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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MELISSA A. STENCEL,
Plaintiff,

- against -

MARK A. MISITI and
KASEY L. MISITI,
Defendants.

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Index No.:15509/10
Motion Date:7/19/11
Calendar No.:21
Motion Seq. :1

The following papers numbered 1 to 9 read on this motion by defendants **MARK A. MISITI and KASEY L. MISITI** for an order pursuant to CPLR 3211 and 3212 granting summary judgment in their favor and dismissing the plaintiff's complaint as against them.

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

Upon the foregoing papers it is ordered that this motion by the defendants**. MISITI and KASEY L. MISITI** for an order pursuant to CPLR 3211 and 3212 granting summary judgment in their favor motion by defendants **MARK A. MISITI and KASEY L. MISITI** for an order pursuant to CPLR 3211 and 3212 granting summary judgment in their favor for failure to state a cause of action pursuant to New York State Insurance Law 5102(d) in that the plaintiff did not sustain "serious injury" as required by New York State Insurance Law 5102(d) and dismissing the plaintiff's complaint as against them is decided as follows:

This action arises from an automobile accident that occurred on December 11, 2008, at about 8:20 p.m., at the intersection of Route 109 and Fulton Street which had a traffic control device. The plaintiff's vehicle was hit in the front driver's side door by the

defendant's vehicle. The defendant admitted going through the red light and striking the plaintiff's car.

The defendants move for summary judgment claiming that the plaintiff has not sustained a serious injury under New York State Insurance Law §5102(d).

As the proponent of this summary judgment motion defendants must make a *prima facie* showing of entitlement to summary judgment as a matter of law by offering sufficient evidence to demonstrate the absence of any material issues of fact. Alvarez v Prospect Hospital, 68 N. Y. 2d 320 (1986); Zuckerman v City of New York, 49 N.Y. 2d 557 (1980). Therefore, on this motion the defendants bear the initial burden establishing *prima facie* that the plaintiff did not sustain a "serious injury" within the meaning of Insurance Law §5102(d). Gaddy v. Eyler, 79 NY2d 955 (1992); Licari v. Elliot, 57 NY2d 230 (1982). Additionally, the defendants have the burden of making a *prima facie* showing that the plaintiff's injury was not causally related to the accident. Elshaarawy v U-Haul Co., 72 AD3d 878 (2d Dept.2010); Autiello v. Cummings, 66 AD3d 1072(3d Dept. 2009.)

In support of their motion, the defendants submit the pleadings in this case and the deposition testimony of plaintiff Melissa A. Stencel taken on September 21, 2011. Additionally the defendants have submitted the affirmed report of Dr. John M. Lloyd dated December 27, 2011, wherein Dr. Lloyd examined plaintiff Stencel and found that she had a full range of motion and her cervical and lumbar sprain was resolved and that the MRI's show degenerative changes.

The defendant's examining doctor has set forth in his affirmed medical report that then plaintiff had full and normal range of motion based upon objective range of motion tests. He also stated what the numerical findings were compared to and what their opinion is normal. Contrary to plaintiff's contentions that this evidence is contradictory and legally insufficient the Court finds that these findings are acceptable under the law. See, Layne v. Drouillard, 65 AD2d 1197(2d Dept. 2009).

Therefore, the Court finds that the defendants have satisfied their burden through legally sufficient documentary evidence from the affirmed reports of Dr. John M. Lloyd that the plaintiff did not meet the threshold requirement of Insurance Law §5102(d) in

that plaintiff did not sustain serious injury" as the result of the subject accident. Oberly v Bangs, 96 NY2d 295(2001)

Since the defendants have made 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 "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 (3d Dept. 2008.)

In opposition to the defendants' motion, the plaintiff submits the pleadings in this case, the deposition testimony of plaintiff Melissa A. Stencel taken on September 21, 2011, and the deposition testimony of defendant Kasey L. Misiti taken on September 21, 2011. Additionally the plaintiff's submit the affirmed report of Dr. Robert H. Ross dated April 30, 2012, wherein Dr. Ross examined the plaintiff on April 30, 2012, the unaffirmed reports of Dr. Bradley Cohen dated, April 15, 2009 and September 28, 2011 where Dr. Cohen performed an electrodiagnosis and electromyography on the plaintiff's extremities, and the unaffirmed radiologic MRI report of Dr. Sheldon Feit, who performed MRI's of the plaintiffs cervical and lumbar spine, dated January 18, 2009 and January 19, 2009. The plaintiff also submits the unaffirmed physical therapy notes from an unidentified physical therapist who treated plaintiff.

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 a recent examination. The plaintiff's doctors also concluded that plaintiff Stencel's limitations were significant and permanent and, in fact, resulted from trauma which was caused by the accident in issue. 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 she sustained a "serious injury" under the permanent consequential and/or significant limitation use categories of Insurance Law §5102(d) as a result of the accident in issue. Mahmmod v Vicks, 81 AD 3d 606(2d Dept. 2011); Evans v Pitt, 77 AD3d 611(2d Dept. 2010.)

Consequently, this Court finds that the plaintiff has raised triable issues of fact as to whether she has suffered a "serious injury" as to warrant trial of this matter on the issue. Therefore, defendants motion for summary judgment pursuant to Insurance Law §5102(d) is denied. Noble v. Ackerman, 252 AD2d 392 (1st Dept. 1998); Greene v. Frontier Central School District, 214 Ad 2d 947 (4th Dept. 1995) is denied.

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 defendants have 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 constituted her usual and customary activities for not less than 90 of the 180 days immediately following the subject accident. Taylor v Taylor, 87 AD 3d 1129 (2d Dept.2011.)

In the deposition testimony given by plaintiff Stencel, she specifically stated that after the accident she had missed no time from work as a result of the injury. This testimonial evidence sufficiently establishes the defendants *prima facie* showing that the plaintiff did not meet the requirements of New York State Insurance Law §5104(a). McConnell v Ouedraogo, 24 AD3d 423 (2d Dept. 2005.)

The plaintiff contends that although she can work, she can no longer go on trips and that she has limitations bending down, bending, bending over, going up and down stairs and lifting things. However, the Court finds that plaintiff's opposition is insufficient to raise a triable issue of fact as to whether he 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.) As such, 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 the plaintiff from performing her usual and customary activities to a greater extent rather then some slight curtailment. Licari v Elliot, 57 NY2d 230 (1982.). Thus any claim by plaintiff for non-economic loss is barred by §5104(a) of the New York State Insurance Law.

Accordingly, the defendants' motion for summary judgment in their favor and against plaintiff on the grounds that the plaintiff did not sustain "serious injury" pursuant to Insurance Law §5102(d) is denied and the branch of the defendants' motion for

summary judgment in their favor and against the plaintiff on the ground that any claim by the plaintiff for non-economic loss is barred by Insurance Law§5104(a) is granted. Thus, the branch of the defendants' to motion to dismiss the plaintiff's complaint is also denied.

Dated: November 29, 2012

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Timothy J. Dufficy, J.S.C.