**SHORT FORM ORDER**

**NEW YORK SUPREME COURT-QUEENS COUNTY**

**P R E S E N T : Hon. Timothy J. Dufficy Part 35**
**Justice**

**----------x**

**DELGADO D. TAYLOR,**
**Plaintiff,**

**Index No.: 16190/10**
**Motion Date: 5/10/12**
**Calendar No.:15**
**Motion Seq. : 2**

**- against -**

**KEVIN CUTLER, JR. and**
**SIMONE A. ALLEN**
**Defendants.**

**----------x**

The following papers numbered 1 to 9 read on this motion by defendants **KEVIN CUTLER, JR. and SIMONE A. ALLEN** for an order pursuant to CPLR 3212 and 3211 granting the defendants summary judgment in their favor on the issue of liability against the plaintiff **DELGADO D. TAYLOR** and dismissing the plaintiff's complaint as against them.

| | Papers Numbered |
|---|---|
| Notice of Motion-Affirmation-Exhibits..... | 1-4 |
| Affirmation in Opposition-Affidavits-Exhibits..... | 5-7 |
| Rely Affirmation..... | 8-9 |

Upon the foregoing papers it is ordered that this motion by defendants **KEVIN CUTLER, JR. and SIMONE A. ALLEN** for an order pursuant to CPLR 3212 and 3211 granting the defendants summary judgment on the issue of liability and against plaintiff **DELGADO D. TAYLOR** and dismissing the plaintiff's complaint as against them on the ground that the negligence of the defendants was not the proximate cause of the plaintiff's alleged injuries and on the grounds that the plaintiff has failed to establish serious injury as set forth in §5102(d) of the New York State Insurance Law is denied.

**Dated: September 25, 2012**

**TIMOTHY J. DUFFICY, J.S.C.**

**MEMORANDUM**

**NEW YORK SUPREME COURT-QUEENS COUNTY**

**P R E S E N T : Hon. Timothy J. Dufficy** **Part 35**
**Justice**

**----------x**

**DELGADO D. TAYLOR,**

**Plaintiff,**

**- against -**

**KEVIN CUTLER, JR. and**
**SIMONE A. ALLEN**

**Defendants.**

**----------x**

**Index No.: 16190/10**
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This is an action for personal injuries allegedly sustained by plaintiff Taylor on November 1, 2009, as the result of a motor vehicle accident that occurred on the Southern State Parkway, about fifty feet from Exit 15, near Corona Avenue in Nassau County, New York.

Defendants Kevin Cutler, Jr. and Simone A. Allen now move for an order pursuant to CPLR 3212 and 3211 granting summary judgment on the issue of liability and against plaintiff **DELGADO D. TAYLOR** and dismissing the plaintiff's complaint as against them on the grounds that the negligence of the defendants was not the proximate cause of the plaintiff's alleged injuries and that the plaintiff has failed to establish serious injury as set forth in §5102(d) of the New York State Insurance Law.

On a motion for summary judgment the court must determine whether or not there are issues of fact which should be properly resolved by a jury. Hartford Accident and Indemnity Company v Wesoloski, 33 N.Y.2d 169 (1973.) A defendant's negligence is the proximate cause of an injury if it was a substantial factor of the events which produced the subject injuries. Broderick v RY Management Co., Inc. 71 Ad3d 144 (1st Dept. 2009.)

In support of their motion, the defendants have submitted the May 12, 2011 deposition testimony of the plaintiff and the May 20, 2011 deposition testimony of defendant Allen. At the Examination Before Trial, defendant Allen testified that she was driving westbound on the Southern State Parkway and plaintiff Delgado Taylor was a passenger in that

vehicle. It was drizzling on the night of the accident and she had observed a puddle and a lot of debris on the right side of the roadway so she drove her vehicle into the left-hand lane of the parkway. She saw another car came in front of her vehicle so she drove her vehicle even more to the left-hand side of the roadway. Defendant Allen stated that she then felt a car approaching on her right-hand side and that the car in the left-hand lane then moved over to the middle lane. She felt something was happening when her vehicle suddenly came to a stop on the left-hand lane of the parkway with the car partially on the grassy median and the rear of the car protruding onto the left-hand shoulder of the parkway. Defendant Allen stated that she did not hit anything and that the tire on her vehicle went underneath the engine. The police then responded to the accident and inquired as to whether the plaintiff needed medical attention which plaintiff declined.

At the plaintiff's Examination Before Trial, plaintiff Delgado testified that at the time of the accident the roads were wet with debris, sticks and leaves and very windy that day and night. The plaintiff testified that the defendants' vehicle was traveling in the right-hand lane, passing Exit 15 on the parkway, when the defendants' vehicle came around the bend when he observed another automobile accident that had occurred on the parkway ahead of them. Defendant Allen then drove her vehicle from the far right-hand lane into the middle lane for approximately five minutes until she began to move her vehicle into the left-hand lane. Defendant Allen then slowed down from a speed of approximately 55 miles per hour to about 45 miles per hour. The plaintiff testified that when defendant Allen attempted to move the vehicle into the left-hand lane, the car did not go straight but instead it veered left. The driver's side tire of the defendant's vehicle then hit the curb on the median of the parkway, rolling into the bushes on the center grass median, and the two rear tires of the defendants' vehicle were still protruding onto the parkway when the vehicle came to a stop.

The plaintiff further testified that after the accident occurred, he was standing outside the defendants' vehicle for a few minutes when a police officer from the other accident came over to investigate this occurrence. The officer then administered a breathalyzer test to the plaintiff which plaintiff passed. The plaintiff testified that defendant Allen had not ingested any alcohol that night either.

The deposition testimony presents issues of fact as to whether or not defendant Allen's was negligent. The Court notes that even though the plaintiff failed to address the

issue of liability in its opposition, the Court finds there is sufficient admissible evidence before the Court to create an issue of fact on the question of proximate cause and the defendants' negligence that need to be resolved by a jury. As such, the defendants' motion seeking summary judgment in their favor and dismissing the plaintiff's complaint as against them on the ground that the defendants' negligence was not the proximate cause of plaintiff's alleged injuries is denid.

The defendants also move for summary judgment on the grounds that the plaintiff has failed to establish "serious injury" as that term is defined in §5102(d) of the New York State Insurance Law. The defendants have the initial burden of establishing that plaintiff has not sustained a serious injury. Toure v Avis Rent A Car System, Inc., 98 N.Y.2d 345 (2005); Torres v Torrano, 79 Ad3d 1121 (2010); Mannix v Lisi's Towing Service, Inc., 67 Ad3d 977 (2d Dept. 2009.) The defendants argue that based on the fact that the claims of injury alleged by the plaintiff are the result of a prior accident and pre-existing thus the plaintiff cannot meet the threshold requirement. The defendants contend that in the plaintiff's 2003 automobile accident, the plaintiff was a rear seat passenger in a vehicle that was rear-ended by another vehicle and as a result of the 2003 accident plaintiff's neck and back were injured. Following that 2003 accident, the plaintiff underwent physical therapy for about two months and then initiated a civil lawsuit as a result of the 2003 accident. The defendants claim that the plaintiff's pre-existing injury was the proximate cause of any alleged injuries that the plaintiff claims to have been caused in the November, 2009 accident and that the instant complaint should be dismissed on those grounds.

In support, the defendants submit the unaffirmed report of Dr. Leon Sultan which this Court will not consider. Medical records are inadmissible if they are neither sworn to nor affirmed to be true under penalties of perjury. Grasso v Angerami, 79 N.Y. 2d 813 (1991.)

The defendants also submit the affirmed report of Dr. Daniel Feurer, dated July 26, 2011, which will be considered by the Court. Dr. Feuer concluded that based upon his examination of the plaintiff and upon review of pertinent medical records, the plaintiff did not demonstrate any objective neurological disability or neurological permanency from the November 1, 2009 automobile accident. Dr. Feuer also concluded that the plaintiff was neurologically stable and able to engage in full active employment in construction and maintenance and able to resume the full activities of daily living without restriction. Dr.

Feuer also found that plaintiff's neurological range of motion was normal in all areas.

Here, the Court finds that the defendants have met their *prima facie* burden of proving that the plaintiff did not sustain a serious injury within the meaning of New York State Insurance Law §5102(d) through the affirmed report of Dr. Feuer and the burden of proof shifts to the plaintiff to demonstrate the existence of a triable issue of fact. Gaddy v. Eyler, 70 N.Y.2d 955 (1992); Licari v. Elliot, 57 N.Y. 2d 230 (1982).

In opposition to the defendants' motion, the plaintiff submits the affirmation of Dr. Andrew Dowd, an orthopedist, who examined the plaintiff two (2) days after the November 1, 2009 accident. Dr. Dowd's affirmation states that as a result of his examination and medical opinion, the plaintiff's range of motion limitations were causally connected to the motor vehicle accident that occurred on November 1, 2009. Dr. Andrew Dowd who performed multiple range of motion tests upon the plaintiff's cervical and lumbar spine with the use of a goniometer. Dr. Dowd examined the plaintiff on March 29 and April 5, 2012. Dr. Dowd also reviewed the MRI films of the plaintiff's cervical and lumbar spine and the results of the NCV/EMG studies conducted by neurologist Dr. Yong Chi. Dr. Chi's test results revealed evidence of bilateral C5 and C6 sensory nerve dysfunction, right C4 sensory nerve dysfunction, lumbar radiculopathy and cervical peripheral neuropathy. Dr. Dowd also reviewed the reports of Dr. David Hsu and Dr. Chi, both of whom examined the plaintiff at Hollis Medical Care, P.C. from November 3, 2009 through March 30, 2010. Dr. Dowd affirmed that in his opinion he could state with a reasonable degree of medical certainty that as a result of the plaintiff"s automobile accident that occurred on November 1, 2009, the plaintiff sustained disc herniations with loss of signal at levels C3-4, C4-5, and C6-7, as well as disc herniations with loss of signal at levels L3-4, L4-5, L5-S1. Dr. Dowd also affirmed that in his medical opinion, the plaintiff has a permanent 22% loss of cervical extension, a 33% loss of left and right cervical rotation, a permanent 33% loss of cervical flexion, a permanent 33% loss of lumbar extension, a permanent 33% loss of lumbar flexion, and a permanent 11% loss of left and right cervical lateral flexion.

Dr. Dowd also affirmed that in his opinion that from the date of the accident until at least March 1, 2010, the plaintiff would have been unable to perform his ordinary and customary activities and that review of the plaintiff's medical records confirms the plaintiff's disability from work for the four (4) month period following the November,

2009 accident.

Dr. Dowd also affirmed that in his medical opinion, after the plaintiff's 2003 automobile accident occurred, the plaintiff had finished his treatment and was able to perform his usual manual labor, play sports and run without any pain or restrictions. Dr. Dowd concluded that plaintiff had no pre-existing injuries that were still present before plaintiffs 2009 motor vehicle accident.

Accordingly, the Court finds that the plaintiff has raised triable issues of fact by submitting the affirmed reports of his doctors that show that he had significant limitations in his range of motion and that these significant limitations were caused by the November 1, 2009 automobile accident. *see*, Ortiz v Zorbas, 62 Ad3d 770(2d Dept. 2009); Azor v Torrado, 59 A.D. 3d 367 (2d Dept.2009.)

Since the plaintiff has raised a triable issue of fact as to whether or not he has sustained a serious injury pursuant to New York State Insurance Law § 5102(d) as a result of the automobile accident that occurred on November 1, 2009, a material issue of fact exists as to warrant a trial of this matter.

Here, the plaintiff has presented triable issues of fact through admissible documentary evidence by submitting the affirmation of Dr. Andrew Dowd in which Dowd affirms that in his medical opinion to a reasonable degree of medical certainty, the plaintiff's range of motion limitations were all causally connected to plaintiff's November 1, 2009 motor vehicle accident.

Therefore, the defendant's motion for summary judgment on the issue of whether or not plaintiff sustained serious injury is denied. Noble v Ackerman, 252 A.D. 2d 392 (1st Dept. 1998); Greene v Frontier Central School District, 214 A.D.2d 947(4th Dept. 1995.)

The defendants also claim that the plaintiff's complaint should be dismissed because plaintiff cannot meet the 90/180 threshold pursuant to New York State Insurance Law §5102(d). As the proponent of the motion the defendant must make a *prima facie* showing that plaintiff cannot demonstrate that he sustained 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 or the impairment. Jackson v. L.P. Transportation, Inc., 72 NY2d 975(1988).

While the court finds that the defendants have met their burden of showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102(d) based largely on the plaintiff's deposition testimony, the Court finds that the plaintiff has presented legally sufficient medical evidence from Dr. Dowd that he was unable to perform his usual and customary activities from November 1, 2010 until March 1, 2010, which is sufficient to raise a triable issue of fact and to require the denial of this branch of the defendants motion for summary judgment. Cabey v. Leon, 84 AD3d 1295(2d Dept. 2011).

Lastly, the defendants argue that the plaintiff's claim should be dismissed because he has not sufficiently explained his over one year gap in treatment. However, the Court finds that the plaintiff has created a genuine issue of fact regarding his gap in treatment by stating in his affidavit that he stopped receiving medical treatment on or about March 30, 2010, because the main doctor treating him left the medical practice and then right after that, his s no-fault benefits were cut off and he did not have private health insurance. Abdelaziz v. Fazel, 78 AD3d 1086 (2d Dept. 2010); Domanas v. Delgado Travel Agency, Inc. 56 AD2d 717 (2d Dept. 2008); Jules v. Barbecho, 55 Ad3d 548 (2d Dept. 2008).

Thus, the defendants motion for summary judgment is denied in its entirety.

**Dated: September 26, 2012**

**TIMOTHY J. DUFFICY, J.S.C.**