SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 3
NASSAU COUNTY

YVETTE JARVIS, as Parent and Natural Guardianof SHONTAVEA JARVIS, an infant,

Plaintiff,

-against-

ALEX O. ALVARADO, ALEXANDER M. WHITMAN and JACK R. WHITMAN,

Defendants.

MOTION DATE: 12/12/11

MOTION SEQ. NOS.: 001, 002
INDEX NO.: 13327/10

The following papers read on this motion (numbered 1-5):

Notice of Motion 1
Notice of Cross Motion.....2
Affirmation in Opposition.....3
Reply Affirmation.....4
Sur Reply Affirmation.....5

Plaintiff SHONTAVEA JARVIS, age 16, alleges that on October 12, 2009 at approximately 3:44 p.m., she was a passenger in a motor vehicle operated by defendant ALEXANDER M. WHITMAN and owned by defendant JACK R. WHITMAN, which came into contact with a vehicle owned and operated by defendant ALEX O. ALVARADO. The accident occurred on Front Street at the intersection of Burston Street, Hempstead. Defendants ALEXANDER M. WHITMAN and JACK R. WHITMAN now move, and defendant ALEX O. ALVARADO cross moves (collectively, the "defendants"), for an order dismissing plaintiff's complaint pursuant to **CPLR §3212** on grounds that plaintiff failed to sustain a "serious injury" within the meaning of **Insurance Law §5102(d)**. Defendant ALEX O. ALVARADO adopts and incorporates all arguments set forth by the WHITMAN defendants. The motions are determined as follows.

Insurance Law §5102(d) provides that a "serious injury means a personal injury which results in (1) death; (2) dismemberment; (3) significant disfigurement; (4) a fracture; (5) loss of a fetus; (6) permanent loss of use of a body organ, member, function or system; (7) permanent consequential limitation of use of a body organ or member; (8) significant limitation of use of a body function or system; or (9) 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" (numbered by the Court). The Court's consideration in this action is confined to whether plaintiff's injuries constitute a permanent consequential limitation of use of a body organ or member (7), a significant limitation of use of a body function or system (8), or a medically determined injury which prevented plaintiff from performing all of the material acts constituting her usual and customary daily activities for ninety days of the first one hundred eighty days following the accident (9).

In support of their motion for summary judgment, defendants submit an affirmed report of examination, dated October 7, 2011, of orthopedist Michael J. Katz, MD, covering an examination of that date and the deposition of plaintiff conducted on June 13, 2011.

Dr. Katz reported that physical examination of plaintiff's cervical and lumbar spines, right shoulder, right arm and right knee revealed normal range of motion results, comparing the results to norms. Dr. Katz's other reported findings, which specified the orthopedic tests performed, also revealed normal findings. Dr. Katz diagnosed resolved strain of the cervical and lumbosacral spines, resolved right arm contusion and asymptomatic right knee derangement. Dr. Katz stated that plaintiff "shows no signs or symptoms of permanence relative to the neck, back and right arm", is "asymptomatic regarding the right knee" and is "capable of all pre-loss activities."

Plaintiff testified at her deposition that as a result of the accident she missed one and one half weeks of school and did not participate in one or two school trips, but otherwise her school life was not affected by the accident. Plaintiff testified that she can only walk two miles rather than four miles because of the knee injury she sustained in the accident and can no longer play handball or basketball. Plaintiff stated that she only complained to her treating physician Dr. Taverni of problems with her right knee and made no complaints regarding her neck and back. Plaintiff also testified that she went to Dr. Taverni's office, where she had physical therapy, for one and one half months in 2009. The Court finds however, that her testimony with respect to any further treatment is vague. The Court notes that, although plaintiff testified that there was no time she was confined to home as a result of the accident, her bill of particulars alleges that she was completely confined to her bed in a supine position for three days following the accident and was confined to her house for two weeks. The Court also notes that plaintiff's bill of particulars alleges that she was incapacitated from school activities for one and one half months after the accident whereas plaintiff testified that her school life was not affected in ways other than missing school for

one and one half weeks and missing one or two school trips.

The Court finds that the report of defendants' examining physician is sufficiently detailed in the recitation of the various clinical tests performed and measurements taken during the examination, to satisfy the Court that an "objective basis" exists for his opinion. Furthermore, the Court finds that, defendants' motion papers have adequately addressed plaintiff's claim asserted in her bill of particulars that she suffered a medically determined injury or impairment of a non-permanent nature which prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the accident. In making a determination with respect to this category of serious injury, the Court notes that the Second Department has considered a totality of a defendants' motion papers. Plaintiff testified that she only missed one and one half weeks of school. *See* **Richards v. Tyson**, 64 AD3d 760; **Kurin v. Zyuz**, 54 AD3d 902. In addition, plaintiff's complaints described above do not qualify as substantially all of the material acts which constituted her usual and customary activities. *See* **Grant v. New York City Transit Authority**, 89 AD3d 1058 *citing* **Pacheco v. Connors**, 69 AD3d 818.

Accordingly, the Court finds that defendants have made a *prima facie* showing that plaintiff SHONTAVIA JARVIS did not sustain a serious injury within the meaning of **Insurance Law §5102(d)**. With that said, the burden shifts to plaintiff to come forward with some evidence of a "serious injury" sufficient to raise a triable issue of fact. **Gaddy v. Eyler**, 79 NY2d 955, 957.

In opposition, plaintiff submits (1) an affirmed report of physical medicine and rehabilitation physician Joseph Taverni, MD, dated November 22, 2011, covering examinations conducted on November 17, 2009, April 1, 2010 and November 9, 2011; (2) an unaffirmed report covering an MRI of plaintiff's right knee conducted on December 3, 2009; (3) an unaffirmed report covering an MRI of plaintiff's lumbar spine conducted on January 15, 2010; (4) an affirmed report of orthopedist Raghava R. Polavarapu, MD, dated February 23, 2011, covering an examination conducted on that date; and (5) an affirmed report of physical medicine and rehabilitation physician Francisco H. Santiago, MD, dated February 9, 2011, covering an examination conducted on that date.

It is the determination of this Court that plaintiff has failed to submit *objective* medical evidence (of either a quantitative or qualitative nature) sufficient to raise a triable issue as to whether or not she sustained a "serious injury" within the meaning of **Insurance Law §5102(d)**. The Court notes at the outset that the report of a physician which is not affirmed, or subscribed before a notary or other authorized official, is not competent evidence. **CPLR 2106**; **Grasso v. Angerami**, 79 NY2d 814; **Kolodziej v.**

Savarese, 88 AD3d 851; **Lively v. Fernandez**, 85 AD3d 981; **D'Orsa v. Bryan**, 83 AD3d 646; **Pierson v. Edwards**, 77 AD3d 642; **Vasquez v. John Doe # 1**, 73 AD3d 1033. Accordingly, the Court cannot consider the unaffirmed MRI reports of plaintiff's right knee and lumbar spine. Even if it could consider the submitted MRI reports, it is well established that the existence of a radiologically confirmed tear alone will not suffice to defeat summary judgment. *See* **Pommells v. Perez**, 4 NY3d 566 at 574; **Bamundo v. Fiero**, 88 AD3d 831; **McLoud v. Reyes**, 82 AD3d 848; **Vilomar v. Castillo**, 73 AD3d 758; **Acosta v. Alexandre**, 70 AD3d 735; **Magid v. Lincoln Services Corp.**, 60 AD3d 1008.

The Court notes that Dr. Taverni fails to properly affirm his affirmation to be true under penalties of perjury. **CPLR §2106**. However, even were the Court to consider his affirmation, the Court finds that it fails to raise an issue of fact. The Court also notes that, contrary to plaintiff's deposition testimony, Dr. Taverni claims that plaintiff received physical therapy during eight visits from December 1, 2010 until February 10, 2011. Dr. Taverni's affirmation also must be disregarded to the extent it relies on the unaffirmed MRI reports of David L. Katz, MD and Adam Silvers, MD of Next Generation Radiology. *See* **CPLR §2106**; **Austin v. Dominguez**, 79 AD3d 952; **Kreimerman v. Stunis**, 74 AD3d 753; **Vasquez v. John Doe #1**, 73 AD3d 1033; **Vilomar v. Castillo**, 73 AD3d 758; **Casiano v. Zedan**, 66 AD3d 730; **McNeil v. New York City Transit Authority**, 60 AD3d 1018; **Sorto v. Morales**, 55 AD3d 718.

Although Dr. Taverni's failure to provide contemporaneous numerical range of motion measurements arising out of examinations conducted on November 17, 2009 (one month post accident) and April 1, 2010, is no longer a bar to recovery **[Perl v. Meher**, 18 NY3d 208], the Court finds that even with respect to Dr. Taverni's unquantified findings, he failed to sufficiently set forth the objective tests performed. *See* **Lewars v. Transit Facility Management Corp.**, 84 AD3d 1176; **Resek v. Morreale**, 74 AD3d 1043; **Fiorillo v. Arriaza**, 52 AD3d 465. Rather, Dr. Taverni's findings are seemingly based on plaintiff's complaints of pain. Plaintiff's complaints of subjective pain do not by themselves satisfy the "serious injury" requirement of the no-fault law. *See* **Scheer v. Koubek**, 70 NY2d 678; **Rovello v. Volcy**, 83 AD3d 1034; **Calabro v. Petersen**, 82 AD3d 1030; **Catalano v. Kopmann**, 73 AD3d 963; **Sham v. B&P Chimney Cleaning & Repair Co., Inc.**, 71 AD3d 978; **Ambos v. New York City Transit Authority**, 71 AD3d 801. Furthermore, the Court finds that the limited orthopedic evaluation, including one left knee range of motion measurement on November 9, 2011, is not sufficient to raise an issue of fact.

Likewise, the Court finds that the report of orthopedist Dr. Polavarapu, submitted by plaintiff in opposition, fails to raise an issue of fact, as a result of his failure to explain or

reconcile inconsistencies in his own report between several of his findings and conclusions. *See* **McLoud v. Reyes**, *supra*. Although Dr. Polavarapu reported certain restricted ranges of motion of plaintiff's lumbar spine and right knee, he diagnosed "status post lumbar sprain/strain/contusion-resolved" and "status post right knee sprain" and opined that "plaintiff did not sustain any permanent or temporary impairment as a result of injuries sustained in the October 12, 2009 accident." The Court notes that Dr. Polavarapu's conclusion directly contradicts the statement of plaintiff's treating orthopedist Dr. Taverni, that plaintiff's injury to her right knee is permanent.

The Court finds the report of physical medicine and rehabilitation physician Dr. Santiago, also submitted by plaintiff in opposition, covering an examination conducted on February 9, 2011, to be without probative value. Throughout his report, Dr. Santiago erroneously refers to plaintiff as a male. Even if the Court were to consider Dr. Santiago's report, the Court finds it fails to raise an issue of fact. Dr. Santiago opines that plaintiff's injuries consisting of lumbosacral sprain/strain and right knee sprain/strain have resolved, that she is able to return to pre loss activity levels without any restrictions, and that her condition has reached pre-injury status.

The Court finds that plaintiff has also failed to raise an issue of fact as to whether she sustained a serious injury under the 90/180 category of **Insurance Law 5102(d)**. Plaintiff testified at her deposition that as a result of the accident she missed only one and one half weeks of school. *See* **Richards v. Tyson**, *supra*; **Kurin v. Zyuz**, *supra*. *See also* **Bamundo v. Fiero**, *supra*; **Kreimerman v. Stunis**, *supra* **Yunatanov v. Stein**, 69 AD3d 708; **McIntosh v. O'Brien**, 69 AD3d 585;**LaMarre v. Michelle Taxi, Inc.**, 60 AD3d 911; **Leeber v. Ward**, 55 AD3d 563. In the absence of competent medical evidence, the Court finds that plaintiff's deposition testimony regarding her limitations walking and playing sports is insufficient to demonstrate a serious injury.

On the basis of the foregoing, it is

ORDERED, that the motion by defendants ALEXANDER M. WHITMAN and JACK R. WHITMAN and the cross motion by defendant ALEX O. ALVARADO for summary judgment pursuant to **CPLR §3212** dismissing the complaint of plaintiff on the grounds that plaintiff failed to sustain a "serious injury" within the meaning of **Insurance Law §5102(d)** are **granted**.

This constitutes the Order of the Court.

Dated: Feb 7, 2012

J.S.C.