SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

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

KENNETH I. DEUTSCH and WENDY GOLDIN,	TRIAL/IAS PART 31 NASSAU COUNTY
Plaintiffs, - against -	Index No.: 16337/10 Motion Seq. Nos.: 01, 02 Motion Dates: 01/31/12 01/25/12
JOHN REIMERS and WILLIAM REIMERS,	**XXX**
Defendants.	

The following papers have been read on these motions:

	Papers Numbered
Notice of Motion (Seq. No. 01), Affirmation and Exhibits	1
Affirmation in Opposition to Motion Seq. No. 01, Affidavits and Exhibits	2
Reply Affirmation to Motion Seq. No. 01	3
Notice of Motion (Seq. No. 02), Affirmation, Affidavit and Exhibits	4
Affirmation in Opposition to Motion Seq. No. 02	5
Reply Affirmation to Motion Seq. No. 02	6

Upon the foregoing papers, it is ordered that the motions are decided as follows:

Defendants move (Seq. No. 01), pursuant to CPLR § 3212 and Article 51 of the Insurance Law of the State of New York, for an order granting them summary judgment on the ground that plaintiff Kenneth Deutsch ("Deutsch") did not sustain a "serious injury" in the subject accident as defined by New York State Insurance Law § 5102(d). Plaintiffs oppose defendants' motion.

Plaintiffs move (Seq. No. 02), pursuant to CPLR § 3212, for an order granting partial summary judgment as to the liability against defendants. Defendants oppose the motion.

This action arises from a motor vehicle accident which occurred on September 19, 2008, at approximately 5:30 p.m., in the eastbound lanes of the Grand Central Parkway, Queens, New

York, at or near its intersection with the Jewel Avenue Exit. The accident involved a 2005 Porche Boxster owned and operated by plaintiff Deutsch and a 1986 Volvo Station Wagon owned by defendant William Reimers ("WR") and operated by defendant John Reimers ("JR"). Plaintiff Wendy Goldin ("Goldin") is plaintiff Deutsch's wife whose claims were derivative in nature. Plaintiffs commenced this action by the filing and service of a Summons and Verified Complaint on or about August 26, 2010. Issue was joined on or about October 4, 2010. Pursuant to a stipulation between the parties, plaintiff Goldin has dropped all of her claims.

Briefly, it is plaintiff Deutsch's contention that the accident occurred when his vehicle, moving slowly in stop and go traffic on the Grand Central Parkway, was struck in the rear by defendants' vehicle. Plaintiff Deutsch claims that defendant JR admitted at his Examination Before Trial ("EBT") that he did not see plaintiff Deutsch's vehicle until the moment of collision and offered no explanation for said collision other than his failure to pay attention to the road. *See* Plaintiffs' Affidavit in Support Exhibit D.

Plaintiff Deutsch claims that defendant JR was the negligent party in that he failed his duty to exercise reasonable care under the circumstances to avoid an accident. Plaintiff Deutsch additionally claims that defendant JR cannot come up with a non-negligent explanation for striking plaintiff Deutsch's vehicle in the rear.

In opposition to plaintiffs' motion, defendants argue that, at his EBT, defendant JR testified that there were no brake lights illuminated on plaintiff Deutsch's vehicle just before the accident. Plaintiffs submit that there is therefore an issue of fact as to the circumstances surrounding the accident and plaintiffs' motion should be denied. Defendants assert that a factual issue remains as to the extent that plaintiff Deutsch's comparative fault contributed to the happening of the subject accident by virtue of his failure to exercise ordinary prudence and to use such care to avoid the collision as an ordinarily prudent person would have under the

circumstances.

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). It is the existence of an issue, not its relative strength that is the critical and controlling consideration. *See Barrett v. Jacobs*, 255 N.Y. 520 (1931); *Cross v. Cross*, 112 A.D.2d 62, 491 N.Y.S.2d 353 (1st Dept. 1985). The evidence should be construed in a light most favorable to the party moved against. *See Weiss v. Garfield*, 21 A.D.2d 156, 249 N.Y.S.2d 458 (3d Dept. 1964).

When the driver of an automobile approaches another automobile from the rear, he or she is bound to maintain a reasonably safe rate of speed and control over his or her vehicle and to exercise reasonable care to avoid colliding with the other vehicle pursuant to New York State Vehicle and Traffic Law ("VTL") § 1129(a). *See Krakowska v. Niksa*, 298 A.D.2d 561, 749 N.Y.S.2d 55 (2d Dept. 2002); *Bucceri v. Frazer*, 297 A.D.2d 304, 746 N.Y.S.2d 185 (2d Dept. 2002).

A rear end collision with a stopped vehicle establishes a *prima facie* case of negligence on the part of the operator of the offending vehicle. *See Tutrani v. County of Suffolk*, 10 N.Y.3d 906, 861 N.Y.S.2d 610 (2008). Such a collision imposes a duty of explanation on the operator. *See Hughes v. Cai*, 55 A.D.3d 675, 866 N.Y.S.2d 253 (2d Dept. 2008); *Gregson v. Terry,* 35 A.D.3d 358, 827 N.Y.S.2d 181 (2d Dept. 2006); *Belitsis v. Airborne Express Freight Corp.*, 306 A.D.2d 507, 761 N.Y.S.2d 329 (2d Dept. 2003).

Of course, in a rear-end collision, the frontmost driver has the duty not to stop suddenly or slow down without proper signaling, pursuant to VTL § 1163, so as to avoid a collision. *See Gaeta v. Carter*, 6 A.D.2d 576, 775 N.Y.S.2d 86 (2d Dept. 2004); *Purcell v. Axelsen*, 286 A.D.2d 379, 729 N.Y.S.2d 495 (2d Dept. 2001).

As noted, a rear-end collision with a stopped or stopping vehicle creates a *prima facie* case of liability with respect to the operator of the rearmost vehicle, thereby requiring the operator to rebut the inference of negligence by providing a non-negligent explanation for the

collision. *See Francisco v. Schoepfer*, 30 A.D.3d 275, 817 N.Y.S.2d 52 (1st Dept. 2006); *McGregor v. Manzo*, 295 A.D.2d 487, 744 N.Y.S.2d 467 (2d Dept. 2002).

Vehicle stops which are foreseeable under the prevailing traffic conditions, even if sudden and frequent, must be anticipated by the driver who follows, since the following driver is under a duty to maintain a safe distance between his or her car and the car ahead. *See Shamah v. Richmond County Ambulance Service, Inc.*, 279 A.D.2d 564, 719 N.Y.S.2d 287 (2d Dept. 2001).

Drivers must maintain safe distances between their cars and the cars in front of them and this rule imposes on them a duty to be aware of traffic conditions including stopped vehicles. *See* VTL § 1129(a); *Johnson v. Phillips*, 261 A.D.2d 269, 690 N.Y.S.2d 545 (1st Dept. 1999).

Drivers have a duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident. *See Filippazzo v. Santiago*, 277 A.D.2d 419, 716 N.Y.S.2d 710 (2d Dept. 2000).

Plaintiffs, in their motion, have demonstrated *prima facie* entitlement to summary judgment on the issue of liability against defendants. Therefore, the burden shifts to defendants to demonstrate an issue of fact which precludes summary judgment. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980).

After applying the law to the facts in this case, the Court finds that defendants have failed to meet their burden to demonstrate an issue of fact which precludes summary judgment. Defendants failed to submit any evidence to establish a non-negligent explanation for striking plaintiff Deutsch's vehicle in the rear. *See Cortes v. Whelan*, 83 A.D.3d 763, 922 N.Y.S.2d 419 (2d Dept. 2011); *Balducci v. Velasquez*, 92 A.D.3d 626, 938 N.Y.S.2d 178 (2d Dept. 2012).

Therefore, based upon the foregoing, plaintiffs' motion (Seq. No. 02), pursuant to CPLR § 3212, for an order granting partial summary judgment as to the liability against defendants is hereby **GRANTED**.

The Court will now address defendants' threshold motion (Seq. No. 01).

As a result of the subject accident described above, plaintiff Deutsch claims that he sustained the following injuries:

Cervical Disc Herniation and/or Displacement;

C2-3 broad based central disc herniation tangent with the thecal sac;

C3-4 disc bulging;

C5-6 disc bulging;

C4-5 central disc herniation indenting the thecal sac narrowing both lateral recesses;

C6-7 disc bulging indenting the thecal sac;

C7-T1 central focal disc herniation indenting the thecal sac;

Torticollis;

Limitations to cervical range of motion;

Muscle spasm & guarding - bilateral upper trapezius muscles;

Muscle spasm & guarding - central paraspinal muscles;

Cervicalgia. *See* Defendants' Affirmation in Support Exhibit D.

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 Deutsch claims that, as a consequence of the above described automobile accident, he has sustained serious injuries as defined in § 5102(d) of the New York State Insurance Law 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* Defendants' 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, supra*; *Licari v. Elliot, supra*. 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 defendants' motion. In support of their motion (Seq. No. 01), defendants submit the pleadings, plaintiffs' Verified Bill of Particulars, the transcript of plaintiff Deutsch's EBT testimony, the affirmed report of Michael J. Katz, M.D., who performed an independent orthopedic medical examination of plaintiff on July 8, 2011, the affirmed report of Steven M. Peyser, M.D., who reviewed plaintiff Deutsch's cervical spine MRI performed on December 9, 2008 and the Health Insurance Claim forms submitted by plaintiff Deutsch's treating providers.

Defendants first assert that plaintiff Deutsch's admissions in his EBT testimony regarding the minimal treatment he received after the subject accident is evidence that he failed to sustain a "serious injury" as a result of said accident. Defendants state that "plaintiff testified that he did not tell the police he was injured, request an ambulance or go to a hospital after the accident....The first time he sought medical treatment was three or four days after the accident when he went to a doctor he knew socially, Dr. Lefcort. Dr. Lefcort is a physiatrist who has a practice with other doctors including Dr. Shapiro...He injured his neck and shoulder and Dr. Lefcort gave him physical therapy, message, adjustments, hot compresses and electrical stimulation....He did not go anywhere outside of Dr. Lefcort's practice and the last time he saw Dr. Lefcort was a year ago....Although he had an internist, Dr. Bradford, he did not see him after the accident until his physical months later." *See* Defendants' Affirmation in Support Exhibit E.

Dr. Michael J. Katz, a board certified orthopedic surgeon, conducted an examination of plaintiff on July 8, 2011. Said examination included an evaluation of plaintiff Deutsch's cervical spine and upper extremities. Range of motion testing, conducted by way of a goniometer, revealed

normal findings. Based upon his clinical findings and medical record reviews, Dr. Katz diagnosed plaintiff Deutsch with "[c]ervical strain - resolved with preexisting degenerative changes." Dr. Katz's ultimate diagnosis of plaintiff Deutsch was that "[c]laimant is a 59-year-old male who alleges an injury of 09/18/08 as a seatbelted driver. His prognosis is excellent. Currently, he shows no signs or symptoms of permanence relative to the musculoskeletal system and relative to 09/18/08. He is currently not disabled. He is capable of his full time, full duty work as a real estate broker without restrictions. He is capable of his activities of daily living. He is capable of all pre-loss activities." *See* Defendants' Affirmation in Support Exhibit F.

Dr. Steven M. Peyser, a board certified radiologist, conducted an independent film review of the MRI of plaintiff's cervical spine MRI which was performed on December 9, 2008. *See* Defendants' Affirmation in Support Exhibit G. With respect to his review of the cervical spine MRI, Dr. Peyser's findings were "[p]osterior central disc herniation C3-4 and C4-5. Spondylitic changes with bulging C6-7 with bilateral forminal stenoisi. Bilateral thyroid masses....These findings are most consistent with degenerative disc disease. There is no evidence of post traumatic etiology that can be determined on this evaluation. The bilateral thyroid masses are unrelated to trauma." *See* Defendants' Affirmation in Support Exhibit G.

With respect to plaintiffs' 90/180 claim, defendants submit that plaintiff Deutsch's admissions at his EBT establish that he did not sustain an injury that prevented him from performing substantially all of the material acts that constituted his customary daily activities for at least 90 days of the 180 days immediately after the accident. Plaintiff testified that, at the time of the accident, he was employed as a real estate broker by Prudential Douglas Elliman, that he was confined to his bed for two days and his home for a couple of weeks after the accident and the week after the accident he started doing work in his house. In addition, he quit that job to start his

own business two years ago and worked 60-70 hours a week as he did before at Prudential. Furthermore, plaintiff Deutsch is not claiming he was disabled for doing his normal activities for three months out of the first six months after the accident. *See* Defendants' Affirmation in Support Exhibit E.

Defendants also argue that the Health Insurance Claims forms submitted by plaintiff Deutsch's treating providers are further evidence that he did not sustain an injury which prevented him from working after the subject accident. Specifically, the Health Insurance Claim forms submitted by Dr. Daniel Shapiro from Neurological Services of Queens for the first three months after the subject accident do not state that plaintiff Deutsch was unable to work as a result of his injuries. *See* Defendants' Affirmation in Support Exhibit H.

Based upon this evidence, the Court finds that defendants have established a *prima facie* case that plaintiff Deutsch did not sustain serious injuries within the meaning of New York State Insurance Law § 5102(d).

The burden now shifts to plaintiffs to come forward with evidence to overcome defendants' 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, *supra*; *Grossman v. Wright*, 268 A.D.2d 79, 707 N.Y.S.2d 233 (2d Dept. 2000).

To support their burden, plaintiffs submit an Affidavit from plaintiff Deutsch, the Affidavit of Lawrence J. Lefcort, DC, the Affidavit of Daniel Shapiro, M.D., the affirmed reports of Daniel Shapiro, M.D. and the affirmed report of Lawrence J. Lefcort, DC.

In his own Affidavit, plaintiff Deutsch states, "[i]n the days following the accident, I began to experience severe pains in my neck and back. I first sought medical attention on or about September 23, 2008, a few days following the accident. For approximately one month following

the accident, I remained in my home, and only occasionally attempted to do light work from my home, such as making phone calls from my home in connection with my real estate practice. During the year following the accident, beginning approximately three or four days following the accident, I experienced the following limitations, which I had not experienced prior to the accident. (a) difficulty sleeping. (b) difficulty sitting, lying or otherwise remaining in one position for an extended period of time. (c) difficulty going for long walks. (d) difficulty turning my neck while driving, in both directions. (e) constant neck pain, and more occasionally, a shooting pain which would radiate down the entire length of my arm. I experienced none of these aforementioned symptoms prior to the accident and believe all of them to be the result of the accident. To the present day, I still experience pain in my neck, on an almost constant basis. I also experience shooting pains in my arm, on an occasional basis. I no longer play golf. I continue to play tennis, on a weekly or biweekly basis, but must take pain medication, specifically four Advil each time, in order to cope with the pain when I do. I am still unable to sit for long periods, exceeding approximately 45 minutes to an hour. I avoid long drives, including drives as short as those from my home in Manhasset into the borough of Manhattan, New York City. For this reason, me and my wife visit clubs in the (*sic*) Manhattan far less frequently. I also work mostly from home, and visit my office in the city no more than once every three weeks. Since the accident, I only work 30-40 hours per week, at least in part because my symptoms inhibit my ability to work long hours, as I did before the accident. I am no longer able to carry heavy garbage bags, and have difficulty carrying other heavy things." *See* Plaintiffs' Deutsch Affidavit in Opposition.

Plaintiffs argue that the Affidavits of plaintiff Deutsch's physicians raise issues of fact as would preclude summary judgment.

Plaintiffs submit the Affidavit of Lawrence Lefcort, a chiropractor and owner of Bay Terrace Chiropractic, P.C. Dr. Lefcort initially saw plaintiff Deutsch on September 23, 2008 and, on said date, referred him to Dr. Daniel Shapiro. Dr. Lefcort subsequently examined plaintiff Deutsch on May 27, 2010. *See* Plaintiffs' Lefcort Affidavit in Opposition Exhibit F. Dr. Lefcort also saw plaintiff Deutsch on January 4, 2012. On that date, Dr. Lefcort conducted a computerized spinal range of motion exam and a computerized muscle strength test. The results of the tests indicated deviations from normal. Dr. Lefcort states, "[i]n my opinion, plaintiff sustained the following medical conditions, which are causally related to the accident of September 19, 2008: a) herniated discs in the cervical region, specifically: a broad based central herniation at C2/3 tangent with the thecal sac; a central herniation at C4/5 indenting the thecal sac narrowing both lateral recesses; and a central focal herniation at C7-T1 indenting the thecal sac; b) disc bulges in the cervical region, specifically at C3/4, at C5/6 and at C6/7, the latter indenting the thecal sac. c) Cervical radiculopathy. d) Limitations to cervical range of motion, as quantified in paragraph 6 above. I am of the opinion that the herniated discs in plaintiff's cervical spine, together with the resulting cervical radiculopathy, and limitations to the cervical range of motion, are directly causally related to the automobile accident of September 19, 2008. It is possible that a pre-existing conditions (*sic*), such as a degenerative conditions (*sic*) of Plaintiff's spine related to his age, could be a factors (*sic*) which might have increased his vulnerable (*sic*) to the injury of September 19, 2008. However these factors by themselves would not suffice to explain the symptoms and limitations encountered during my examination and treatment of plaintiff. Such symptoms and limitations were caused by the accident of September 19, 2008. It is my opinion that the injuries sustained by plaintiff were such that they definitely and significantly reduced his functional capacity to perform his customary personal activities....The disabilities resulting from the

plaintiff's injuries manifested themselves following the accident September 19, 2008 and continued throughout my treatment of plaintiff, and are likely to continue indefinitely." *See id.*

Plaintiffs also submitted the certified medical reports of Daniel Shapiro, M.D. in support of their opposition to defendants' motion. *See* Plaintiffs' Shapiro Affidavit in Opposition Exhibit E. Dr. Shapiro examined plaintiff Deutsch on September 23, 2008 and November 4, 2008.

In reply to plaintiffs' opposition, defendants argue that "[i]n opposition, plaintiff did not submit an affirmation from a treating physician, but rather came forward with the affirmation of plaintiff's treating chiropractor, Lawrence Lefcort D.C., which is insufficient to defeat this motion because he does not adequately address the plaintiff's cessation of treatment in May 2010, a year and half prior to chiropractor Lefcort's recent examination of the plaintiff on January 4, 2012, subsequent to the filing of this motion. Chiropractor Lefcort also does not address the 2 year gap in his treatment of the plaintiff from November 4, 2008, less than two months after the accident, to May 27, 2010."

As previously stated, 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, supra.* The Court finds that neither plaintiff Deutsch nor his doctors adequately explained the cessation of plaintiff Deutsch's treatment after May 2010. *See Haber v. Ullah*, 69 A.D.3d 769, 892 N.Y.S.2d 531 (2d Dept. 2010); *Milosevic v. Mouladi*, 72 A.D.3d 1036, 898 N.Y.S.2d 870 (2d Dept. 2010); *Collado v. Aboizeid*, 68 A.D.2d 912, 890 N.Y.S.2d 326 (2d Dept. 2009).

Consequently, as plaintiff Deutsch had an approximately two year gap in treatment and

failed to adequately explain said cessation of treatment, the Court finds that these factors override plaintiff Deutsch's objective medical proof of limitations and permits dismissal of plaintiffs' Verified Complaint.

Additionally, plaintiff Deutsch's treating chiropractor failed to address the findings of defendants' radiologist, Dr. Steven M. Peyser, 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).

Furthermore, plaintiff Deutsch'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).

Finally, plaintiff Deutsch'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. Further, no where do plaintiffs claim that, as a result of plaintiff Deutsch's alleged injuries, he was "medically" impaired from performing any of his daily activities (*Monk v. Dupuis*, 287 A.D.2d 187, 734 N.Y.S.2d 684 (3d Dept. 2001)) or that he was curtailed "to a great extent rather than some slight curtailment." *See Licari v. Elliott, supra. See also Sands v. Stark*, 299 A.D.2d 642, 749 N.Y.S.2d 334 (3d Dept. 2002).

Based on the above, the Court finds that plaintiffs have failed to establish by competent medical proof that plaintiff Deutsch sustained a "permanent consequential limitation of use of a body organ or member," a "significant limitation of use of a body function or system" or "a medically determined injury or impairment of a non-permanent nature which prevents the injured

person from 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." *See* Insurance Law § 5102(d).

Accordingly, defendants' motion (Seq. No. 01), pursuant to CPLR § 3212 and Article 51 of the Insurance Law of the State of New York, for an order granting them summary judgment on the ground that plaintiff Deutsch did not sustain a "serious injury" in the subject accident as defined by New York State Insurance Law § 5102(d) is hereby **GRANTED** and plaintiffs' Verified Complaint is dismissed in its entirety.

This constitutes the Decision and Order of this Court.

ENTER:

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

Dated: Mineola, New York
March 22, 2012