**To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.**

**SUPREME COURT OF THE STATE OF NEW YORK**
**WESTCHESTER COUNTY**
**PRESENT: HON. SAM D. WALKER , J.S.C.**

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ALEXANDRA STOLLMAN,

Plaintiffs,

-against-

Index No. 70909/2015
**DECISION & ORDER**
Seq #1

ANDREW HARRIS and DELORISE M. HARRIS,

Defendants.

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The following papers were read on the defendant's motion for summary judgment seeking dismissal of the complaint:

| PAPERS | NUMBERED |
|---|---|
| Notice of Motion/Affirmation/Exhibits A-I | 1-11 |
| Affirmation In Opposition/Exhibits A-G | 12-19 |
| Reply Affirmation | 20 |

Based on the submissions, and for the reasons set forth below, it is ordered that the defendant's motion is denied:

Factual and Procedural Background

Plaintiff commenced this action to recover damages for personal injuries allegedly sustained when the plaintiff was struck by a motor vehicle while crossing the street on March 24, 2013 at the intersection of 86th Street and Riverside Drive, New York County, New York. Plaintiff alleges that, as a result, she suffered serious injuries as defined by Insurance Law § 5102(d).

Plaintiff commenced the action by filing a summons and verified complaint on June 6, 2014 with the Kings County Clerk. Defendants, Andrew Harris and Delorise M. Harris,

interposed an answer, joining issue. The matter was then transferred to Westchester County by Order dated October 8, 2015. Plaintiff served a bill of particulars, and a supplemental bill of particulars, and the parties participated in discovery and took depositions. The Court (Lefkowitz, J) issued a Trial Readiness Stipulation & Order, directing the plaintiff to file a note of issue and certificate of readiness within twenty days of the entry of the Order and further directing that any motion for summary judgment be served via NYSCEF or by mail, within sixty days following the filing of the note of issue. Plaintiff filed the note of issue and the defendant now timely files the instant motion for summary judgment, seeking dismissal of the complaint based on the claim that the plaintiff has not sustained a "serious injury" within the meaning of New York State Insurance Law § 5102(d). Plaintiff opposes the motion.

**Discussion**

It is well settled that the party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact, *Alvarez v Prospect Hosp.*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers, *Winegrad v New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 487 N.Y.S.2d 316 (1985). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" *Alvarez v Prospect Hosp.*, 68

N.Y.2d at 324, 508 N.Y.S.2d 923, citing to *Zuckerman v City of New York*, 49 N.Y.2d at 562, 427 N.Y.S.2d 595.

Insurance Law §5102 defines "serious injury" as

> a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a 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 eighty days immediately following the occurrence of the injury or impairment. McKinney's Insurance Law §5102(d)

In order to recover under the "permanent loss of use" category, the plaintiff must demonstrate a total loss of use of a body organ, member, function or system, *Oberly v Bangs Ambulance*, 96 N.Y.2d 295, 727 N.Y.S.2d 378 (2001). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system" categories, either objective evidence of the extent, percentage or degree of the plaintiff's limitation or loss of range of motion must be provided or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating the plaintiff's limitations to the normal function, purpose and use of the body part, *Perl v Meher*, 18 N.Y.3d 208, 936 N.Y.S.2d 655 [2011]; *Toure v Avis Rent A Car Systems, Inc.*, 98 N.Y.2d 345, 746 N.Y.S.2d 865(2000).

In her bill of particulars, the plaintiff enumerated the list of injuries she allegedly sustained as a result of the accident. Accordingly, the plaintiff alleges that the injuries she suffered meet the threshold standard in that they constitute: a permanent loss of use of a body organ or member; a significant limitation of use of a body function or system; or 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, i.e. the 90/180 injury. Defendants now argue that the plaintiff's injuries do not satisfy this State's No-Fault law "serious injury" threshold.

On a "threshold motion", the defendants must "satisfy their prima facie burden of showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102 (d) as a result of the subject accident". *Russo v. Ross*, 32 A.D.3d 386, 387, 821 N.Y.S.2d 101, 102 (2d Dep't 2006). In support of this position, the defendants rely upon the plaintiff's Examination Before Trial ("EBT") transcript, independent medical examination reports from Lisa Nason, M.D., a Board Certified Orthopedist, who examined the plaintiff on January 14, 2015 and a film review report from Melissa Sapan Cohn, M.D., a Board Certified Radiologist.

It is well settled that the degree or seriousness of an injury may be shown in one of two ways: either by an expert's designation of a numeric percentage of a plaintiff's loss of range of motion or by an expert's qualitative assessment of a plaintiff's condition provided that the evaluation 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.*, 98 N.Y.2d 345, 357, 746 N.Y.S.2d 865, 774 N.E.2d 1197

(2002). A defendant can establish that a plaintiff's injuries are not serious within the meaning of New York State Insurance Law § 5102(d), by the submission of an affirmed medical report from a medical expert who has examined the plaintiff and has determined that there are no objective medical findings to support the plaintiff's alleged claim. *Rodriguez v. Huerfano*, 46 A.D.3d 794, 849 N.Y.S.2d 275 (2d Dept. 2007).

In the instant matter, Dr. Nason examined the plaintiff on September 24, 2015. Dr. Nason's examination of the plaintiff's cervical spine revealed flexion of 50 degrees, with 50 degrees being normal; extension of 60 degrees, with 60 degrees being normal; rotation of 80 degrees, with 80 degrees being normal, and lateral bending of 45 degrees with 45 degrees being normal. There were no structural abnormalities and no evidence of muscle atrophy. Her examination of the right shoulder also revealed normal range of motion and no tenderness to palpation at the acromioclavicular joint. Dr. Nason opined that no orthopedic treatment is needed and the plaintiff has no objective evidence of disability.

Dr. Cohn reviewed the plaintiff's cervical spine CT obtained on March 24, 2013 at St. Lukes Hospital. Dr. Cohn states that there is no acute fracture or traumatic subluxation identified, no destructive lesions are noted and the prevertebral soft tissues are normal. Dr. Cohn states that there are degenerative changes with osteophyte formation, disc space narrowing at C5-6 and C6-7. Dr. Cohn opines that there is no evidence for acute fracture or traumatic subluxation and no evidence for acute traumatic related injury on the submitted examination.

Defendants further contend that the plaintiff is employed as a TV commercial producer and only missed six weeks of work as a result of the accident, that her activities were not restricted by a medical doctor upon her return to work and she was able to travel

to Los Angeles for work two to two and a half months after the accident for two to three weeks.

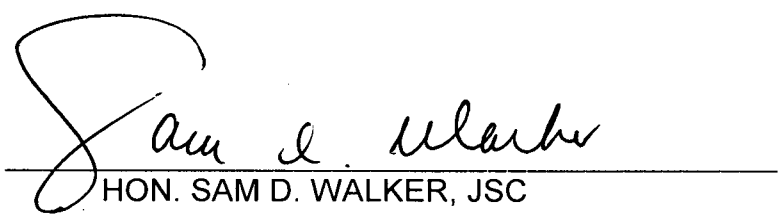
However, upon review, and viewing the facts in the light most favorable to the plaintiff, this Court finds that the defendants have not met their burden of demonstrating its entitlement to summary judgment as a matter of law. Here the doctors' objective findings do not establish *prima facie* that the plaintiff's injuries do not meet the threshold. Defendants argue that the plaintiff only offers doctors' affirmations from 2013 and does not offer any recent physician's affirmation. However, Dr. Nason's report states that there are no prior injuries or medical problems, and provides no opinion as to the plaintiff's shoulder injury in relation to the accident. Defendants offer no opinion as to the plaintiff's shoulder injury, which occurred in 2013 after the accident and if such injury was proximately caused by the accident. The Court finds the defendants' affirmations to be insufficient to demonstrate that the plaintiff did not sustain a serious injury as defined by Insurance Law §5102(d). Since the Court finds that the defendants have not met their burden, the Court need not address the sufficiency of the plaintiff's papers.

With regard to any alleged 90/180 injury, the defendants have met their *prima facie* burden. Plaintiff has not submitted any medical evidence to show that she was prevented 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. *Secor v. O'Dell*, 136 A.D.2d 618, 523 N.Y.S.2d 863 (2d Dep't 1988). That part of the defendants' motion is therefore, granted.

Accordingly, the defendant's motion is granted in part and denied in part. The parties are directed to appear in the Settlement Conference Part on February 7, 2017 at 9:15 a.m. in 1600.

The foregoing shall constitute the Decision and Order of the Court.

Dated: White Plains, New York
December 31, 2016



HON. SAM D. WALKER, JSC