Platt v Cunningham
2007 NY Slip Op 34017(U)
December 6, 2007
Supreme Court, Suffolk County
Docket Number: 0026250/2005
Judge: Robert W. Doyle
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SHORT FORM ORDER

INDEX No. 05-26250
CAL. No. 07-00095-MV

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 5-29-07
ADJ. DATE 7-30-07
Mot. Seq. # 001 - MG

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CHERYL PLATT,

Plaintiff,

- against -

ROBERT J. CUNNINGHAM,

Defendant.

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Upon the following papers numbered 1 to 23 read on this motion by defendant for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 11 ; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 12 - 19 ; Replying Affidavits and supporting papers 20 - 21 ; Other sur-reply 22 -23 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by the defendant for summary judgment dismissing the complaint is granted.

This action arose from an accident occurring on November 22, 2002 in which the plaintiff allegedly sustained serious personal injuries. The defendant moves for summary judgment dismissing the complaint pursuant to Insurance Law §5102(d). The plaintiff opposes the motion and defendant has submitted a reply affirmation in rebuttal to that opposition. The plaintiff has submitted a sur-reply affirmation.

Under the Insurance Law "'[s]erious 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" (Insurance Law §5102[d]).

In the context of the plaintiff's claims, the term "significant," as it appears in the statute, has been defined as "something more than a minor limitation of use" (***Licari v Elliott,*** 57 NY2d 230, 455 NYS2d 570 [1982]). For this purpose, the plaintiff must demonstrate not only the extent or degree of the limitation but also its duration (***Beckett v Conte,*** 176 AD2d 774, 575 NYS2d 102 [1991], app. den. 79 NY2d 753, 581 NYS2d 281). The duration of the injury must be more than "fleeting" (***Partlow v Meehan,*** 155 AD2d 647, 548 NYS2d 239 [1989]). The term "consequential" means important or significant (***Kordana v Pomellito,*** 121 AD2d 783, 503 NYS2d 198 [1986], app. dis. 68 NY2d 848, 508 NYS2d 425). A "permanent loss" of use of a body organ, member, function or system must be total (***Oberly v Bangs Ambulance Inc.,*** 96 NY2d 295, 727 NYS2d 378 [2001]). In order to prove the extent or degree of physical limitation, an expert can designate a numeric percentage of a plaintiff's loss of range of motion or give a "qualitative assessment of a plaintiff's condition...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" (***Toure v Avis Rent A Car Sys.,*** 98 NY2d 345, 746 NYS2d 865, 868 [2002]; rearg. den. ***Manzano v O'Neil,*** 98 NY2d 728, 749 NYS2d 478).

Generally, on a motion for summary judgment to dismiss a complaint for failure to set forth a prima facie case of serious injury as defined by Insurance Law §5102(d), the initial burden is on the defendant "to present evidence, in competent form, showing that the plaintiff has no cause of action" (***Rodriguez v Goldstein,*** 182 AD2d 396, 397, 582 NYS2d 395, 396 [1992]). "It is well settled that the proponent of a motion for summary judgment under the no-fault statute must submit admissible evidence demonstrating that a plaintiff did not sustain a serious injury as defined by Insurance Law § 5102[d]" (***Fitzmaurice v Chase,*** 288 AD2d 651, 652, 732 NYS2d 690, 691 [2001]; *see,* ***Barbarulo v Allery,*** 271 AD2d 897, 707 NYS2d 268 [2000]). Once the defendant has met the burden, the plaintiff must then, by competent proof, establish a *prima facie* case that such serious injury exists (***DeAngelo v Fidel Corp. Services, Inc.,*** 171 AD2d 588, 567 NYS2d 454, 455 [1991]). Such proof, in order to be in a competent or admissible form, shall consist of affidavits or affirmations (***Pagano v Kingsbury,*** 182 AD2d 268, 587 NYS2d 692 [1992]). The proof must be viewed in a light most favorable to the non-moving party, here the plaintiff (***Cammarere v Villanova,*** 166 AD2d 760, 562 NYS2d 808, [1990]).

The defendant has submitted in support of the motion, inter alia, the affirmations and memorandum of law of his attorney, copies of the pleadings, the plaintiff's verified bill of particulars, the deposition testimony of the plaintiff and the sworn reports of defendant's experts, Dr. Frederick Mortati (Dr. Mortati) and Dr. William A. Healy III (Dr. Healy), dated October 25, 2006 and November 14, 2006, respectively. The plaintiff avers in the complaint that the subject accident occurred on November 22, 2002 in the Town of Southampton at the intersection of Majors Path and North Sea Mecox Road. The plaintiff further avers in the complaint that as a result of this accident she sustained serious injuries as defined in Insurance Law Section 5102[d] and economic loss greater than basic economic loss.

The plaintiff avers in her verified bill of particulars that she sustained, as a result of the accident a permanent consequential limitation and significant limitation consisting of "*specifically* the cervical spine, lumbar spine, right arm and left and right knee" (Motion, Exhibit C, page 8 [emphasis added]). The plaintiff also claims, with regard to these injuries, that she sustained, a moderate foraminal disc protrusion at L4-5, disc bulges with borderline spinal stenosis at C3-C4 through C6-C7, radiculopathy at C5-C6, cervical shoulder strain, neck and back strain, neck pain radiating to both shoulders and also radiating down the right arm, "[d]iffuse cervical, bilateral cervical paraspinal bilateral shoulder girdle

[* 3]

tenderness, worse on the right", cervical and lumbosacral sprain, "[d]iffuse lumbosacral, bilateral lumbar paraspinal... and bilateral sacroiliac tenderness", low back pain which radiated to sacroiliac areas bilaterally, "pins and needles" in both arms, muscle tightness in the right arm, cyanosis[1] of the right arm "at times", right knee pain, "[h]ypermobility[2] of the patellar and positive patellar grind test of the right knee", [w]eakness in the quadriceps on the right side on the right knee and was tender over the greater trochanteric area bilaterally", "[c]hondromalicia[3] patellar of the right knee" and hypermobility of the left knee (Motion, Exhibit C, page 4 [bracketed material added]. The plaintiff also averred that with regard to the lumbar spine injuries an MRI noted the existence of disc degenerative changes and with regard to the cervical spine injuries, the MRIs noted the existence of degenerative disease.[4] The plaintiff also avers that these injuries are permanent and that she has sustained a permanent partial disability. The plaintiff further states that she was not confined to bed or home following the accident, but was out of work for two days. Finally, the plaintiff avers that, other than being in the hospital for an MRI, she was not hospitalized, that x-ray expense and expenses for physician's services were approximately $1,550.85 and $3,154.91, respectively, that she received $4,881.76 in payments from her no-fault carrier through May 21, 2003 and that she has asserted no claim for property damage.

The plaintiff testified at her deposition that her brother picked her up at the scene of the accident and took her home. She called her workplace and told them that she would not be coming in, but two to three days later she returned to work. The day after the accident she sought treatment from Dr. Prill, her family physician. She complained to Dr. Prill of headaches, pain in the jaw, right side of her head, neck, shoulders, hips and knees and of numbness in her right arm. She received physical therapy until approximately April of 2003. She was also treated after the accident by a chiropractor and several physicians. Her medical treatment for accident related injuries ended in 2003, except for treatment she received in 2006 from Dr. Mendelsohn, a neurologist. Dr Mendelsohn had recommended surgery but she has not seen a surgeon with regard to that recommendation or had surgery with regard to an accident related injury. She had not injured her neck prior to the accident and was not told either before or after the accident that she had a degenerative condition in her neck. Prior to the accident she did not have pain in her neck, hips, lower back or knees, dizziness or other than occasional headaches. She now has constant headaches, but does not take anything for them. She is currently not under the care of any physician. The plaintiff further testified that the No-Fault insurance carrier has reimbursed her for lost earnings and she has had some out of pocket expenses for physicians' services.

Dr Healy, an orthopedist, averred in his report dated November 14, 2006 that he examined the

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[1] Cyanosis is defined as a blue or grayish discoloration of the skin "due to the presence of abnormal amounts of reduced hemoglobin in the blood" (Taber's Cyclopedic Medical Dictionary, Tenth Edition, page C-99)

[2] Hypermobility is defined as an excessive "facility of movement" (Taber's Cyclopedic Medical Dictionary, Tenth Edition, pages M-43 and H-51)

[3] Chondromalicia is defined as a softness of any cartilage (Taber's Cyclopedic Medical Dictionary, Tenth Edition, page C-48)

[4] The MRI of the lumbar spine was dated February 15, 2003 and the MRIs of the cervical spine were dated March 28, 2003 and June 29, 2004.

plaintiff on the same date. He reviewed an MRI taken of the plaintiff's lumbar spine taken on February 15, 2003 which showed evidence of L4-L5 degenerative disc disease with a herniation at L4-L5. On his review of a cervical MRI taken on March 27, 2003 he noted evidence of a straightening of the cervical spine, marked desiccation of all of the intervertebral discs with disc bulges at C3-C4, C4-C5, C5-C6 and C6-C7. He also indicated that an MRI of the plaintiff's cervical spine taken on June 28, 2004[5] showed minimal differences with the previous study and that there was evidence of multilevel degenerative disc disease "as well as facet hypertrophy consistent with degenerative cervical spondylosis" (Motion, Exhibit E, page 7). He indicated that his range of motion findings with regard to the plaintiff's cervical spine for flexion, extension and right and left rotation were at normal ranges. He also indicated that, while right and left lateral rotation were at "30-45", normal was at "30-45" degrees (Ibid.). Dr Healy averred that his range of motion findings for the plaintiff's lumbar spine upon comparison were at normal. He indicated that his range of motion findings with regard to the plaintiff's knees for right and left flexion was at "135" with normal at 135 degrees and for right and left extension was at "0-5" with "0-5" degrees as normal (Ibid. page 9).

Dr. Healy opined that the plaintiff may have sustained a cervical or lumbar sprain or strain as a result of the accident and that this strain or sprain may have exacerbated the plaintiff's pre-existing cervical and lumbar degenerative disc disease. He found no evidence of radiculopathy, but he opined that the plaintiff still suffers from a persistent degenerative process in her cervical and lumbar spine. He described the condition of the plaintiff's knee as "essentially benign" (Ibid. page 10). He concluded that the plaintiff had fully recovered from a cervical and lumbar sprain.

Dr. Mortati, a neurologist, averred that he examined the plaintiff on October 25, 2006. After performing various neurological tests for the cranial nerves, motor system, reflexes and sensory system, Dr. Mortati concluded that the plaintiff had a normal neurological examination. He opined unequivocally that the plaintiff did not sustain neurological injury as a result of the accident and that this opinion was based on his examination and the plaintiff's symptoms.

Contrary to the plaintiff's contentions, Dr. Healy performed objective tests of the plaintiff's cervical and lumbar spines (*see*, ***Atkinson v Oliver,*** 36 AD3d 552, 830 NYS2d 30 [2007]; ***Style v Joseph,*** 32 AD3d 212, 820 NYS2d 26 [2006]; ***Samud v New York City Transit Authority,*** 11 Misc3d 1090[A], 819 NYS2d 851 [2006]) and, after comparison, found that the plaintiff's range of motion for these areas was normal and that any cervical or lumbar sprains caused by the accident had resolved. Although Dr. Healy's report was deficient in that he failed to explain how a "normal" range of motion for cervical right and left lateral rotation varied as much as fifteen degrees, he nevertheless ascribed the plaintiff's condition in the cervical and lumbar spines, with the exception of possible strains or strains, to pre-existing degenerative disease. Dr. Healy also found no evidence of radiculopathy. Similarly, although Dr Healy's reference to "normal" with regard to right and left extension of the knees had an unexplained variation of five degrees, he described the condition of the plaintiff's knee as "benign".

Dr. Mortati, after performing a full neurological examination found that the plaintiff had not sustained neurological injury as a result of the subject accident. Contrary to the plaintiff's assertion, Dr.

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[5] Based on the plaintiff's bill of particulars and page 3 of Dr. Healy's report this appears to be the same cervical MRI as reviewed in the cervical MRI report dated June 29, 2004.

[* 5]

Mortati's finding of "diminished appreciation of pinprick, temperature, and vibration sensations in a stocking-glove distribution in the right arm...." did not raise a triable issue of fact as the plaintiff had informed Dr. Mortati that she had been advised by Dr. Mendelsohn that the numbness in her right arm was secondary to a bulging disc in her neck which was impinging on her nerves.[6] In any event the subjective complaints of pain in the plaintiff's deposition and the reference in the plaintiff's bill of particulars to conditions of her knees and right arm which were primarily minor or mild, do not constitute a serious injury (***Parks v Miclette,*** 41 AD3d 1107, 838 NYS2d 717 [2007]).

Here the defendant has met his prima facie burden of demonstrating that the plaintiff did not sustain a serious injury as a result of the subject accident (***Yagi v Corbin,*** AD3d , 843 NYS2d 276 [2007]; ***Shinn v Catanzaro,*** 1 AD3d 195, 767 NYS2d 88 [2003]; ***Grossman v Wright,*** 268 AD2d 79, 707 NYS2d 233 [2000]). The defendant has also tendered sufficient proof to demonstrate, prima facie, that the plaintiff did not sustain economic loss in excess of basic economic loss. Accordingly, the Court now turns to the proof submitted by the plaintiff in opposition to the motion.

The plaintiff has submitted in opposition to the motion, inter alia, the affirmations of her attorney, the affirmed report of Dr. Mendelsohn dated June 27, 2007 and her affidavit. Dr. Mendelsohn avers in his report that he treated the plaintiff on May 21, 2003 with regard to the subject accident. At that visit the plaintiff complained that since the accident she has had headaches, neck pain, pain in her knees and pain in her legs. She also complained that she still experienced intermittent numbness in her right arm. After a neurological examination, he believed that the plaintiff's condition was caused by cervical radiculopathy at C5-C6 on the right. On April 26, 2004 the plaintiff came to his office for a follow-up visit at which time she continued to complain of numbness radiating down into her right arm and hand and periods of "pins and needles" in both arms and legs (Affirmation in Opposition, Exhibit E, paragraph 3). After he performed a complete physical he noted that the plaintiff had weakness and sensory deficits in her right arm. At that time he advised the plaintiff to seek a surgical consultation because of the numbness, pain and radiculopathy in her right arm. The EMG and NCV testing on the plaintiff conducted on May 18, 2004 confirmed right C5-C6 radiculopathy and the second MRI of the cervical spine conducted on June 28, 2004 showed disc bulges from C3-C4 through C6-C7. On September 13, 2005 the plaintiff came to his office for another follow-up visit at which time she complained of intermittent numbness and weakness in her right arm as well as cervical pain and stiffness.

Dr. Mendelsohn further averred that he reviewed and attached copies of the office records of several of the plaintiff's other treating health care providers; Dr. Prill, Dr. Richard Sears, a chiropractor, Hampton Physical Therapy, Dr. Ira J Chernoff, an orthopedist, and Dr. Moreta, a neurologist. He also stated that he reviewed the films of the MRIs of the plaintiff's lumbar spine taken on February 15, 2003 and of the plaintiff's cervical spine taken on March 27, 2003 and June 28, 2004 and has attached copies of the reports[7]. Based on this review he found evidence of a herniated disc at L4-L5 and evidence of both a reversal of the plaintiff's lordotic curve and of disc bulges from C3 to C7. He also stated that this cervical condition resulted in significant stenosis at multiple levels.

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[6] Dr. Healy has opined that the plaintiff's cervical bulging discs were caused by pre-existing degenerative disease and not the accident.

[7] The MRI reports are dated March 28, 2003 and June 29, 2004, respectively.

Dr. Mendelsohn has also averred that on June 26, 2007 he conducted a complete neurological examination of the plaintiff and found restricted range of motion in the plaintiff's neck, shoulders, arms and lower back. He also found numbness, "tingling symptomology" together with cervical radiculopathy. On testing the plaintiff's range of motion using a goniometer he found with regard to the cervical spine, that flexion was up to 15 degrees compared with a normal range of 45 degrees, that extension was up to 15 degrees compared with a normal range of 45 degrees, that right and left rotation was up to 35 degrees compared with a normal range of 70 degrees and that right and left lateral flexion was up to 20 degrees compared with a normal range of 45 degrees. On testing of the lumbar spine he found flexion to be up to 60 degrees compared with normal range of 90 degrees, extension to be up to 15 degrees with a normal range of 45 degrees, right and left rotation to be up to 10 degrees with a normal range of motion of 45 degrees and right and left lateral flexion to be up to 20 degrees with a normal range of motion of 45 degrees. He also found straight leg raising was positive on the right and left at "30/70". Dr. Mendelsohn found right knee flexion to be 70 degrees with a normal range at 140 degrees and left knee flexion to be at 90 degrees with a normal range at 140 degrees.

Dr. Mendelsohn opined that, based on his review of the plaintiff's medical history and medical records, his observations of and conversations with the plaintiff and his review of the MRI films of the plaintiff's lumbar and cervical spines, the plaintiff had sustained "cervical radiculopathy with possible reflex sympathetic dystrophy of the right upper extremity, lower back pain secondary to a herniated nucleus pulposes at L4-L5; bilateral hip pain and bulging discs causing spinal stenosis" as a direct result of the accident (Affirmation in Opposition, Exhibit E, paragraph 11). He further opined that "With the added possibility of reflex sympathetic dystrophy, CHERYL PLATT is suffering from radicular symptoms in the right arm and right hand" (Ibid. paragraph 12).

The plaintiff averred in her affidavit that following the accident she was driven home by her brother. Five days after the accident she was treated by her primary physician, Dr. Prill, who prescribed Naprosyn in response to her complaints of headaches, pain in the jaw and right side of her head, neck, shoulders, hips and knees. Her right knee was particularly painful. She was treated again by Dr. Prill on December 12, 2002. Since she was not feeling better she sought and received, from the end of December to May 24, 2003, treatment from Dr. Richard Sears, a chiropractor and physical therapy from Hampton Physical Therapy. She also sought treatment from Dr. Ira Chernoff, an orthopedist and Dr. Moretta, a neurologist. Dr. Moreta ordered MRIs of her lumbar and cervical spine and brain. Following these MRIs she was informed that the bulges in her cervical disc were impinging on her nerves and that the impingement was causing the numbness and tingling in her right arm. She also consulted with Dr. Mendelsohn, who after sending her for a second MRI of her cervical spine, advised her that the numbness and tingling in her right arm was caused either by cervical radiculopathy or reflex sympathetic dystrophy. She continues to have pain in her neck radiating to her shoulders as well as numbness, tingling and weakness in her right arm. Finally, the plaintiff avers that she has not been involved in any subsequent accidents that could have aggravated the injuries she sustained in the subject accident.

Defendant contends in reply that Dr. Mendelsohn's report is deficient in that he relied in part upon the unsworn medical reports of the plaintiff's other treating physicians (*see*, ***Monaco v Davenport,*** 277 AD2d 209, 715 NYS2d 731 [2000]). This contention is without merit in that all of the unsworn reports submitted by Dr Mendelsohn, except for the physical therapy reports, were initially referred to in the bill of particulars and the doctors' reports submitted by the defendant in support of the motion (see, **Kearse *v***

New York City Transit Authority, 16 AD3d 45, 789 NYS2d 281 [2005]).

The defendant also contends that the plaintiff's submissions are deficient in that neither Dr. Mendelsohn nor the plaintiff explain the gap in treatment from the plaintiff's previous visit to Dr. Mendelsohn on September 13, 2005 [8] and the last visit, nearly two years later, on June 26, 2007. A gap in the plaintiff's medical treatment is considered to be a cessation of all treatment, and while such a gap is not dispositive, "a plaintiff who terminates therapeutic measures following the accident, while claiming 'serious injury,' must offer some reasonable explanation for having done so" (***Pommells v Perez,*** 4NY3d 566, 574, 797 NYS2d 380, 385 [2005]). Even if, as the plaintiff contends, she underwent sustained therapeutic treatment for nearly three years after the accident, she is not relieved from the necessity of tendering a reasonable explanation for the subsequent gap in treatment (***DeLeon v Ross,*** AD3d , 844 NYS2d 36 [2007]; ***Baez v Rahamatali,*** 24 AD3d 256, 808 NYS2d 171 [2005], aff. 6 NY3d 868, 817 NYS2d 204). The omission of either the plaintiff or Dr. Healy to explain this gap in treatment is fatal to the plaintiff's complaint (***Neugebauer v Gill,*** 19 AD3d 567, 797 NYS2d 541 [2005]; ***Hernandez v Taub,*** 19 AD3d 368, 796 NYS2d 169 [2005]).

Dr. Mendelsohn's reports of May 21, 2003 and April 26, 2004[9] are also deficient in that they failed to address references in the plaintiff's bill of particulars to the MRI's taken of the plaintiff's lumbar and cervical spines dated February 15, 2003 and March 28, 2003 which indicated the presence of degenerative disc disease. Dr. Mendelsohn's report of June 27, 2007 is also deficient in that, although he found deficiencies in range of motion in the plaintiff's cervical and lumbar spines and in straight leg raising, he failed to address Dr. Healy' assertion that the herniated disc in the plaintiff's lumbar spine and the bulging discs in the plaintiff's cervical spine arose from a pre-existing degenerative disc disease or to address Dr Moreta's reference in his report dated May 7, 2003 to degenerative disease at C3-C4 through C6-C7. Although Dr. Mendelsohn stated in this report that he reviewed the films of the February 15, 2003, March 28, 2003 and June 29, 2004 MRIs he still did not address the references in these MRI reports to degenerative disc disease. He also did not address whether his finding of cervical radiculopathy or the numbness or tingling in the plaintiff's right arm, which he attributed to cervical radiculopathy, arose from the pre-existing degenerative disc disease. This is a critical omission in that the plaintiff averred in her affidavit that Dr. Mendelsohn informed her that cervical disc bulges were impinging on her nerves which in turn caused the numbness in her right arm. This failure renders his conclusion that the injuries to the plaintiff's cervical spine, lumbar spine and right arm[10] were caused by the subject accident, speculative and conclusory (***Legendre v Bao,*** 29AD3d 645, 816 NYS2d 495 [2006]; ***Lagois v Public Administrator of Suffolk County,*** 303 AD2d 644, 760 NYS2d 52 [2003]). Furthermore, although he found significant range of motion deficiencies for the plaintiff' right knee, he did not attribute these injuries to the subject accident.

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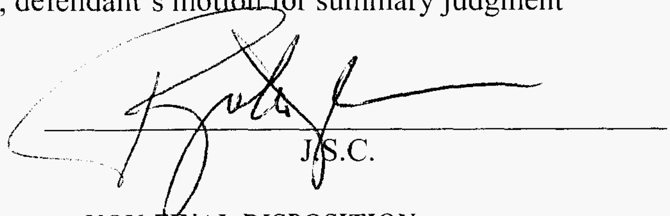
[8] However, the plaintiff also stated in her deposition that her medical treatment for accident related injuries ended in 2003.

[9] Dr. Mendelsohn's report of September 13, 2005 was not considered as it was unsigned, and for the most part, illegible (***Tornatore v Haggerty,*** 307 AD2d 522, 763 NYS2d 344 [2003]).

[10] In his report Dr. Mendelsohn referred to the plaintiff's "right upper extremity" (Affirmation in Opposition, Exhibit E, paragraph 11)

The plaintiff's proof is also deficient in that neither the plaintiff nor Dr. Mendelsohn offer medical proof that the range of motion limitations found by Dr. Mendelsohn in the plaintiff's cervical and lumbar spines and knees existed contemporaneously with the accident (***D'Onofrio v Floton, Inc.,*** 2007 N.Y. Slip Op. 08404, 2007 WL 3317973 [App. Div. Second Dept.]). Although the plaintiff's treating physical therapist noted limitations in the plaintiff's ability to kneel or squat in the report dated March 26, 2003, this does not constitute sufficient medical evidence (***Tornatore v Haggerty,*** supra). In any event, Dr. Chernoff, an orthopedist, noted in his report dated February 26, 2003, that the plaintiff 's knee range of motion was "good" and that her knee injury was limited to "chondromalacia of the right knee" (Affirmation in Opposition, Exhibit E, Report of Dr. Chernoff, dated February 26, 2003) and Dr. Moreta, a neurologist, found in his report dated January 29, 2003 that the plaintiff exhibited negative straight leg raising. Moreover, the plaintiff's subjective complaints of pain in her affidavit do not constitute competent objective medical evidence sufficient to raise a triable of issue of fact with respect to either a permanent consequential limitation or a significant limitation injury (***Young v Ryan,*** 265 AD2d 547, 697 NYS2d 150 [1999]). Accordingly, since the plaintiff's proof has failed to raise a triable issue of fact with respect to whether, as a result of the subject accident, she sustained a serious injury as defined pursuant to Insurance Law 5102[d] or whether she sustained economic loss in excess of basic economic loss (***Rulison v Zanella,*** 119 AD2d 957, 501 NYS2d 487 [1986]), defendant's motion for summary judgment dismissing the complaint is granted.

Dated: DEC 0 6 2007



J.S.C.

_X_ FINAL DISPOSITION ____ NON-FINAL DISPOSITION