SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK - QUEENS COUNTY

Present: HONORABLE LOURDES M. VENTURA, J.S.C. IAS Part 37

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FANI PASHALIDES, Index

Plaintiff, Number: 714009/2019

-against- Motion

Date: December 6, 2021

SABELLE KATHERINE GLIKSMAN,

Defendant. Motion

----------X Seq. No.: 1

The following electronically filed (EF) papers read on this motion by defendant for an Order: pursuant to CPLR 3212 dismissing the plaintiff's Complaint as a matter of law; and for such other and further relief as this Court may deem just and proper.

	Papers Numbered
Notice of Motion - Affirmation - Memorandum in Support - Exhibits.....	EF 9-17
Opposition to Motion - Exhibits - Affirmation of Service.....……..	EF 19-29
Affirmation in Reply to Motion……....	EF 35

Upon the foregoing papers, it is Ordered that defendant's motion is determined as follows:

Plaintiff commenced this personal injury action seeking to recover damages allegedly sustained in a motor vehicle collision that occurred on or about August 28, 2018, at or near the Northern State Parkway 1 mile west of exit 25, in the County of Nassau, State of New York where a vehicle operated by defendant, while intoxicated, made contact with a vehicle operated by plaintiff. Plaintiff alleges that as a result of the collision she sustained serious injuries as defined New York Insurance Law ("NYIL") § 5102.

Defendant filed this summary judgment motion pursuant to CPLR 3212 seeking summary judgment and dismissing the complaint of the plaintiff, on the grounds that plaintiff's injuries do not satisfy the "serious injury" threshold requirement of NYIL § 5102(d). In support of defendant's motion, it submits the following evidence: a copy of the summons, complaint, and answer; a copy of the verified bill of particulars; a copy of plaintiff's examination before trial ("EBT") testimony transcript; medical report by Howard V. Katz, M.D (hereinafter "Dr. Katz"); and Radiologist MRI report Jeffrey Warhit, M.D, (hereinafter "Dr. Warhit").

Plaintiff opposes defendant's motion and avers that plaintiff did sustain serious injuries as defined pursuant to NYIL § 5102(d) warranting denial of defendant's motion. In support of plaintiff's opposition papers, it submits the following evidence: copy of the plaintiff's affidavit; a copy of the verified bill of particulars; police accident report; property damage photos of plaintiff's

and defendant's cars; medical report by Manish Mammen, M.D. (hereinafter "Dr. Mammen"); Radiologist MRI report by Matthew Diament, M.D. (hereinafter "Dr. Diament"); medical report by Yakov Perper, M.D.(hereinafter "Dr. Perper"); and medical report and examination by Mike Pappas, M.D. (hereinafter " Dr. Pappas").

"It is well settled that 'the proponent of a summary judgment motions must make *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact'" (*see Pullman v. Silverman*, 28 NY3d 1060 [2016]) quoting (*Alvarez v. Prospect Hosp*., 68 NY2d 320 [1986]). Failure to make such a prima facie "showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to judgment as a matter of law (*Alvarez*, 68 NY2d 320; *Winegrad*, 64 NY2d 851). The burden rests on defendant to establish, by the submission of evidentiary proof in admissible form, that plaintiff has not suffered a "serious injury" (*Lowe v. Bennett*, 122 AD2d 728 [1st Dept 1986], *affd*, 69 NY2d 701, 512 NYS2d 364 [1986]). When a defendant's motion is sufficient to raise the issue of whether a "serious injury" has been sustained, the burden shifts and it is then incumbent upon the plaintiff to produce prima facie evidence in admissible form to support the claim of serious injury (*Lopez v. Senatore*, 65 NY2d 1017 [1985]). In support of a claim that plaintiff has not sustained a serious injury, a defendant may rely either on the sworn statements of the defendant's examining physician or the unsworn reports of plaintiff's examining physician (*Pagano v. Kingsbury*, 182 AD2d 268 [2d Dept 1992]).

Once the burden shifts, it is incumbent upon the plaintiff, in opposition to the defendant's motion, to submit proof of serious injury in "admissible form". (*Licari v. Elliott*, 57 NY2d 230 [1982]). A medical affirmation or affidavit which is based on a physician's personal examination and observations of plaintiff, is an acceptable method to provide a doctor's opinion regarding the existence and extent of a plaintiff's serious injury is deemed competent medical evidence (*see Yunatanov v Stein*, 69 AD3d 708 [2d Dept 2010]). Thus, in the absence of objective medical evidence in admissible form of serious injury, plaintiff's self-serving affidavit is insufficient to raise a triable issue of fact (*Fisher v. Williams*, 289 AD2d 288 [2d Dept 2001]).

Pursuant to NYIL § 5102(d), "'serious 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 days during the one hundred eighty days immediately following the occurrence of the injury or impairment."

The Court of Appeals has long recognized that the "legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries" (*see Toure v Avis Rent A Car Sys., Inc.*, 98 NY2d 345, 350 [2002] *citing* (*Dufel v Green*, 84 NY2d 795

[1995]); *see also Licari,* 57 NY2d at 234-235). As such, objective proof of a plaintiff's injury is required in order to satisfy the statutory serious injury threshold (*see e.g. Dufel,* 84 NY2d at 798; *Lopez,* 65 NY2d 1017); subjective complaints alone are not sufficient (*see e.g. Gaddy v Eyler,* 79 NY2d 955 [1992]; *Scheer v Koubek,* 70 NY2d 678 [1987]). "In order to prove the extent or degree of physical limitation, an expert's designation of a numeric percentage of a plaintiff's loss of range of motion can be used to substantiate a claim of serious injury (*Toure,* 98 NY2d at 345). "As such, [courts require] objective proof of a plaintiff's injury in order to satisfy the statutory serious injury threshold" [citations omitted] (*see Toure,* 98 NY2d at 350). "An expert's *qualitative* assessment of a plaintiff's condition also may suffice, 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" (*Id.*).

DISCUSSION

According to the bill of particulars, plaintiff alleges she sustained injuries to her lumbar spine and, as a result, suffered serious injuries as prescribed pursuant to NYIL § 5102(d), under the following categories: permanent consequential limitation and 90/180-day.

I. Permanent Consequential Limitation

"Only a total loss of use is compensable under the 'permanent loss of use' exception to the no-fault remedy." (*Oberly v Bangs Ambulance, Inc.*, 96 NY2d 295 [2001]). Without any evidence within the record, this Court will only address the issue of a significant limitation of use of a body function or system.

Defendant argues that plaintiff's injuries do not qualify as a serious injury under the permanent consequential limitation category of NYIL § 5102(d). First, defendant avers that plaintiff's injuries do not constitute a permanent limitation nor significant limitation. Second, defendant avers that the chain of causation broke due to a year and six months gap in medical treatment. Third, defendant further avers that plaintiff's injuries are due to pre-existing conditions.

On a motion for summary judgment alleging plaintiff's injuries are not serious within the meaning of Insurance Law § 5102(d), the defendant bears the burden of establishing that plaintiff did not sustain a serious injury caused by the accident. (*Gardner v Spitz*, 2021 N.Y. Misc. LEXIS 4023, at *5-6 [Sup Ct, Queens County May 21, 2021, No. 715199/2018]). Defendant's burden may be satisfied by presenting affirmations by medical experts reciting that "the plaintiff has normal ranges of motion in the affected body parts, and identifies the objective tests performed to arrive at that conclusion." (*Id.*). Upon making this showing, "the burden shifts to the plaintiff to come forward with evidence to overcome the defendant's submissions by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law" (*Grossman v Wright*, 268 AD2d 79, 83–84 [2d Dept 2000]).

To determine whether an injury is a "serious injury" under NYIL § 5102(d), the movant must show the injury's duration and its extent, or the degree of limitations associated with it. (*Rovelo v Volcy*, 83 AD3d 1034, 1035 [2d Dept 2011]). Furthermore, "any subjective complaints

of pain and limitation of motion must be substantiated by verified objective medical findings based on recent examination of the plaintiff" [citations omitted]. (*Id.*).

Here, defendant submits *inter alia* a medical report dated October 14, 2020, affirmed by Howard V. Katz, M.D ("Dr. Katz"). The affirmed report by Dr. Katz in relevant part, reads as follows:

> "CURRENT COMPLAINTS: Ms. Pashalides reports that she has complaints of pain in her lower back. She reports that her symptom have improved compared to the reported date of injury. […]
> OCCUPATIONAL SUMMARY: Ms. Pashalides reports that she was employed full time as a teacher at the time of the accident. […] She states that she did not miss any time from work due to the accident. At present time, she is working full-time at the same job performing her duties without limitations.
> PHYSICAL EXAMINATION: […] She is in no acute distress and is able to understand and cooperate during the examination.
> IMPRESSION:
> 1. Normal examination of the cervical spine.
> 2. Lumbar spine sprain/strain – resolved.
> DEGREE OF DISABILITY: There is no evidence of orthopedic disability.
> ABILITY TO WORK: Ms. Pashalides reports that she was employed as a teacher at the time of the accident. Currently, she is working on a full time basis. Ms. Fani Pashalides is capable of working without restrictions.
> ACTIVITIES OF DAILY LIVING: Ms. Fani Pashalides can perform her activities of daily living as she was doing prior to the accident. […]
> PROGNOSIS: Ms. Pashalides' current prognosis is good.
> Upon completion of the examination, Ms. Fani Pashalides offers no complaints as a result of this examination and left the examining area stable and unchanged."

Additionally, during Dr. Katz's examination of plaintiff, he used a goniometer and concluded that plaintiff did not have any loss of range of motion in her cervical and lumbar spine, Lhermitte, atrophy, loss of muscle straight. Dr. Katz's further concluded that plaintiff could perform her activities of daily living as she was doing prior to the accident.

Defendant's evidence, specifically, Dr. Katz affirmation, affirming that plaintiff's goniometer readings were normal and that plaintiff can perform her activates daily living as she was doing prior to the accident is *prima facie* evidence that the plaintiff did not suffer permanent consequential limitation, permanent loss, or significant limitation use of a body organ, member, function, or system in accordance with NYIL § 5102(d). The burden now shifts to the plaintiff. (*see Staff v Yshua*, 59 AD3d 614, 614 [2d Dept 2009] [finding that an orthopedist's affirmation that plaintiff's goniometer readings were normal, and that the plaintiff could live his daily activities without restrictions was prima facie evidence that the plaintiff's injury was not serious]). The burden now shifts to plaintiff to rebut defendant's prima facie showing and raise a triable issue of fact.

In opposition, the plaintiff submits *inter alia* medical reports and an affirmation from Dr. Pappas, who examined the plaintiff on March 11, 2021. Dr. Pappas' affirmation in relevant part reads, as follows:

> "It is my opinion with a reasonable degree of medical certainty that the patient has a significant limitation of ranges of motion ranging from 34% to 45% in the lumbosacral spine. I also tested the patient's reflexes and found that they are 1 and 2+ and symmetric throughout upper and lower extremities. I recommended pain management and recommended that she restart physical therapy in an effort to decease pain and improve her overall level of mobility.
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> 8. Ms. Pashilades had an injury that occurred acutely on August 28, 2018. Based on the interval since the time of the accident, she has permanent injuries to the lumbar spine including lumber disc herniations with radiculopathy. It is my opinion based on the records reviewed and my own evaluation, that the patient had no pre-existing condition and she was asymptomatic just prior to this accident. She should avoid overhead lifting and lifting more than ten pounds. It is my opinion with a reasonable degree of medical certainty that the injuries are a permanent orthopedic condition, and the patient has confirmed serious injuries including L2-L3 disc bulge, L4-L5 disc bulge and L5-Sl broad based right paracentral disc herniation with annular tear superimposed upon a disc bulge impinging upon the thecal sac and resulting in right lateral recess stenosis abutting the right descending S1 nerve roots as they exit the thecal sac, and radioculopathy.
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> 9. With a reasonable degree of medical certainty she may require further treatment of the lumbar spine based on the permanent nature of the injuries. Based upon Ms. Pashalide's continued complaints of pain two and a half years post accident, it is my opinion with a reasonable degree of medical certainty that Ms. Pashalide suffered a permanent partial disability to the lumbosacral spine. It is my opinion with a reasonable degree of medical certainty that the patient's injuries, significant limitations of ranges of motion and substantial limitation of activities are casually related to the motor vehicle accident of August 28, 2018.
>
> 10. The patient exhibited pains, limitations and inability to conduct daily tasks without full range of motion during examination and therefore, it is my opinion with a reasonable degree of medical certainty that the patient had substantial restriction of activities including daily chores and recreational activities from the time of the accident of August 28, 2018 to the present time. Based upon my review of past medical history and history during examinations I do not find that the patient had any prior condition that contributed to the patient's findings."

The Court finds that in opposition plaintiff raised triable issues of fact regarding plaintiff's lumbar spine injury through the submission for the affirmation of Dr. Pappas who concluded that plaintiff's lumbar spine injury was permanent, and directly related to the subject accident.(See *Himmelburger v Buchris*, 117 AD3d 801, 802 [2d Dept 2014]; *Khaimov v Armanious*, 85 AD3d 978, 979 [2d Dept 2011]; *Abdelaziz v Fazel*, 78 AD3d 1086, 1086 [2d Dept 2010]; *Smith v Matinale*, 58 AD3d 829 [2d Dept 2009]).

In addition, the conflicting medical reports submitted by the parties raises triable issues of fact as to whether plaintiff sustained a "serious injury" within the meaning of Insurance Law § 5102 (d) (see *Wilcoxen v. Palladino*, 122 AD3d 727, 728 [2d Dept 2014][finding that "in light of the conflicting expert medical opinions submitted by the parties, the Supreme Court properly denied the defendants' motion for summary judgment dismissing the complaint on the ground 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 also *Cariddi v. Hassan,* 45 A.D.3d 516 [2007]; *Gaviria v. Alvardo*, 65 A.D.3d 567 [2009]).

To the extent that defendant argues that plaintiff failed to explain the purported gap in her treatment, this Court finds plaintiff has provided an adequate explanation in her affidavit that her health insurance ceased, so she did not go back for treatment and could not afford to pay for her own treatment (see Plaintiff's Exhibit 20, "Plaintiff's Affidavit"; *Black v Robinson*, 305 AD2d 438, 439-40 [2d Dept 2003] [plaintiff testified at her examination before trial that she underwent therapy for six months until her "insurance monies ran out" and she could no longer afford it and thereafter returned to her general practitioner provided by the HIP center]).

Defendant's contentions that plaintiff's injuries were preexisting and degenerative in nature are rebutted by Dr. Pappas' affirmation which states that based upon his physical examination of the plaintiff including the MRI and his opinion that based upon his review, the findings of the MRIs which aided him in the diagnosis and conclusions in this report and conclude that the results are casually related to the motor vehicle accident of August 28, 2018. (see *Greenberg v Macagnone*, 126 AD3d 937, 938 [2d Dept 2015][Based on Doctor's physical examination of the plaintiff, his review of the plaintiff's medical records, including an MRI report, the plaintiff's medical history, and his own treatment of the plaintiff, the doctor's opine "with a reasonable degree of medical certainty that the plaintiff's motor vehicle accident on March 10, 2011 was and is the competent producing cause of [the plaintiff's] right lateral recess disc herniation at L5-S1 with compression of the right S1 nerve root," was sufficient to rebut defendant's prima facie shoring.

Accordingly, as plaintiff has rebutted defendant's *prima facie* showing with respect to her lumbar spine, the branch of defendant's motion seeking summary judgment dismissing plaintiff's claim of permanent consequential limitation of use to her lumber spine under NYIL § 5102(d) is denied.

II. 90/180 Day

Defendant avers 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, defendant has failed to establish, *prima facie*, that plaintiff did not suffer a serious injury under the 90/180 category of NYIL § 5102(d). While defendant relies on plaintiff's deposition testimony to establish, *prima facie*, his entitlement to judgment as a matter of law 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, Hall v Stargot*, 187 AD3d 996, 996 [2d Dept 2020]; *Reid v Edwards-Grant*, 186 AD3d 1741, 1742 [2d Dept 2020]; Jong Cheol Yang v Grayline N.Y. Tours, 186 AD3d 1501, 1502 [2d Dept 2020]).

To the extent that Dr. Katz's concludes that plaintiff can perform her activities of daily living as she was doing prior to the accident his opinion was based upon an examination performed on October 14, 2020, over two years after the alleged accident and did not relate her findings to the relevant period of time following the alleged accident (*see, Jong Cheol Yang v Grayline N.Y. Tours*, 186 AD3d 1501, *supra*; *Daddio v Shapiro*, 44 AD3d 699, 700 [2d Dept 2007]; *Greenidge v Righton Limo, Inc*., 43 AD3d 1109, 1110 [2d Dept 2007]).

As defendant has failed to establish his *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; Owens-Stephens v PTM Mgmt. Corp*., 191 AD3d 691 [2d Dept 2021]; *Ali v Williams*, 187 AD3d 1107 [2d Dept 2020]). Accordingly, the branch of defendant's motion seeking summary judgment dismissing plaintiff's claim of a serious injury under the 90/180 of NYIL § 5102(d) is denied *(see, id.)*.

CONCLUSION

Based upon the foregoing, defendant's motion for summary judgment dismissing the complaint on the ground that plaintiff failed to sustain a "serious injury" under NYIL § 5102(d) is denied. Any other requested relief not expressly addressed herein has nonetheless been considered by this Court and is hereby denied. Plaintiff's Complaint is dismissed as to all categories.

This shall constitute the Decision and Order of the Court.

Date: January 7, 2022

LOURDES M. VENTURA, J.S.C.