SHORT FORM ORDER

NEW YORK SUPREME COURT-QUEENS COUNTY

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

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JILLIAN M. RAMOS,

Plaintiff,

- against -

HARDEL M. BULGIN and
HANDEL C. BULGIN

Defendants.

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Index No.: 30079/10
Motion Date: 5/3/12
Mot. Cal. No.: 26
Mot. Seq. 1

The following papers numbered 1 to 9 read on this motion by defendants **HARDEL M. BULGIN and HANDEL C. BULGIN** for an order pursuant to CPLR 3212 granting summary judgment in their favor and against plaintiff **JILLIAN M. RAMOS** and dismissing the 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 **HARDEL M. BULGIN and HANDEL C. BULGIN** for an order pursuant to CPLR 3212 granting summary judgment in their favor and against the plaintiff on the grounds that the plaintiff did not sustain a serious injury pursuant to Insurance Law § 5102(d) and dismissing the plaintiff's complaint as against them is denied. The branch of the defendants' motion for summary judgment in their favor and against the plaintiff on the grounds that any claim by the plaintiff for non-economic loss is barred by Insurance Law § 5104(a) is granted.. (See the accompanying Memorandum).

Dated: July 9, 2012

TIMOTHY J. DUFFICY, J.S.C.

MEMORANDUM

SUPREME COURT :QUEENS COUNTY
PART 35

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JILLIAN M. RAMOS,

Plaintiff,

- against -

HARDEL M. BULGIN and
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Defendants.

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This action arises out of an automobile accident that occurred on August 12, 2010, at approximately 8:30 a.m., at the intersection of Queens Boulevard and 69th Street in the County of Queens. The plaintiff was traveling westbound on Queens Boulevard and had stopped at a red traffic light on Queens Boulevard at the intersection of 69th Street. Plaintiff's vehicle was struck in the rear end of her stationary car by defendant Hardel M. Bulgin, who was the driver of a black Range Rover that was owned by defendant Handel Bulgin. The plaintiff was taken by ambulance to New York Hospital Queens. Thereafter, the plaintiff commenced the instant action to recover for personal injuries sustained as a result of the accident. The defendants now move for summary judgment in their favor and to dismiss the plaintiff's complaint on the grounds that plaintiff Jillian Ramos has not met the "serious injury" threshold requirement of New York State Insurance Law §5102(d) and the 90/180 day requirement pursuant to New York State Insurance Law §5104(a).

In support of their motion, the defendants have submitted medical records from New York Hospital Queens where the plaintiff was transported by ambulance after the accident. The plaintiff was treated at the hospital and was diagnosed with a neck sprain, concussion syndrome (with wake-ups), and a high respiratory rate. When the patient was discharged from the hospital, she was given musculoskeletal referrals and was prescribed

ibuprofen (800 mg) to be taken three times a day and cyclobenzaprine (10 mg) twice a day. Plaintiff was treated and released from the hospital.

The defendants submit the unaffirmed report from Dr. Richard Rizzuti, dated August 21, 2010. Dr. Rizzuti performed an MRI of the plaintiff's cervical spine. Dr. Rizzutti stated that it was his impression was that the plaintiff had no abnormalities, no evidence of disc herniation and no spinal stenosis. The defendants have also provided the unaffirmed report of Dr. Robert Israel, who conducted an independent orthopaedic examination of the plaintiff on November 16, 2011. Dr. Israel concluded that the plaintiff's range of motion was completely within normal limits and that the plaintiff has no disability as a result of the instant accident.

The defendants have also provided an affirmed report from Dr. Aric Hausknecht, dated April 26, 2011, stating that the plaintiff was examined at the Complete Care Electrodiagnostic Laboratory and that he had conducted an electrodiagnostic study upon the plaintiff. Dr. Hausknecht 's report concluded that his electrodiagnostic study of the plaintiff found her range of motion to be "within normal limits."

Lastly, the defendants submit the affirmed report of Dr. Alan Greenfield from Medical Imaging Consulting Services, who performed a lumbar spine MRI on the plaintiff on August 21, 2010. Dr. Greenfield's report states that while he found that the plaintiff had degenerative disc bulge and bone spurs, he opined that none of his findings could be attributed to the automobile accident that is the subject of this litigation with any degree of medical certainty.

As the proponent of the motion, the defendants have the burden of making a prima facie showing that the plaintiff has not suffered serious injury pursuant to Insurance Law §5102(d) and that the plaintiff's injury was not causally related to the accident. Elshaarawy v U-Haul Co., 72 A.D. 3d 878 2d Dept. 2010); Autiello v Cummings, 66 A.D.3d 1072 (3d Dept. 2009.) The burden is upon the defendants to come forward with sufficient evidentiary proof in admissible form showing that the plaintiff has not sustained a serious injury pursuant to Insurance Law § 5102(d). Here, the defendants have satisfied their burden through legally sufficient documentary evidence from the affirmed reports of Dr. Hausknecht and Dr.Greenfield that plaintiff did not sustain serious injury within the meaning of Insurance Law §5102(d) as a result of the subject accident,

and that the alleged injuries were not sustained as a result of the subject accident. Oberly v Bangs, 96 N.Y. 2d 295 (2001). Thus, the Court finds that the defendants have provided proof demonstrating, *prima facie,* the absence of any condition in the plaintiff which might arguably meet the serious injury threshold of Insurance Law § 5102(d). Since the defendant's have made out a *prima facie* case, the burden of proof shifts to the plaintiff to demonstrate that there are triable issues of fact which show that the plaintiff sustained a "serious injury" within the meaning of Insurance Law §5102(d) and that these injuries were sustained as a result of the subject accident . Gaddy v Eyler, *supra*; Hildenbrand v Chin, 52 AD3d 1164 (Dept. 2008).

In opposition to the defendants' motion, the plaintiff submits the affirmed report of Dr. Josephine Brawner, dated August 18, 2010, regarding an examination the doctor performed upon the plaintiff. Dr. Brawner's report concluded that the plaintiff was suffering from an abnormal range of motion in her cervical spine, lumbar spine, right knee, and that plaintiff had post-traumatic headaches and dizziness as a result of the accident. Dr. Brawner also concluded that the plaintiff's disability rendered the plaintiff partially incapacitated from work and that the auto accident was the cause of the plaintiff's injuries based upon the pathological findings.

The plaintiff also submits several affirmed follow-up reports from Dr. Brawner. In the first report, dated September 20, 2010, Dr. Brawner found limited range of motion in the plaintiff's cervical and lumbar spine as a result of the August 12, 2010 accident. Dr. Brawner also concluded that plaintiff suffered myofascial derangement to the cervical spine, lumbar spine, disc bulge in the lumbar spine, initial right knee pain, and post-traumatic headaches and dizziness.

The plaintiff further submits Dr. Brawner's affirmed report follow-up of the plaintiff's examination, dated October 13, 2010. This report stated that the plaintiff had limited range of motion in the cervical spine, extension, right lateral flexion, left lateral flexion, and bilateral rotation. Additional affirmed reports from Dr. Brawner, dated December 7, 2010, April 19, 2011 and July 19, 2011, all concluded that the plaintiff's range of motion was limited and that the plaintiff continued to remain partially incapacitated. Plaintiff also submits an MRI report from Dr. Brawner where an MRI was

performed upon the plaintiff's lumbosacral spine. Dr. Brawner found that the posterior disc buldge at L5-S1 was impinging upon the anterior aspect of plaintiff's spinal canal.

Plaintiff further submits the affirmed report from Dr. Pobre, dated December 7, 2010, regarding an MRI of the plaintiff's thoractic spine. Dr. Pobre concluded that the plaintiff had a slight right convex thoracic scoliosis and posterior disc bulges at the T4-5 and T-11-12 level as well as incidentally noted at the L1-2 levels.

Lastly, the plaintiff submits the affirmed report from Dr. Aric Hausknect, dated April 26, 2011, wherein Dr. Hauseknect found that the plaintiff suffered from a limited range of motion in her forward flexion, extension, left lateral flexion, and right lateral flexion and that plaintiff had thoracolumbar derangement with T-4-5, T11-12, L1-2 and L5-S1 disc bulges.

This Court finds that the plaintiff has raised triable issues of fact. The affirmed medical reports of the plaintiff's doctors show that the plaintiff had significant limitations in range of motion both contemporaneous to the accident, as well as in recent examination. The plaintiff's doctors also concluded that the plaintiff's limitations were significant and permanent and in fact resulted from trauma which was caused by the accident. (S*ee*, Ortiz v Zorbas, 62 AD3d 770 (2d Dept. 2009); Azor v Torado, 59 AD3d 367 (2d Dept 2009.) Therefore, the plaintiff has raised a triable issue of fact as to whether or not the plaintiff has sustained a serious injury under the permanent consequential and/or the significant limitation of use categories of Insurance Law §5102(d) as a result of the accident that occurred on June 9, 2010. *See*, Mahmmod v. Vicks, 81 AD3d 606 (2d Dept. 2011); Evans v Pitt, 77 AD3d 611(2d Dept. 2010).

Inasmuch as the defendants' doctors and the plaintiff's doctors clearly do not agree as to whether the plaintiff has suffered a serious injury, a material issue of fact exists as to warrant a trial of this matter on the issue as to whether or not the plaintiff suffered serious injury. Therefore, the defendants summary judgment motion pursuant to Insurance Law §5102(d) is denied. Noble v Ackerman, 252 AD2d 392 (1st Dept.1998); Greene v Frontier Central District School District, 214 AD2d 947 (4th Dept.1995.)

The defendants also move for summary judgment under the 90/180 day category of Insurance Law § 5104(a) claiming that the plaintiff's claim for non-economic loss is barred by that statute. As the proponent of the summary judgment motion, the defendant has the burden of making a *prima facie* showing that the plaintiff did not sustain a medically-determined injury or impairment of a nonpermanent nature which prevented

her from performing substantially all of the material acts which constituted her usual and customary activities for not less than 90 of the 180 days immediately following the subject accident. Taylor v. Taylor, 87 AD3d 1129 (2d Dept. 2011), citing, Reynolds v. Wai Sang Leung, 78 AD 919 (3d Dept. 1980); Udochi v. H&S Car Rental Inc. 76 AD 3d 1011 (3d Dept. 1980). In the deposition testimony given by the plaintiff, she specifically stated after the accident she missed no time from work as a result of the injury. This testimonial evidence sufficiently establishes defendants prima facie showing that plaintiff did not meet the requirements of New York State Insurance Law § 5104(a). McConnell v. Ouedraogo, 24 AD3d 423 (2d Dept. 2005)(plaintiff's inability to return to work for six months following the accident was insufficient to establish that plaintiff was unable to perform substantially all of the usual daily activities for not less than 90 of the first 180 days as a result of the accident).

In opposition, plaintiff contends that although she can work she can no longer go on trips, that she has limitation bending down, bending, over, going up and down stairs and lifting things. However, the Court finds that the plaintiff's opposition is insufficient to raise a triable issue as to whether she sustained a serious injury under the 90/180 day category. Pinder v. Salvatore, 69 AD3d 823 (2d Dept. 2010); Rouach v. Betts, 71 AD3d 977 (2d Dept. 2010.) Thus, the Court finds that the defendants have met their burden of showing that the plaintiff did not sustain a disability that was a medically determined injury or impairment of a non-permanent nature so as to curtail plaintiff from performing her usually and customary activities to a greater extent rather then some slight curtailment. Licari v Elliot, 57 NY2d 230 (1982.) Thus, any claim by the plaintiff for non-economic loss is barred by Section 5104(a) of the New York State Insurance Law.

Accordingly, the defendants motion for summary judgment in their favor and against the plaintiff on the grounds that the plaintiff did not sustain a serious injury pursuant to Insurance Law § 5102(d) is denied and the branch of their motion for summary judgment in their favor and against the plaintiff on the grounds that any claim by the plaintiff for non-economic loss is barred by Insurance Law § 5104(a) is granted. Therefore, the defendants' motion to dismiss the plaintiff's complaint is also denied.

Dated: July 9, 2012

TIMOTHY J. DUFFICY, J.S.C.