Thompson v Bronx Merchant Funding Servs., LLC
2016 NY Slip Op 32751(U)
November 23, 2016
Supreme Court, Bronx County
Docket Number: 23050/2012E
Judge: Donald A. Miles
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
IAS PART 8

Index No. **23050/2012E**

JUANITA TERRY THOMPSON,

Plaintiff(s),

-against-

BRONX MERCHANT FUNDING SERVICES, LLC, SHAJAHAN ALI, JASON SAMUELS and EDWARD J. SAMUELS

Defendant(s).

DECISION/ ORDER
Present:
Hon. Donald A. Miles
Justice Supreme Court

Recitation, as required by CPLR 2219(a), of the papers considered in the review of the defendants' motion for summary judgment on threshold.

Papers	Numbered
Notice of Motion by defts, Bronx Merchant & Ali, Aff in Support, and Exhibits Thereto	1
Notice of Motion by Samuels defts, Affirmation in Support, and Exhibits thereto & Memo of Law	2
Plaintiff's Affirmation in Opposition to Motions	3
Defendants' Reply Affirmation	4
Defendants' Reply Affirmation	5

The motion by defendants BRONX MERCHANT FUNDING SERVICES, LLC and SHAJAHAN ALI ("Bronx Merchant") and the motion by co-defendants JASON SAMUELS and EDWARD J. SAMUELS ("Samuels"), pursuant to CPLR § 3212, seeking summary judgment on the basis that plaintiff did not sustain a serious injury in accordance with Insurance Law § 5102(d) are consolidated and decided as follows:

In her verified and supplemental bill of particulars, plaintiff claims injuries to her cervical spine, lumbar spine, right shoulder and right knee (for which she underwent surgery) as a result of the subject May 21, 2012 motor vehicle accident.

To prevail on a motion for summary judgment, the defendant has the initial burden to present competent evidence showing that plaintiff has not suffered a "serious injury"

(*see Rodriguez v Goldstein*, 182 AD2d 396 [1st Dept. 1992]). Such evidence includes "affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim." (*Shinn . Catanzaro*, 1AD3d 195, 197 [1st Dept. 2003], *quoting Grossman v. Wright*, 268 AD2d 79, 84 [1st Dept. 2000]). Where there is objective proof of injury, the defendant may meet his or her burden upon the submission of expert affidavits indicating that the plaintiff's injury was caused by a pre-existing condition and not the accident (*Farrington v Go On Time Car Serv.*, 76 AD3d 818 [1st Dept. 2010]) *citing Pommells v Perez*, 4 NY3d 566 [2005]). In order to establish *prima facie* entitlement to summary judgment under the 90/180 category of the statute, a defendant must provide medical evidence of the absence of injury precluding 90 days of normal activity during the first 180 days following the accident (*Elias v Mahlah*, 58 AD3d 434 [1st Dept. 2009]. However, a defendant can establish *prima facie* entitlement to summary judgment on this category without medical evidence by citing other evidence, such as a plaintiff's own deposition testimony or records demonstrating that plaintiff was not prevented from performing all of the substantial activities constituting customary daily life activities for the prescribed period (*id*).

Once the defendant meets his or her initial burden, the plaintiff must then demonstrate a triable issue of fact as to whether he or she sustained a serious injury (*see Shinn*, 1AD3d at 197. A plaintiff's expert may provide a qualitative assessment that has an objective basis and compares plaintiff's limitations with normal function in the context of the limb or body system's use and purpose, or a quantitative assessment that assigns a numeric percentage to plaintiff's loss of range of motion (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350-351 [2002]). Further, where the defendant has established a pre-existing condition, the plaintiff's expert must address causation (*see Valentin v Pomilla*, 59 AD3d 184 [1st Dept. 2009]; *Style v Joseph*, 32 AD3d 212, 214 [1st Dept. 2006]).

Bronx Merchant has made a *prima facie* showing that plaintiff did not sustain a

serious injury, by offering, *inter alia*, the affirmed report of Dr. Hillman, an orthopedic surgeon, Dr. Agrawal, a neurologist, and Dr. Springer, a radiologist. Dr. Springer reviewed MRIs of the right shoulder, right knee, cervical spine and lumbar spine, all taken between five and twelve weeks after the accident. He affirms that each show degeneration and none show any evidence of recent trauma. Specifically regarding the right knee, for which plaintiff had a prior arthroscopic surgery,[1] Dr. Springer states that there was no fracture, dislocation or joint effusion; that the anterior cruciate and posterior cruciate ligaments were intact; that the medial meniscus and lateral meniscus were intact and that there was no evidence of recent trauma causally related to the subject accident.

Defendants' orthopedist and neurologist found full range of motion in all of the areas in which plaintiff complained of injury and concluded that the alleged injuries to the cervical spine, lumbar spine, right shoulder and right knee were resolved. Both Dr. Hillman's and Dr. Agrawal's reports indicate that plaintiff had a normal orthopedic and neurologic exam, respectively, with no evidence of any residual or permanent disability and that plaintiff was not disabled from working or from performing her activities of daily living.

Additionally, the defendants met their initial burden with respect to plaintiff's 90/180 claim by pointing to plaintiff's deposition testimony that she was not confined to her bed and home for more than one week and had returned to work within the first 90 days following the accident.

Defendants further highlight the plaintiff's testimony that plaintiff had a prior knee replacement surgery performed on her left knee in 2000 and also a right knee arthroscopy in 2001. Furthermore, plaintiff testified that when she had the subsequent right knee replacement surgery on 10/2/14 and was out of work for three months as a result of the surgery, plaintiff had already been back at work for approximately two years and four

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[1]Plaintiff's right knee replacement surgery was performed on 10/2/14 and subsequent to Dr. Springer's examination of plaintiff.

months following the accident.

In support of their motion, the Samuels defendants have also made a *prima facie* showing that plaintiff did not sustain a serious injury by submitting the affirmed reports of Dr. Hershon, an orthopedic surgeon, Dr. Feuer, a neurologist, and Dr. Coyne, a radiologist. Dr. Coyne reviewed the aforesaid MRIs of the plaintiff's right shoulder, right knee, cervical spine and lumbar spine and noted degenerative changes which he opined were chronic, longstanding, pre-existent and not causally related to the subject accident of May 21, 2012. As to the plaintiff's right knee replacement, Dr. Coyne states that the surgical arthroplasty addressed very longstanding and severe tri-compartmental degenerative osteoarthritis, which was not causally related to the subject accident.

Similarly, the defendants' orthopedist and neurologist found full range of motion in all of the areas in which plaintiff complained of injury and concluded that the alleged injuries to the cervical spine, lumbar spine, right shoulder and right knee were resolved. Both Dr. Hershon's and Dr. Feuer's reports indicate that plaintiff had a normal orthopedic and neurologic exam, respectively, (with the exception of diabetic peripheral neuropathy) with no evidence of any residual or permanent disability and that plaintiff was not disabled from working or from performing her activities of daily living.

In opposition, plaintiff submits the affirmation of Dr. Cohen, an orthopedic surgeon, with whom plaintiff began treating on July 9, 2012 for the injuries to her right shoulder and right knee, having been referred by her physiatrist, Dr. Cruz-Banting, and upon whose affirmation plaintiff also relies. Dr. Cohen noted restricted range of motion in plaintiff's right shoulder and right knee, diagnosed plaintiff with traumatic synovitis and concluded that a total right knee replacement was necessary and directly related to the injuries sustained in the subject motor vehicle accident. Dr. Cohen's affirmation incorporates the operative report of Dr. Kramer, his partner with whom he practices, concerning plaintiff's 10/2/14 right knee surgery, as well as follow up office notes after the surgery. As regards plaintiff's right shoulder, Dr. Cohen opines that plaintiff is likely

to require surgery in the future. Dr. Cohen concludes that although some of plaintiff's conditions were affected by pre-existing conditions, the severity of her symptoms was a direct result of the subject accident and her disabilities are permanent in nature. Dr. Cohen states that plaintiff has sustained a partial but significant permanent impairment of the right shoulder and loss of the right knee, causally related to her accident and that her condition is likely to worsen as she ages.

Dr. Cruz-Banting notes in her affirmation, and in which she incorporates the office notes, that on her initial visit on June 4, 2012, plaintiff complained of radiating neck pain, shoulder pain and low back pain. After noting plaintiff's prior left knee replacement in 2000, Dr. Cruz-Banting states that no other body part injured in the subject accident was involved in prior trauma or medical care. Her report goes on to detail restricted range of motion in plaintiff's cervical spine, lumbar spine, right shoulder and right knee, which she causally related to the accident with a recommended treatment plan including physical therapy, acupuncture and an orthopedic consultation and MRIs. As recent as January 3, 2017, plaintiff still complained of pain in the right arm, back , neck, right shoulder and both knees. Dr. Cruz-Banting measured restricted range of motion, tenderness and spasm in all the affected areas and opined that plaintiff's neck and back injuries are permanent and causally related to the accident.

Neither Dr. Cohen nor Dr. Cruz-Banting disputes the defendants' contention that plaintiff had long-standing chronic degenerative changes to her right and left knees prior to the subject accident. It is clear that plaintiff had a long history of knee related ailments and severe osteoarthritis for many years prior to the accident. In fact, both the pre-operative and post-operative diagnosis was "osteoarthritis right knee." Noticeably absent are the medical records regarding plaintiff's prior surgery to her right knee in 2001. None of plaintiff's doctors have addressed her prior history of degenerative and chronic conditions. Plaintiff does not even offer an affirmation from a radiologist who reviewed plaintiff's MRI films.

A physician may not rely upon unsworn medical findings of other doctors. *Concepcion v Walsh*, 38 AD3d 317 (1st Dept. 2007). Once a defendant has presented evidence of degenerative disc disease, it is incumbent upon plaintiff in a serious injury case to present proof to meet the defendant's assertion of lack of causation. *Santiago v Nimbus Serv. Corp.* 18 Misc.3d 126(a), 2008 N.Y. Slip Op. 50253(U) [1st Dept. 2008].

Defendants' radiologists who did reviews of the plaintiff's MRI films stated that the changes to plaintiff's cervical spine, lumbar spine, right shoulder and right knee were degenerative. Plaintiff also testified that she had prior surgeries to her left and right knees. Plaintiff's medical evidence failed to raise a triable issue of fact as plaintiff's physicians failed to address the non-conclusory opinions of defendants' experts that the disc bulges and disc herniations as well as the condition of plaintiff's right shoulder and right knee were degenerative in nature. The failure of the plaintiff's doctors to address the findings of degenerative changes set forth by the defendants' expert is fatal to the opposition.

In *Pommells v Perez*, 4 N.Y.3d 566, the Court of Appeals held that even where there is objective medical proof, when additional contributory factors interrupt the chain of causation between the accident and claimed injury, such as a gap in treatment, an intervening medical problem or a pre-existing condition, summary dismissal of the complaint may be appropriate unless such is adequately explained by the plaintiff.

In *Franchini v Palmieri*, 1 N.Y.3d 536, the Court of Appeals held that summary judgment was properly granted to the defendants, stating that "plaintiff's submissions were insufficient to defeat summary judgment because her experts failed to adequately address plaintiff's pre-existing back condition and other medical problems, and did not provide any foundation or objective medical basis supporting the conclusions they reached."

While plaintiff's doctors' reports regarding bulges and herniations, coupled with restrictions in range of motion, raise a triable question of fact as to whether plaintiff's injuries are serious (*Byong Vol Yi v Canela*, 70 AD3d 584 [1st Dept. 2010]) they do not

raise a triable question of fact as to causation given that plaintiff's physicians failed to address the opinion of defendants' experts that the conditions revealed in the plaintiff's MRIs were degenerative in nature. *Torres v Triboro Servs. Inc.*, 2011 NY Slip Op. 3189 (1st Dept. 2011).

As to the 90/180 day claim, the fact that plaintiff missed three months from work following her right knee replacement surgery, is not enough to raise a triable issue of fact. The fact is, there is no report contemporaneous with the accident, in admissible form that indicates that plaintiff was disabled from her employment for longer than one weeks post-accident or within the first 90 days following the accident.

Considered in the light most favorable to the plaintiff, the evidence adduced is sufficient to demonstrate, *prima facie*, the absence of a statutory serious injury and the plaintiff has not submitted evidence in admissible form sufficient to raise a material issue of fact as to whether the plaintiff sustained a serious injury as defined in the Insurance Law as a result of the subject accident. Therefore, summary judgment is hereby granted to the defendants as against the plaintiff and her action is hereby dismissed.[2]

This constitutes the decision and Order of the Court.

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DATE

HON. DONALD MILES, J.S.C.

[2] Plaintiff's motion, pursuant to CPLR § 3212, seeking summary judgment on the issue of liability (¶ 3 Aff in Opp of Jeffrey J. Belovin, Esq.) although not on submission before this court, is now academic and should be denied as moot.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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JUANITA TERRY THOMPSON,

Plaintiff,

Index# 23050/2012

-against-

BRONX MERCHANT FUNDING SERVICE LLC, SHAJAHAN ALI, ALI, JASONSAMUELS AND EDWARD J. SAMUELS,

Defendant.

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MEMORANDUM OF LAW (1) IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

ABRAMS, GORELICK, FRIEDMAN & JACOBSON, P.C.
Attorneys for Defendants,
Jason's Samuels and Edward J. Samuels
One Battery Park Plaza – Fourth Floor
New York, New York 10004
(212) 422-1200
Our File Nos.: 30989

MEMORANDUM OF LAW
IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Defendants, JASON SAMUELS and EDWARD J. SAMUELS, by their attorneys, ABRAMS GORELICK FREIDMAN & JACOBSON, LLP, respectfully submit this Memorandum of Law in support of the motion for Summary Judgment as to the plaintiff's failure demonstrate that she sustained a serious injury under the requirements of New York State Insurance Law, Section 5102(d).

PRELIMINARY STATEMENT

This Memorandum of Law is submitted in support of the motion on behalf of defendants, JASON SAMUELS and EDWARD J. SAMUELS, seeking an Order granting summary judgment dismissing plaintiff's complaint for plaintiff's failure to demonstrate that she sustained a serious injury under the requirements of the *New York State Insurance Law*, Section 5102(d).

This Memorandum will set forth the standards by which plaintiff's medical proof in this case must be evaluated to determine if plaintiff has suffered an injury, which would qualify for purposes of satisfying the "serious injury" threshold under Insurance Law § 5102(d).

As will be demonstrated, when the quantum of medical proof is assessed against the applicable standards, it becomes clear that the plaintiff is unable to establish a "serious injury" as contemplated by the statute. The plaintiff has failed to exchange any statement or report by any doctor or medical professional in competent, admissible form to establish the severity of the injury and to establish that the injury was caused by the accident, which is the subject matter of this litigation.

ARGUMENT

POINT I

PLAINTIFFS HAVE NOT SUSTAINED SERIOUS INJURY AS DEFINED UNDER NEW YORK STATE INSURANCE LAW § 5102(d)

The instant motion is proper for the Court to decide at this time. In fact, Summary Judgment motions for non-serious or non-qualifying injuries are "encouraged" by the courts. *Stossel v. Fleyshmahker*, 117 Misc. 2d 454, 458 N.Y.S.2d 484 (Civil Ct., Kings County 1983).

It is respectfully submitted that the present case is the type that the legislature specifically intended to bar from litigation when it enacted Insurance Law §5102(d). The purpose of the no-fault law is to guarantee first party benefits for basic economic loss caused in a motor vehicle accident. However, the trade-off for this guarantee is the restriction on a cause of action for personal injuries above and beyond the basic economic loss first party benefits. (See Insurance Law §5102[j]). That is unless plaintiff can prove a "serious injury" as defined by Insurance Law §5102(d). See, Report, of the Joint Legislative Committee on Insurance Rates Regulation and Re-codification of the Insurance Law, N.Y. Legis. Doc. 1973, No. 18; *Licari v. Elliot*, 57 N.Y.2d 330, 455 N.Y.S.2d 570 (1982); *Scheer v. Koubek*, 70 N.Y.2d 678, 518 N.Y.S.2d 788 (1987); *Thrall v. City of Syracuse*, 96 A.D.2d 715, 464 N.Y.S.2d 1022, *rev'd on dissenting opn. below*, 60 N.Y.2d 950, 471 N.Y.S.2d 51, *rearg. denied* 61 N.Y.2d 905, 474 N.Y.S.2d 1027.

Although plaintiff initially treated for her injuries, plaintiff has not presented any evidence to demonstrate that she has sustained a medically determined "serious injuries" as required by New York State Insurance Law, §5102(d). Plaintiff in her Bill of Particulars alleges: (1) a permanent loss of use of function; (2) a significant limitation of use of a body function; and (3) a significant limitation of use of a system.

It is well settled law that the threshold question of whether a plaintiff has presented a *prima facie* case of "serious injury" as defined by New York State Insurance Law, §5102(d) is a matter to be decide on the first instance. *Licari v. Elliot*, 57 N.Y.2d 330, 455 N.Y.S.2d 570 (1982).

According to the medical records and reports obtained from the plaintiff's health care providers to date, plaintiff has suffered, at most, only soft tissue injuries, precluding entitlement to maintain the instant action pursuant to the New York Insurance Law, §5102(d).

The defendants have satisfied their burden by the submission, in admissible form, of the reports of orthopedic surgeon, Dr. Stuart J. Hershon, neurologist, Dr. Daniel J. Feuer, and diagnostic radiologist, Dr. Scott Coyne. The seriousness of plaintiff's alleged injuries have been clearly placed at issue, as has the issue of proximate causation. These elements of proof submitted by the defendants in support of the motion adequately demonstrate that plaintiff has not sustained a qualifying injury and more tellingly, that the injuries claimed to have been sustained as a result of the subject accident were all pre-existing and degenerative in nature.

Once the movants have satisfied their burden of proof, the burden is then shifted to plaintiff to come forward with competent, admissible medical evidence, based on objective findings, sufficient to raise a triable issue of fact that she sustained a serious injury as contemplated by the statute. See Luckey v. Bauch, 17 A.D.3d 411, 792 N.Y.S.2d 624 (2d Dep't. 2005); Sims v. Megaris, 15 A.D.3d 468, 790 N.Y.S.2d 487 (2d Dep't. 2005); Elgendy v. Nieradko, 307 A.D.2d 251, 762 N.Y.S.2d 275 (2d Dep't. 2003); Shmuckler v. Shpilberg, 306 A.D.2d 398, 760 N.Y.S.2d 800 (2d Dep't. 2003). Plaintiff cannot satisfy this burden herein.

A. Plaintiffs cannot satisfy the statutory mandate

Insurance Law Section 5102(d) defines a "serious injury". Section 5104(a) of the Insurance Law provides, in pertinent part, that litigation can be maintained for personal injuries arising out of a motor vehicle accident only in the case of serious injury.

The categories of death, dismemberment, significant disfigurement, a fracture and/or loss of a fetus as listed in § 5102(d) are inapplicable to plaintiff's alleged injuries and need not be addressed. As to the other potentially applicable subcategories, the case law to be cited in this Memorandum will demonstrate that plaintiff cannot satisfy her burden of proof.

We all recognize that often even slight injuries produce pain, discomfort and limitation of motion, but pain and discomfort, unsupported by credible medical evidence, are insufficient to sustain a finding of serious injury. See *Antorina v. Mordes*, 609 N.Y.S.2d 273, 274 (2nd Dep't, 1994). "Significant" or "Serious" requires something more than a minor limitation. *Licari v. Elliot*, *supra* at 236. Simply stated, the courts have held that subjective complaints and symptomatology without a diagnosis based upon a medical foundation are insufficient to establish a prima facie case of the serious injury within the meaning of the Insurance Law.

It is respectfully submitted that plaintiff has completely failed to satisfy the threshold of having sustained a "serious injury", which is required by Insurance Law §5102(d). Factually, plaintiff has not demonstrated by way of her Bill of Particulars, deposition testimony, medical records or in any other manner, that they have, in fact, sustained a "serious injury."

In defining a "serious injury", §5102(d) of the New York State Insurance Law states:

> "'Serious injury' means 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 days during the one hundred and eighty days immediately following the occurrence of the injury or impairment."***
>
> New York State Insurance Law, §5102(d)
> (emphasis supplied).

The legislature, in providing such a comprehensive definition of "serious injury" clearly sought to eliminate minor or insignificant injuries. As stated by the Court of Appeals in *Licari v. Elliot*:

> "We begin our analysis of these two categories of serious injury by recognizing that one of the obvious goals of the legislature's scheme of no-fault automobile reparations is to keep minor personal injury cases out of court."
>
> Licari v. Elliot, supra at 230.

In *Pommells v. Perez*, 4 A.D.2d 101 (1st Dept. 2004), the Court gave examples of such instances, such as when additional contributory factors interrupted the chain of causation between the accident and claimed injury -- such as a gap in treatment, an intervening medical problem or a pre-existing condition – and summary dismissal was rightly awarded to defendants.

An impression of "subjective complaints, mild objective symptoms" does not constitute serious injury as contemplated by the holding of the *Pommells* Court of Appeals. It is submitted that the independent medical examiners that examined the plaintiff herein did not find that she sustained a serious injury as interpreted by the *Pommells Court.*

In affirming the grant of summary judgment to the defendant and the dismissal of the *Pommells* complaint, the Court of Appeals reiterated the law in New York: "proof of a herniated disc, without additional objective medical evidence establishing that the accident resulted in significant physical limitations, is not alone sufficient to establish a serious injury."

While it is clear that the legislature intended to allow plaintiffs to recover for non-economic injuries in the appropriate case, it has also intended that it be determined whether or not a *prima facie* case of serious injury has been established which would permit a plaintiff to maintain a common law cause of action in tort. *Licari, supra* at 573.

Thus, in establishing a "serious injury" as the threshold requirement to maintain an action under the No-Fault Insurance Law, on the basis of a permanent loss of the use of a body organ, member, function or system, it is plaintiff's clear burden to establish by a fair preponderance of the credible medical evidence that the injury complained of is both permanent in nature and causally related to the occurrence. *Bugge v. Sweet*, 90 A.D.2d 858, 456 N.Y.S.2d 496 (3rd Dep't. 1982). The plaintiffs herein have done neither.

"Serious injury" includes limitation of the use of a body organ or member, provided that the limitation of an organ or member is "permanent" and "consequential" in the sense of important or significant, or the limitation of a function or system is "significant". See *Countermine v. Galka*, 189 A.D.2d 1043, 593 N.Y.S.2d 113 (3rd Dep't. 1993).

However, the mere finding that the limitation of the function or system is permanent is not sufficient to definitively prove a "serious injury" under the statute. See *Locatelli v. Blanchard*, 108 A.D.2d 1032, 485 N.Y.S.2d 603 (3rd Dep't. 1985) (a contusion on the plaintiff's chest which resulted in permanent tenderness, but did not cause any loss of mobility or substantial disability was held not to constitute a serious injury); *Colona v. Norwood*, 78 A.D.2d 883, 433 N.Y.S.2d 47 (2nd Dep't., 1980) (it was held that a lumbosacral strain from which plaintiff recovered in less than the statutory ninety (90) day period was not a serious injury); *Scheer v. Koubek*, 70 N.Y.2d 678, 518 N.Y.S.2d 788 (1987) (the Court of Appeals held that complaints or transitory pain are not sufficient to establish the existence of a serious injury);

Brennan v. Bauman & Sons Buses, Inc., 107 A.D.2d 654, 484 N.Y.S.2d 25 (2nd Dep't., 1985) (it was held that cerebral concussion with post-concussion syndrome, cervical sprain with radiculitis, intermittent pain in the neck, back and head regions, and blurring of vision, was insufficient to establish the existence of a serious injury).

In the instant case, plaintiff has failed, as a matter of law, to establish that she sustained "serious injuries" within the meaning of Insurance Law §5102(d).

B. Standard of Proof

To prevail on a motion for summary judgment, the defendant has the initial burden to present competent evidence showing that the plaintiff has not suffered a "serious injury" *(see* Rodriguez v Goldstein, 182 AD2d 396, 396-397 [1st Dept 1992]). Such evidence includes "'affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim'" *(*Shinn v Catanzuro, 1 AD3d 195, 197 [1st Dept 2003], quoting Grossman v. Wright, 268 AD2d 79, 84 [2nd Dept 2000]).

Where there is objective proof of injury, the defendant may meet his or her burden upon the submission of expert affidavits indicating that the plaintiff's injury was caused by pre-existing conditions and not the accident (Farrington v Go On Time Car Serv., 76 AD3d 818, 818 [1st Dept 2010), *citing* Pommells v. Perez, 4 NY3d 566 [2005]). "In order to establish prima fade entitlement to summary judgment under [the 90/180] category of the statute, a defendant must provide medical evidence of the absence of injury precluding 90 days of normal activity during the first 180 days following the accident' *(see e.g,* Elias v Mahlah, 58 AD3d 434, 435 [1st Dept 2009]). However, 'a defendant can establish prima facie entitlement to summary judgment on this category without medical evidence by citing

other evidence, such as the plaintiff's own deposition testimony or records demonstrating that [plaintiff] was not prevented from performing all of the substantial activities constituting customary daily activities for the prescribed period" (*id.*).

Once the defendant meets his or her initial burden, the plaintiff must then demonstrate a triable issue of fact as to whether he or she sustained a serious injury (*see* Shinn, 1 AD3d at 197). A plaintiff's expert may provide a qualitative assessment that has an objective basis and compares the plaintiff's limitations with normal function in the context of the limb or body system's use and purpose, or a quantitative assessment that assigns a numeric percentage to the plaintiff's loss of range of motion (Toure v Avis Rent A Car Sys., 98 NY2d 345, 350-351 [2002]). Where the defendant has established a pre-existing condition, the plaintiff's expert must address causation *(see* Valentin v Pomilla, 59 AD3d 184, 186 [1st Dept. 2009]; Style v Joseph, 32 AD3d 212, 214 [1st Dept.2006)].

C. Permanent Loss of Use of Body Organ, Member, Function or Systems

To constitute a permanent loss of use of body organ, member, function or system, the Court requires proof that any one or all of the aforementioned categories no longer operate(s) at all, or operate(s) in some limited way, or operate(s) only with pain. *Mooney v. Ovitt*, 100 A.D.2d 702, 474 N.Y.S.2d 618 (3rd Dep't. 1984). However, permanency of the alleged injury is not enough to overcome the No-Fault threshold. *Weaver v. Ware*, 89 A.D.2d 710, 392 N.Y.S.2d 550 (Sup. Ct. Onondaga Cty. 1977).

The interpretation of the serious injury requirement of the Insurance Law is well settled that any injury, even if permanent, that is "minor, mild or light" is insignificant within the meaning of the statute and will not support a cause of action based on any category of serious injury. Gaddy v. Eyler, 79 N.Y.2d 955, 582 N.Y.S.2d 990 (1992).

Where a plaintiff seeks to establish a "serious injury" within this category, he must produce competent medical evidence that there is a loss of use, which is permanent. *Gaddy v. Eyler*, 79 N.Y.2d 955, 852 N.Y.S.2d 990 (1992). No such evidence can be produced herein.

In Oberly v. Bangs Ambulance, Inc., 96 N.Y.2d 295, 727 N.Y.S.2d 378 (2001) the Court of Appeals held that "to qualify as a serious injury within the meaning of the statute, 'permanent loss of use' must be total." Furthermore, in order to sustain a claim of permanency, the plaintiffs must produce medical proof, in admissible form, which definitively establishes permanent injury. DeFilippo v. White, 101 A.D.2d 801, 475 N.Y.S.2d 141 (2d Dep't. 1984). The Court of Appeals stated in Scheer v. Koubek, 70 N.Y.2d 678, 518 N.Y.S.2d 788 (1987), that pain is not enough.

When assessed against the Oberly standard as cited above, it is clear that the injuries claimed to have been sustained by plaintiffs do not qualify under this subcategory.

D. Permanent Consequential Limitation of use of a Body Organ or Member – Significant Limitation of Use of a Body Organ, Function or System

These two subdivisions can be jointly addressed. Both of these categories involve an injury resulting in a limitation of use, which is more than "minor, mild or slight". See *Gaddy v. Eyler*, *supra* at 995. There are differences between the two categories, however. The "consequential limitation of use" category requires that the limitation be permanent, whereas the "significant limitation of use" does not require that the limitation be permanent. *Lanuto v. Constantine*, 192 A.D.2d 989, 596 N.Y.S.2d 994 (3rd Dept. 1993); *Decker v. Rassaert*, 131 A.D.2d 626, 516 N.Y.S.2d 710 (2nd Dept. 1987).

Furthermore, the "consequential limitation of use" must be with respect to a body organ or member, whereas the "significant limitation of use" must be with respect to a body function or system. See *Coon v. Brown*, 192 A.D.2d 908, 596 N.Y.S.2d 597 (3rd Dept. 1993) (allegations of

limitation of use of neck do not come within the "consequential limitation of use" category as a body organ or member is not involved, but rather a function or system).

To come within either of these two categories, plaintiff must initially set forth a limitation of use. *Coving v. Cinnireljia*, 146 A.D.2d 565, 536 N.Y.S.2d 514 (2nd Dept. 1989).

For the asserted limitation of use to be "consequential" or "significant", there must be proof that there is more than a "minor, mild or slight" limitation of use. *Gaddy v. Evler, supra; Licari v. Elliott, supra.* The limitation of use must be "important" or "meaningful." *Licari v. Elliott*, supra. Mere proof of an unspecified degree of limitation of motion or an adverse medical condition will not suffice to establish this requirement. See, *Wilkins v. Cameron*, 214 A.D.2d 557 (2nd Dept. 1995) (unspecified extent or degree of a limitation insufficient); *Louh v. City of Syracuse*, 191 A.D.2d 1018 (4th Dept. 1993) (mere diagnosis of a mild soft-tissue injury insufficient); *Naenza v. Letkaiornsook*, 172 A.D.2d 500 (2nd Dept. 1991) (mere diagnosis of acute sprain of the cervical spine and contusion of the knee whose sequelae are chronic insufficient).

Following Licari the Appellate Division of this Department, in Grossman v. Wright, 268 A.D.2d 79, 707 N.Y.S.2d 233 (2d Dep't. 2000), clarified the type and quality of proof that plaintiffs must submit in order to satisfy their burden under §5102(d). The Court stated that plaintiff must present objective evidence of the injury, and the verified objective medical findings must be based on a recent examination of the plaintiff. See also Bailey v. Ichtechenko, 11 A.D.3d 419, 782 N.Y.S.2d 781 (2d Dep't. 2004); Rudas v. Petschauer, 10 A.D.3d 357, 781 N.Y.S.2d 120 (2d Dep't. 2004); Paul v. Trerotola, 11 A.D.3d 434, 782 N.Y.S.2d 770 (2d Dep't. 2004).

The plaintiff must also submit competent medical evidence linking a specified degree of limitation or restriction of motion, or a functional impairment to constraints in plaintiff's daily activities, which constraints are "significant" and/or "consequential." *Atkins v. Metropolitan Suburban Bus Auth.*, 222 A.D.2d 390, 634 N.Y.S.2d 522 (2nd Dept. 1995); *Lanuto v. Constantine*, supra. See also *Cannizzaro v. King*, 187 A.D.2d 842 (3rd Dept. 1992) (mild back strain resulting in mild limitation of use not "consequential" or "significant"); *Gadden v. Carmen*, 169 A.D.2d 812 (2nd Dept. 1991) (acute cervical sprain, but no significant limitation of use); *Delfino v. Davey*, 159 A.D.2d 604 (2nd Dept. 1990) (cervical, thoracic and lumbar sprains medically characterized as mild; numerous visits to doctors irrelevant).

As to a durational element, the consequential limitation category requires competent medical proof of permanency. *Morsellino v. Frankel*, 161 A.D.2d (2nd Dept. 1990); *LeGreca v. Ebelin*, 156 A.D.2d 337 (2nd Dept. 1989) ("prognosis remains guarded" insufficient). While the significant limitation category does not require proof of permanency, under that category there must be a consideration of the duration of the limitation. *Letellier v. Walker*, 222 A.D.2d 658, 635 N.Y.S.2d 682 (2nd Dept. 1995); *Canizzaro v. King*, 187 A.D.2d 842 (3rd Dept. 1992). A limitation which was substantial in degree but only fleeting in duration may not be significant. *McCleder v. Hefter*, 194 A.D.2d 594 (2nd Dept. 1993) (limitation of movement that lasted only three months mitigated claim of significant limitation).

In regard to these statutory categories of injury, the Courts have uniformly held that whether a limitation of use of function is "significant" or "consequential" relates to medical significance and involves a comparative determination of the degree or qualitative nature of the injury based on the normal function, purpose and use of the body part. Dufel v. Green, 84 N.Y.2d 795, 622 N.Y.S.2d 900 (1995). The courts have reiterated that an opinion concerning

significant limitation requires a comparative determination of the degree or qualitative nature of the injury based on the normal function, purpose and use of the body part and that same must be supported by objective medical evidence. Best v. Bleu, 300 A.D.2d 858, 752 N.Y.S.2d 427 (3d Dep't. 2002); Dabiere v. Yager, 297 A.D.2d 831, 748 N.Y.S.2d 427 (3d Dep't. 2002); Lewis v. City of New York, 2 A.D.3d 597, 768 N.Y.S.2d 356 (2d Dep't. 2003); Leahy v. Fitzgerald 1 A.D.3d 924, 768 N.Y.S.2d 55 (4d Dep't. 2003).

In order to qualify under either the permanent consequential limitation of use of a body organ or member, or significant limitation of use of a body function or system, the courts have recently and regularly stated that plaintiffs must demonstrate that the claimed injury is consequential, that is, significant and permanent, that is, that the organ member or function operates in some limited way or only with persistent pain. Subjective complaints of pain fail to raise a triable issue of fact that a plaintiff suffered a permanent consequential limitation of a body organ, member or system. Magro v. Huang, 8 A.D.3d 245, 777 N.Y.S.2d 318 (2d Dep't. 2004); Raugalas v. Chase Manhattan Corp., 305 A.D. 2d 654, 760 N.Y.S.2d 204 (2d Dep't. 2003); Curry v. Velez, 243 A.D.2d 442, 663 N.Y.S.2d 63 (2d Dep't. 1997).

Moreover, the Appellate Divisions have uniformly held that a diagnosis of a bulging or a herniated disc by itself does not constitute a serious injury. Manzano v. O'Neil, 285 A.D.2d 966, 727 N.Y.S.2d 231 (4d Dep't. 2001); Rose v. Ferguson, 281 A.D.2d 857, 721 N.Y.S.2d 873 (3d Dep't. 2001); Pierre v. Nanton, 279 A.D.2d 621, 719 N.Y.S.2d 706 (2d Dep't. 2001).

In Meely v. 4 G's Truck Renting Co., Inc., 16 A.D.3d 26, 789 N.Y.S.2d 277 (2d Dep't. 2005), the Appellate Division, Second Department held that the mere existence of herniated discs on an MRI report was insufficient for motorists to establish, *prima facie*, a serious physical injury within the meaning of the Insurance Law. As in the case at bar, defendant's expert opined

that plaintiff suffered from degenerative disc disease and there were no findings on the MRI, which were causally related to the subject motor vehicle accident.

In Dolores Perez v. Milciadez Rodriguez, 25 A.D.3d 506, 809 N.Y.S. 2d 15 (1st Dep't. 2006), the Appellate Division, First Department, held that the existence of a miniscal tear on a MRI report was insufficient to establish, *prima facie*, a serious injury.

Similarly, in Chan v. Casiano, 36 A.D.3d 580, 828 N.Y.S.2d 173 (2d Dep't. 2007). The Appellate Division, Second Department held that while the plaintiff submitted a radiologist's report, which suggested a meniscus tear the report failed to indicate that the tear was caused by the subject accident. Furthermore, the plaintiff's orthopedist failed to offer objective medical proof showing a significant impairment of a body function caused by this injury.

In Cortez v. Manhattan Bible Church, 14 A.D.3d 466, 789 N.Y.S.2d 117 (1st Dep't. 2005), the Appellate Division in evaluating the adequacy of the injuries claimed to have been sustained by plaintiff, reminded the litigants that objective proof of the nature and degree of a plaintiff's injury is required to satisfy the statutory "serious injury" threshold. The Court dismissed plaintiff's complaint stating that disc bulges and herniations, standing alone, are simply not enough to meet the serious injury threshold and further, plaintiff failed to establish a causal relationship between his alleged injuries and the motor vehicle accident. Noble v. Ackerman, 252 A.D.2d 392, 675 N.Y.S.2d 86 (Dep't. 1998); Simms v. APA Truck Leasing Corporation, 14 A.D.3d 322, 788 N.Y.2d 63 (1st Dep't. 2005); Diaz v. Turner, 306 A.D. 2d 241, 761 N.Y.S.2d 93 (2d Dep't. 2003).

Recently, the Courts of this State have been more restrictive as to what constitutes a qualifying injury under the categories of Section 5102(d). In Bent v. Jackson, 15 A.D.3d 46, 788

N.Y.S.2d 56 (Dept. 2005), the Court made it clear that "measurable diminution" is not the Insurance Law standard, but rather, plaintiffs are required to present proof of a "significant limitation of use or body function or system." See also Knoll v. Seafood Express, et al. 17 A.D.3d 233, 793 N.Y.S.2d 391 (1st Dept. 2005).

Plaintiff has failed to present competent medical evidence that her alleged injuries resulted either a permanent consequential limitation of use of a body organ or member or that she suffered a significant limitation of use of a body function or system.

E. Medically Determined Injury or Impairment 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 90 Days During the 180 Days Immediately Following the Occurrence

The last category of the statute, a medically determined injury or impairment of a nonpermanent nature, which prevents the injured person from performing substantially all of the person's usual and customary daily activities which lasts not less than 90 days during the 180 day period immediately following the accident's occurrence, is not triggered by the alleged injuries sustained by the plaintiffs herein. Doran v. Sequino, 17 A.D.3d 626, 795 N.Y.S.2d 245 (2d Dep't. 2005); Kivlan v. Acevedo, 17 A.D.3d 321, 792 N.Y.S.2d 573 (2d Dep't. 2005).

In order to come within this category, a plaintiff must establish four (4) requirements:

1. The plaintiff must establish plaintiff's inability to perform the requisite acts lasted for not less than 90 days during the 180 days following the occurrence of the injury. *Boyd v. Pierce*, 638 N.Y.S.2d 808 (3rd Dept. 1996); *Gant v. Sparacino*, 203 A.D.2d 515 (2nd Dept. 1994);

2. There must be proof that "substantially all" of the plaintiff's usual activities were curtailed. See, *etc. Gaddy v. Eyler*, 70 N.Y.2d 955, 582 N.Y.S.2d 990 (1992). In that regard, proof must be submitted detailing what the usual activities were and which of those activities were curtailed as a result of the accident. *Raitoort v. Travelers Companies*, 209 A.D.2d 363 (1st Dept. 1994); *Delfino v. Davey*, 159 A.D.2d 604 (2nd Dept. 1990). Failure to do so or to do so

in conclusory terms will result in a failure to qualify under this category. *Jean-Mehu v. Berbek*, 215 A.D.2d 440 (2nd Dept. 1995).

3. The plaintiff must submit competent medical evidence that an injury or impairment was sustained. *McKnight v. LaValle*, 147 A.D.2d 902 (4th Dept. 1989); and

4. The plaintiff must present competent medical evidence that the injury was the cause of the claimed disability or impairment over the applicable period. *Lough v. City of Syracuse*, 191 A.D.2d 1018 (4th Dept. 1993)

Plaintiff herein has not submitted sufficient proof that she was unable to perform her usual and customary daily activities for not less than ninety days of the one hundred eighty days immediately following the occurrence of the motor vehicle accident. The record is void of any curtailments of her usual and customary activities for any period of time as a direct result of this accident.

It is alleged in her Verified Bill of Particulars that plaintiff was confined to bed and home for one (1) week following the accident.

Without sufficient evidence to support plaintiff's claim that she was unable to resume daily activities for ninety (90) out of one hundred eighty (180) days following the accident, plaintiff cannot make out a prima facie showing of serious injury. *Hewan v. Callozzo*, 223 A.D.2d 425, 636 N.Y.S.2d 336 (1st Dep't. 1996). Plaintiff must submit proof of confinement, incapacity or other substantial curtailment of daily activities and a Doctor's affidavit based on subjective complaints of pain is not sufficient. *Id* at 337. It is respectfully submitted that in the instant action, plaintiff cannot satisfy her burden of a proper showing of a "serious injury".

Even "intermittent pain" is not sufficient to prove a "serious injury". *McHaffie v. Antieri*, 190 A.D.2d 780, 593 N.Y.S.2d 844 (2nd Dep't. 1993). Further, the Court in *Licari v. Elliot*,

supra, at 573, discussed the rigid standard of the 90/180 day requirement of Insurance Law §5102(d).

> "As to the statutory 90/180 day period of disability requirement, it should be considered a necessary condition to the application of the statute. Where the statute is specific, as it is here, that the period of disability must be "for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment", the legislature has made it abundantly clear that disability falling within the threshold period must be proved along with the other statutory requirements in order to establish a *prima facie* case of serious injury."
>
> *Licari v. Elliott, supra* at 573.

The Court of Appeals also stated that the words "substantially all" should be construed to mean that the plaintiff has been curtailed from performing his or her usual activities to a great extent rather than some slight curtailment. *Licar v. Elliott, supra* at 573. A mere intrusion will not suffice.

Plaintiff has not submitted proof that "substantially all" of her usual activities were curtailed. Plaintiff has not submitted competent medical evidence that an injury or impairment was sustained and lastly, plaintiff has not presented competent medical evidence that the injury was the cause of the claimed disability or impairment. Cohen v. City of New York, 8 A.D.3d 320, 777 N.Y.S.2d 717 (2d Dep't. 2004); Hammerling v. Korn, 8 A.D.3d 227, 777 N.Y.S.2d 314 (2d Dep't. 2004); Feeney v. Klotz 309 A.D.2d 782, 765 N.Y.S.2d 639 (2d Dep't. 2003); Baker v. Zelem, 202 A.D.2d 617, 609 N.Y.S.2d 330 (2d Dep't. 1994); Lalli v Tamasi, 266 A.D.2d 266, 698 N.Y.S.2d 276 (2d Dep't. 1999). The curtailment of recreational and household activities is insufficient to satisfy the threshold. Omar v. Goodman, 295 A.D.2d 413, 743 N.Y.S.2d 568 (2d Dep't. 2002).

In view of the foregoing, plaintiff has failed to put forth credible evidence of any kind to establish that she was curtailed from performing "substantially all" of her usual activities to a great extent over the strict 90/180 days requirement under this subsection of the statute.

F. Questions of Causal Relation

In addition to the obstacles that defendant contends plaintiff cannot overcome as listed above, another is the question of causal relation. The analysis concerning this element of the case begins with the Court of Appeals' review of Carrasco v. Mendez, 5 A.D.3d 716, 773 N.Y.S.2d 605 (2d Dep't. 2004), which was one of the three of the trilogy of cases decided by the Court of Appeals on the same day. (Pommels v. Perez, 4 A.D.3d 101, 772 N.Y.S.2d 21(1st Dep't. 2004), Brown v. Dunlap, 6 A.D.3d 159, 774 N.Y.S.2d 147 (1st Dep't. 2004) and Carrasco supra, were all decided on April 28, 2005; see Pommells v. Perez, 4 N.Y.3d 566, 797 N.Y.S.2d 380 (2005)). The Court stated the following:

> "As in Pommells and Brown, defendants submissions shifted to the plaintiff the burden of coming forward with evidence indicating a serious injury causally related to the accident. Unlike Brown however, defendant presented evidence of a pre-existing degenerative disc condition causing plaintiffs alleged injuries, and the plaintiff failed to rebut that evidence sufficiently to raise an issue of fact."

In those situations where plaintiffs' experts fail to address persuasive proof of degenerative/pre-existing conditions, there is an inadequate foundation to support plaintiff's contention that her medical condition was causally related to the accident.

In Lorthe v. Adeyeye, 306 A.D.2d 252, 760 N.Y.S.2d 530 (2d Dep't. 2003), the defendants submitted the affirmed medical reports of their medical experts which established, prima facie, that neither plaintiff sustained a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject motor vehicle accident. In opposition to the motion, the

plaintiffs submitted the affirmations of their examining orthopedist, who stated that each plaintiff was suffering restrictions of motion in his or her lumbosacral spine. However, the plaintiffs' orthopedist failed to address the proof that the disc bulges in the lumbosacral spines of both plaintiffs were due to pre-existing degenerative changes. Therefore, his findings that the plaintiff's current restrictions of motion were causally related to the subject accident was mere speculation. See also Ginty v. MacNamara, 300 A.D.2d 624, 751 N.Y.S.2d 790 (2d Dep't. 2002); Narducci v. McRae, 298 A.D.2d 443, 748 N.Y.S.2d 764 (2d Dep't. 2002); Kallicharan v. Sooknanan, 282 A.D.2d 573, 723 N.Y.S.2d 376 (2d Dep't. 2001).

In Ginty v. MacNamara, *supra*, the defendants had submitted the sworn medical reports of their examining medical experts which establish, *prima facie*, that plaintiff did not sustain a serious injury within the meaning of the statute. In opposition to the motion, while the opinion of plaintiff's examining physician was that plaintiff was suffering from restriction of motion in his cervical spine, the expert failed to indicate his awareness that that the plaintiff was suffering from chronic degenerative disc disease and therefore, his finding that the plaintiffs current restriction of motion was causally related to the subject accident was mere speculation.

The Second Department has spoken to the issue in Giraldo v. Mandanici, 24 A.D.3d 419, 805 N.Y.S.2d 124 (2d Dep't. 2005), even though defendant's orthopedist made no findings as to the range of motion in the plaintiff's cervical spine and found "some" limitation in his lumbar spine, a *prima facie* case for summary judgment was made out when the expert attributed the conditions in the plaintiff's cervical and lumbar spines to degenerative changes.

The *Giraldo* Court pointed out that plaintiff's evidence in opposition failed to raise a triable issue of fact. Continuing, the Court stated that as the Supreme Court had noted, plaintiff's experts have failed to address the findings of defendant's expert attributing the condition of the

plaintiff's cervical and lumbar spine to degenerative changes. This rendered speculative, said the *Giraldo* Court, the plaintiff's expert's opinion that plaintiff's lumbar and cervical conditions were caused by the motor vehicle accident.

Dr. Scott S. Coyne, M.D., a Board Certified radiologist conducted an independent review of plaintiff's MRI films. Dr. Coyne concluded on reviewing the MRI films that the findings were reflective of chronic injures and/or were not attributable to the subject accident.

New York Courts have recently found that the affirmed report of a radiologist, which stated that the MRI studies of the plaintiff revealed only degenerative changes unrelated to the accident suffices to establish a *prima facie* case that plaintiffs did not sustain a serious injury within the meaning of Insurance Law § 5102(d). Brown v. Tairi Hacking Corp., 23 A.D.3d 325, 804 N.Y.S.2d 756 (2nd Dep't. 2005).

In the case at bar, the defendants have submitted persuasive evidence that plaintiff suffered from pre-existing degenerative conditions. The doctors of the defendants have made no objective findings related to the subject accident. Any complaints of pain were merely subjective. The doctors have concluded that the plaintiff has sustained merely sprains and strains that have fully resolved. There was no evidence of any neurological and/or orthopedic disability.

CONCLUSION

Defendants' submission demonstrate that the plaintiff did not suffer a "serious injury" under any applicable category within Insurance Law, §5102(d). Plaintiff has not demonstrated a significant limitation of use of a body function or system. Plaintiff is unable to demonstrate a "permanent and total" loss of use of a body organ, member, function or system. Furthermore, plaintiff is unable to demonstrate a "serious injury" of a medically determined nature or impairment of a non-permanent nature, which endured for 90 out of the 180 days immediately

following the occurrence. The plaintiff sustained soft tissue injuries that included sprains and strain. The injuries resolved shortly after the accident and the plaintiff did not suffer any residual effects.

It is clear, after reviewing the defendants' physician's reports, and in light of plaintiff's own Bill of Particulars and deposition testimony, that plaintiff's alleged injuries prove to be insufficient to satisfy the threshold requirements. Plaintiff has no physical disabilities as a result of the accident and no permanent injuries of any kind.

For all of these reasons, it is respectfully requested that this Court grant the instant motion in its entirety, and enter an Order granting the moving defendants summary judgment dismissing plaintiff's Complaint in its entirety with prejudice, together with such other and further relief as this Court may deem just and proper.

Dated: New York, New York
November 23, 2016

DENNIS J. MONACO