SHORT FORM ORDER **INDEX NO. 728/2005**

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

CARYL B. VISSICHELLI,

Plaintiff,

-against-

JAMES B. CONKLIN, JR., THE TOWN OF BROOKHAVEN, JOAN T. BEPLER, PHAROAH HOLLAND and RUTH HOLLAND,

Defendants.

ORIG. RETURN DATE: OCTOBER 25, 2006
FINAL SUBMISSION DATE: FEBRUARY 22, 2007
MTN. SEQ. #: 003
MOTION: MD

ORIG. RETURN DATE: OCTOBER 25, 2006
FINAL SUBMISSION DATE: FEBRUARY 22, 2007
MTN. SEQ. #: 004
CROSS-MOTION: XMD

ORIG. RETURN DATE: OCTOBER 25, 2006
FINAL SUBMISSION DATE: FEBRUARY 22, 2007
MTN. SEQ. #: 005
CROSS-MOTION: XMG

ORIG. RETURN DATE: DECEMBER 18, 2006
FINAL SUBMISSION DATE: FEBRUARY 22, 2007
MTN. SEQ. #: 006
MOTION: MOT D

ORIG. RETURN DATE: DECEMBER 18, 2006
FINAL SUBMISSION DATE: FEBRUARY 22, 2007
MTN. SEQ. #: 007
CROSS-MOTION: XMOT D

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Upon the following papers numbered 1 to 21 read on these motions _____ FOR VARIOUS RELIEF _____.
Notice of Motion and supporting papers 1-3 ; Affirmation in Opposition and supporting papers 4, 5 ; Replying Affidavits and supporting papers 6 ; Notice of Cross-Motion and supporting papers 7, 8 ; Notice of Cross-Motion and supporting papers 9-11 ; Answering Affidavits and supporting papers 12 ; Notice of Motion and supporting papers 13-15 ; Answering Affidavits and supporting papers 16 ; Notice of Cross-Motion and supporting papers 17-19 ; Answering Affidavits and supporting papers 20 ; Replying Affidavits and supporting papers 21 ; it is,

ORDERED that this motion by defendants JAMES B. CONKLIN, JR. and THE TOWN OF BROOKHAVEN for an Order, pursuant to CPLR 3212 and Insurance Law § 5102(d), granting summary judgment dismissing plaintiff's complaint and all cross-claims asserted against these defendants, on the grounds that plaintiff did not suffer a "serious injury" as that term is defined by Insurance Law § 5102(d), is hereby **DENIED** for the reasons set forth herein. Defendants PHAROAH HOLLAND and RUTH HOLLAND's cross-motion seeking the same relief, which incorporated by reference the facts and arguments submitted in support of defendants CONKLIN and THE TOWN OF BROOKHAVEN's motion, is similarly **DENIED**; and it is further

ORDERED that this cross-motion by defendant JOAN T. BEPLER for an Order, pursuant to CPLR 3212, granting summary judgment dismissing plaintiff's complaint and all cross-claims asserted against this defendant, or in the alternative, pursuant to Insurance Law § 5102(d), on the grounds that plaintiff did not suffer a "serious injury" as that term is defined by Insurance Law § 5102(d), is hereby **GRANTED** as provided herein; and it is further

ORDERED that this motion by defendant JOAN T. BEPLER for an Order precluding the testimony of co-defendants PHAROAH HOLLAND and RUTH HOLLAND, or in the alternative, compelling co-defendants PHAROAH HOLLAND and RUTH HOLLAND to appear for depositions by a date certain, is hereby determined as provided herein; and it is further

ORDERED that this motion by defendants JAMES B. CONKLIN, JR. and THE TOWN OF BROOKHAVEN for an Order, pursuant to CPLR 3216, striking the answer of co-defendants PHAROAH HOLLAND and RUTH HOLLAND for failure to appear for depositions, or in the alternative, precluding

the testimony of co-defendants PHAROAH HOLLAND and RUTH HOLLAND, or in the alternative, compelling co-defendants PHAROAH HOLLAND and RUTH HOLLAND to appear for depositions by a date certain, is hereby determined as provided herein.

This action is to recover for injuries allegedly sustained by plaintiff as the result of a motor vehicle accident involving five vehicles that occurred on September 7, 2004, on Route 112 at the intersection of Sunrise Highway, in the Town of Brookhaven, State of New York.

Defendants JAMES B. CONKLIN, JR., THE TOWN OF BROOKHAVEN, JOAN T. BEPLER, PHAROAH HOLLAND and RUTH HOLLAND have all moved for summary judgment, arguing that plaintiff has not met the serious injury threshold as set forth in Insurance Law § 5102(d). In addition, defendant BEPLER seeks summary judgment on the grounds that no liability arising from the subject accident can be attributed to her. In support thereof, defendants have submitted, among other things, affirmations of counsel, plaintiff's verified bill of particulars, and reports from a neurologist and orthopedist who conducted independent medical examinations of plaintiff.

Plaintiff served a verified bill of particulars, verified on December 9, 2005, which alleged that she suffered numerous injuries as a result of the accident, including carpal tunnel syndrome; cervical spine sprain/strain; lumbar spine sprain/strain; cervical radiculopathy; and significant limitation in cervical and lumbar range of motion. Each injury was claimed by plaintiff to be permanent, except those of a superficial nature.

Plaintiff was physically examined, on or about May 8, 2006, by RICHARD A. PEARL, M.D., a neurologist, and by JOSEPH P. STUBEL, M.D., an orthopedist designated by defendant. After conducting objective tests on plaintiff, Dr. Pearl found, as indicated by his sworn report, that plaintiff had suffered a cervical and lumbosacral sprain, but that plaintiff had no neurological injury or disability. Further, Dr. Stubel's sworn report indicates that plaintiff suffered a sprain of her neck, lower back, and left wrist, but exhibited normal range of motion in her cervical spine, lumbar spine and left wrist. Dr. Stubel opined that plaintiff's injuries were caused by the subject accident, but that she did not exhibit any objective signs of disability. Dr. Stubel further opined that plaintiff was capable of performing normal activities of daily living. In addition, on April 10,

2006, STEVEN L. MENDELSOHN, M.D. reviewed plaintiff's MRI film of her cervical spine performed on October 25, 2004, and found no evidence of focal disc herniation or any trauma related abnormality. Based upon these findings, defendants argue that plaintiff has not satisfied the "serious injury" threshold, as set forth in Insurance Law § 5102(d). Defendants contend that plaintiff's alleged soft tissue injuries do not constitute a serious injury.

In opposition to the applications, plaintiff has provided recent medical evidence of plaintiff's limitations. Since the accident, plaintiff has been treated by WILLIAM F. FLADER, M.D., as well as a chiropractor. Plaintiff has submitted an affidavit of plaintiff and a sworn medical report dated November 2, 2006 of Dr. Flader. Dr. Flader opined that plaintiff has suffered significant limitation in her cervical and lumbar spine; a consequential limitation in her cervical and lumbar spine; and a permanent partial disability in her cervical and lumbar spine. In addition, plaintiff has submitted an MRI report of a neuroradiologist, DAVID PANASCI, M.D., who interpreted a November 12, 2004 MRI of plaintiff's lumbar spine. Plaintiff argues that the foregoing submissions establish that plaintiff has suffered a serious injury, in that the medical records and reports, which are based upon objective tests and diagnostic studies, show that plaintiff sustained a significant limitation in the use of a body function and a permanent consequential limitation in use of a body member.

New York's No-Fault Insurance Law precludes recovery for any "non-economic loss, except in the case of serious injury, or for basic economic loss" arising out of the negligent use or operation of a motor vehicle (Insurance Law § 5104[a]). As recognized by the Court of Appeals, the "legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries" (*Dufel v Green*, 84 NY2d 795 [1995]; *see also Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Licari v Elliott*, 57 NY2d 230 [1982]). The Legislature also intended that the issue of whether a plaintiff sustained a "serious injury" could be determined by the courts as a matter of law on a motion for summary judgment (*see Licari v Elliott*, 57 NY2d 230, *supra*).

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" (Insurance Law § 5102[d]).

To establish a permanent consequential limitation or a significant limitation of use, the medical evidence submitted by a plaintiff must include objective, quantitative evidence with respect to diminished range of motion or a qualitative assessment, based on objective findings, comparing the plaintiff's present limitations to the normal function, purpose and use of the affected body, organ, member or function (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, *supra*). "Whether a limitation of use or function is 'significant' or 'consequential' ... relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part" (*Dufel v Green*, 84 NY2d 795, *supra*; *see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, *supra*). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*see Licari v Elliott*, 57 NY2d 230, *supra*). Further, subjective claims of pain and limitation of movement must be verified by objective medical findings that are based on a recent examination of the plaintiff (*see Ali v Vasquez*, 19 AD3d 520 [2005]; *Batista v Olivo*, 17 AD3d 494 [2005]; *Grossman v Wright*, 268 AD2d 79 [2000]).

A movant seeking summary judgment on the ground that a plaintiff's negligence claim is barred under the No-Fault Insurance Law bears the initial burden of establishing a *prima facie* case that the plaintiff did not sustain a "serious injury" (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, *supra*; *Gaddy v Eyler*, 79 NY2d 955 [1992]; *Pagano v Kingsbury*, 182 AD2d 268 [1992]). Once a movant meets this burden, the plaintiff must present proof in admissible form showing that a serious injury exists or demonstrate an acceptable excuse for failing to meet the requirement of tender in admissible form (*Gaddy v Eyler*, 79 NY2d 955, *supra*; *Pagano v Kingsbury*, 182 AD2d 268, *supra*; *Grasso v Angerami*, 79 NY2d 813 [1991]; *see generally Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Gong v Joni*, 294 AD2d 648 [2002]; *Romano v St. Vincent's Med. Ctr.*, 178 AD2d 467 [1991]; *Commrs. of the State Ins. Fund v Photocircuits Corp.*, 2 Misc 3d 300 [Sup Ct, NY County 2003]).

In the case at bar, the Court finds that defendants' submission was sufficient to establish that plaintiff did not sustain a "serious injury" as a result of the accident (*see Hernandez v DIVA Cab Corp.*, 22 AD3d 722 [2005]; *Khan v Hamid*, 19 AD3d 460 [2005]; *Luckey v Bauch*, 17 AD3d 411 [2005]. The burden, therefore, shifted to plaintiff to raise a triable issue of fact. In opposition, plaintiff presented competent medical evidence, namely the sworn medical report of Dr. Flader dated November 2, 2006 substantiating her claim that her injuries caused a permanent consequential limitation of use of a body member, or a significant limitation of use of a body function. The Court finds that such submission was sufficient to rebut defendants' *prima facie* showing of no serious injury (*see Gordover v Balandina*, 2007 NY Slip Op 5225 [2d Dept 2007]; *Paz v Wydrzynski*, 2007 NY Slip Op 4807 [2d Dept 2007]; *Dickie v Pei Xiang Shi*, 304 AD2d 786 [2003]).

Accordingly, these motions by defendants JAMES B. CONKLIN, JR., THE TOWN OF BROOKHAVEN, PHAROAH HOLLAND and RUTH HOLLAND for summary judgment dismissing plaintiff's complaint, on the grounds that plaintiff has failed to sustain a "serious injury" as that term is defined by Insurance Law § 5102(d), is denied.

Turning to defendant JOAN T. BEPLER's motion for summary judgment, that branch of the motion seeking dismissal of plaintiff's complaint on the grounds that plaintiff did not suffer a "serious injury" is denied as moot, given the Court's ruling herein. However, plaintiff has not opposed that branch of defendant's motion seeking summary judgment, pursuant to CPLR 3212, dismissing plaintiff's complaint and all cross-claims asserted against defendant BEPLER on the grounds that no liability can attach to this defendant. In support of the application, defendant has submitted, among other things, affirmations of counsel and the signed, sworn deposition transcript of defendant JOAN T. BEPLER.

Defendant BEPLER testified that her automobile was hit from behind while she was at a stop. It is well-settled that a rear-end collision with a stopped vehicle creates a *prima facie* case of liability with respect to the operator of the rear vehicle, requiring a non-negligent explanation for the collision (see *Briceno v Milbry*, 16 AD3d 448 [2005]; *Niyazov v Bradford*, 13 AD3d 501 [2004]; *Russ v Investech Sec.*, 6 AD3d 602 [2004]). Here, defendant's sworn deposition

testimony has established that she was stopped when her vehicle was hit in the rear by co-defendant JAMES B. CONKLIN, JR.'s vehicle.

On a motion for summary judgment, the test to be applied is whether or not triable issues of fact exist or whether on the proof submitted a court may grant judgment to a party as a matter of law (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Andre v Pomeroy*, 35 NY2d 361 [1974]; *Akseizer v Kramer*, 265 AD2d 356 [1999]). It is well-settled that a proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering evidentiary proof in admissible form to demonstrate the absence of any material issues of fact (*Dempster v Overview Equities, Inc.*, 4 AD3d 495 [2004]; *Washington v Community Mut. Sav. Bank*, 308 AD2d 444 [2003]; *Tessier v N.Y. City Health and Hosps. Corp.*, 177 AD2d 626 [1991]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Gong v Joni*, 294 AD2d 648 [2002]; *Romano v St. Vincent's Med. Ctr.*, 178 AD2d 467 [1991]; *Commrs. of the State Ins. Fund v Photocircuits Corp.*, 2 Misc 3d 300 [Sup Ct, NY County 2003]).

In the case at bar, the Court finds that defendant BEPLER has made an initial *prima facie* showing of entitlement to judgment as a matter of law (*see e.g. Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Andre v Pomeroy*, 35 NY2d 361, *supra*; *Rodriguez v N.Y. City Transit Auth.*, 286 AD2d 680 [2001]), and plaintiff has not produced evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. Accordingly, that branch of defendant BEPLER's motion seeking summary judgment dismissing plaintiff's complaint and all cross-claims against her is granted.

The remaining two motions at bar concern the failure of defendants PHAROAH HOLLAND and RUTH HOLLAND to appear for depositions, notwithstanding the fact that the deposition dates have been scheduled and adjourned on numerous occasions. The movants seek an Order precluding defendants, compelling them to appear, or striking their pleading. In opposition, counsel for defendants HOLLAND alleges that he is not aware of these defendants' current address, and therefore he has been unable to notify them of the deposition dates.

In view of the foregoing, defendants PHAROAH HOLLAND and RUTH HOLLAND shall appear for depositions within thirty (30) days of service of the within Order with notice of entry, or be precluded from offering evidence at the time of the trial of this action.

The foregoing constitutes the decision and Order of the Court.

Dated: June 29, 2007

HON. JOSEPH FARNETI
Acting Justice Supreme Court