At an IAS Term, Part 13 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 27th day of July 2020.

P R E S E N T:

HON. BRUCE M. BALTER

Justice.

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LATONYA MCCLEAN,

Plaintiff,

- against - Index No. 503030/16

MARC CHRISTOPHER DAVIS AND CELESTE C. KEYES,

Defendants.

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The following e-filed papers considered herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	30-37
Opposing Affidavits (Affirmations)	52
Reply Affidavits (Affirmations)	53
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing e-filed papers, defendants Marc Christopher Davis (Davis) and Celeste C. Keyes (Keyes) move for an order, pursuant to CPLR 3212, granting summary judgment dismissing plaintiff Latonya McClean's complaint as against them on the grounds that they were not negligent, and that the plaintiff did not sustain a "serious injury" as defined under New York State Insurance Law § 5102 (d).

Factual Background

This is an action to recover monetary damages for personal injuries allegedly sustained by the plaintiff Latonya McClean (plaintiff) on November 25, 2015, as a result of a motor vehicle collision which took place on Vandalia Avenue at or near its intersection with Pennsylvania Avenue in Brooklyn, New York. During his deposition, Davis testified that on the date of the accident, he was operating a gray 2005 Toyota Corolla, which was owned by his mother, Keyes. Davis was driving on Vandalia Avenue, which is a two-way street, separated by double yellow lines, with one lane of traffic in each direction. Parking was also located on both sides of the street. According to Davis, the plaintiff, who was operating a silver 2009 Honda Accord, struck his vehicle on the front passenger side as she attempted to pull out of a parallel parking spot into the moving traffic lane in which he was traveling. As a result of the impact, Davis' vehicle struck another vehicle which was parked further up the street on the right side of the road. Davis testified that he had been driving on Vandalia Avenue for two blocks before the collision occurred, and that his highest rate of speed was 27 miles per hour.

During her deposition, the plaintiff testified that prior to the accident, her vehicle was parked on Vandalia Avenue in front of the apartment building in which she resided. According to plaintiff, the vehicle operated by Davis struck her vehicle as she was already in the travel lane and exiting the parking spot. Before attempting to enter the moving lane of travel, the plaintiff claimed that she checked her side view mirror and looked behind her, but did not see Davis' vehicle prior to the collision. Plaintiff further claimed she heard a screeching sound from the left side just before feeling an impact on the front left corner of her vehicle near the headlight and the front bumper. After her vehicle was struck, she

observed the Davis vehicle hit another car that was parked about six car lengths up the street. Plaintiff alleges that she sustained various injuries as a result of the accident.

Plaintiff subsequently commenced this personal injury action, on or about May 5, 2016, against defendants Davis and Keyes (collectively, defendants) alleging negligence. Defendants interposed a Verified Answer on or about June 21, 2016 . The parties engaged in discovery and the plaintiff filed a note of issue on January 9, 2019. Defendants' current summary judgment motion is timely.

Discussion

Defendants seek summary judgment in their favor dismissing plaintiff's complaint on the threshold ground that the plaintiff did not suffer a "serious injury" as defined under Insurance Law § 5102 (d). Defendants also seek dismissal of the complaint on the issue of liability arguing that the plaintiff was solely negligent for the accident in that she failed to yield the right of way to defendants' approaching vehicle in violation of Vehicle and Traffic Laws (VTL) § 1143, and pulled out of a parking spot when it was not safe to do so in violation of VTL 1162. The court will first address the issue of whether the injuries allegedly sustained by plaintiff meet the serious injury threshold requirement of Insurance Law § 5102 (d).

Serious Injury Threshold

Pursuant to Insurance Law § 5102 (d), "[s]erious injury' means 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 [90] days during the one hundred eighty [180] days immediately following the occurrence of the injury or impairment."

The term "significant," as it appears in the statute, has been defined as "something more than a minor limitation of use," and the term "substantially all" has been construed to mean "that the person has been curtailed from performing his [or her] usual activities to a great extent rather than some slight curtailment (*Licari v Elliot*, 57 NY2d 230, 236 [1982]). On a motion for summary judgment, it is defendant's initial burden to present a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d), as a result of the subject accident (*see Toure v Avis Rent A Car Sys*., 98 NY2d 345, 352-53 [2002]; *Schultz v Von Voight*, 86 NY2d 865 [1995]). Defendant may meet his or her burden by presenting, *inter alia*, the affidavits or affirmations of medical experts who examined plaintiff and concluded that no objective medical findings support plaintiff's claims (*see Grossman v Wright*, 268 AD2d 79, 83-84 [2d Dept 2000]). Once the defendant has met the burden, the plaintiff must then present competent admissible medical evidence, based on objective findings, sufficient to raise a triable issue of fact that he or she sustained serious injuries (*see Luckey v Bauch*, 17 AD3d 411 [2d Dept 2005]; *DeAngelo v Fidel Corp. Services, Inc.*, 171 AD2d 588, 567 [1st Dept 1991]). Such proof, in order to be in competent or admissible form, shall consist of affidavits or affirmations (*see Pagano v Kingsbury*, 182 AD2d 268 [2d Dept 1992]).

Here, in her verified bill of particulars, plaintiff alleges that she sustained serious injuries including C5-6 cervical bulges, reversal of the cervical lordosis, left shoulder tear

and decreased range of motion in her cervical spine. She also alleged that her injuries fall within the following categories of Insurance Law § 5102 (d): 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; and a medically determined injury or impairment of a non-permanent nature which prevented plaintiff from performing substantially all of the material acts which constitute her usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment.

In support of their motion to dismiss plaintiff's complaint on the ground that she did not sustain a "serious injury," defendants submit copies of the pleadings, including plaintiff's bill of particulars (NYSCEF Doc. Nos. 31, 32 34, Walsh Affirm, exhibits A, B, D), the transcript of plaintiff's examinations before trial (NYSCEF Doc. No. 36, Walsh Affirm, exhibit F) and the affirmed report, dated February 1, 2017, of defendant's examining orthopedic surgeon, Dana A. Mannor, M.D., who examined the plaintiff on the same date (NYSCEF Doc. No. 37 at pages 31-50, Walsh Affirm., exhibit F). In her report, Dr. Mannor affirmed that her examination of the plaintiff's cervical spine revealed no muscle spasm and no tenderness to palpation. It further revealed no atrophy, deformity or soft tissue swelling. Dr. Mannor's examination of both plaintiff's right shoulder and left shoulder revealed no heat, swelling, effusion, erythema, crepitus, atrophy or deformity appreciated. Additionally, Dr. Mannor affirmed that she, with a hand-held goniometer, tested the ranges of motion of the plaintiff's cervical spine, left shoulder and right shoulder, and reported that the ranges of motion were all within normal ranges, and set forth her specific measurements, and compared them to the norms. Dr. Mannor also described other orthopedic tests that she performed on

plaintiff (Spurlings test, Neer Impingement test, Drop Arm test, Hawkins test, Apprehension test, O'Brien test, and the Cross Adduction test), and reported that the results were all negative. Based upon her examination, Dr Mannor concluded that the plaintiff's alleged injuries of a cervical spine sprain/strain and left shoulder sprain/strain were now resolved, and further found no evidence of permanency, or a casually related orthopedic disability.

Defendants also refer to plaintiff's deposition testimony in which she testified that immediately after the accident, she made no complaints of pain to the ambulance personnel who came to the scene. Later that evening, plaintiff went to the New York Community Hospital, where she complained of a headache and pain in her left side, left shoulder, and left arm. She was given Motrin and was discharged later that night. Plaintiff testified that a couple of weeks later, on December 9, 2015, she began physical therapy to address her complaints of pain in her left side, left shoulder, and left arm. Plaintiff's physical therapy treatment included getting her neck cracked and applying heat to whatever body part was bothering her, and doing various arm exercises. She underwent nerve testing, X-rays and MRIs of her left shoulder, left forearm, and neck, and was given a brace for her hands, a TENS Unit, and a neck stretcher for her cervical lordosis. Defendants note that the plaintiff admitted that the physical therapy has helped to relieve her pain. They further note that at the time of her deposition, the plaintiff testified that her current complaints of pain occurred upon opening and closing her hands, and that she experienced occasional discomfort in her neck. As a result of the accident, plaintiff testified that she can no longer hold her three year-old child on her left side, and that she has difficulty typing with her left hand at work. She further testified that after the accident occurred, she only missed one day of work as a guest service agent. Plaintiff explained that she is still able to type with both hands, which

is part of her work duties, but that she limits the usage of her left hand when typing to prevent it from getting irritated. Other than that, defendants note that the plaintiff claimed of no other limitations as a result of her accident.

In opposition to defendants' motion, the plaintiff argues that the defendants' expert, Dr. Mannor, in rendering her opinion, only relied upon plaintiff's verified bill of particulars and failed to review any of her medical history. As such, she argues that Dr. Mannor's report should be rejected as lacking any foundation. Plaintiff additionally argues that the defendants' expert failed to address the 90/180 day category of her serious injury allegations. Plaintiff therefore argues that the defendants have failed to meet their burden in dismissing her complaint on the ground that she did not sustain a serious injury.

The court finds that the defendants have met their prima facie burden of demonstrating that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the subject accident (*see Grossman v Wright*, 268 AD2d at 84–85). Contrary to plaintiff's contention, even though Dr. Mannor did not review the plaintiff's medical records, her report was sufficient to satisfy the defendants' prima facie burden as to the alleged injuries in that her medical opinion was supported by her physical examination of the plaintiff, as well as the objective physical tests she performed showing full range-of-motion in the complained of regions (*see Hayes v Vasilios,* 96 AD3d 1010, 1011 [2d Dept 2012]; *DeJesus v Paulino*, 61 AD3d 605, 607 [1st Dept 2009]; *see also Staff v Yshua*, 59 AD3d 614 [2d Dept 2009]).

In addition, although defendants' expert failed to relate her findings to the 90/180 category of serious injury for the period of time immediately following the accident, defendants are permitted to use a plaintiff's deposition testimony to establish that she did not

sustain a nonpermanent injury that prevented her from performing substantially all of her material daily activities for at least 90 of the 180 days immediately following the accident (*see e.g., Bleszcz v Hiscock*, 69 AD3d 890, 891-92 [2d Dept 2010][plaintiff admitted in her deposition testimony that she missed only one day from work as a result of the subject accident]: *Sanchez v Williamsburg Volunteer of Hatzolah, Inc*., 48 AD3d 664 [2d Dept 2008] ["defendants made a prima facie showing, through the plaintiff's deposition testimony, that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the subject accident"]). As noted above, plaintiff admitted during her deposition that she only missed one day of work as a result of the accident, and that the only limitations and/or restrictions she experienced after the accident were that she limited her use of her left hand to type at work, and could not pick up her three year-old on her left side anymore. Such testimony sufficiently demonstrates that the plaintiff did not sustain an injury which rendered her unable to perform substantially all of her daily activities for not less than 90 days of the first 180 days after the accident (*see* Insurance Law § 5102 [d]; *Bleszcz v Hiscock*, 69 AD3d at 891-92).

In opposition, the plaintiff fails to raise a triable issue of fact (*see Barry v Future Cab Corp*., 71 AD3d 710, 711 [2d Dept 2010];*Yunatanov v Stein*, 69 AD3d 708, 710 [2d Dept 2010]; *Ponciano v Schaefer*, 59 AD3d 605 [2d Dept 2009]). In fact, the plaintiff only refers to her deposition testimony and submits no medical evidence in opposition to the defendants' motion. Plaintiff's subjective complaints of pain or discomfort in her neck, left shoulder/arm, or her assertions that she is unable to pick up her daughter on her left side or perform her customary daily activities for 90 out of the 180 days immediately following the accident are insufficient to raise any triable issues of fact (*see Kabir v Vanderhost*, 105 AD3d 811, 812

[2d Dept 2013]; *Barry v Future Cab Corp*., 71 AD3d at 711; *Harney v Tombstone Pizza Corp*., 279 AD2d 609, 609–10 [2d Dept 2001]). Indeed, the plaintiff was required to come forward with objective medical evidence, based upon a recent examination, to verify her subjective complaints of pain and limitations of motion, which she has failed to do (*see Ali v Vasquez*, 19 AD3d 520 [2d Dept 2005]; *Batista v Olivo*, 17 AD3d 494 [2d Dept 2005]). Thus, plaintiff has failed to raise an issue of fact rebutting defendants' prima facie showing that her alleged injuries sustained as a result of the subject accident do not constitute a permanent loss of use of a body organ, member, function or system, a permanent consequential limitation of use of a body organ or member, a significant limitation of use of a body function or system, or a medically determined injury which rendered her unable to perform substantially all of her daily activities for not less than 90 days of the first 180 days thereafter (*see* Insurance Law § 5102 [d]).

Accordingly, defendants' motion (Seq. No. 003) seeking summary judgment dismissing plaintiff's complaint on the ground that she did not sustain a "serious injury" in the subject accident as defined by Insurance Law § 5102 (d) is hereby GRANTED and plaintiff's Verified Complaint is dismissed in its entirety. In light of the foregoing, that branch of defendants' motion for summary judgment in their favor on the issue of liability is denied as moot.

The foregoing constitutes the decision and order of the court.

ENTER

J. S. C.