Nunoo v Adarkwah
2010 NY Slip Op 33953(U)
December 9, 2010
Sup Ct, Bronx County
Docket Number: 300174/09
Judge: Mary Ann Brigantti-Hughes
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SUPREME COURT STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15

PRESENT: Honorable Mary Ann Brigantti-Hughes

MICHAEL NUNOO and BENJAMIN BOAFO

DECISION/ORDER

PLAINTIFFS,

INDEX NO.:300174/09

-against-

STEPHEN A ADARKWAH, KENNETH K. SARFO, KAUSHIK M. PATEL, and BX MGMT,INC.,

DEFENDANTS.

The following papers numbered 1 to 12 read on these motions for summary judgment noticed on April 29, 2010 and submitted on the motion calendar of August 10, 2010 in Part IA-15:

Papers submitted	Numbered
Defendant Bx. Mgmt Inc.'s, Notice of Motion, Affirmation, & Exhibits	1,2,3.
Defendants Stephen A Adarkwah and Kenneth K. Sarfo's Notice of Motion, Affirmation, & Exhibits	4,5,6
Affirmation in Opposition, Memorandum of Law, Affidavits, & Exhibits	7,8,9,10
Reply Affirmation, & Exhibits	11

Upon the foregoing papers, the Decision and the Order on this motion is as follows:

Upon the foregoing papers, defendants seek an order granting summary judgment pursuant to CPLR § 3212 dismissing plaintiffs complaints and all cross claims under New York Insurance Law § 5102(d) and § 5101(a) and such other and further relief the Court may deem just and proper..

The instant matter, seeks to recover monetary damages for personal injuries allegedly sustained by the plaintiffs as a result of a motor vehicle accident which allegedly occurred on January 1, 2008 at the intersection of West Mosholu Parkway and St. Paul Avenue, Bronx County, New York.

Plaintiff Michael Nunoo (hereinafter "plaintiff Nunoo") alleges in his Verified Bill of Particulars that as a result of the aforementioned motor vehicle accident he sustained the following injuries: (1) bulging annular fibrosis at L3-L4, L4-L5 and L5-S1, most pronounced at

L4-5; (2) lumbar myofascial derangement; (3) chest wall contusion; (4) right ankle sprain; (5) cervical and thoracic myofascial derangement; (6) reversal of cervical lordosis indicative of muscle spasm; (7) bulging disc material at L3-L4, L4-L5 and L5-S1 results in mild spinal stenosis at L3-L5 and mild to moderate spinal stenosis at L4-L5; (8) right sided L4 radiculopathy as shown on EMG study; (9) chronic neck pain radiating to the right shoulder; (10) mid back pain; (11) chronic low back pain: (12) pain radiating to the right hip and lower extremity weakness; (13) right ankle pain; (14) anterior chest pain; (15) antalgic gait.

Plaintiff Benjamin Boafo (hereinafter "plaintiff Boafo") alleges in his Verified Bill of Particulars that as a result of the aforementioned motor vehicle accident he sustained the following injuries: (1) broad-based disc bulges at L5-L5 and L5-S1; (2) chronic low back pain radiating to the hips; (3) cervicalgia; (4) left shoulder tendinopathy; (5) necessity of multiple trigger point injections; (6) necessity of epidural steriod injections; (7) right parasagittal T1-T2 and left parasagittal T6-T7 herniations with thecal sac inpertation; (9) tendinosis/tendinopathy left shoulder.

New York Insurance Law § 5102(d) defines "serious injury" as:

> A personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; 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 (90) days during the one hundred eighty (180) days immediately following the occurrence of the injury or impairment.

Plaintiffs' Bill of Particulars further alleges that they have sustained serious injuries as defined by New York Insurance Law § 5102(d) in that

> "said injuries have resulted in a permanent loss of use of a body organ, member, function or system; a significant consequential limitation of use of a body function or system; permanent consequential limitation of use of a body function or system and/or medically determined injury of impairment of a non-permanent nature which prevented the plaintiff[s] from performing substantially all of the material acts which constitute plaintiff[s'] usual and customary daily activities for not less than ninety (90) days during the one hundred eighty (180) days immediately following the occurrence of the injury injury or impairment."

Summary Judgment Standard

In a motor vehicle case, a defendant moving for summary judgment on the issue of whether plaintiff sustained a serious injury has the initial burden of presenting competent

evidence establishing that the injuries do not meet the threshold. Linton v. Nawaz, 62 AD 3d 434 (1st Dept. 2009) *citing* Wadford v. Cruz, 35 AD3d 258 (1st Dept. 2006). Defendants may establish that plaintiffs have not suffered a serious injury within the meaning of New York Insurance Law § 5102(d) by submitting either sworn or affirmed reports from their examining physician, plaintiff's unsworn treating physician records or plaintiff's own deposition testimony. *See* Grossman v. Wright, 268 AD2d 79 (1st Dept. 2000), Arjona v. Calcano, 7 AD3d 279 (1st Dept. 2004), Nelson v. Distant, 308 AD2d 338 (1st Dept. 2003). If the defendant can demonstrate that there is no material issue of fact, the plaintiff has the burden to produce admissible evidence establishing the existence of a material issue of fact . *See*Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986). The plaintiff must present nonconclusory expert evidence sufficient to support a finding that the alleged injury is serious as defined by Insurance Law § 5102(d), but also that the injury was causally related to the accident. *See* Diaz v. Anasco, 38 AD3d 295 (1st Dept. 2007). If the plaintiff fails to produce admissible evidence, the defendant is entitled to summary judgment. Alvarez at 325.

Discussion

In support of their motion defendant Bx. Mgmt. Inc., submitted the unsworn affirmation of Dr. Julio Westerband, a orthopedist, and the unsworn affirmation of Dr. Stanley Ross, a orthopedist, plaintiffs' verified bill of particulars and plaintiffs' Examination Before Trial (hereinafter "EBT") transcripts .

"To obtain summary judgment the movant... must do so by tender of evidentiary proof in admissible form." Friends of Animals, Inc. v. Associated Fur Mfrs., 46 N.Y.2d 1065, 1067 (1979), *see also* Pagano v. Kingsbury, 182 A.D.2d 268 (2nd Dept. 1992). "Thus, when a defendant moves for summary judgment dismissing the complaint based on the plaintiff's failure to establish 'serious injury' and relies solely on findings of the defendant's own medical witnesses, those findings must be in admissible form, i.e., affidavits or affirmations, and not unsworn reports, in order to make a 'prima facie showing of entitlement to judgment as a matter of law'. Pagano v. Kingsbury, 182 A.D.2d 270, (2nd Dept. 1992) *quoting* Winegrad v. N.Y. Univ. Med. Ctr., 64 N.Y.2d 851 (1985).

In the case at bar, Dr. Westerband and Dr. Ross' reports do not comply with CPLR § 2106 which requires a physician's statement to be "affirmed by him to be true under the penalties of perjury." *See*, Offman v. Singh 27 A.D.3D 284 (1st Dept. 2006), Jones v. Schmitt, 7 Misc. 3d 47 (2nd Dept. 2005) (physician's statement is admissible if physician refers to CPLR § 2106 which contains the phrase under penalties of perjury and he affirmed the truth of the affirmation). Neither doctors' affirmation includes the language prescribed by CPLR § 2106 that his statement is affirmed to be true under the penalties of perjury. However, since plaintiffs have failed to raise the issue in opposition, the inadequacies of the reports are waived. *See* Scudera v. Mahbubur, 299 A.D.2d 535 (2nd Dept. 2002), Shinn v. Catanzaro, 1 A.D.3d 195 (1st Dept. 2003), Cross v Radiologix, Inc., 2009 NY Slip Op 30446U (N.Y. Sup. Ct. New York County 2009).

Dr. Westerband performed a orthopedic examination of plaintiff Nunoo on February 19,

2010. In preparation of his examination Dr. Westerband reviewed plaintiff Nunoo's St. Barnabas Hospital records, lumbar spine and cervical spine MRI reports dated January 18, 2008, an x-ray reports of the lumbar spine, cervical spine, thoracic spine, right ankle, and chest dated January 21, 2008, x-ray reports of the cervical and lumbar spine dated May 25, 2008, reports from Dr. Gautham Khakhar dated January 7, 2008 and February 6, 2008 and an interim note from Dr. Khakhar dated February 11, 2008, NCV/EMG report dated February 6, 2008, progress noted dated January 8, 2008 through February 18, 2008, and P,M, and R initial evaluation report dated January 7, 2008.

Dr. Westerband states in his report that plaintiff Nunoo was a seat belted rear passenger at the time of the accident, who was rendered unconscious. Plaintiff Nunoo was taken to St. Barnabas Hospital following the accident. At the hospital he had his neck and right ankle x-rayed and was discharged on the same day with prescription medication. Plaintiff Nunoo stated he initially had complaints of pain to his neck, lower back, and right ankle. Dr. Westerbarand states that after the accident he "was started on a course of physical therapy, massage therapy, and heat and ice treatments four times a week." Plaintff Nunoo informed Dr. Westerband that the aforementioned treatment was not helpful and he was "not continuing the recommended treatment at the present time." Dr. Westerband states that plaintiff Nunoo was unemployed at the time of the accident and on the date of examination. Plaintiff Nunoo informed Dr. Westerband that he is able to walk for one block, stand for two hours before he has to sit, sit for five minutes before he has to change positions "because of pain" and he is unable to participate in sports due to the injury. At the time of the examination, plaintiff Nunoo reported pain in the lower back and stated "his symptoms have worsened." The report states that plaintiff Nunoo did not undergo surgery because of the accident.

It should be initially noted that Dr. Westerband states in his report that "[a]ll measurements were confirmed by a hand held goniometer." Dr. Westerband's neurological examination of plaintiff Nunoo's bilateral upper extremities revealed deep tendon reflexes, biceps and triceps at 2+ bilaterally, atrophy negative bilaterally, muscle strength in each range was 5/5 bilaterally. Dr. Westerband's neurological examination of plaintiff Nunoo's bilateral lower extremities revealed deep tendon reflexes in the right knee, left knee, right ankle and left ankle at 2+ bilaterally, atrophy negative bilaterally, muscle strength in each range was 5/5 bilaterally, gait were normal bilaterally, and heel-toe-walk was negative bilaterally.

In addition, Dr. Westerband also performed range of motion examinations of plaintiff Nunoo's cervical spine, lumbar spine, thoracic spine, right ankle, left ankle and left foot. Dr. Westerband's range of motion examination as to plaintiff Nunoo's cervical spine revealed "flexion at 60 degrees (60 degrees normal), extension at 60 degrees (60 degrees normal), bilateral lateroflexion at 45 degrees (45 degrees normal), and bilateral rotation at 80 degrees (80 degrees normal)." In addition, the orthopedic Distraction, Compression and Soto Hall tests were all negative. The range of motion examination of plaintiff's Nunoo's thoracic spine reaveled no paraspinal spasmand there was no tenderness noted on palpation. The range of motion examination as to plaintiff's lumbar spine revealed "flexion at 90 degrees (90 degrees normal), extension at 25 degrees (25 degrees normal), bilateral lateral bending at 25 degrees (25 degrees

normal), and straight leg raising is negative at 80 degrees normal on the right." Moreover, the orthopedic Fabre and Ely's tests on the lumbar spine were both negative.

The examination of plaintiff Nunoo's right ankle revealed a "surgical scar" (however it should be noted that there is no evidence that plaintiff Nunoo had a prior injury or surgery resulting from the accident in the case at bar). There was no heat, swelling, effusion erythema, crepitus or atrophy noted to the right ankle. Plaintiff Nunoo's right ankle range of motion examination revealed "dorisflexion at 20 degrees (20 degrees normal), plantar flexion at 20 degrees (20 degrees normal), inversion at 20 degrees (20 degrees normal), and eversion at 280 degrees (20 degrees normal)." In addition, he performed the orthopedic Drawer's and Instability test and they were both negative. The range of motion examination of plaintiff Nunoo's left ankle and foot revealed "dorisflexion at 20 degrees (20 degrees normal), plantar flexion at 20 degrees (20 degrees normal), inversion at 20 degrees (20 degrees normal), and eversion at 280 degrees (20 degrees normal)."

Dr. Westerband's impression was that plaintiff's cervical spine, lumbar spine, thoracic spine and right ankle/right foot sprain and strain were all "resolved". He concluded that there was "no evidence of causally related disability."

Furthermore, defendant Bx. Mgmt. Inc. submitted a orthopedic examination report of plaintiff Boafo conducted by Dr. Ross on February 22, 2010. In preparation of his examination Dr. Ross reviewed plaintiff Boafo's bill of particulars, lumbar spine MRI report dated January 11, 2008, thoracic spine MRI report dated June 6, 2008, left shoulder MRI report dated February 15, 2008, and x-ray reports of the thoracic spine and left shoulder dated January 28, 2008,

In addition to the above, Dr. Ross also reviewed plaintiff Boafo's orthopedic reports from Dr. Dov Berkowitz dated February 8, 2008 and April 4, 2008, initial evaluation report from Physical Medicine and Rehabilitation of New York, P.C. dated January 7, 2008, initial evaluation report from Dr. Gautham Khakhar dated January 7, 2008, follow-up physiatric evaluation report from Dr. Gautham Khakhar dated January 7, 2008 through October 3, 2008, pain management consultation report from Dr. Brial Haftel dated June 13, 2008 , operative report from Dr. Haftel dated August 25, 2008 for the cervical/thoracic epidural steriod injection, operative report from Dr. Haftel dated August 11, 2008 for the epidurogram procedure, and the NCV/EMG report dated February 6, 2008 by Dr. Gautham Khakhar.

Dr. Ross states in his report as to plaintiff Boafo that he was a seat belted rear passenger at the time of the accident. Plaintiff Boafo was taken to St. Barnabas Hospital following the accident, where CT scans and x-rays were conducted. Dr. Ross states plaintiff Boafo was discharged on the same day with prescription Motrin. After the accident plaintiff Boafo "was started on a course of physical therapy, massage therapy, and heat treatments five times a week." Plaintff Boafo informed Dr. Ross that the aforementioned treatment was not helpful and he was "not continuing the recommended treatment at the present time." Plaintiff Boafo stated that his last treatment was in September 2008. The report states that plaintiff Boafo was unemployed at the time of the accident but was a college student and "missed a few days of college due to the

accident." The report states that plaintiff Boafo did not undergo any surgery because of the accident.

Dr. Ross' neurological examination of plaintiff Boafo's bilateral upper extremities revealed deep tendon reflexes, biceps and triceps at 2+ bilaterally, atrophy was negative and, muscle strength in each range was 5/5 bilaterally. Dr. Ross' neurological examination of plaintiff Boafo's bilateral lower extremities revealed deep tendon reflexes in the right knee, left knee, right ankle and left ankle at 2+ , atrophy was negative, muscle strength in each range was 5/5 , gait was normal and heel-toe-walk was negative.

In addition, Dr. Ross also performed range of motion examinations of plaintiff Boafo's cervical spine, lumbar spine, thoracic spine, right ankle, left ankle and right foot. Dr. Ross' range of motion examination as to plaintiff Boafo's cervical spine revealed "flexion to 50 degrees (50 degrees normal), extension to 60 degrees (60 degrees normal), right lateral bending to 45 degrees (45 degrees normal), and left lateral bending to 45 degrees (45 degrees normal), and right rotation to 80 degrees (80 degrees normal) and left lateral rotation to 80 degrees (80 degrees normal)." The range of motion examination of plaintiff's Boafo's thoracic spine revealed "no complaint of tenderness to palpation over inferior angle or over the spinous process from T1 through T2" and "no paraspinal spasm". The range of motion examination as to plaintiff's lumbar spine revealed "flexion to 60 degrees (60 degrees normal), extension to 25 degrees (25 degrees normal), right lateral bending to 25 degrees (25 degrees normal), left lateral bending to 25 degrees (25 degrees normal) and straight leg raising is negative bilaterally."

The examination of plaintiff Boafo's right ankle revealed no heat, swelling, effusion erythema, crepitus or atrophy. Plaintiff Boafo's right ankle range of motion examination revealed "dorisflexion at 20 degrees (20 degrees normal), plantar flexion at 40 degrees (40 degrees normal), inversion at 30 degrees (30 degrees normal), and eversion at 20 degrees (20 degrees normal)." The examination of the right foot revealed no atrophy or heel instability. Also the Drawer test was negative and no tenderness or swelling noted. It should be noted that unlike Dr. Westerband's examination of plaintiff Nunoo, Dr. Ross' examination did not state what objective means he used to confirm his measurements.

Dr. Ross' impression was that plaintiff Boafo's cervical spine, lumbar spine, thoracic spine and right ankle/right foot sprain and strain were all "resolved". He concluded that there was "no evidence of causally related disability."

In further support of their motion, defendant Bx Mgmt Inc. has also submitted plaintiffs' EBT transcripts. Plaintiff Nunoo testifiedin his EBT that after the accident he was taken to St. Barnabas Hospital. He testified that he was discharged from the hospital and the day after the accident he went to a physical therapy facility. He treated at the facility for eight to nine months. He stopped treating at the facility because he was told he was "done". Plaintiff Nunoo testified that at the time of the accident he was enrolled as a full time student in Long Island University. He testified the accident occurred during a break, but once school started he missed only "two full days of school" due to the accident. He also testified that before the accident he was

engaged in a audio visual internship in Long Island University. He testified that after the accident he continued his internship but it "fluctuated".

Plaintiff Boafo testified in his EBT that after the accident he was taken to St. Barnabas Hospital and discharged. He testified that he sought medical treatment two days after the accident at a facility on Putnam Avenue in the Bronx. He testified that he was treated at the facility for seven to eight months. His treatment at the facility ended because his physical therapist told him he was done with treatment. Plaintiff Boafo testified that at the time of the accident he was a student in the midst of transferring from Lehman College to Pace University. He testified that he started attending Pace University in late January 2008. Plaintiff Boafo goes on to testify that he missed "a lot of time from classes" due to the accident, but he does not recall how many classes he missed especially how many classes he missed on the January 2008 semester. However, later on in the EBT plaintiff Boafo testified that he did not miss any time from Pace University.

Defendants have meet their burden by submitting proof that establishes plaintiff Nunoo did not sustain a serious injury pursuant to Insurance Law § 5102. *See,* Gaddy v. Eyler, 79 N.Y.2d 955 (1992). Consequently, the burden shifts to the plaintiff Nunoo to present evidence overcoming defendants' proffered evidence by demonstrating a triable issue of fact that a serious injury was sustained within Insurance Law § 5102. *See* Id.

However, as to plaintiff Boafo, defendants have failed to meet their prima facie burden of presenting competent evidence of establishing that the injuries do not meet the threshold requirement within the meaning of New York Insurance Law § 5102(d) as a result of the alleged accident. *See,* Linton v. Nawaz, 62 AD 3d 434 (1st Dept. 2009), Wadford v. Cruz, 35 AD3d 258 (1st Dept.2006), Toure v. Avis Rent a Car Sys., 98 N.Y.2d 345 (2002), Gaddy v. Eyler, 79 N.Y.2d 955 (1992). Plaintiffs correctly argue that defendants failed to meet their burden because Dr. Ross' range of motion findings were not based on any objective tests and he failed to address plaintiff Boafo's left shoulder injury. *See*, Simantov v Kipps Taxi, Inc., 68 A.D.3d 661 (1st Dept. 2009), Linton v. Nawaz, 62 A.D.3d 434 (1st Dept 2009), Lamb v. Rajinder, 51 A.D.3d 430 (1st Dept 2008). Thus, defendants have failed to meet their burden as to plaintiff Boafo's claim that he sustained a serious injury pursuant to New York Insurance Law § 5102(d) as to the categories of permanent loss of use of a body organ, member, function or system permanent consequential limitation of use of a body organ or member, significant limitation of use of a body function or system. Consequently, defendants failure to meet their initial burden as to plaintiff Boafo, "renders it unnecessary to consider plaintiff's [Boafo's] opposition to the motion" as to the aforementioned categories. Simantov v Kipps Taxi, Inc., 68 A.D.3d 661 (1st Dept. 2009), Saltzman v. Gardella's Elite Limousine Serv., 2010 NY Slip Op 30204U (NY Sup. Ct. New York County 2010).

Nonetheless, defendants did meet their initial burden of proof as to plaintiff Boafo's 90/180 day claim. A "defendant can establish the nonexistence of a 90/180-day claim 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

usual and customary daily activities for the prescribed period." Id *citing* Elias v. Mahlah, 58 A.D.3d 434 (1st Det. 2009), Copeland v. Kasalica, 6 A.D.3d 253 (1st Dept. 2004). Both plaintiffs' EBT testimony fails to establish that they satisfied the statutory requirements of the 90/180 day claim. *See* McClelland v Estevez, 2010 NY Slip Op 7067; 908 N.Y.S.2d 192 (1st Dept. 2010) (plaintiff's 90/180 day claim dismissed based on his testimony he only missed three days of work after the accident), DeJesus v. Paulino, 61 A.D.3d 605; 878 N.Y.S.2d 29 (1st Dept. 2009) (reference to plaintiffs' proof and deposition testimony was sufficient to deny plaintiff's 90/180 day claim). Thus the burden now shifts to plaintiff Boafo to present evidence overcoming defendants' proffered evidence by demonstrating a triable issue of fact as to the 90/180 day claim *See*, Gaddy v. Eyler, 79 N.Y.2d 955 (1992).

In opposition to the motion, plaintiffs have submitted the affirmations of Dr. Gautam Khakhar dated August 9th, 2010, the affirmation of Leena Doshi dated August 11, 2010 regarding plaintiff Nunoo's lumbar spine MRI supervised by Dr. Mark Novick on January18, 2008, the affirmation of Dr. Brian Haftel dated August 9, 2010 regarding examinations of plaintiff Boafo conducted on June 13, 2008, August 11, 2008, and August 25, 2008, the affirmation of Dr. Dov. J. Berkowitz, dated August 10, 2010 regarding the orthopedic examination of plaintiff Boafo conducted on February 8, 2008 and April 4, 2008, the affirmation of Dr. David R. Payne, dated August 10, 2010, regarding plaintiff Boafo's thoracic spine MRI conducted on May 30, 2008, the affirmation of Dr. Mark Shapiro dated August 12, 2010 regarding plaintiff Boafo's lumbar spine MRI conducted on January 11, 2008, the affirmation of Dr. Mark Shapiro dated August 12, 2010 regarding plaintiff Boafo's left shoulder MRI conducted on February 15, 2008, plaintiff Nunoo's and Boafo's affidavits dated August 11, 2010 and lastly a New York Motor Vehicle No Fault Insurance Law Denial of Claim Form regarding plaintiff Nunoo's benefits.

The affirmation of Dr. Khakhar as to plaintiff Nunoo states that he maintains an office at Physical Medicine & Rehabilitation of New York, P.C. in Bronx, New York. He states that in preparation of his affirmation he reviewed the lumbar spine MRI supervised by Dr. Mark Novick on January18, 2008 and Dr. Julio Westerband's medical report. Dr. Khakhar states that plaintiff Nunoo was first seen in Dr. Khakhar's office on January 7, 2008. At the initial examination plaintiff Nunoo complained of neck pain radiating to the bilateral upper extremities, mid back pain with right lower extremity weakness, right ankle pain, headaches and anterior chest pain. The examination revealed deep tendon reflexes were "2+ through out and bilaterally symmetric", manual motor testing was 4/5 in the deltiods, biceps, right ankle dorisflexior and right knee flexor. The cervical palpation, anterior chest, thoracic exam, right ankle exam and the lumbar exam all revealed tenderness. The mechanical examinations of plaintiff Nunoo revealed Spurling's maneuver was positive bilaterally and the straight leg testing was positive on the right.

Dr. Khakhar's affirmation also states that at the initial examination he performed range of motion examinations of plaintiff Nunoo's, lumbar spine, cervical spine and right ankle. Dr. Khakhar's range of motion examination as to plaintiff Nunoo's cervical spine revealed "painful range of motion via hand held goniometer." He found "diminished left rotation 60 degrees

(normal 80 degrees) (25% loss of normal range of motion), right rotation 65 degrees (normal 80 degrees) (18.75% loss of normal), left side bending 35 degrees (normal 50 degrees) (30% loss of normal), right side bending 30 degrees (normal 50 degrees) (50% loss of normal)." Dr. Khakhar's range of motion examination as to plaintiff Nunoo's lumbar spine revealed "painful range of motion via hand held goniometer." He found "diminished flexion 65 degrees (normal 90 degrees) (27.7% loss of normal), and extension 20 degrees (normal 30 degrees) (33% loss of normal) ." The right ankle exam revealed "painful range of motion". It should be noted that Dr. Khakhar's affirmation regarding plaintiff Nunoo's initial right ankle examination does not state what objective means he used to confirm plaintiff's "painful range of motion" nor does it state what degrees if any plaintiff Nunoo's range of motion was limited.

The initial clinical impression as to plaintiff Nunoo revealed injuries to his neck, mid back, low back, right ankle, chest and post traumatic headaches. Plaintiff Nunoo was started on a physical therapy program and as refereed for x-rays of the cervical spine, thoracic spine, lumbar spine, chest and right ankle. He was also referred for MRI's of the cervical spine and lumbar spine. A follow up of four to six weeks time was advised.

Dr. Khakhar's affirmation states that x-rays were performed at his facility on January 7, 2008 per Dr. Allan Keil. The x-rays revealed no fracture to the cervical spine or right ankle, no acute disease regarding the chest, mild thoracolumbar scoliosis as to the thoracic spine and lumbar spine straightening and borderline L4-L5 intervertebral disc space narrowing. In addition, a MRI of plaintiff Nunoo's cervical and lumbar spine was performed on January18, 2008 at Doshi Diagnostic Imaging by Dr. Mary Novick. The MRI of the cervical spine revealed "reversal of the cervical lordosis [which] may indicate cervical spine muscle spasm." The lumbar spine MRI revealed " [b]ulging annular fibrosus at L3-L4, L4-L5 and L5-S1, most pronounced at L4-5...[b]ulging disc material at L3-L4, L4-L5 and L5-S1, result[ing] in mild spinal stenosis at L3-4 and mild to moderate spinal stenosis at L4-5." Moreover, EMG/NCV tests of the lower and upper extremities were performed at Physical Medicine & Rehabilitation of New York, P.C. on February 6, 2008. The test of the lower extremity revealed right L4 lumbar radiculopathy, but the test of the upper extremity was negative.

Dr. Khakhar's affirmation states that plaintiff Nunoo was also seen in follow up evaluations on February 6, 2008, April 11, 2008, June 12, 2008 and July 2, 2010. At the February 6, 2008 examination plaintiff Nunoo complained of right ankle pain, mid back pain, low back pain and lower extremity weakness. His cervical spine range of motion examination on that date revealed "painful range of motion via hand held goniometer." He found "diminished left rotation 60 degrees (normal 80 degrees), right rotation 70 degrees (normal 80 degrees), left side bending 35 degrees (normal 50 degrees) and right side bending 35 degrees (normal 50 degrees) with tenderness." Dr. Khakhar's range of motion examination as to plaintiff Nunoo's lumbar spine revealed "painful range of motion via hand held goniometer." He found "diminished flexion 75 degrees (normal 90 degrees), and extension 20 degrees (normal 30 degrees) (loss of 33% normal range of motion), with tenderness and spasming." Plaintiff Nunoo's straight leg test was positive on the right. His right ankle exam revealed "tenderness in the region of the anterior talofibular ligament" with "painful dorisflexion and plantar flexion".

Dr. Khakhar states that plaintiff Nunoo was to continue with his physical therapy, have electrodiagnostic tests conducted as to his upper and lower extremities and a follow up of four to six weeks time was advised to reassess his symptoms.

At the examination of April 11, 2008 plaintiff Nunoo complained of low back and right ankle pain, yet "denied neck, pain or mild back pain or anterior chest pain." An exam of the right ankle revealed "edema with tenderness in the anterior talofibular ligament and painful range of motion". Again, it should be noted that Dr. Khakhar's affirmation regarding plaintiff Nunoo's right ankle examination does not state what objective means he used to confirm the "painful range of motion" nor does it state what degrees if any plaintiff Nunoo's range of motion was limited. In addition, a range of motion examination of plaintiff Nunoo's lumbar spine revealed "diminished flexion 80 degrees, extension 20 degrees with tenderness." As with the right ankle it should be noted that Dr. Khakhar's affirmation regarding plaintiff Nunoo's lumbar spine examination does not state what objective means he used to confirm the diminished range of motion. The straight leg test was positive on the right, yet the exam of his cervical spine was nontender and pain free and thoracic spine exam was also nontender. Dr. Khakhar again states that plaintiff Nunoo was to continue with his therapy program but it was to be tapered to two times a week and a follow up of four to six weeks time was advised to reassess his symptoms.

On the examination of June 12, 2008 plaintiff Nunoo complained of "low back and right ankle pain which had improved." Plaintiff Nunoo informed Dr. Khakhar that physical therapy had been helpful. Dr. Khakhar stated that plaintiff Nunoo's ankle pain "improved at this time." The examination of plaintiff Nunoo's lumbar spine revealed "tenderness in the bilateral paraspinal muscles" while his range of motion exam revealed "forward flexion to 75 degrees (normal 90 degrees) with pain on end of range of motion ...[e]xtension was to 25 degrees (normal 30 degrees)." Again, it should be noted that Dr. Khakhar's affirmation regarding plaintiff Nunoo's lumbar spine examination does not state what objective means he used to confirm the diminished range of motion. Plaintiff Nunoo was to continue his lumbar spine physical therapy program two times per week and he was also referred to pain management for further assessment. Plaintiff Nunoo was advised to avoid strenuous activity. A follow up of four to six weeks time was advised.

Plaintiff Nunoo's next visit was not until July 2, 2010. At the most recent examination plaintiff Nunoo complained of "ongoing lower back pain". Dr. Khakhar states that plaintiff Nunoo physical therapy treatment stopped in August 2008 and after that he "continued therapy via home exercise program." At the July 2, 2010 visit Mr. Nunoo "reported increased pain in his low back with sitting [and] lifting" At this examination plaintiff Nunoo "also reported difficulties with activities of daily living...including cleaning...grocery shopping...and recreational activities."

In preparation of his July 2, 2010 examination Dr. Khakhar reviewed past evaluations of plaintiff Nunoo at Physical Medicine & Rehabilitation of New York, P.C.; St. Barnabas Hospital Records; 911 call report; evaluation of Dr. Sebastian Lattuga a spine specialist; x-rays performed on January 7, 2008 of the cervical spine, right ankle, chest, thoracic spine and lumbar spine, the

MRI of the cervical spine, the lumbar spine MRI performed January 18, 2008, and the EMG/NCV test of the lower and upper extremities which were performed on February 6, 2008.

The July 2, 2010 physical exam revealed "painful range of motion with tenderness to palpation." Spasms were noted in the right lumbar paraspinal muscless. Dr. Khakhar's range of motion examination as to plaintiff Nunoo's lumbar spine via an "objective hand-held goniometer" revealed " flexion 65 degrees (normal 90 degrees), corresponding to a 28% loss of normal range of motion...extension 20 degrees (normal 30 degrees), corresponding to a 33% loss of normal range of motion ." However, his examination of plaintiff Nunoo's left and right lateral bending was within the full range of motion.

Dr. Khakhar's final diagnosis was that plaintiff Nunoo "sustained the following injuries: post traumatic lumbar disc bulges at L3-L4, L4-L5 and L5-S1 with spinal stenosis; traumatic right L4 radiculopathy per EMG/NCV study; cervical and lumbar radiculopathy as per Dr. Lattuga; posttraumatic cervical, thoracic and lumbar myofascial derangement; posttraumatic right ankle sprain; posttraumatic chest wall contusion; posttraumtic headaches. Dr. Khakhar's conclusion was that as a result of the accident plaintiff Nunoo sustained injuries to his cervical spine , thoracic spine, lumbar spine, right ankle sprain and a chest wall injury.

Dr. Khakhar states plaintiff Nunoo's "signs and symptoms of residual pathology to the muscular and supportive structures of the lumbar spine...are permanent in nature." He also stated that plaintiff Nunoo's "disability is partial, permanent and has resulted in chronic pain with remission and exacerbation during over use of the back." He states that a restriction of lumbar R.O.M. up to 33% is significant..[coupled with the fact] these restrictions are occurring...two (2) years post trauma, ...constitute a permanent loss." He further states that based on plaintiff's Nunoo's "physical examination, objective testing, decreased range of motion and upper and lower extremity weakness and the affirmed MRI report of the MRI scan of his lumbar spine, it may be stated with reasonable degree of medical certainty that the accident...was the direct component producing cause of [plaintiff] Nunoo's ...injuries." Lastly Dr. Khakhar states that "within a reasonable degree of medical certainty....[plaintiff] Nunoo sustained a partially permanent consequential limitation ...and a significant limitation of use of his skeletal, muscular and nervous system, from the date of the accident to the present day and continuing."

In further opposition to defendant's motion, plaintiff Nunoo submits the affirmation of Dr. Leena Doshi dated August 11, 2010 regarding plaintiff Nunoo's lumbar spine MRI supervised by Dr. Mark Novick on January18, 2008. Dr. Doshi's affirmation states that she is the "medical director of Doshi Diagnostic Imaging Services." She states she performs "services for Doshi Diagnostic Imaging Services at Woodlawn MRI at Our Lady of Mercy 3250 Westchester Avenue, Bronx New York.." The affirmation further states that Dr. Novick supervised plaintiff Nunoo's lumbar spine MRI on January18, 2008 but she is making this affirmation because the reading radiologist, Dr. Novick "is no longer employed by us." CPLR § 4518 pertains to the business exception to the hearsay rule. "While a physician's office records are generally admissible in evidence under the "business records" exception to the hearsay rule, these records are distinguishable from physicians' reports, which are usually prepared for a

specific purpose and are generally not the systematic, routine, day-by-day records which are the focus of the business records exception." Flaherty v. Am. Turners N.Y., Inc., 291 A.D.2d 256, 258 (1st Dept. 2002) *citing* Wilson v. Bodian,130 A.D.2d 221 (2nd Dept. 1987). "However, in the Second Department, as here, when dealing with "the 'report' of a radiologist, providing an 'interpretation of MRI film, as opposed to a day-to-day business entry of a treating physician' (*see* Komar v. Showers, 227 A.D.2d [135] at 136) [such report] is admissible as evidence if it was prepared for the purposes of diagnosis and treatment of a patient and not for the purpose of litigation." Carter v. Rivera, 2009 NY Slip Op 29219 (N.Y. Sup. Ct. Kings County 2009). Nevertheless, since Dr. Khakhar's report was in admissible form his "various medical opinions relying on [the unsworn] MRI reports are sworn and thus competent evidence." Id. *citing* Pommells v. Perez, 4 N.Y.3d 566 (2005). Moreover, Dr. Westerband states in his affirmation that he reviewed plaintiff Nunoo's lumbar spine MRI report dated January 18, 2008 in preparation of his examination. Therefore the unsworn MRI report are properly before courts when both defendant's and plaintiff's experts refer to them in their affirmations. Rivera v. Super Star Leasing, Inc. 57 A.D.3d 288(1st Dept. 2008) According to Dr. Novick, the lumbar spine MRI of plaintiff Nunoo conducted on January 18, 2008 revealed "[b]ulging annular fibrosus at L3-L4, L4-L5, and L5-S1, most pronounced at L4-S1 [and]...L4-L5. The bulging disc material at L3-L4,L4-L5 and L5-S1 results in mild spinal stenosis at L3-L4 and mild to moderate spinal stenosis at L4-L5".

Plaintiff Nunoo raised a triable issue of fact as to his lumbar spine injury. For limitations to be proven under the serious injury threshold the plaintiff must submit medical evidence that "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 v. Avis Rent A Car Sys., 89 N.Y.2d 345 (2002). Plaintiff Nunoo's initial and most recent examination revealed a limited range of motion quantified by an objective measurement using a goniometer, coupled with the lumbar spine MRI which revealed bulges led Dr. Khakhar to causally relate the injury to the accident. Consequently, plaintiff Nunoo's lumbar spine injury satisfies the statutory serious injury threshold. "It is well settled that contemporaneous, objective proof of injury, such as an expert's designation of a numeric percentage loss of range of motion or the extent or degree of physical limitation, is necessary to satisfy the statutory serious injury threshold." Lazarus v Perez 73 A.D.3d 528 (1st Dept 2010) *citing* Franchini v. Palmieri, 1 N.Y.3d 536 (2003), Toure v. Avis Rent A Car Sys., 89 N.Y.2d 345 (2002), *see also* Levin v Khan, 73 A.D.3d 991 (2nd Dept. 2010) (Plaintiff's doctor's contemporaneous and most recent examination of the plaintiff revealed range of motion limitations and the doctor's review of plaintiff's right shoulder MRI report revealed a torn rotator cuff led the doctor to causally relate the injury to the accident, and thereby satisfy statutory serious injury threshold).

However, plaintiff Nunoo has failed to raise a triable issue of fact as to his cervical spine, thoracic spine, right ankle, and chest injuries. In regard to plaintiff Nunoo's cervical spine Dr. Khakhar's initial examination revealed a diminished range of motion examination quantified by use of a goniometer. Nonetheless in his most recent examination of plaintiff Nunoo Dr. Khakhar did not perform a range of motion test demonstrating whether plaintiff Nunoo's cervical spine range of motion was still diminished. This failure to perform the cervical spine range of motion

finding in his most recent examination is fatal to plaintiff Nunoo's attempt to satisfy the serious injury threshold. *See id.* In addition, plaintiff Nunoo did not demonstrate a diminished range of motion quantified by an objective measurement as to his right ankle or thoracic spine. Moreover, although Dr. Khakhar states that his initial examination of plaintiff Nunoo's right ankle revealed "painful range of motion" he does not state a numeric percentage of the loss of the range of motion, if any nor does he quantified this by use of an objective measurement. *See* Toure v. Avis Rent A Car Sys., 89 N.Y.2d 345 (2002), Lazarus v Perez 73 A.D.3d 528 (1st Dept 2010).

Furthermore, plaintiff Nunoo, has failed to prove that he suffered a permanent loss of use of a body organ, member, function or system because he did not prove the loss of use is total and not merely significant or consequential. *See* Oberly v. Bangs Ambulance Inc., 96 N.Y.2d 295 (2001). Although, Dr. Khakhar states that plaintiff Nunoo's restricted lumbar spine range of motion of "33% is significant" and "constitute a permanent loss" the loss of use of plaintiff's lumbar spine is not "total". *See* Byong Yol Yi v. Canela, 70 A.D.3d 584 (1st Dept 2010).

As to plaintiffs 90/180 day claim they have both failed to demonstrate that they were prevented from performing activities for at least 90 days and that their curtailment was to a great degree rather than slight. Licari v. Elliott, 57 N.Y.2d 230, 441 N.E.2d 1088; 455 N.Y.S.2d 570 (1982). Plaintiff Nunoo, failed to meet his burden as to the 90/180 day claim by not submitting medical evidence connecting his alleged inability to perform his daily activities with the alleged accident related injuries. *See* Sougstad v. Meyer, 40 AD3d 839 (2nd Dept 2007). Plaintiff Nunoo's verified bill of particulars states that he was confined to his bed and home for one day and he missed approximately two days of school due to the accident. In addition, he testified in his own EBT that the accident occurred during a break, but once school started he missed only "two full days of school" due to the accident. He also testified that prior to the accident he was engaged in a audio visual internship in Long Island University and continued his internship after the accident. Thus, plaintiff Nunoo's own testimony fails to establish that he satisfied the statutory requirements of the 90/180 day claim. *See* McClelland v Estevez, 908 N.Y.S.2d 192 (1st Dept. 2010) (plaintiff's 90/180 day claim dismissed based on his testimony he only missed three days of work after the accident), DeJesus v. Paulino, 61 A.D.3d 605 (1st Dept. 2009) (reference to plaintiff's proof and deposition testimony was sufficient to deny plaintiff's 90/180 day claim), Clemmer v. Drah Cab Corp., 74 A.D.3d 660 (1st Dept. 2010) (Plaintiff's 90/180 day claim denied when defendants submit plaintiff's affidavit in which he said he returned to work two and a half months after the accident and plaintiff failed to submit competent objective medical proof or other evidence to raise an issue of fact as to the 90/180 day claim), *see also* Day v. Santos, 58 A.D.3d 447 (1st Dept 2009).

In addition, plaintiff Boafo has also failed to meet his burden as to the 90/180 day claim by not submitting medical evidence connecting his alleged inability to perform his daily activities with the alleged accident related injuries. *See* Sougstad v. Meyer, 40 AD3d 839 (2nd Dept 2007). Plaintiff Boafo's verified bill of particulars states that he was confined to his bed and home for two days and he missed approximately two days of school due to the accident. In addition, he testified in his EBT that the accident occurred during a break, but once school

started he missed only "two full days of school" due to the accident. Plaintiff Boafo testified that at the time of the accident he was a student in the midst of transferring from Lehman College to Pace University. He testified that he started attending Pace University in late January 2008. Plaintiff Boafo testified he missed "a lot of time from classes" due to the accident but he does not recall how many classes he missed especially how many classes he missed in the January 2008 semester. However, plaintiff Nunoo later on testified that he did not miss any time from Pace University. As with plaintiff Nunoo, plaintiff Boafo's own testimony failed to establish that he satisfied the statutory requirements of the 90/180 day claim. *See* McClelland v Estevez 908 N.Y.S.2d 192 (1st Dept. 2010), DeJesus v. Paulino, 61 A.D.3d 605; (1st Dept. 2009), Clemmer v. Drah Cab Corp., 74 A.D.3d 660; (1st Dept. 2010), Day v. Santos, 58 A.D.3d 447; 870 N.Y.S.2d 30 (1st Dept 2009).

The court disagrees with defendants' contention that plaintiffs' gap in treatment should warrant summary judgment in their favor. Plaintiff Nunoo states in his affidavit that he "told the therapist ...that after nearly nine months, the therapy had not helped with [his] lower back and ankle pain and [his] therapy was then stopped." Furthermore, Dr. Khahkhar states in his affirmation the plaintiff's Nunno's supervised physical therapy was discontinued in August 2008 "as it was felt that at that time that he had reached a level of maximum benefit from physical therapy he had received up to that point." Dr. Khakhar's statement that plaintiff Nunoo's treatment ended because "he had reached a level of maximum benefit from physical therapy" is an adequate explanation. *See* Pommells v. Perez, 4 NY 3d 566 (2005). In addition, plaintiff Nunoo states in his affidavit that he could not resume further "therapy since [his] no-fault benefits had been cut off in ([he] believe[d] [in] May]" and he was not "earning enough money to pay for the therapy on [his] own. Dr. Khakhar's affirmation also states that plaintiff's Nunno had "financial issues at that time and could not continue with or resume his therapy because his no fault benefits had been terminated a few months prior." In addition, plaintiffs submit a New York Motor Vehicle No Fault Insurance Law Denial of Claim Form that demonstrates that plaintiff Nunoo's no fault benefits were terminated on May 16, 2008. "Plaintiff, adequately explains the gap in treatment by offering proof of the termination of her insurance benefits, and her own statement that she could not continue physical therapy out of pocket" Peluso v. Janice Taxi Co., Inc., 909 N.Y.S.2d 699 *citing* Wadford v. Cruz 35 AD3d 258-259 (1st Dept. 2006).

As to plaintiff Boafo, he states in his affidavit that therapy ended because his "therapist told [him] that [he] was done with the treatment...it was felt that further therapy would not improve [his] condition." Moreover Dr. Khakhar's statement in his affirmation dated August 9th, 2010 that plaintiff's Boafo "was discontinued from his supervised physical therapy program in October 2008, as it was felt [that] he ha[d] reached a level of maximum benefit from the PT he ha[d] received up to that point" adequately explains his gap in treatment. *See* Pommells v. Perez, 4 NY 3d 566 (2005)

ORDERED, that Defendants, Bx. Mgmt Inc.'s, Stephen A Adarkwah and Kenneth K. Sarfo's motion for an Order pursuant to CLPR § 3212 granting summary judgment pursuant to New York Insurance Law § 5102(d) is **denied** as to plaintiff Boafo's injuries, and **denied** as to

plaintiff Nunoo's lumbar spine injury, but **granted** as to plaintiff Nunoo's cervical spine, thoracic spine, right ankle, and chest injury and **granted** to plaintiffs Boafo and Nunoo's 90/180 day claim.

Dated: December 9, 2010

Hon. Mary Ann Brigantti-Hughes, J.S.C.