SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

PRESENT: Donna-Marie E. Golia, JSC Part 21

YOUNG S. SHIN,

Plaintiff,

v

MOJEEB AHMED and AFTAB AHMED,

Defendants.

Index No. 700847/2019
Motion Date: 8/2/2021
Motion Seq. No.: 001

DECISION & ORDER

The following electronically filed papers numbered EF12 to EF21 and EF24 to EF30 read on this motion by defendants for summary judgment pursuant to New York Civil Practice Law and Rules ("CPLR") 3212:

	Papers Numbered
Notice of Motion, Statement of Material Fact, Affirmation, Exhibits, Memorandum of Law, Affidavit.....	EF12 – EF21
Affirmation in Opposition, Exhibits.....	EF24 – EF28
Affirmation in Reply, Affidavit.....	EF29 – EF30

Defendants Mojeeb Ahmed and Aftab Ahmed ("defendants") move, pursuant to CPLR 3212, for summary judgment dismissing the complaint on the ground that plaintiff failed to sustain a "serious injury" under New York Insurance Law ("NYIL") § 5102(d). Plaintiff Young S. Shin ("plaintiff") opposes the motion. Upon the papers submitted, defendants' motion is granted in part and denied in part, as discussed more fully below.

Plaintiff commenced this action for personal injuries she sustained as a result of an alleged motor vehicle accident that occurred on October 28, 2018 at or near the intersection of Booth Street and 65th Road in Queens, New York. Plaintiff alleges injuries to her cervical, thoracic and lumbar spine, bilateral shoulders, bilateral knees and pelvis.

In her bill of particulars, plaintiff avers that she satisfies the following serious injury categories under NYIL § 5102(d): 1) significant disfigurement, 2) fracture, 3) a permanent loss of use of a body organ, member, function or system, 4) a permanent consequential limitation of use of a body function or system, 5) a significant limitation of use of a body function or system and 6) a medically determined injury or impairment preventing her from performing all of the material acts substantiating her usual and customary daily activity for not less than 90 days of the 180 days following the alleged accident ("90/180 category").

In their motion, with regard to plaintiff's claim of a serious injury under the 90/180 category, defendants assert that plaintiff has failed to satisfy the 90/180 category of NYIL § 5102(d). Specifically, defendants aver that plaintiff testified that she was not employed at the time of the alleged accident and did not undergo surgery as a result of the alleged accident. Defendants also note that plaintiff testified that there are no activities that she could no longer do as a result of the alleged accident.

Additionally, with regard to plaintiff's claim of a serious injury under the permanent loss of use of a body organ, member, function or system, the permanent consequential limitation of use of a body function or system and the significant limitation of use of a body function or system categories of NYIL § 5102(d), defendants annex the medical report of Dr. Jessica F. Berkowitz ("Dr. Berkowitz"), a radiologist, who examined the MRI films of plaintiff's cervical and lumbar spine and left shoulder. Defendants also annex the medical report of Dr. Dana A. Mannor ("Dr. Mannor"), an orthopedist who conducted an independent medical examination of plaintiff on February 4, 2021 and determined that plaintiff had normal ranges of motion.

In opposition, plaintiff argues that while Dr. Mannor examined her on February 4, 2021, Dr. Mannor never reviewed her medical records. Plaintiff also asserts that Dr. Mannor's findings are contradicted by those of her treating physician, Dr. Sang Lee ("Dr. Lee"), thereby raising a question of fact as to whether she suffered range of motion limitations as a result of the alleged accident.

Additionally, plaintiff argues that she sustained a serious injury under the 90/180 category since her neck and back complaints affect her daily life. Plaintiff also notes that she treated with Dr. Lee for complaints to her neck, back and left shoulder for six months and received chiropractic and acupuncture treatment three-to-four times a week.

In support of her opposition, plaintiff annexes Dr. Lee's medical records as well as the medical reports of Dr. Brijesh V. Reddy ("Dr. Reddy") and Dr. Daniel Schlusselberg ("Dr. Schlusselberg"), radiologists who performed MRIs on her cervical and lumbar spine and left shoulder. Plaintiff contends that the MRIs confirm her neck, back and left shoulder injuries.

In reply, defendants argue that contrary to plaintiff's assertion, Dr. Mannor was not required to review her medical records before forming her opinion. Defendants also contend that plaintiff's radiologists failed to causally connect the etiologies noted in her MRI films to the alleged accident. Similarly, defendants aver that Dr. Lee's May 30, 2021 report is devoid of evidentiary value as Dr. Lee failed to quantify any loss or limitation in the range of motion to plaintiff's left shoulder and failed to identify any objective tests he used to measure any range of motion deficits. Likewise, defendants assert that Dr. Lee failed to quantify any loss or limitation in the range of motion to plaintiff's left shoulder during her initial visit on November 14, 2018 despite noting that her left shoulder had "limited range of motion."

Additionally, defendants argue that plaintiff's experts did not address or refute Dr. Berkowitz's finding that plaintiff's cervical spine MRI showed multi-level disc bulges and hypertrophic joint changes, which were chronic and degenerative in nature.

DISCUSSION

As a threshold matter in personal injury actions involving an automobile accident, a plaintiff is "required to plead and prove that he or she sustained a 'serious injury' as defined in the No-Fault Law" (Zecca v Riccardelli, 293 AD2d 31, 33 [2d Dept 2002] citing Licari v Elliott, 57 NY2d 230, 236 [1982]; NYIL § 5102(d)).

Under NYIL § 5102(d), a "serious injury" is defined as one which results in, *inter alia*, significant disfigurement, 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" (see, Oberly v Bangs Ambulance Inc., 96 NY2d 295, 298 [2d Dept 2001]).

As the "'legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries,'" courts "have required objective proof of a plaintiff's injury in order to satisfy the statutory serious injury threshold" (Toure v Avis Rent A Car Sys., Inc., 98 NY2d 345, 350 [2002] [citations omitted]). Therefore, a "defendant has the initial burden of making a *prima facie* showing that the injured plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d)" (Akhtar v Santos, 57 AD3d 593 [2d Dept 2008]; Farozes v Kamran, 22 AD3d 458, 458 [2d Dept 2005]). In doing so, where a defendant "relies solely on findings of the defendant's own medical witnesses, those findings must be in admissible form, i.e., affidavits or affirmations, and not unsworn reports, in order to make a '*prima facie* showing of entitlement to judgment as a matter of law'" (Pagano v Kingsbury, 182 AD2d 268, 270 [2d Dept 1992] [citation omitted]).

Once defendant has made a *prima facie* showing, the burden shifts to "the plaintiff to come forward with sufficient evidence that [he or] she sustained a serious injury" (Lisa v Pastor, 262 AD2d 368 [2d Dept 1999]). Similarly, "a plaintiff's opposition, to the extent that it relies solely on the findings of the plaintiff's own medical witnesses, must be in the form of affidavits or affirmations, unless an acceptable excuse for failure to comply with this requirement is furnished" (Pagano, 182 AD2d at 270, supra).

I. Significant Disfigurement

Under NYIL § 5102(d), a significant disfigurement is established where a plaintiff has suffered an injury that "a reasonable person" would regard as "unattractive, objectionable, or as the object of pity and scorn" (Maldonado v Piccirilli, 70 AD3d 785, 786 [2d Dept 2010]). The defendant bears "the initial burden of establishing as a matter

of law" that the plaintiff did not suffer a significant disfigurement (see, Borquist v Hyde Park Cent. Sch. Dist., 107 AD3d 926 [2d Dept 2013]).

Here, defendants have failed to establish, *prima facie*, that plaintiff did not sustain a significant disfigurement as a result of the alleged accident (see, id.). Indeed, in their moving papers, defendants failed to address plaintiff's claim that she sustained a significant disfigurement, let alone proffer any argument, evidence or authority under which to satisfy their initial *prima facie* burden (see, Ballard v Cunneen, 76 AD3d 1037, 1038 [2d Dept 2010]; Perez v Hilarion, 36 AD3d 536, 537 [1st Dept 2007]; Onder v Kaminski, 303 AD2d 665, 666 [2d Dept 2003]). As defendants have failed to establish their *prima facie* entitlement to judgment as a matter of law as to plaintiff's claim of a significant disfigurement, the Court "need not consider the sufficiency" of plaintiff's opposition papers (see, Onder, 303 AD2d at 666, supra; Ballard, 76 AD3d at 1038, supra). Accordingly, the branch of defendants' motion seeking summary judgment dismissing plaintiff's claim of a significant disfigurement under NYIL § 5102(d) is denied (see, id.).

II. Fracture

As defendants have similarly failed to address plaintiff's claim of a fracture, let alone proffer any argument, evidence or authority under which to satisfy their initial *prima facie* burden (see, Knight v James, 183 AD3d 709, 710 [2d Dept 2020]; Alexander v Gordon, 95 AD3d 1245, 1246 [2d Dept 2012]), the Court need not consider the sufficiency of plaintiff's opposition papers (see, id.; Brourman v Gorokhovsky, 89 AD3d 660 [2d Dept 2011]). Accordingly, the branch of defendants' motion seeking summary judgment dismissing plaintiff's claim of a fracture under NYIL § 5102(d) is denied (see, id.).

III. A Permanent Loss of Use of a Body Organ, Member, Function or System

Defendants argue that plaintiff has not suffered a permanent loss of any body part, member or system as a result of the alleged accident to qualify as a serious injury under NYIL § 5102(d).

To qualify as a serious injury under the permanent loss category of NYIL § 5102(d), a plaintiff must submit evidence to establish "a total loss of use" of the injured body part (Oberly, 96 NY2d at 296, supra; Nesci v Romanelli, 74 AD3d 765, 766 [2d Dept 2010]; Albury v O'Reilly, 70 AD3d 612 [2d Dept 2010]). Here, defendants have established, *prima facie*, that plaintiff did not suffer a permanent loss of any part of her body. Indeed, in her medical report, Dr. Mannor opined that plaintiff "can perform her activities of daily living as she was doing prior to the accident" and that there is "no evidence of orthopedic disability, permanency, or residuals" (see, Def. Exh. F).

In opposition, plaintiff has not submitted any evidence to establish a "total loss of use" of any part of her body to rebut defendants' *prima facie* showing (see, id.; Nesci, 74 AD3d at 766–67, supra; Amato v Fast Repair Inc., 42 AD3d 477, 477 [2d Dept 2007]; Crespo v Kramer, 295 AD2d 467, 468 [2d Dept 2002]). Indeed, as plaintiff failed to raise any argument in opposition to this branch of defendants' motion, the branch of

defendants' motion seeking summary judgment dismissing plaintiff's claim of permanent loss of a body part, member or system under NYIL § 5102(d) is granted (see, id.).

IV. Permanent Consequential Limitation of Use of a Body Organ or Member

Defendants argue that plaintiff's injuries do not qualify as a serious injury under the permanent consequential limitation of use of a body organ or member category of NYIL § 5102(d).

To establish a serious injury under the permanent consequential limitation category of NYIL § 5102(d), plaintiff's medical evidence "must contain objective, quantitative evidence with respect to diminished range of motion or a qualitative assessment comparing plaintiff's present limitations to the normal function, purpose and use of the affected body organ, member, function or system" (John v Engel, 2 AD3d 1027, 1029 [3d Dept 2003] citing Toure, 98 NY2d at 353, supra). Therefore, a defendant is entitled to summary judgment where "plaintiff's evidence is limited to conclusory assertions tailored to meet statutory requirements" (Lopez v Senatore, 65 NY2d 1017, 1019 [1985]; see also, Kivelowitz v Calia, 43 AD3d 1111 [2d Dept 2007]; Smith v Askew, 264 AD2d 834, 834 [2d Dept 1999]).

Here, defendants have made a *prima facie* showing that plaintiff did not suffer a permanent consequential limitation of use to her cervical, thoracic or lumbar spine, bilateral shoulders or bilateral knees under NYIL § 5102(d). Indeed, defendants submitted the affirmed medical report of their examining orthopedist, Dr. Mannor, who examined plaintiff's range of motion using a goniometer on February 4, 2021 and found no limitations or deficits in her cervical, thoracic or lumbar spine, bilateral shoulders or bilateral knees (see, Def. Exh. F; Canner v Diamond, 187 AD3d 1127 [2d Dept 2020]; Staff v Yshua, 59 AD3d 614 [2d Dept 2009]). Dr. Mannor also determined that the "sprain/strain[s]" to plaintiff's cervical, lumbar and thoracic spine, bilateral shoulders and bilateral knees had "resolved" and that there was "no evidence of orthopedic disability, permanency, or residuals" (see, id.; Ramirez v L-T. & L. Enter., Inc., 189 AD3d 1636, 1638 [2d Dept 2020]; Cole v Brandofino, 280 AD2d 446, 447 [2d Dept 2001]; Hayden v Plotkin, 278 AD2d 455, 455 [2d Dept 2000]). To the extent that plaintiff argues that Dr. Mannor did not review her medical records, such argument is academic as Dr. Mannor objectively measured plaintiff's range of motion and found no deficits or limitations to her cervical, lumbar or thoracic spine, bilateral shoulders or bilateral knees (see, Kearse v New York City Transit Auth., 16 AD3d 45, 49–50 [2d Dept 2005]).

Moreover, defendants' submission of Dr. Berkowitz's medical report further buttresses their *prima facie* showing that plaintiff did not suffer a permanent consequential limitation of use to her cervical, thoracic or lumbar spine, bilateral shoulders or bilateral knees under NYIL § 5102(d) (see, Def. Exh. E). Indeed, Dr. Berkowitz reviewed the MRIs of plaintiff's left shoulder performed on November 12, 2018, cervical spine performed on December 6, 2018 and lumbar spine performed on January 9, 2019 and determined that the MRIs revealed "no causal relationship between [plaintiff's] alleged accident and the findings on the MRI examination[s]" (see, id.; Yi Di Chen v Falikman, 186 AD3d 1295, 1296 [2d Dept 2020]; Greenberg v Macagnone, 126 AD3d 937, 938 [2d Dept 2015];

Grossman v Wright, 268 AD2d 79, 85 [2d Dept 2000]). Dr. Berkowitz further opined that the MRI of plaintiff's lumbar spine and left shoulder were "unremarkable" and that the "[d]isc bulges and hypertrophic facet joint changes" seen on plaintiff's cervical spine MRI were "chronic and degenerative in origin" (see, Wettstein v Tucker, 178 AD3d 1121, 1122 [2d Dept 2019]; Jilani v Palmer, 83 AD3d 786, 787 [2d Dept 2011]).

In response to defendants' *prima facie* showing, plaintiff failed to raise a triable issue of fact with respect to her cervical, thoracic and lumbar spine, bilateral shoulders and bilateral knees. While plaintiff submits Dr. Lee's medical report documenting his evaluations on November 14, 2018 and June 30, 2021, Dr. Lee's report does not indicate whether he performed any objective range of motion tests on plaintiff's cervical, thoracic or lumbar spine, bilateral shoulders or bilateral knees to determine the extent or degree of physical limitations and their duration to these body parts (see, Pl. Exh. D; Saunders v Mian, 176 AD3d 994, 995 [2d Dept 2019]; McKinney v Lane, 288 AD2d 274, 275 [2d Dept 2001]; Pramnieks v Bush, 272 AD2d 596, 596 [2d Dept 2000]). For instance, Dr. Lee does not mention whether he used a device such as a goniometer or an inclinometer to measure the extent or degree of physical limitation and their duration or state any basis for his comparison (i.e. whether he compared plaintiff's range to the normal active range of motion based on the American Medical Association's "Guidelines to the Evaluation of Permanent Impairment"). Therefore, in the absence of any showing that Dr. Lee performed any objective range of motion test on plaintiff's cervical, thoracic or lumbar spine, bilateral shoulders or bilateral knees, Dr. Lee's opinions that "all findings were consistent with the type of accident described by Ms, [sic] Shin which occurred on 10-28-18" and that plaintiff's "physical injuries were causally related to this motor vehicle accident" are merely speculative and conclusory (see, Pl. Exh. D; Lisa, 262 AD2d at 368, supra; Besso v DeMaggio, 56 AD3d 596, 597 [2d Dept 2008]).

Furthermore, to the extent that Dr. Lee performed a nerve conduction study and EMG on January 25, 2019, more than two years prior to defendants' motion for summary judgment, such examination is insufficient to raise a triable issue of fact as to whether plaintiff sustained a serious injury under the permanent consequential limitation category of NYIL § 5102(d) since the findings were not based on a recent examination (see, Pl. Exh. D; Deutsch v Tenempaguay, 48 AD3d 614, 615 [2d Dept 2008]; Mauchy v Nieves, 19 AD3d 560, 561 [2d Dept 2005]; Mejia, 35 AD3d at 407, supra). Similarly, Dr. Reddy's MRI of plaintiff's lumbar spine on January 9, 2019 and Dr. Schlusselberg's MRI of plaintiff's cervical spine and left shoulder on November 21, 2018 and December 6, 2018, respectively, are insufficient to raise a triable issue of fact since they were not based on a recent examination or radiological study of plaintiff (see, id.; Keena v Trappen, 294 AD2d 405, 406 [2d Dept 2002]; Pl. Exh. B, C). Fatally, in their reports, neither Dr. Reddy nor Dr. Schlusselberg established any causation for their findings or form any medical opinion that the purported findings were in any way causally related to the alleged accident (see, Nociforo v Penna, 42 AD3d 514, 515 [2d Dept 2007]; Freese v Maffetone, 302 AD2d 490, 491 [2d Dept 2003]; Bonner v Hill, 302 AD2d 544, 545 [2d Dept 2003]).

Therefore, without any objective testing demonstrating that plaintiff has a permanent consequential limitation to her cervical, thoracic or lumbar spine, bilateral shoulders or bilateral knees or that such injuries are causally related to the alleged

accident, plaintiff cannot rebut Dr. Mannor's opinion that the "sprain/strain[s]" to these body parts had "resolved" or Dr. Berkowitz's conclusion that the findings on her cervical spine MRI were "chronic and degenerative in origin" (see, Def. Exh. D; Deutsch, 48 AD3d at 615, supra; Pommells v Perez, 4 NY3d 566, 579 [2005]; Khan v Finchler, 33 AD3d 966, 966–67 [2d Dept 2006]). Accordingly, as plaintiff has failed to provide competent medical evidence to rebut defendants' *prima facie* showing, the branch of defendants' motion for summary judgment dismissing plaintiff's claim of a permanent consequential limitation to her cervical, lumbar and thoracic spine, bilateral shoulders and bilateral knees is granted (see, Deutsch, 48 AD3d at 615, supra; Mejia, 35 AD3d at 408, supra).

However, defendants have failed to establish, *prima facie*, that plaintiff did not sustain a permanent consequential limitation of use to her pelvis under NYIL § 5102(d). Indeed, defendants do not submit any evidence that their examining physicians performed any objective range of motion tests on plaintiff's pelvis to determine the extent or degree of physical limitation and its duration to plaintiff's pelvis (see, Cho v Demelo, 175 AD3d 1235, 1237 [2d Dept 2019]; Grisales v City of New York, 85 AD3d 964, 965 [2d Dept 2011]).

As defendants have failed to establish, *prima facie*, that plaintiff did not sustain a permanent consequential limitation of use to her pelvis under NYIL § 5102(d), the Court need not determine whether plaintiff's opposition papers are sufficient to raise a triable issue of fact (see, id.; Kang v Guillen, 151 AD3d 827, 828 [2d Dept 2017]). Accordingly, the branch of defendants' motion seeking summary judgment dismissing plaintiff's claim of permanent consequential limitation of use to her pelvis under NYIL § 5102(d) is denied.

V. Significant Limitation of Use of a Body Function or System

Defendants argue that plaintiff's injuries do not qualify as a serious injury under the significant limitation of use of a body function or system category of NYIL § 5102(d).

Under the significant limitation category of NYIL § 5102(d), "any assessment of the 'significance' of a bodily limitation necessarily requires consideration not only of the extent or degree of limitation, but of its duration as well, notwithstanding the fact that Insurance Law § 5102(d) does not expressly set forth any temporal requirement for a 'significant limitation'" (Griffiths v Munoz, 98 AD3d 997 [2d Dept 2012]; Toure, 98 NY2d at 353, supra).

Here, defendants have established, *prima facie*, that plaintiff did not sustain a significant limitation of use to her cervical, thoracic or lumbar spine, bilateral shoulders or bilateral knees under NYIL § 5102(d). Indeed, Dr. Mannor's medical report demonstrates that an orthopedic examination on February 4, 2021 revealed a normal range of motion to plaintiff's cervical, thoracic and lumbar spine, bilateral shoulders and bilateral knees and that the "sprain/strain[s]" to these body parts had "resolved" with "no evidence of orthopedic disability, permanency, or residuals" (see, Def. Exh. F; Yeu Jin Baik v Enriquez, 124 AD3d 880, 881 [2d Dept 2015]; Staff, 59 AD3d at 614, supra; Jilani, 83 AD3d at 787, supra). Similarly, upon reviewing the MRIs of plaintiff's cervical and lumbar spine and left shoulder, Dr. Berkowitz determined that there was "no causal relationship

between [plaintiff's] alleged accident and the findings on the MRI examination[s]" (see, Yi Di Chen, 186 AD3d at 1296, supra; Greenberg, 126 AD3d at 938, supra; Grossman, 268 AD2d at 85, supra; Def. Exh. E). Rather, Dr. Berkowitz concluded that the MRIs of plaintiff's lumbar spine and left shoulder were "unremarkable" and that the "[d]isc bulges and hypertrophic facet joint changes" seen on plaintiff's cervical spine MRI were "chronic and degenerative in origin" (see, id.; Wettstein v Tucker, 178 AD3d 1121, 1122 [2d Dept 2019]; Jilani, 83 AD3d at 787, supra).

In response to defendants' *prima facie* showing, plaintiff failed to raise a triable issue of fact with respect to her cervical, thoracic and lumbar spine, bilateral shoulders and bilateral knees. Indeed, Dr. Lee's November 14, 2018 and June 30, 2021 medical examinations failed to indicate whether he performed any objective range of motion tests on plaintiff's cervical, thoracic and lumbar spine, bilateral shoulders and bilateral knees to determine whether she had any deficits or limitations to these parts of her body as a result of the alleged accident (see, Pl. Exh. D; Saunders, 176 AD3d at 995, supra; McKinney, 288 AD2d at 275, supra; Pramnieks, 272 AD2d at 596, supra). Similarly, Dr. Lee's nerve conduction study and EMG on January 25, 2019, Dr. Reddy's MRI of plaintiff's lumbar spine on January 9, 2019 and Dr. Schlusselberg's MRI of plaintiff's cervical spine and left shoulder on November 21, 2018 and December 6, 2018, respectively, are insufficient to raise a triable issue of fact since these records are not based on a recent examination of plaintiff (see, Pl. Exh. B, C, D; Deutsch, 48 AD3d at 615, supra; Mauchy, 19 AD3d at 561, supra; Keena, 294 AD2d at 406, supra). Furthermore, as neither Dr. Reddy nor Dr. Schlusselberg proffers any opinion as to causation in that the purported findings on plaintiff's radiological studies are causally related to the alleged accident, plaintiff cannot rebut defendants' *prima facie* showing (see, Nociforo, 42 AD3d at 515, supra; Freese v Maffetone, 302 AD2d 490, 491 [2d Dept 2003]; Williams v Hasenflue, 272 AD2d 470, 470 [2d Dept 2000]). Accordingly, as plaintiff has failed to provide competent medical evidence to rebut defendants' *prima facie* showing with respect to her cervical, thoracic and lumbar spine, bilateral shoulders and bilateral knees, the branch of defendants' motion for summary judgment dismissing plaintiff's claim of a significant limitation of use to her cervical, thoracic and lumbar spine, bilateral shoulders and bilateral knees under NYIL § 5102(d) is granted (see, Deutsch, 48 AD3d at 615, supra; Mejia, 35 AD3d at 408, supra; Lisa, 262 AD2d at 368, supra).

However, defendants have failed to establish, *prima facie*, that plaintiff did not suffer a significant limitation of use to her pelvis under NYIL § 5102(d). Indeed, defendants' examining physician failed to perform any objective range of motion tests on plaintiff's pelvis to determine the extent or degree of physical limitation and its duration (see, Cho, 175 AD3d at 1237, supra; Grisales, 85 AD3d at 965, supra; Holiday v United Steel Prod., Inc., 139 AD3d 804, 805 [2d Dept 2016]).

As defendants have failed to establish, *prima facie*, that plaintiff did not sustain a significant limitation of use to her pelvis, the Court need not determine whether plaintiff's opposition papers are sufficient to raise a triable issue of fact (see, Singleton v F & R Royal, Inc., 166 AD3d 837, 838 [2d Dept 2018]; Nunez v Alies, 162 AD3d 1058, 1059 [2d Dept 2018]). Accordingly, the branch of defendants' motion seeking summary judgment

dismissing plaintiff's claim of significant limitation of use to her pelvis under NYIL § 5102(d) is denied.

VI. 90/180 Category

Defendants argue that plaintiff did not sustain a medically determined injury or impairment that prevented her from performing substantially all of the material acts constituting her customary daily activities during at least 90 of the first 180 days following the alleged accident.

To establish a serious injury under the 90/180 category of NYIL § 5102(d), a "plaintiff must establish that he or she 'has been curtailed from performing his [or her] usual activities to a great extent'" rather than "some slight curtailment" (Lanzarone v Goldman, 80 AD3d 667, 669 [2d Dept 2011]; DeFilippo v White, 101 AD2d 801, 803 [2d Dept 1984]).

Here, defendants have failed to establish, *prima facie*, that plaintiff did not suffer a serious injury under the 90/180 category of NYIL § 5102(d). Indeed, while defendants annex the medical report of Dr. Mannor who opined that plaintiff "can perform her activities of daily living as she was doing prior to the accident" and that there is "no evidence of orthopedic disability, permanency, or residuals," Dr. Mannor based her opinion on an orthopedic examination performed on February 4, 2021, more than two years after the alleged accident and did not relate any of her findings to the relevant period of time following the alleged accident (see, Def. Exh. F; Scinto, 57 AD3d at 647, supra; Daddio v Shapiro, 44 AD3d 699, 700 [2d Dept 2007]; Greenidge v Righton Limo, Inc., 43 AD3d 1109, 1110 [2d Dept 2007]). Moreover, while defendants relied on plaintiff's deposition testimony to establish that plaintiff did not sustain a serious injury under the 90/180 category, plaintiff's testimony did not address her usual and customary daily activities "during the specific relevant time frame" and "did not compare . . . [her] pre-accident and post-accident activities during that relevant time frame" (see, Def. Exh. D; Hall v Stargot, 187 AD3d 996, 996 [2d Dept 2020]; Jong Cheol Yang v Grayline N.Y. Tours, 186 AD3d 1501, 1502 [2d Dept 2020]).

As defendants have failed to establish their *prima facie* entitlement to judgment as a matter of law as to plaintiff's claim of a serious injury under the 90/180 category, the Court "need not consider the sufficiency" of plaintiff's opposition papers (see, Hall, 187 AD3d at 996, supra; Ali v Williams, 187 AD3d 1107 [2d Dept 2020]). Accordingly, the branch of defendants' motion seeking summary judgment dismissing plaintiff's claim of a serious injury under the 90/180 category of NYIL § 5102(d) is denied (see, id.).

In sum, defendants Mojeeb Ahmed and Aftab Ahmed's motion for summary judgment dismissing the complaint on the ground that plaintiff failed to sustain a serious injury under NYIL § 5102(d) is granted in part and denied in part.

This constitutes the Decision and Order of the Court.

Dated: November 9, 2021

Donna-Marie E. Golia, JSC

FILED
11/10/2021
COUNTY CLERK
QUEENS COUNTY