrees). Dr. McMahon opined that the limited range of motion was permanent and quite significant, and that plaintiff would likely need total knee replacement surgery in the future. Plaintiff also had tingling in the fingers which was a symptom of the narrowing of the neural foramina, and neck pain that was consistent with the impingement of the herniated discs upon the thecal sac. Dr. McMahon concluded that plaintiff sustained serous injuries as a result of the accident; that he had a significant and permanent limitation of motion in the right knee; that his neck and back conditions were also permanent; and that he would experience some degree of daily pain in his neck, back and right knee for the rest of his life which would limit his ability to perform ordinary daily activities.

Plaintiff also submits an operative report from Lenox Hill Hospital documenting that on February 13, 2007, he underwent a right knee arthroscopic partial medial meniscectomy, right knee partial synovectomy and right knee lysis of adhesions. Preoperative and postoperative diagnosis was right knee torn medial meniscus and synovitis fibrosis.

In his affidavit, plaintiff asserts that he was not able to work after the surgery because his job duties were too strenuous on his knee (plaintiff's affidavit at ¶ 6). He was terminated in June 2007 and did not find a new position that was less physically demanding until November 2007 (*id.*). Since the accident he has experienced difficulty in performing activities such as kneeling, crouching, bending, lifting, sleeping, walking, standing, playing basketball and interacting with his daughter (*id.* at ¶¶ 9, 10-13).

Plaintiff also testified that he discontinued treatment for his injuries in April 2007, when the no-fault insurance benefits were cut off (*id.* at ¶ 7). At the time, he did not have private health insurance and subsequently lost his job in June 2007 (*id.*).

Considering the evidence in the light most favorable to plaintiff (*see Kesselman v Lever House Restaurant*, 29 AD3d 302, 304 [1st Dept 2006]), the Court concludes that plaintiff has raised a triable issue of fact as to whether he sustained a "serious injury" within the meaning of Insurance Law § 5102 (d). Plaintiff submitted a MRI taken two months after the accident revealing tears in the right knee's medial meniscus and cruciate ligament. He also submitted an affirmation from his treating surgeon and a hospital operative report documenting arthroscopic surgery for the meniscus tear just four months after the accident, which caused a loss of a portion of the meniscus and permanently altered the load distribution of his knee. Dr. McMahon opined that plaintiff sustained a significant and permanent limitation of motion in the right knee, and that his injuries will continue to affect his ordinary daily activities. These submission are sufficient to raise a triable issue of fact. (*See Machat v Mazzarino*, 59 AD3d 500, 501 [2d Dept 2009] ["affirmation of [plaintiff's] treating orthopedist, who performed surgery on her right knee three months after the accident, and an affirmation of her radiologist, who reported that an MRI taken approximately three weeks after the accident revealed tears in that knee's menisci and cruciate ligaments, were sufficient to raise a triable issue of fact"]; *Rangel-Vargas v Vurchio*, 289 AD2d 92, 92 [1st Dept 2001] [evidence that plaintiff sustained a torn meniscus that required surgery was sufficient to raise issue of fact as to whether she sustained

a serious injury]; *Noriega v Sauerhaft*, 5 AD3d 121, 121 [1st Dept 2004] ["Issues of fact as to whether plaintiff sustained serious injuries are raised by evidence of, *inter alia*, a torn meniscus requiring surgery"]; *Smith v Vohrer*, 62 AD3d 528, 529 [1st Dept 2009]; *Engles v Claude*, 39 AD3d 357, 357 [1st Dept 2007]).

Further, there is conflicting evidence regarding whether plaintiff in fact sustained a meniscus tear of the right knee. Defendants' radiologist opined that the right knee MRI was normal. Plaintiff's radiologist found a meniscus tear upon review of the same MRI, which resulted in arthroscopic surgery. The conflicting medical evidence presents a factual dispute which precludes summary judgment (*see Garcia v Long Island MTA*, 2 AD3d 675, 675 [2d Dept 2003]).

Any gaps in treatment have been adequately explained since plaintiff's affidavit indicates that he discontinued his treatment in April 2007 when his no-fault insurance benefits were cut off, and that he did not have private health insurance at that time (*see Jules v Barbecho*, 55 AD3d 548, 549 [2d Dept 2008] ["The plaintiff adequately explained the significant gap in her treatment history by stating in her affidavit that she stopped treatment about four to five months after the subject accident because her no-fault insurance was cut off and she could not afford to personally pay for further treatment."].

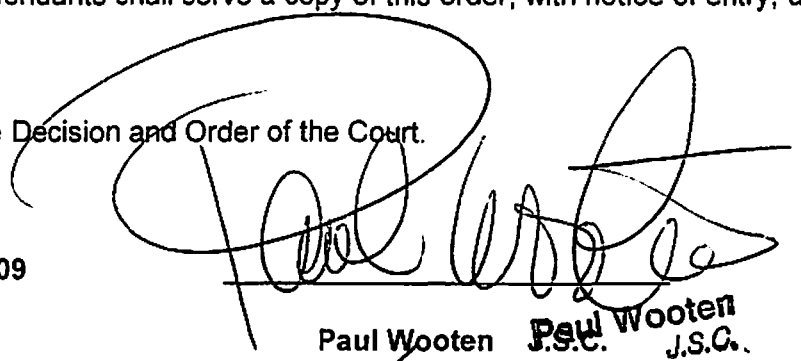
Accordingly, summary judgment with respect to plaintiff's claim of a "serious injury" under Insurance Law § 5102 (d) is denied. For these reasons and upon the foregoing papers, it is,

ORDERED that defendants' motion for summary judgment is denied; and it is further,

ORDERED that plaintiff shall serve any and all pre-trial notices and any HIPPA authorizations within five days of this order and a final pre-trial/settlement conference shall take place on November 5, 2009 at Part 22, 80 Centre Street, Courtroom 136, New York, New York 10013, and the case is scheduled for trial on December 8, 2009 at Part 40, 60 Centre Street, Courtroom 242, New York, New York 10013; and it is further,

ORDERED that defendants shall serve a copy of this order, with notice of entry, upon plaintiff.

This constitutes the Decision and Order of the Court.



Dated: September 30, 2009

Paul Wooten J.S.C. Paul Wooten J.S.C.

Check one: ☐ **FINAL DISPOSITION** ☑ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST**