"original"

Index No.: 607733/2018

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. **DENISE F. MOLIA**
Justice

MARIA SANTANA SAENZ LAINEZ,

Plaintiff,

-against-

ARNELGE A. IGLESIAS, ASMEL IGLESIAS, VICTOR GARCIA AND DIANA GARCIA-DIAZ,

Defendants.

CASE DISPOSED: YES
MOTION R/D: 03/06/2020
SUBMISSION DATE: 07/10/2020
MOTION SEQUENCE NO.: 001; MG
MOTION SEQUENCE NO.: 002; MG

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Upon the **E-file document list** numbered 12 to 42 read on the application of defendants Arnelge A. Iglesias and Asmel Iglesias and defendants Victor Garcia and Diana Garcia-Diaz, for an Order pursuant to CPLR 3212, granting defendants Arnelge A. Iglesias and Asmel Iglesias and defendants Victor Garcia and Diana

Garcia-Diaz summary judgment dismissing the plaintiff's complaint and any cross-claims on the grounds that plaintiff Maria Santana Saenz Lainez did not sustain a serious injury under Insurance Law § 5102 (d); it is

ORDERED that the motion by defendants Arnelge A. Iglesias and Asmel Iglesias for an Order pursuant to CPLR 3212, granting them summary judgment dismissing the plaintiff's complaint and any cross-claims on the grounds that plaintiff Maria Santana Saenz Lainez did not sustain a serious injury under Insurance Law § 5102 (d) is **GRANTED** for the reasons set forth herein; and it is further

ORDERED that the motion by defendants Victor Garcia and Diana Garcia-Diaz for an Order pursuant to CPLR 3212, granting them summary judgment dismissing the plaintiff's complaint on the grounds that plaintiff Maria Santana Saenz Lainez did not sustain a serious injury under Insurance Law § 5102 (d) is **GRANTED** for the reasons set forth herein.

By the filing of a summons and complaint on April 23, 2018, plaintiff Maria Santana Saenz Lainez ("plaintiff") commenced this personal injury action arising from a motor vehicle accident alleged to have occurred on April 26, 2017 on Candlewood Road, at or near its intersection with Commack Road, in the Town of Islip, County of Suffolk, and State of New York. Issue was joined by defendants Victor Garcia and Diane E. Garcia-Diaz ("the Garcia defendants") on June 13, 2018 through the service of an answer with cross-claims. Defendants Arnelge A. Iglesias and Asmel Iglesias (the "Iglesias defendants") served their answer on July 27, 2018 and their amended answer on the same date.

Plaintiff served her bill of particulars dated July 30, 2018 and therein she alleges that she sustained various personal injuries, including the following: C6/7 posterior disc herniation in the midline right paramedian, causing impression on the ventral cord margin, central spinal stenosis, C4/5 posterior focal disc herniation, extending focally into the left anterior recess impressing upon the C5 ventral nerve root, C5/6 midline posterior disc herniation impressing upon the thecal sac and encroaching into the left C6 nerve root, C3/4 midline focal posterior disc herniation and radial annular tear with impression on the ventral thecal sac, generalized straightening of the cervical lordosis through C6 evidencing muscular spasm, L4/5 posterior disc bulging impressing on the ventral thecal sac impinging upon the left L5 root with left lateral recess stenosis, L5/S1 2mm retrolisthesis with a broad posterior disc herniation and midline radial annular tear, L3/4 diffuse posterior disc bulge impressing upon the ventral thecal sac with peripheral bulging extending eccentrically into the left most right neural foramen, L1/2 and L2/3 posterior left peripheral subligamentous disc bulges, posterior paraspinal fascitis, left convexity

to lumbar curvature and kyphotic angulation with apex at L1/2, severe headaches, constant left-sided neck pain and associated radicular pain into the left upper extremity, constant debilitating mid-back pain, lower back pain radiating to the lower extremities, difficulty walking, bending, lifting, and moving upward from sitting positions, right L/4 radiculopathy, and bilateral median nerve neuropathy. Plaintiff alleges she was confined to her bed and home for several weeks following the accident as well as intermittently as a result of the accident.

The Iglesias and Garcia defendants now move for summary judgment dismissing the complaint on the grounds that plaintiff has not sustained a serious injury under Insurance Law § 5102 (d). In support of their motion, the Iglesias defendants submit, *inter alia*, an attorney affirmation, a copy of the pleadings, verified bill of particulars, the transcript of plaintiff's examination before trial, and the affirmed report of Dr. Richard Weiss (the "IME report"). The Garcia defendants rely upon the arguments raised by the Iglesias defendants and submit an attorney affirmation, a copy of the pleadings, and the motion papers of the Iglesias defendants. Plaintiff opposes the motions and submits, *inter alia*, an attorney affirmation, her sworn affidavit, the affirmed report of Dr. Neal H. Frauwirth, a copy of plaintiff's medical records from Southside Hospital emergency room, Community Chiropractic Care, and Long Island Spine Specialists, the MRI reports of plaintiff's cervical and lumbar spines, the medical report of Dr. Jasjit Singh, and the affirmation of Dr. Steven Winter, a board certified radiologist. Plaintiff argues that defendants have not met their prima facie burden and that, in any event, issues of fact preclude granting defendants summary judgment. The Iglesias defendants and Garcia defendants reply by attorney affirmations.

Plaintiff's examination before trial was held on October 3, 2019. Thereat, she testified to being a passenger in her boyfriend's car at the time of the accident, that she was taken from the scene by ambulance to Southside Hospital, she was given a neck collar, released the same day, and confined to her bed and home for approximately four months, as her back would hurt when she walked. Plaintiff further testified that she received therapy for pain in her neck and back at Community Chiropractic Care three times a week for approximately six months, which was reduced to twice a week. Plaintiff further testified that she stopped receiving treatment around February or March of 2019. Plaintiff testified she was referred to a neurologist whom she saw "a few times" and she was sent by the neurologist for MRIs of her neck and back. Plaintiff was recommended for injection treatments in her back and surgery for her dislocated disc. Plaintiff testified that she refused the injections for fear of same and she did not pursue surgery. Plaintiff testified that she was not advised by any doctors that she was required to stay home for four months and when she presented for her physical therapy appointments, she did not require

much assistance to walk to the vehicle or the physical therapy location. Plaintiff further testified that she was not working at the time of the accident but had since been working at a medicine factory and has not missed any days of work due to her alleged injuries. Plaintiff testified that prior to the accident, she did house work and played soccer with her nephew and that since the accident she cannot cook as she did previously and has difficulty going back and forth with her children as well as bending down and lifting heavy things. Plaintiff also testified she is unable to run since the accident.

Plaintiff was examined by Dr. Weiss on November 7, 2019 on behalf of the defendants. According to the IME report, Dr. Weiss diagnosed plaintiff with resolved cervical, thoracic, and lumbar spine sprain/strain, resolved right and left hand/wrist sprain/ strain, and resolved bilateral knee sprain/strain. Dr. Weiss' examination of plaintiff's cervical, thoracic, and lumbar spines revealed no spasms, tenderness to palpation, full range of motion, and no impingement sign or crepitus noted at the joints. Dr. Weiss performed range of motion tests using a goniometer, with the normal ranges of motion pursuant to the American Medical Association "Guides To The Evaluation Of Permanent Impairment", Fifth Edition. According to the IME report, the cervical compression test was negative and the straight leg raise was negative. Dr. Weiss opines in his report that there is no disability and that plaintiff is capable of working and performing all activities of daily living without restrictions or limitations.

Under New York law, there is no right of recovery for non-economic loss in an action arising out of negligence in the use or operation of a motor vehicle in the absence of evidentiary proof of a "serious injury" as that term is defined in Insurance Law § 5102 (d). It has long-been established that the legislative intent underlying the No-Fault Law, as codified in Article 51 of the Insurance Law, "was to weed out frivolous claims and limit recovery to significant injuries" (***Dufel v Green***, 84 NY2d 795, 622 NYS2d 900 [1995]; *see also* ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865, 746 NYS2d 865 [2002]). The determination of whether or not a plaintiff has sustained a "serious injury" is to be made by the court in the first instance (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Porcano v Lehman***, 255 AD2d 430, 680 NYS2d 590 [2d Dept 1988]; ***Nolan v Ford***, 100 AD2d 579, 473 NYS2d 516 [2d Dept 1984], *aff'd* 64 NYS2d 681, 485 NYS2d 526 [1984]).

Insurance Law § 5102 (d) 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." Plaintiff herein acknowledges she is claiming a serious injury under the permanent consequential and significant limitations of use of a body function or system categories and the category defined as a medically determined injury or impairment of a non-permanent nature which prevents her from performing substantially all of the material acts which constitute her usual and customary activities for not less than ninety days during the one hundred eighty days immediately following the accident ("the 90/180 category").

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 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 plaintiff's limitations to the normal function, purpose and use of the body part (*see* ***Perl v Meher***, 18 NY3d 208, 936 NYS2d 655 [2011]; ***Toure v Avis Rent A Car Sys.***, *supra*). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Cebron v Tuncoglu***, 109 AD3d 631, 970 NYS2d 826 [2d Dept 2013]). In order to qualify under the 90/180-days category, an injury must be "medically determined" such that the condition must be substantiated by a physician and the condition must be causally related to the accident (*see* ***Damas v Valdes,*** 84 AD3d 87, 93, 921 NYS2d 114 [2d Dept 2011]).

On a motion for summary judgment, the defendant has the initial burden of making a *prima facie* showing, through the submission of evidence in admissible form, that the injured plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) (*see* ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Akhtar v Santos***, 57 AD3d 593, 869 NYS2d 220 [2d Dept 2008]). A defendant can establish that a plaintiff's injuries are not serious within the meaning of Insurance Law § 5102 (d) "by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (***Nunez v Teel,*** 162 AD3d 1058, 75 NYS3d 541 [2d Dept 2018]; *see also* ***Brite v Miller***, 82 AD3d 811, 918 NYS2d 349 [2d Dept 2011]; ***Damas v Valdes***, 84 AD3d 87, 921 NYS2d 114 [2d Dept 2011], *citing* ***Pagano v Kingsbury***, 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]; ***Moore v Edison***, 25 AD3d 672, 811 NYS2d 724 [2d Dept 2006]; ***Farozes v Kamran***, 22 AD3d 458,

802NYS2d 706 [2d Dept 2005]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant's own expert witnesses, "those findings must be in admissible form, such as, affidavits and affirmations, and not unsworn reports" to demonstrate entitlement to judgment as a matter of law (***Pagano v Kingsbury***, 182 AD2d 268, 270, 587 NYS2d 692 [2d Dept1992]). A defendant may also establish entitlement to summary judgment using the plaintiff's deposition testimony and unsworn medical reports and records prepared by the plaintiff's own physicians (*see* ***Uribe v Jimenez***, 133 AD3d 844, 20 NYS3d 555 [2d Dept 2015]; ***Elshaarawy v U-Haul Co. of Miss.***, 72 AD3d 878, 900 NYS2d 321 [2d Dept 2010]; ***Fragale v Geiger***, 288 AD2d 431, 733 NYS2d 901 [2d Dept 2001]; ***Grossman v Wright***, 268 AD2d 79, 707 NYS2d 233 [2000]; ***Vignola v Varrichio***, 243 AD2d 464, 662 NYS2d 831 [2d Dept 1997]; ***Torres v Micheletti***, 208 AD2d 519,616 NYS2d 1006 [2d Dept 1994]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316 [1985]; ***Boone v New York City Tr. Auth.***, 263 AD2d 463, 692 NYS2d 731 [2d Dept 1999]; ***Burns v Stranger***, 31 AD3d 360, 819 NYS2d 60 [2d Dept 2006]; ***Rich-Wing v Baboolal***, 18 AD3d 726, 795 NYS2d 706 [2d Dept 2005]). Once defendant has met this burden, plaintiff must then submit objective and admissible proof of the nature and degree of the alleged injury in order to meet the threshold of the statutory standard for "serious injury" under New York's No-Fault Insurance Law (*see* ***Dufel v Green***, 84 NY2d 795, 622 NYS2d 900 [1995]; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Beltran v Powow Limo, Inc.***, 98 AD3d 1070, 951 NYS2d 231 [2d Dept 2012]; ***Tornabene v Pawlewski***, 305 AD2d 1025, 758 NYS2d 593 [2d Dept 2003]; ***Pagano v Kingsbury***,182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]).

Here, defendant has made a prima facie showing that the plaintiff did not sustain a serious injury within the meaning of section 5102 (d) of the Insurance Law through the affirmed report of Dr. Weiss and plaintiff's deposition testimony (*see* ***Toure v Avis Rent A Car Sys.,*** 98 NY2d 345, 746 NYS2d 865 [2002]; ***Gaddy v Eyler,*** 79 NY2d 955, 582 NYS2d 990 [1992]; ***Radoncic v Faulk,*** 170 AD3d 1058, 96 NYS3d 352 [2d Dept 2019]; ***Sierra v Gonzalez First Limo***, 71 AD3d 864, 895 NYS2d 863 [2d Dept 2010]; ***Staff v Yshua***, 59 AD3d 614, 874 NYS2d 180 [2d Dept 2009]; ***Kelly v Rehfeld,*** 26 AD3d 469, 809 NYS2d 581 [2d Dept 2006]; ***Kearse v New York City Tr. Auth.,*** 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]). The IME report of Dr. Weiss indicates that all range of motion measurements conducted on plaintiff's cervical, thoracic and lumbar spines were normal and these findings were based on objective measurements. Dr. Weiss opines that plaintiff has no disability and any alleged injuries sustained as a result of the accident have been fully resolved. Further, plaintiff's testimony establishes that she did not sustain an injury

under the 90/180 category. Plaintiff testified that prior to the accident she did housework, played soccer with her nephew, and engaged with her children. Since the accident, plaintiff alleges that she can no longer play soccer with her nephew, she cannot bend down or pick up anything heavy, is unable to go "with the children back and forth" or go running, and has difficulty making tortillas. In this regard, certain of plaintiff's usual activities were slightly curtailed as a result of the accident, which is insufficient to establish a serious injury (*see e.g.* ***Licari v Elliott,*** 57 NY2d 230, 238, 455 NYS2d 570 [1982]; ***Heesook Choi v Mendez,*** 161 AD3d 1054, 77 NYS3d 266 [2d Dept 2018]; ***Small v City of New York,*** 148 AD3d 959, 49 NYS3d 176 [2d Dept 2017]; ***John v Linden,*** 124 AD3d 598, 1 NYS3d 274 [2d Dept 2015]; ***Marin v Ieni,*** 108 AD3d 165, 969 NYS2d 165 [2d Dept 2013]; ***Karpinos v Cora***, 89 AD3d 994, 933 NYS2d 383 [2d Dept 2011]; ***Kolodziej v Savarese***. 88 AD3d 851, 931 NYS2d 509 [2d Dept 2011]; ***Bamundo v Fiero***, 88 AD3d 831, 931 NYS2d 239 [2d Dept 2011]; ***Omar v Goodman,*** 295 AD2d 413, 743 NYS2d 568 [2d Dept 2002]).

Based upon the above evidence submitted, defendants established that plaintiff did not sustain a permanent consequential limitation of use of a body organ or member or significant limitation of use of a body function or system, and that she was not prevented from performing substantially all of her usual and customary daily activities for 90 of the first 180 days following the accident within the meaning of Insurance Law § 5102 (d) (*see* ***Pryce v Nelson***, 124 AD3d 859, 2 NYS3d 214 [2d Dept 2015]; ***Strenk v Rodas***, 111 AD3d 920, 976 NYS2d 151 [2d Dept 2013] ***Beltran v Powow Limo, Inc.***, 98 AD3d 1070, 951 NYS2d 231 [2d Dept 2012]).

Having made a prima facie showing that plaintiff did not sustain a serious injury under section 5102 (d) of the Insurance Law, the burden therefore shifted to plaintiff to raise a triable issue of fact (*see* ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]). Plaintiff's proof establishing serious injury, medical or otherwise, must not only be admissible, it must be objective as well (*see* ***Toure v Avis Rent A Car Systems, Inc.,*** 98 NY2d 345, 746 NYS2d 865 [2002]; ***Andrews v Slimbaugh,*** 238 AD2d 866, 656 NYS2d 561 [2d Dept 1997]). A plaintiff claiming injury within the "limitation of use" categories must substantiate his or her complaints of pain with objective medical evidence showing the extent or degree of the limitation of movement caused by the injury and its duration (*see* ***Schilling v Labrador***, 136 AD3d 884, 25 NYS3d 331 [2d Dept 2016]; ***Rovelo v Volcy***, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]; ***McLoud v Reyes***, 82 AD3d 848, 919 NYS2d 32 [2d Dept 2011]; ***Ferraro v Ridge Car Serv***, 49 AD3d 498, 854 NYS2d 408 [2d Dept 2008]; ***Mejia v DeRose***, 35 AD3d 407, 825 NYS2d 772 [2d Dept 2006]; ***Laruffa v Yui Ming Lau***, 32 AD3d 996, 821 NYS2d 642 [2d Dept 2006]). To prove significant physical limitation, a plaintiff must present either objective quantitative evidence of the loss of range of motion and its duration based on a recent examination of the

plaintiff or a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (*see* ***Perl v Meher***, 18 NY3d 208, 936 NYS2d 655 [2011]; ***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2002]; ***Rovelo v Volcy***, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]; *see also* ***McEachin v City of New York***, 137 AD3d 753, 756, 25 NYS3d 672, 675 [2d Dept 2016]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Cebron v Tuncoglu***, 109 AD3d 631, 970 NYS2d 826 [2d Dept 2013]). Proof of a herniated or bulging disc, without additional objective medical evidence establishing that the accident resulted in significant physical limitations, is not sufficient to establish a "serious injury" within the meaning of the statute (*see* ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]; ***Hayes v Vasilios***, 96 AD3d 1010, 947 NYS2d 550 [2d Dept 2012]; ***Scheker v Brown***, 91 AD3d 751, 936 NYS2d 283 [2d Dept 2012]; ***Stevens v Sampson***, 72 AD3d 793, 898 NYS2d 657 [2d Dept 2010]***Catalano v Kopmann***, 73 AD3d 963, 900 NYS2d 759 [2d Dept 2010]; ***Casimir v Bailey***, 70 AD3d 994, 896 NYS2d 122 [2d Dept 2010]; ***Keith v Duval***, 71 AD3d 1093, 898 NYS2d 184 [2d Dept 2010]). Sprains and strains are not serious injuries within the meaning of Insurance Law § 5102 (d) (*see* ***Rabolt v Park***, 50 AD3d 995, 858 NYS2d 197 [2d Dept 2008]; ***Washington v Cross***, 48 AD3d 457, 849 NYS2d 784 [2d Dept 2008]; ***Maenza v Letkajornsook***, 172 AD2d 500, 567 NYS2d 850 [2d Dept 1991]).

A plaintiff seeking to recover damages under the 90/180 category of serious injury must prove the injury is "medically determined," meaning that the condition must be substantiated by a physician, and the condition must be causally related to the accident (*see* ***Pryce v Nelson***, 124 AD3d 859, 2 NYS3d 214 [2d Dept 2015]; ***Strenk v Rodas***, 111 AD3d 920, 976 NYS2d 151 [2d Dept 2013]; ***Beltran v Powow Limo, Inc.***, *supra*). A plaintiff must demonstrate that his or her usual activities were curtailed to a "great extent rather than some slight curtailment" (*see* ***Licari v Elliott***, 57 NY2d 230, 236, 455 NYS2d 570 [1982]). Subjective proof, such as complaints of pain, without more, are insufficient to defeat summary judgment and do not establish the existence of a serious injury (***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2002]). Furthermore, a plaintiff claiming serious injury who ceases treatment after the accident must offer a reasonable explanation for having done so (***Pommells v Perez***, 4 NY3d 566, 574,797 NYS2d 380 [2005]; *see also* ***Vasquez v John Doe #1***, 73 AD3d 1033, 905 NYS2d 188 [2d Dept 2010]; ***Rivera v Bushwick Ridgewood Props., Inc.***, 63 AD3d 712, 880 NYS2d 149 [2d Dept 2009]). Plaintiffs cannot establish a serious injury by reliance upon unsworn medical reports (*see* ***Malave v Basikov,*** 45 AD3d 539 [2d Dept 2007]) or unsworn medical records (*see* ***Sutter v Yener,*** 65 AD3d 625 [2d Dept 2009]) and a plaintiff's

physician cannot rely upon unsworn medical reports in rendering his or her opinion (*see* ***Kreimerman v Stunis,*** 74 AD3d 753 [2d Dept 2010]; ***Mobley v Riportella,*** 241 AD2d 443, 660 NYS2d 57 [2d Dept 1997]).

In opposition, plaintiff submits the affirmed report of Dr. Neal H. Frauwirth dated March 19, 2020. The report indicates that plaintiff initially presented to Dr. Frauwirth on September 26, 2018, over a year and five months after the subject accident. Prior to March 19, 2020, plaintiff presented to Dr. Frauwirth on November 21, 2018, a year and three months prior to the most recent examination date of March 19, 2020. It is noted that the March 19, 2020 examination by Dr. Frauwirth was conducted after plaintiff was served with defendants' motions for summary judgment. Being that Dr. Frauwirth did not examine plaintiff contemporaneously with the accident, and instead he relied upon the unaffirmed findings of plaintiff's interpreting radiologists, certain of the statements made by Dr. Frauwirth are inadmissible. Specifically, any opinions as to causation would be inadmissible as would the opinions based upon the MRI reports (*see* ***Kreimerman v Stunis,*** 74 AD3d 753 [2d Dept 2010]). In addition, Dr. Frauwirth opines as to the plaintiff's range of motion limitations of her cervical and lumbar spines. However, Dr. Frauwirth fails to disclose the objective test used to measure plaintiff's range of motion. Moreover, Dr. Frauwirth does not identify the authoritative guideline for the standard of normal ranges as compared to those of plaintiff, as required (*see* ***Tinyanoff v Kuna,*** 98 AD3d 501, 949 NYS2d 203 [2d Dept 2012]; ***Quintana v Arena Transport, Inc.,*** 89 Ad3d 1002, 933 NYS2d 379 [2d Dept 2011]). Thus, the opinions rendered by Dr. Frauwirth regarding the plaintiff's range of motion are speculative and not adequately quantified or qualified on an objective basis (*see* ***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2002]; ***Terranova v Acosta,*** 136 AD3d 710, 24 NYS3d 697 [2d Dept 2016]). Moreover, the report of Dr. Frauwirth fails to address plaintiff's gap in treatment for sixteen months, or more appropriately, her cessation of treatment, as Dr. Frauwirth's report was prepared after plaintiff was served with the summary judgment motions. This unexplained lengthy gap in treatment fails to raise an issue of fact (*see* ***Farozes v Kamran,*** 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]; ***Hernandez v Taub,*** 19 AD3d 368, 796 NYS2d 169 [2d Dept 2005]). Given the serous deficiencies in the report of Dr. Frauwirth, plaintiff has failed to produce a recent examination to substantiate her subjective complaints of pain and alleged limitations of movement (*see* ***Perl v Meher***, 18 NY3d 208, 936 NYS2d 655 [2011]; ***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2002]; ***Rovelo v Volcy***, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]; *see also* ***McEachin v City of New York***, 137 AD3d 753, 756, 25 NYS3d 672, 675 [2d Dept 2016]; ***Resek v Morreale,*** 74 AD3d 1043, 903 NYS2d 120 [2d Dept 2010]).

The Court further notes that the unsworn and unaffirmed reports from Southside Hospital and Long Island Spine Specialists, P.C. are inadmissible and further do not present objective qualitative evidence of plaintiff's alleged restrictions (*see* ***Nemchyonok v Ying***, 2 AD 3d 421, 767 NYS 2d 811 [2d Dept 2003]); ***Pajda v Pedone***, 303 AD2d 729, 757 NYS 2d 452 [2d Dept 2003]); ***Jimenez v Kambli***, 272 AD2d 581, 708 NYS 2d 460 [2d Dept 2000]). As well, the unsworn and unaffirmed reports from Community Chiropractic Care and Dr. Jasjit Singh are inadmissible (*see* CPLR 2106; CPLR 3122-a; ***Puerto v Omholt***, 17 AD3d 650, 794 NYS2d 117 [2d Dept 2005]; ***Gill v O.N.S. Trucking***, 239 AD2d 463, 657 NYS2d 452 [2d Dept 1997]) and the affirmation of Dr. Steven Winter, radiologist, does not causally relate his findings with the subject accident or plaintiff's subjective complaints of pain.[1] As such, the plaintiff has failed to produce reliable evidence necessary to defeat summary judgment (*see* ***Pommells v Perez,*** 4 NY3d 566, 797 NYS2d 380 [2005]: ***Toure v Avis Rent A Car Systems, Inc.,*** 98 NY2d 345, 746 NYS2d 865 [2002]; ***Nicholson v Kwarteng,*** 180 AD3d 695, 115 NYS3d 707 [2d Dept 2020]; ***Radoncic v Faulk,*** *supra*; ***Fiorucci-Melosevich v Harris,*** 166 AD3d 581, 87 NYS3d 224 [2d Dept 2018]; *see also* ***Schilling v Labrador***, 136 AD3d 884, 25 NYS3d 331 [2d Dept 2016]; ***Durand v Urick,*** 131 AD3d 920, 15 NYS3d 475 [2d Dept 2015]; ***Rovelo v Volcy***, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]; ***McLoud v Reyes***, 82 AD3d 848, 919 NYS2d 32 [2d Dept 2011]; ***Ferraro v Ridge Car Serv***, 49 AD3d 498, 854 NYS2d 408 [2d Dept 2008]; ***Mejia v DeRose***, 35 AD3d 407, 825 NYS2d 772 [2d Dept 2006]; ***Laruffa v Yui Ming Lau***, 32 AD3d 996, 821 NYS2d 642 [2d Dept 2006]).

As to the plaintiff's affidavit, certain of the statements made therein are inconsistent with her prior deposition testimony and such statements will be disregarded by the Court (*see* ***Hartman v Mountain Valley Brew Pub, Inc.,*** 301 AD2d 570, 754 NYS2d 31[2d Dept 2003]; ***Prunty v Keltie's Bum Steer,*** 163 AD2d 595, 559 NYS2d 354 [2d Dept 1990]). Nevertheless, self-serving affidavits will not be considered by the Court and cannot raise a triable issue of fact sufficient to defeat summary judgment (*see* ***Lupinsky v Windham Construction Corp.,*** 293 AD2d 317, 739 NYS2d 717 [1st Dept 2002]). Moreover, without objective medical evidence, plaintiff's affidavit, by itself, is insufficient to raise a triable issue of fact regarding the 90/180 category of serious injury (*see* ***Pryce v Nelson***, 124 AD3d

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[1] A plaintiff is entitled to rely upon the unsworn and unaffirmed medical reports or records of his or her doctors that a defendant submits in support of his or her motion (*see* ***Zelman v Mauro,*** 81 AD3d 936, 917 NYS2d 581[2d Dept 2011]). In the instant matter, however, such records and reports were not relied upon by defendants' examining doctor in support of their motions for summary judgment and, as such, they are inadmissible (*see e.g.* ***Cebron v Tuncoglu***, 109 AD3d 631, 633, 970 NYS2d 826 [2d Dept 2013]).

859, 2 NYS3d 214 [2d Dept 2015]; ***Strenk v Rodas***, 111 AD3d 920, 976 NYS2d 151 [2d Dept 2013]; ***Beltran v Powow Limo, Inc.***, 98 AD3d 1070, 951 NYS2d 231 [2d Dept 2012]). Subjective complaints do not qualify as a serious injury (*see* ***Licari v Elliot,*** 57 NY2d 230, 455 NYS2d 570 [1982]). Competent objective medical evidence detailing the injury and the limitations caused by the injury is required but has not been provided herein (*see* ***Kaplan v Vanderhans,*** 26 AD3d 468, 809 NYS2d 582 [2d Dept 2006]; ***Ponce v Magliulo,*** 10 AD3d 644, 781 NYS2d 703 [2d Dept 2004]). The Court has considered plaintiff's remaining arguments and finds that they lack merit.

Accordingly, the motions by defendants Arnelge A. Iglesias and Asmel Iglesias and defendants Victor Garcia and Diana Garcia-Diaz for an Order pursuant to CPLR 3212, granting summary judgment dismissing plaintiff's complaint on the grounds that plaintiff did not sustain a serious injury under Insurance Law § 5102 (d) are **GRANTED**.

The foregoing constitutes the decision and **ORDER** of the Court.

Dated: December 7, 2020

HON. DENISE F. MOLIA, A.J.S.C.