SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JAMES G. CLYNES** **PART** **22M**

Justice

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JENNIFER RAMIREZ,

Plaintiff,

- v -

SINDIA A. AVILA,

Defendant.

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INDEX NO. 155269/2019

MOTION DATE 09/07/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

Defendant's motion for summary judgment and dismissal of the complaint on the ground that plaintiff's claimed injuries do not satisfy the serious injury threshold of Insurance Law 5102 (d) is decided as follows:

Plaintiff seeks recovery for alleged injuries she sustained as a result of a September 12, 2016 motor vehicle accident (NY St Cts Elec Filing [NYSCEF] Doc No. 35, summons and complaint). In her bill of particulars, plaintiff alleges injuries to her cervical and lumbar spine and post-traumatic headaches (NYSCEF Doc No. 37). Plaintiff claims that her injuries fall into one or more of five serious injury categories: (1) significant disfigurement; (2) permanent loss of use of a body organ, member, function, or system; (3) permanent consequential limitation of use of a function or system; (4) significant limitation of use of a body function or system; and (5) 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 90 days during the 180 days immediately following the occurrence of the injury or impairment. However, in opposition to the motion, plaintiff only addresses the latter three categories (*see* NYSCEF Doc No. 46, counsel's affirmation). Therefore, summary judgment is granted dismissing the first two categories alleged, i.e., significant disfigurement and permanent loss (*see Sancino v Metropolitan Transp. Auth.*, 184 AD3d 534, 535 [1st Dept 2020]).

For the remaining categories, defendant bears the initial prima facie burden of establishing that plaintiff did not sustain a serious injury from the accident (*see Newell v Javier*, 220 AD3d 487, 487 [1st Dept 2023]). "Such evidence includes affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (*Spencer v Golden Eagle, Inc.*, 82 AD3d 589, 590 [1st Dept 2011] [internal quotation marks and citations omitted]). Moreover, with respect to the 90/180-day category, plaintiff's deposition testimony can be sufficient prima facie proof (*see Pakeman v Karekezia*, 98 AD3d 840, 841 [1st Dept 2012] [holding that a 90/180-day "claim was refuted by plaintiff's own deposition testimony . . . that he did not miss any time from work, since his duties at work were 'modified'"]). "Once the defendant meets [her] initial burden, the plaintiff must then demonstrate a triable issue of fact as to whether…she sustained a serious injury" (*Spencer*, 82 AD3d at 590). In reviewing the motion, the court "must view the evidence in the light most favorable to the nonmoving party, including drawing all reasonable inferences in favor of the nonmoving party" (*Vega v Metropolitan Transp. Auth.*, 212 AD3d 587, 588 [1st Dept 2023]).

As relevant here, plaintiff gave the following testimony at her October 2020 deposition (NYSCEF Doc No. 39). She did not request emergency medical treatment at the scene of the accident, nor did she go to a hospital. Immediately following the accident, plaintiff did not miss any work. She was confined to bed and home for intermittent periods of two to three days, though could not specify when these periods occurred. Four days after the accident, plaintiff first sought medical care and was treated by chiropractor Dr. Jane M. Fitzgerald, her employer. In October 2018, she stopped treatment and stopped working for Dr. Fitzgerald to address some personal issues. In January 2020, plaintiff returned to her job and resumed treatment.

As for the accident's impact on plaintiff's ability to work, she testified that she requires breaks, needs to alternate between sitting and standing, and experiences increased neck pain when sitting at her desk. She further testified that she has difficulty carrying heavy grocery bags, discomfort washing dishes, and difficulty sleeping. She stated that the pain affects how she does her hair and sometimes affects her transportation choice. However, she acknowledged that there are no activities that she cannot perform due to the accident.

Citing *Licari v Elliott* (57 NY2d 230, 236 [1982]), defendant argues that plaintiff's deposition testimony proves that plaintiff was not "curtailed from performing [her] usual activities to a great extent rather than some slight curtailment" for at least 90 of the 180 days immediately

following the accident, and thus defendant is entitled to summary judgment as to the 90/180-day category of serious injury. As additional support, defendant asserts that plaintiff's post-accident medical records (NYSCEF Doc No. 38)[1] show that no medical professional ever advised her to avoid any activities due to the accident. Therefore, defendant satisfied her burden as to the 90/180-day category.

Turning to the permanent consequential limitation of use and significant limitation of use categories, defendant met her burden with the independent medical examination (IME) report of neurologist Dr. Rene Elkin (NYSCEF Doc No. 40). The report reflects that the doctor reviewed plaintiff's post-accident medical records and performed an IME of plaintiff on February 24, 2021. Dr. Elkin recounts plaintiff's complaints of stiffness in her neck and back, tingling and numbness in her hands, and limits with "heavy lifting, laundry, grocery shopping, and cooking" (NYSCEF Doc No. 40 at 5-6). Based on her examination, Dr. Elkin found that plaintiff's neck and lower back had a full range of motion on forward flexion, retroflexion, and lateral rotation. She also found that plaintiff had no limitation in lateral bending. Plaintiff's MRI report, as interpreted by Dr. Elkin, reveals "age-related degenerative changes" to plaintiff's cervical and lumbar spine that are unrelated to the accident (*id.* at 6-7). As for the NCV/EMG testing, Dr. Elkin opines that her neurological physical examination did not "support the electrodiagnostic findings as reported" (*id.* at 7). Dr. Elkin found no "acute neurological injury resulting from this accident that would explain the persistence of [plaintiff's] symptoms and her ongoing limitations" and no residual dysfunction that prevents plaintiff from functioning at pre-accident level (*id.*). Dr. Elkin concludes that plaintiff's neck and lower back symptoms "are consistent with...muscle sprain" and that plaintiff has no neurological disability or permanence of injury from the accident (*id.* at 6-7).

In opposition, plaintiff submits her own affidavit describing the September 2016 accident, the claimed injuries, and the resulting medical treatments (NYSCEF Doc No. 53). Plaintiff avers that she began treating with Dr. Fitzgerald on September 16, 2016 and to date she has received approximately 215 treatments. Plaintiff represents that she did not sustain any neck or back injuries

[1] They include records from Dr. Jane M. Fitzgerald from September 16, 2016 to February 26, 2018; x-ray reports from Dr. Flavio Kamenetz, dated September 16, 2016; magnetic resonance imaging (MRI) reports from radiologist Dr. Lisa A. Corrente, dated November 16, 2016; nerve conduction velocity (NCV) and electromyography (EMG) studies and reports from neurologist Dr. Winfred P. Wu, dated October 18, 2016, November 29, 2016, November 14, 2017, and December 19, 2017; and an ultrasound report from radiologist Dr. Richard DeNise, dated October 16, 2017.

before September 2016. Likewise, plaintiff indicates that she had a second accident in March 2022, but states that in that accident she "injured different areas of [her] lower back" and her left hip (*id.* at ¶ 7). Plaintiff thus asserts that she still experiences "headaches; constant neck pain which goes into both of [her] arms; and constant back pain" (*id.* at ¶ 9), and as a result she has difficulty sleeping, getting out of bed, bathing, dressing, performing household chores, and walking or driving long distances. Plaintiff also claims that she cannot exercise, dance, or ride a bicycle; she does not socialize with friends; and she is always fatigued and irritable.

In addition, plaintiff proffers an affirmation of her own radiologist, Dr. Corrente, who states that on or about November 16, 2016, she reviewed the MRI examinations of plaintiff's cervical and lumbar spine (NYSCEF Doc No. 52). Dr. Corrente opines that these examinations showed cervical disc herniations at C4-C5, C5-C6, and C6-C7 and lumbar spine disc herniations at L3-L4, L4-L5, and L5-S1. She further opines that the cervical examination showed hypertrophy at C4-C5 and C5-C6. Notably, Dr. Corrente offered no opinion regarding the cause of these conditions.

Dr. Fitzgerald opines that the September 2016 accident caused plaintiff's injuries and resulting disabilities (NYSCEF Doc No. 51, Dr. Fitzgerald's aff). She recounts that she examined plaintiff on September 16, 2016; she recorded plaintiff complaints of headache and neck pain radiating into her upper back, arms, and legs; and she conducted range of motion testing. Upon examining plaintiff's cervical spine, she observed flexion to 40 degrees (normal is 45 degrees), extension to 5 degrees (normal is 45 degrees), right lateral flexion to 10 degrees (normal is 45 degrees), left lateral flexion to 15 degrees (normal is 45 degrees), right rotation to 20 degrees (normal is 80 degrees) and left rotation to 15 degrees (normal is 80 degrees). Upon examining plaintiff's lumbar spine, she observed flexion to 30 degrees (normal is 90 degrees), extension to 5 degrees (normal is 30 degrees), and right and left lateral flexion to 5 degrees (normal is 30 degrees). Dr. Fitzgerald also reports that palpation revealed muscle tenderness and myospasm and dermatome testing showed C5 right lateral arm decrease, L4 left medial leg decrease and L5 decreases on both sides. At this time, Dr. Fitzgerald diagnosed plaintiff with cervical and lumbosacral radiculopathy, lumbar spine sprain, cervical and lumbar ligament sprains, and post-traumatic headaches.

Dr. Fitzgerald states that the MRI testing and NCV/EMG studies confirmed disc herniations, radiculopathy, and bilateral median neuropathies at the wrists. Dr. Fitzgerald performed additional range of motion testing on October 6, 2020 and November 8, 2022, about

four years and six years after the accident, respectively. She details her observations, and in short, found that plaintiff continued to have a limited range of motion in her cervical and lumbar spine as well as post-traumatic headaches. Based on these tests and physical examinations, Dr. Fitzgerald opines that plaintiff's prognosis for a full recovery is poor, the injuries are permanent, and they interfere with her daily living activities.

After sharing these opinions, Dr. Fitzgerald states that plaintiff was in a second motor vehicle accident in March 2022 and injured her lower back and left hip, specifically the discs at L2-L3, L3-L4, and L5-S1. Dr. Fitzgerald asserts that "[t]he injuries to those discs are new and they were not injured in [the prior] motor vehicle accident" (NYSCEF Doc No. 51 ¶ 25). She also mentions that her office employs plaintiff as a clerical worker and provides her with accommodations such as reduced hours and frequent breaks.

Plaintiff contends that her medical evidence and attestations regarding her symptoms requires denial of summary judgment as to the 90/180-day category of serious injury. This contention is without merit. Plaintiff testified that she did not miss work immediately after the accident. She could not specify when she was confined to bed and home except that it was for intermittent periods of two to three days. Indeed, in *Echevarria v Ocasio* (135 AD3d 661, 662 [1st Dept 2016]), the First Department affirmed dismissal of a 90/180-day claim based on plaintiff's "deposition testimony that she returned to work immediately after the accident, and was not confined to bed or home during the relevant period" (*see also Seck v Balla*, 92 AD3d 543, 544 [1st Dept 2012] [dismissing plaintiff's 90/180-day claim as her "deposition testimony and the report of her treating osteopath [show that] she returned to work part-time four days after the accident"]). Further, plaintiff was not required to curtail her daily activities during the requisite period (compare with *Williams v Tatham*, 92 AD3d 472, 473 [1st Dept 2012] [reversing dismissal of 90/180-day claim where plaintiff's chiropractor "concluded that as a result of this accident plaintiff sustained an injury to her spine, and...advised her to refrain from engaging in certain activities, such as cleaning, shopping, and walking"]). Thus, the court grants summary judgment under the 90/180-day category.

The court denies summary judgment under the permanent consequential limitation of use and significant limitation of use categories of serious injury (*see Gordon v Hernandez*, 181 AD3d 424, 425 [1st Dept 2020] [holding that "plaintiff raised an issue of fact as to whether he sustained significant or permanent injuries...by submitting the report of his pain management specialist, who

found that he had restricted range of motion...shortly after the accident and upon a more recent examination, and opined that his injuries were causally related to the accident at issue"]). Here, plaintiff's medical evidence is sufficient to raise a triable issue of fact as to whether plaintiff sustained a serious injury. Plaintiff underwent spinal MRIs close to two months after the subject accident and NCV/EMG testing several times before the second accident occurred. Further, Dr. Fitzgerald's affidavit contains objective quantitative evidence detailing plaintiff's diminished range of motion in her cervical and lumbar spine, based on range of motion testing performed four days after the September 2016 accident and two more recent examinations. Dr. Fitzgerald's medical opinion that this accident caused plaintiff's spinal injuries raises an issue of fact as do plaintiff's MRIs and NCV/EMG testing (*see Linton v Nawaz*, 62 AD3d 434, 435-440 [1st Dept 2009] [affirming denial of summary judgment as plaintiff's treating physician attributed plaintiff's symptoms to the accident]). Although defendant argues that Dr. Fitzgerald did not address Dr. Elkin's opinion that degeneration is the cause of plaintiff's spinal condition, "by relying on the same MRI report[s] as defendant['s] expert, and attributing plaintiff's injuries to a different, yet equally plausible cause, plaintiff[] raised a triable issue of fact" (*Grant v United Pavers Co., Inc.*, 91 AD3d 499, 500 [1st Dept 2012]).[2]

In addition, the second accident raises an issue of fact. Defendant claims that she only learned of the accident upon reading plaintiff's opposition to the motion (NYSCEF Doc No. 54, counsel's reply affirmation). She argues that Dr. Fitzgerald's opinions are speculative as Dr. Fitzgerald made contradictory findings as she stated that a November 2016 MRI report showed injuries to L3-L4 and L5-S1, but later stated injuries to those discs were new in March 2022. At this juncture, the court is not persuaded that such contradiction renders the entirety of Dr. Fitzgerald's opinion speculative as she discusses other disc injuries and because of the issue of fact raised in the preceding paragraph.

Dr. Fitzgerald's findings as to the March 2022 accident appear to be based upon her treatment of plaintiff, her range of motion testing, and from what the court can reasonably infer, MRI reports prepared after the March 2022 accident. As such, the plaintiff's expert adequately addressed the second accident (*cf Zhijian Yang v Alston*, 73 AD3d 562, 563 [1st Dept 2010]

[2] The November 2022 range of motion testing occurred after the second accident but said timing does not necessarily foreclose relief to plaintiff (*see Keri v Beye*, 223 AD3d 432, 433 [1st Dept 2024] [permitting a plaintiff to proceed under the significant limitation category where plaintiff "testified that he sought treatment for [his] injury for only two months and that it had healed"]).

[finding the conclusions of plaintiff's expert speculative in part because the expert "failed to mention, much less account for, plaintiff's prior and subsequent accidents"]). Defendant's lack of access to the subsequent MRI reports does not warrant summary judgment, especially considering Dr. Elkin's opinion in February 2021 that plaintiff's November 2016 MRIs did not show any conditions casually related to the September 2016 accident.

Two final points merit mention. First, defendant's gap in treatment argument is not addressed as defendant raised it for the first time on reply (*Sylla v Brickyard Inc.*, 104 AD3d 605, 606 [1st Dept 2013]). Second, since there are triable issues of fact as to whether the accident caused a serious injury to plaintiff's spine, the court need not reach the issue of plaintiff's alleged post-traumatic headaches (*see Caines v Diakite*, 105 AD3d 404, 404-405 [1st Dept 2013] [holding that since there are a triable issues of fact concerning whether plaintiff sustained a serious injury to his left knee, the court need not consider plaintiff's other claimed injuries]).

The court has considered the parties' remaining contentions and finds them unavailing. Accordingly, it is

ORDERED that defendant's summary judgment motion is granted to the extent of dismissing plaintiff's claim of serious injury under the significant disfigurement, permanent loss of use, and 90/180-day categories of Insurance Law 5102 (d); and it is further

ORDERED that defendant's summary judgment motion is denied as to plaintiff's claim of serious injury under the significant limitation of use and permanent consequential limitation of use categories of Insurance Law 5102 (d); and it is further

ORDERED that within 30 days of entry, movant shall serve a copy of this Decision and Order upon plaintiff with notice of entry.

This constitutes the Decision and Order of the Court.

4/2/2024
DATE

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE