SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 9

NASSAU COUNTY

CHRISTI McBRIDE,

Plaintiff,

-against-

HILDA I. CHIN,

Defendant.

MOTION DATE: 5/11/07

MOTION SEQ. NO.: 001, 002

INDEX NO.: 002618/06

The following papers read on this motion (numbered 1-4):

Notice of Motion.....1
Notice of Cross Motion 2
Affirmation in Reply and in Further Support of Motion for Summary Judgment.....3
Affidavit in Sur-Reply.....4

Defendant Hilda I. Chin's motion and plaintiff Christi McBride's cross motion for summary judgment pursuant to **CPLR §3212** are determined as follows.

Plaintiff Christi McBride, age 36, alleges that on June 28, 2005 at approximately 6:15 p.m., a motor vehicle owned and operated by her was allegedly hit in the rear by a vehicle owned and operated by defendant Hilda I. Chin. The accident occurred on Baldwin Road near Henry Street, in the Town of Baldwin. Defendant now moves for an order dismissing plaintiff's complaint pursuant to **CPLR §3212**, on grounds that plaintiff failed to sustain a "serious injury" within the meaning of **Insurance Law §5102(d)**. Plaintiff cross moves for summary judgment pursuant to **CPLR §3212** on the issue of liability on the basis that defendant struck plaintiff's vehicle in the rear while plaintiff's

vehicle was stopped.

Plaintiff's cross motion on the issue of liability

On August 14, 2006, plaintiff testified at a deposition, that the accident occurred while she was stopped at a yield sign. Defendant testified that when the front of her vehicle came into contact with the rear of plaintiff's vehicle, plaintiff's vehicle was stopped.

A rear-end collision with a stopped vehicle establishes a prima facie case of negligence on the part of the operator of the moving vehicle, and imposes a duty on him or her to explain how the accident occurred. **Gross v. Marc**, 2 AD3d 681; **Mascitti v. Greene**, 250 AD2d 821; **Leal v. Wolff**, 224 AD2d 392; **Gambino v. City of New York**, 205 AD2d 583. If the operator of the moving vehicle cannot come forward with evidence to rebut the inference of negligence, the driver of the lead vehicle may properly be awarded judgment as a matter of law. **Toussant v. Ferrara Bros. Cement Mixer**, 33 AD3d 991; **Piltser v. Donna Lee Management Corp.**, 29 AD3d 973; **Dileo v Greenstein**, 281 AD2d 586; **Tricoli v. Malik**, 268 AD2d 469. In this case, defendant has offered no explanation, nor produced any evidence, to rebut the inference of negligence. On the basis of the foregoing, plaintiff shall have partial summary judgment on the issue of liability.

Defendant's motion for summary judgment on the grounds that plaintiff failed to demonstrate a serious injury within the meaning of Insurance Law §5102(d)

Insurance Law §5102(d) provides that a "serious injury means a personal injury which results in (1) death; (2) dismemberment; (3) significant disfigurement; (4) a fracture; (5) loss of a fetus; (6) permanent loss of use of a body organ, member, function or system; (7) permanent consequential limitation of use of a body organ or member; (8) significant limitation of use of a body function or system; or (9) a medically determined injury or impairment of a nonpermanent 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" (numbered by the Court). The Court's consideration in this action is confined to whether plaintiff's injuries constitute a permanent consequential limitation of use of a body organ or member (7) or significant limitation of use of a body function or system (8). The Court finds that plaintiff has demonstrated a *prima facie* failure to prove a medically determined injury which prevented plaintiff from performing all of the material acts constituting her usual and customary daily activities for ninety days of the first one hundred eighty days following the accident (9).

In support of her motion for summary judgment, defendant submits a report of examination, dated October 11, 2006, of orthopedist Isaac Cohen, MD covering an examination of that date. Dr. Cohen found that physical examination of the cervical spine revealed flexion to 45 degrees, hyperextension to 45 degrees, lateral bending in the 45 degree range to the right and left and rotational motion in the 80 degree range to the right and left, comparing these results to normal. Dr. Cohen also found no muscle spasms or tenderness upon palpation of the paravertebral muscle, negative compression testing and negative Spurling's test.

With respect to the thoracolumbar spine, Dr. Cohen's examination revealed flexion to 90 degrees, hyperextension in the 30 degree range, lateral bending to the right and left in the 30 degree range and rotational motion to the right and left in the 30 degree range, comparing these results to normal. With respect to plaintiff's knees, Dr. Cohen found normal range of motion with full flexion of the right and left knee to 150 degrees, negative McMurray's and Drawer sign and negative abduction and adduction stress testing. Dr. Cohen also reported a negative straight leg raise test, normal sensory examination of the lower extremities, normal knee and ankle reflexes and normal toe and heel walking.

Dr. Cohen diagnosed a "status post motor vehicle accident, cervical and lumbosacral strain, resolved." Dr. Cohen stated that plaintiff's "mild subjective

complaints" could not be corroborated by his examination and that plaintiff has "completely normal functional capacity of both upper as well as lower extremities." Dr. Cohen concluded, that plaintiff "does not have any objective evidence of residual disability or permanency related to this accident," and that "no sequella is noted." Dr. Cohen stated further that plaintiff does not require "any form of active medical management."

Defendant also submits portions of the deposition testimony of plaintiff conducted on August 14, 2006. Plaintiff claims that as a result of not feeling well after the accident, she worked half days for approximately six days (although in her bill of particulars, plaintiff claims she was incapacitated from her employment and/or household duties for one week and continuing intermittently thereafter). Plaintiff testified that after the accident, she drove her vehicle home and thereafter drove with her husband to the emergency room of North Shore University Hospital in Manhasset. Plaintiff stated that she did not receive any diagnostic testing and that the physician who examined her, prescribed Motrin. She testified that within one week she saw orthopedist Dr. Kupersmith and thereafter underwent physical therapy at New York Physical Therapy, had an MRI at Baldwin Imaging and had appointments with a pain management doctor and an acupuncturist. At the time of the deposition, she testified that she was still receiving physical therapy.

The Court finds that the report of defendant's examining physician, is sufficiently detailed in the recitation of the various clinical tests performed and measurements taken during the examination, so as to satisfy the Court that an "objective basis" exists for his opinion. Accordingly, the Court finds that defendant has made a *prima facie* showing that plaintiff Christi McBride did not sustain a serious injury within the meaning of **Insurance Law §5102(d)**. Consequently, the burden shifts to plaintiff to come forward with some evidence of a "serious injury" sufficient to raise a triable issue of fact. **Gaddy v. Eyler**, 79 NY2d 955, 957.

Plaintiff submits an unaffirmed report of Glenn Schwartz, MD, dated August 24, 2005, covering an MRI of the cervical spine. Dr. Schwartz found a "straightening with slight reversal normal cervical lordosis," "C4-5 and C5 posterior disc bulges with osteophytic ridges slightly impinging on spinal cord," "C6-7 broad based central posterior disc herniation without involvement of spinal cord" and "multilevel foraminal encroachment." The Court notes that the report of a physician which is not affirmed, or subscribed before a notary or other authorized official, is not competent evidence. **CPLR 2106**; **Grasso v. Angerami**, 79 NY2d 814; **Bravo v. Rehman**, 28 AD3d 694; **Kunz v. Gleeson**, 9 AD3d 480; **Magro v. He Yin Huang**, 8 AD3d 245; **Grossman v. Wright**, 268 AD2d 79; **Young v. Ryan**, 265 AD2d 547. However, since defendant's physician, Dr. Cohen, stated the results of the MRI in his report of examination, the MRI can be considered by the Court. **Kearse v. New York City Transit Authority**, 16 AD3d 45; **Pech v. Yael Taxi Corp**, 303 AD2d 733; **Ayzen v. Melendez**, 299 AD2d 381; **Perry v. Pagano**, 267 AD2d 290.

Plaintiff submits an affirmation of orthopedist Lee M. Kupersmith, MD, dated April 4, 2007, purportedly attaching an unaffirmed "medical narrative", dated June 30, 2006, unaffirmed report of Glenn Schwartz, MD, dated August 24, 2005, covering an MRI of plaintiff's cervical spine, affidavit of plaintiff, sworn to on April 13, 2007 and deposition testimony of plaintiff and defendant, dated August 14, 2006. The Court notes that plaintiff has failed to submit reports covering other medical care mentioned in the record, such as examinations by physical therapists at New York Physical Therapy, pain management physician and acupuncturists Dr. Iadevo and Dr. Kirschen and neurologist Dr. Dulai

In his affirmation of April 4, 2007, Dr. Kupersmith states that upon his initial examination on July 15, 2005, plaintiff exhibited a restriction in range of motion of her neck and mid back to lower back region. Dr. Kupersmith opines that "examination of the neck showed restricted motion with the chin to the chest at 3 inches, extension of the neck

of 0 degrees, lateral rotation to the right of 50 degrees and to the left of 60 degrees, lateral bending to the right and left of 20 degrees with tenderness around the left trapezoidal rhomboid region." Dr. Kupersmith also found negative straight leg raising. Dr. Kupersmith diagnosed a "cervical herniated nucleus pulposus, thoracolumbar and lumbosacral sprains." The unaffirmed medical report which was purportedly incorporated in Dr. Kupersmith's affirmed report, covered examinations conducted on July 15, 2005, September 13, 2005, October 18, 2005, December 13, 2005 and May 16, 2006. In this narrative, Dr. Kupersmith sets forth various range of motion findings of the cervical and lumbosacral spine without comparing the findings to normal ranges of motion.

In an affidavit, sworn to on April 13, 2007, plaintiff states that she still has "very severe and daily pain in her head, neck and back which is aggravated by standing at work, being too long in one position, using stairs, bending and lifting objects of even moderate weight including [her] children." Plaintiff claims that this pain has resulted in difficulties "performing regular household chores such as cooking, lifting groceries, washing clothes and cleaning." Plaintiff also states that she has difficulty doing activities with her children such as bowling, ice skating, taking long walks and going to amusement parks. In addition, she claims to have difficulty sitting for a long period of time necessitating "constant breaks at work as well at home." Plaintiff complains that she cannot engage in any vigorous physical activity and that she is currently experiencing numbness in her right leg.

It is the determination of this Court that plaintiff has failed to submit *objective* medical evidence (of either a quantitative or qualitative nature) sufficient to raise a triable issue as to whether or not she sustained a "serious injury" within the meaning of **Insurance Law §5102(d)**. The affirmation of Dr. Kupersmith is not based on a recent examination of plaintiff. *See* **Whitfield-Forbes v. Pazmino**, 36 AD3d 901; **Albano v. Onolfo**, 36 AD3d 728; **D'Alba v. Yong-Ae Choi**, 33 AD3d 650; **Gomez v. Epstein**, 29 AD3d 950; **Legendre v. Siqing Bao**, 29 AD3d 645. In addition, Dr. Kupersmith failed to

compare his range of motion findings to normal "leaving the court to speculate as to the meaning of those figures" **Kouros v. Mendez**, 2007 WL 1845623 *citing* **Manceri v. Bowe**, 19 AD3d 462, 463. *See* **Tobias v. Chupenko**, 2007 NY Slip Op. 05259; **Cotto v. JND Concrete & Brick, Inc.**, 2007 WL 1633680; **Osgood v. Martes**, 39 AD3d 516; **Caracci v. Miller**, 34 AD3d 515.

The Court notes that other than the range of motion findings set forth in Dr. Kupersmith's report, the report is conclusory and fails to specify the objective tests performed. *See* **Patalano v. Curreri**, 30 AD3d 497; **Vazquez v. Basso**, 27 AD3d 728; **Kelly v. Rehfeld**, 26 AD3d 469; **Edwards v. New York City Transit Authority**, 17 AD3d 628; **Mendolia v. Harris**, 16 AD3d 561.

There is also insufficient evidence that plaintiff's alleged injuries are permanent **§5102(d)**((7)). Dr. Kupersmith's assertion that plaintiff's injuries "may be permanent in nature" is conclusory as he fails to offer any evidence of permanency. "Mere repetition of the word 'permanent' in the affidavit of a treating physician is insufficient to establish 'serious injury' and [summary judgment] should be granted for defendant where plaintiff's evidence is limited to conclusory assertions tailored to meet statutory requirements." **Lopez v. Senatore**, 65 NY2d 1017, 1019. *See also*, **Grossman v. Wright**, 268 AD2d 79; **Lincoln v. Johnson**, 225 AD2d 593; **Orr v. Miner**, 220 AD2d 567. Any statements of permanency of plaintiff's injuries are belied by her deposition testimony that she only missed up to six half days of work. *See* **Relaford v. Valentine**, 17 AD3d 339.

In addition, although Dr. Kupersmith asserts in his medical narrative of June 30, 2006, that plaintiff "requires additional orthopedic care at this time," plaintiff has failed to submit any evidence documenting further care. Furthermore, Dr. Kupersmith's conclusory statement that the injuries to plaintiff's cervical, thoracic and lumbarsacral spines are "causally related to [the] motor vehicle accident of June 28, 2005," fails to adequately establish a causal relationship between the accident and plaintiff's injuries. *See* **Howell Reupke**, 16 AD3d 377.

Plaintiff's complaint of subjective pain does not by itself satisfy the "serious injury" requirement of the no-fault law. **Scheer v. Koubek**, 70 NY2d 678; **Ranzie v. Abdul-Massih**, 28 AD3d 447; **Nelson v. Amicizia**, 21 AD3d 1015; **Kivlan v. Acevedo**, 17 AD3d 321; **Rudas v. Petschauer**, 10 AD3d 357; **Barrett v. Howland**, 202 AD2d 383. Plaintiff's affidavit does not raise an issue of fact as it consists of self serving and conclusory statements with respect to her current pain and abilities. Plaintiff's claim that she suffers very severe pain which is aggravated by standing at work and that she has difficulty sitting for too long, is belied by her deposition testimony that she missed only six half days of work and that her duties at work did not change as a result of the accident. *See* **Relaford v. Valentine**, *supra*; **Mercado v. Garbacz**, 16 AD3d 631.

Although the MRI report of plaintiff's cervical spine indicates disc bulges and a herniated disc, the Court notes that the existence of a radiologically confirmed disc injury alone will not suffice to defeat summary judgment. *See* **Pommells v. Perez**, 4 NY3d 566, 574; **Bravo v. Rehman**, *supra*; **Howell Reupke**, 16 AD3d 377; **Kearse v. New York City Transit Authority**, *supra*.

The Court has examined the parties' remaining contentions and find them to be without merit.

On the basis of the foregoing, it is

ORDERED, defendant HILDA I. CHIN's motion for summary judgment dismissing the complaint of plaintiff CHRISTI McBRIDE, on the grounds that plaintiff CHRISTI McBRIDE failed to sustain a "serious injury" within the meaning of **Insurance Law §5102(d)** is **granted**; and it is further

ORDERED, plaintiff CHRISTI McBRIDE's cross motion for partial summary judgment on the issue of liability is **granted**.

Defendant shall serve plaintiff with a copy of this Order within 15 days after entry of this Order in the records of the Nassau County Clerk.

This constitutes the order of the Court.

Dated: 8/3, 2007 ENTER:

J.S.C.

ENTERED

SEP 10 2007

NASSAU COUNTY
COUNTY CLERK'S OFFICE