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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN Justice

PART 22

SHARON HELLER,

Plaintiff,

- against-

IMAD AL-SHARQIYA, AUREL PETRE ANTON and EDUARD SADYKHOV,

Defendants.

INDEX NO. 104027/2004

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

The following papers, numbered 1 to 4 were read on this motion by defendants for summary judgment on the threshold "serious injury" issue.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits (Memo)	3
Replying Affidavits (Reply Memo)	4

Cross-Motion: ☐ Yes ■ No

On February 3, 2004, plaintiff Sharon Heller ("plaintiff"), while crossing the street as a pedestrian, was involved in an accident with a vehicle owned by defendant Aurel Petre Anton and operated by defendant Imad Al-Sharqiya, and a vehicle owned and operated by defendant Eduard Sadykhov (collectively "defendants"). The accident occurred on East 57th Street near Lexington Avenue in New York County, New York. Plaintiff commenced this action to recover damages for alleged personal injuries suffered as a result of the subject motor vehicle accident. The parties completed discovery and a Note of Issue was filed on April 10, 2008. Defendants now move for an order pursuant to CPLR 3212, granting summary judgment dismissing the complaint on the threshold issue of "serious injury," pursuant to Insurance Law § 5102 (d).[1]

[1]Defendants Al-Sharqiya and Anton moved for summary judgment on May 12, 2008. Defendant Sadykhov moved for summary judgment on June 24, 2008, adopting the same arguments.

SERIOUS INJURY THRESHOLD

Pursuant to the Comprehensive Motor Vehicle Insurance Reparation Act of 1974 (now Insurance Law § 5101 *et seq.* - the "No-Fault Law"), a party seeking damages for pain and suffering arising out of a motor vehicle accident must establish that he or she has sustained at least one of the nine categories of "serious injury" as set forth in Insurance Law § 5102 (d) (*see Licari v Elliott*, 57 NY2d 230 [1982]). 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 loss"]; permanent consequential limitation of use of a body organ or member ["permanent consequential limitation"]; significant limitation of use of a body function or system ["significant limitation"]; 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 ["90/180-day"].

"Serious injury" is a threshold issue, and thus, a necessary element of a plaintiff's prima facie case (*Licari*, 57 NY2d at 235; Insurance Law § 5104 [a]). The serious injury requirement is in accord with the legislative intent underlying the No-Fault Law, which was enacted to "'weed out frivolous claims and limit recovery to significant injuries'" (*Toure v Avis Rent A Car Sys., Inc.*, 98 NY2d 345, 350 [2002], quoting *Dufel v Green*, 84 NY2d 795, 798 [1995]). As such, to satisfy the statutory threshold, a plaintiff is required to submit competent objective medical proof of his or her injuries (*id.* at 350). Subjective complaints alone are insufficient to establish a prima facie case of a serious injury (*id.*).

Plaintiff alleges permanent injuries to her back and neck, including herniated and bulging discs, cervical radiculopathy and lumbar derangement (*see* Al-Sharqiya and Anton motion, bill of particulars at ¶ 11). She claims a "serious injury" under the following relevant categories: (1) permanent loss; (2) permanent consequential limitation; (3) significant limitation;

and (4) 90/180-day (*see id.* at ¶ 20). The Court must determine whether, as a matter of law, plaintiff has sustained a "serious injury" under at least one of the claimed categories.

SUMMARY JUDGMENT ON SERIOUS INJURY

The issue of whether a claimed injury falls within the statutory definition of "serious injury" is a question of law for the Court, which may be decided on a motion for summary judgment (*see Licari*, 57 NY2d at 237). The moving defendant bears the initial burden of establishing, by the submission of evidentiary proof in admissible form, a prima facie case that the plaintiff has not suffered a "serious injury" as defined in section 5102 (d) *(see Toure*, 98 NY2d at 352; *Gaddy v Eyler,* 79 NY2d 955, 956-57 [1992]). Once the defendant has made such a showing, the burden shifts to the plaintiff to submit prima facie evidence, in admissible form, rebutting the presumption that there is no issue of fact as to the threshold question (*see Franchini v Palmieri*, 1 NY3d 536, 537 [2003]; *Rubensccastro v Alfaro*, 29 AD3d 436, 437 [1st Dept 2006]).

A defendant can satisfy the initial burden by relying on the sworn or affirmed statements of their own examining physician, plaintiff's sworn testimony, or plaintiff's unsworn physician's records (*see Arjona v Calcano*, 7 AD3d 279, 280 [1st Dept 2004]; *Nelson v Distant*, 308 AD2d 338, 339 [1st Dept 2003]; *McGovern v Walls*, 201 AD2d 628, 628 [2d Dept 1994]). Reports by a defendant's own retained physician, however, must be in the form of sworn affidavits or affirmations because a party may not use an unsworn medical report prepared by the party's own physician on a motion for summary judgment (*see Pagano v Kingsbury*, 182 AD2d 268, 270 [2d Dept 1992]). Moreover, CPLR 2106 requires a physician's statement be affirmed (or sworn) to be true under the penalties of perjury.

A defendant can meet the initial burden of establishing a prima facie case of the nonexistence of a serious injury by submitting the affidavits or affirmations of medical experts who examined the plaintiff and opined that plaintiff was not suffering from any disability or

consequential injury resulting from the accident (*see Gaddy,* 79 NY2d at 956-57*; Brown v Achy*, 9 AD3d 30, 31 [1st Dept 2004]; *see also Junco v Ranzi*, 288 AD2d 440, 440 [2d Dept 2001] [defendant's medical expert must set forth the objective tests performed during the examination]). A defendant can also demonstrate that plaintiff's own medical evidence does not indicate that plaintiff suffered a serious injury and that the injuries were not, in any event, causally related to the accident (*see Franchini*, 1 NY3d at 537). A defendant can additionally point to plaintiff's own sworn testimony to establish that, by plaintiff's own account, the injuries were not serious (*see Arjona*, 7 AD3d at 280; *Nelson*, 308 AD2d at 339).

The plaintiff's medical evidence in opposition to summary judgment must be presented by way of sworn affirmations or affidavits (*see Pagano*, 182 AD2d at 270; *Bonsu v Metropolitan Suburban Bus Auth.*, 202 AD2d 538, 539 [2d Dept 1994]). However, a reference to unsworn or unaffirmed medical reports in a defendant's motion is sufficient to permit the plaintiff to rely upon the same reports *(see Ayzen v Melendez,* 299 AD2d 381, 381 [2d Dept 2002]). Submissions from a chiropractor must be by affidavit because a chiropractor is not a medical doctor who can affirm pursuant to CPLR 2106 (*see Shinn v Catanzaro*, 1 AD3d 195, 197 [1st Dept 2003]). Moreover, an expert's medical report may not rely upon inadmissible medical evidence, unless the expert establishes serious injury independent of said report (*see Friedman v U-Haul Truck Rental*, 216 AD2d 266, 267 [2d Dept 1995]; *Rice v Moses*, 300 AD2d 213, 213 [1st Dept 2002]).

In order to rebut the defendant's prima facie case, the plaintiff must submit objective medical evidence establishing that the claimed injuries were caused by the accident, and "provide objective evidence of the extent or degree of the alleged physical limitations resulting from the injuries and their duration" (*Noble v Ackerman*, 252 AD2d 392, 394 [1st Dept 1998]; *see also Toure*, 98 NY2d at 350). Plaintiff's subjective complaints "must be sustained by verified objective medical findings" (*Grossman v Wright*, 268 AD2d 79, 84 [2d Dept 2000]).

Such medical proof should be contemporaneous with the accident, showing what quantitative restrictions, if any, plaintiff was afflicted with (*see Nemchyonok v Ying*, 2 AD3d 421, 421 [2d Dept 2003]). The medical proof must also be based on a recent examination of plaintiff, unless an explanation otherwise is provided (*see Bent v Jackson*, 15 AD3d 46, 48 [1st Dept 2005]; *Nunez v Zhagui*, 60 AD3d 559, 560 [1st Dept 2009]).

A medical affirmation or affidavit that is based on a physician's personal examination and observation of a plaintiff is an acceptable method to provide a physician's opinion regarding the existence and extent of a serious injury (*see O'Sullivan v Atrium Bus Co.*, 246 AD2d 418, 419 [1st Dept 1998]). "However, an affidavit or affirmation simply setting forth the observations of the affiant are not sufficient unless supported by objective proof such as X-rays, MRIs, straight-leg or Laseque tests, and any other similarly-recognized tests or quantitative results based on a neurological examination" (*Grossman*, 268 AD2d at 84; *see also Arjona*, 7 AD3d at 280; *Lesser v Smart Cab Corp.*, 283 AD2d 273, 274 [1st Dept 2001]). A physician's conclusory assertions based solely on subjective complaints cannot establish a serious injury (*see Lopez v Senatore*, 65 NY2d 1017, 1019 [1985]).

A plaintiff's medical proof of the extent or degree of a physical limitation may take the form of either an expert's "designation of a numeric percentage of a plaintiff's loss of range of motion"; or 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*, 98 NY2d at 350). The medical submissions must specify when and by whom the tests were performed, the objective nature of the tests, what the normal range of motion should be and whether plaintiff's limitations were significant (*see Milazzo v Gesner*, 33 AD3d 317, 317 [1st Dept 2006]; *Vasquez v Reluzco*, 28 AD3d 365, 366 [1st Dept 2006]).

Further, a plaintiff who claims a serious injury based on the "permanent loss" category

has to establish that the injury caused a "total loss of use" of the affected body part (*see Oberly v Bangs Ambulance, Inc.*, 96 NY2d 295, 299 [2001]).

The "permanent consequential limitation" category requires a plaintiff to establish that the injury is "permanent," and that the limitation is "significant" rather than slight (*see Altman v Gassman*, 202 AD2d 265, 265 [1st Dept 1994]). Whether an injury is "permanent" is a medical determination, requiring an objective basis for the medical conclusion of permanency (*see Dufel*, 84 NY2d at 798). Mere repetition of the word "permanent" in the physician's affirmation or affidavit is insufficient. (*See Lopez*, 65 NY2d at 1019.)

The "significant limitation" category requires a plaintiff to demonstrate that the injury has limited the use of the afflicted area in a "significant" way rather than a "minor, mild or slight limitation of use" (*Licari*, 57 NY2d at 236). In evaluating both "permanent consequential limitation" and "significant limitation," "[w]hether 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*, 84 NY2d at 798). Moreover, a "'permanent consequential limitation' requires a greater degree of proof than a 'significant limitation,' as only the former requires proof of permanency" (*Altman*, 202 AD2d at 651).

The 90/180-day category requires a demonstration that plaintiff has been unable to perform substantially all of his or her usual and customary daily activities for not less than 90 days during the 180 days immediately following the injury *(see Licari*, 57 NY2d at 236). The words "substantially all" mean that the person has been "curtailed from performing his usual activities to a great extent rather than some slight curtailment" *(id.)*. A physician's statement that is too general and non-specific does not support a 90/180-day claim (*see e.g. Morris v Ilya Cab Corp.*, 61 AD3d 434, 435 [1st Dept 2009]; *Gorden v Tibulcio*, 50 AD3d 460, 463 [1st Dept 2008]).

Finally, "even where there is objective medical proof, when additional contributing factors interrupt the chain of causation between the accident and claimed injury--such as a gap in treatment, an intervening medical problem or a preexisting condition--summary dismissal of the complaint may be appropriate" (*Pommels v Perez*, 4 NY3d 566, 572 [2005]). Accordingly, a plaintiff is required to offer a reasonable explanation for a gap in treatment *(id.* at 574; *Delorbe v Perez*, 59 AD3d 491, 492 [2d Dept 2009]; *DeLeon v Ross,* 44 AD3d 545, 545-46 [1st Dept 2007]; *Wadford v Gruz*, 35 AD3d 258, 258-59 [1st Dept 2006]; *Colon v Kempner*, 20 AD3d 372, 374 [1st Dept 2005]).

DISCUSSION

In support of the summary judgment motion, defendants submit, *inter alia*, an affirmed report of neurologist Dr. R.C. Krishna; plaintiff's January 10, 2008 deposition; and the bill of particulars. (*See* Al-Sharqiya and Anton motion, exhibits B, C, D.)

Dr. Krishna conducted a neurological independent medical examination of plaintiff on February 26, 2008. Dr. Krishna reviewed the bill of particulars but no other medical records. Dr. Krishna's report indicates that range of motion of the cervical spine revealed flexion 45 degrees (normal is 45 degrees), extension 45 degrees (normal is 45 degrees), right and left lateral flexion 45 degrees (normal is 45 degrees) and bilateral rotation 80 degrees (normal is 80 degrees). Range of motion of the thoracolumbar spine revealed flexion 90 degrees (normal is 90 degrees), extension 30 degrees (normal is 30 degrees), right and left lateral rotation 30 degrees (normal is 30 degrees) and right and left rotation 30 degrees (normal is 30 degrees). The objective tests used to determine the range of motion findings, if any, were not specified. Sensory and motor system examination were normal. Dr. Krishna opined that the neurological examination was normal. Dr. Krishna concluded that any cervical or lumbar strain injury had resolved; that there was no neurological disability or permanency; and that plaintiff can perform her daily activities without any restrictions.

Plaintiff testified at her deposition that she was not confined to home following the accident (plaintiff's deposition at 108). She was employed as a teacher at the time of the accident and missed one day from work and 2 weeks from an after-school program (*id.* at 10-11.) She also worked part-time as a fitness instructor, and continued to work in that capacity after the accident with some modifications to the weight lifting and cardio components (*id.* at 14, 16-17). She made no claim for lost wages in the bill of particulars.

Plaintiff also testified that she rode a bicycle every weekend before the accident, but was not able to bicycle at all after the accident because she had trouble turning her head (*id.* at 100, 102). Other activities that she had difficulty performing since the accident included driving, exercise, weight lifting, grading papers and preparing lesson plans (*id.* at 101-103, 105-107).

Based on the foregoing, the Court concludes that defendants have failed to meet their initial burden of establishing a prima facie case that plaintiff did not suffer a "serious injury" under the categories of permanent loss, permanent consequential limitation or significant limitation (*see* Insurance Law § 5102 [d]). The First Department has recently clarified that a defendant cannot meet the initial burden "if it presents the affirmation of a doctor which recites that the plaintiff has normal ranges of motion in the affected body parts but does not specify the objective tests performed to arrive at that conclusion" *Linton v Nawaz*, 62 AD3d 434, 439-39 [1st Dept 2009]; *see also Caballero v Fev Taxi Corp.*, 49 AD3d 387, 387 [1st Dept 2008]; *Lamb v Rajinder*, 51 AD3d 430, 430 [1st Dept 2008]; *accord Perez v Fugon*, 52 AD3d 668, 669 [2d Dept 2008]).

The report of Dr. Krishna, which also fails to address plaintiff's MRIs, is the only medical evidence submitted by defendants in support of their motion. However, Dr. Krishna does not set forth any of the objective tests, if any, that were utilized to determine that plaintiff's cervical spine and thoracolumbar spine range of motion was within the normal range. Accordingly, defendants have failed to establish a prima facie case (*see Linton*, 62 AD3d at 439 [defendants

did not shift burden to plaintiff to demonstrate that an issue of fact existed where their expert failed to state what, if any, objective tests he utilized when examining plaintiff which led him to conclude that plaintiff had full ranges of motion and that the alleged injuries were fully resolved]; *Caballero*, 49 AD3d at 387 [defendants did not meet initial burden where reports of examining neurologist and orthopedist "failed to set forth the objective tests performed to support their claims that there was no limitation of range of motion, and did not address the objective findings of plaintiff's MRIs showing, inter alia, herniated and bulging discs"]; *Lamb*, 51 AD3d at 430 [defendant's neurologist "failed to set forth objective tests performed supporting his claims that there was no limitation of range of motion"]).

Because defendants have failed to make a prima facie showing, their summary judgment motion with respect to the categories of permanent loss, permanent consequential limitation and significant limitation must be denied regardless of the claimed insufficiency of the opposing papers (*see Offman v Singh*, 27 AD3d 284, 284 [1st Dept 2006]). It is therefore unnecessary to consider the sufficiency of the evidence submitted in opposition to the motion with respect to these categories (*see Caballero*, 49 AD3d at 387-88).

The Court does, however, conclude that defendants have sustained their initial burden of proof with regard to the 90/180-day category. "In order to establish prima facie entitlement to summary judgment under this category of the statute, [a] defendant must provide medical evidence of the absence of injury precluding 90 days of normal activity during the first 180 days following the accident" (*Elias*, 58 AD3d at 435). However, a defendant can establish the nonexistence of a 90/180-day claim absent medical proof by citing to evidence, such as the plaintiff's own testimony, demonstrating that the plaintiff was not prevented from performing all of the substantial activities constituting his or her usual and customary daily activities for the prescribed period (*id.*; *Copeland v Kasalica*, 6 AD3d 253, 254 [1st Dept 2004]).

Defendants' proffer of plaintiff's own testimony sufficiently demonstrates that the injuries

did not prevent plaintiff from performing "substantially all" of her usual and customary daily activities for the requisite time period (*see Licari*, 57 NY2d at 236). Plaintiff's deposition indicates that she was not confined to home at all following the accident. She continued her part-time job as a fitness instructor, and missed only one day of work and 2 weeks from the after-school program. These time periods are far less than the 90/180 days required by the statute, and are sufficient to meet defendants' initial burden of establishing a prima facie case. (*See Copeland*, 6 AD3d at 254 [home and bed confinement for less than the prescribed period evinces lack of serious injury under 90/180-day category]; *Sanchez v Williamsburg Volunteer of Hatzolah, Inc.*, 48 AD3d 664, 664-65 [2d Dept 2008] [defendants made prima facie showing that plaintiff did not sustain a serious injury under 90/180-day category through plaintiff's deposition testimony that he missed only five weeks of work); *Camacho v Dwelle*, 54 AD3d 706, 706 [2d Dept 2008] ["by submitting the plaintiff's deposition testimony that he missed only 15 days of work as a result of the accident, the defendants demonstrated that the plaintiff was able to perform 'substantially all' of the material acts constituting his customary daily activities for more than 90 days of the first 180 days subsequent to the accident"]).

Since defendants have sustained their initial burden of establishing prima facie entitlement to summary judgment under the 90/180-day category, the burden shifts to plaintiff to produce evidentiary proof in admissible form establishing the existence of a genuine issue of fact necessitating a trial under this category (*see Gaddy*, 79 NY2d at 957).

In opposition to summary judgment, plaintiff submits, *inter alia*, an affirmation of Dr. Francisco Delara, Jr. affirming MRIs taken in 2004 and 2007; an affirmation of treating physician Dr. Thomas A. Scilaris with underlying medical reports; and certified medical records of physical therapist Dr. Eugene J. Liu of Park East Sports Medicine and Rehabilitation Center ("Park East"). (*See* affirmation in opposition, exhibits 1, 2, 3.)

The MRI of plaintiff's cervical spine taken on February 28, 2004, revealed focal disc

herniation at C5-6 situated just right of midline and associated with slight flattening of the anterior cord contour; minimal annular bulges at C3-4, C4-5 and C6-7; and suspect small central subligamentous disc herniation at T2-3. The MRI of the lumbar spine taken on February 28, 2004, revealed slight annular bulge at L5-S1 and no disc herniation. A repeat MRI of the cervical spine taken on June 28, 2007, showed that the small right of midline disc herniation at C5-6 had diminished in size since February 28, 2004; a small central disc herniation at T2-3 had increased in size and abutted the anterior cord margin; minimal bulging of the annulus fibrosus at C3-4, C4-5 and C6-C7 was stable; and nonspecific reversal of the cervical lordosis that may have been due to muscle spasm.

Dr. Scilaris' affidavit indicates that plaintiff was initially treated by Dr. Stanley Liebowitz at Dr. Scilaris' office on July 13, 2006. At the initial examination, plaintiff had limitations of motion in her cervical spine. Motion of the neck was restricted on turning to the right to 40 degrees (normal is 80 degrees); she could turn 85 degrees to the left (normal is 80 degrees); extension was painful but relatively full; and flexion was 30 degrees (normal is 80 degrees). Examination of the lower back revealed tenderness well localized in the lumbar spine. Straight leg raising test was negative. X-rays of the cervical spine reviewed by Dr. Scilaris showed a reversal of the normal cervical lordosis with narrowing and irregularities, especially at the C5/6 interspace. The lumbar spine x-rays showed a left-sided mild curvature on the anterior/posterior view. Plaintiff was determined to have severe permanent restrictions in her cervical spine with objective findings of a herniated disc on MRI; and permanent chronic strain of the back associated with disc bulges which limited her activity. Dr. Scilaris also opined that the herniated and bulging discs documented by plaintiff's 2004 MRIs were caused by the accident.

Dr. Scilaris examined plaintiff on April 19, 2007. Examination revealed marked spasming and tenderness of the trapezium. Trigger points on the left were noted. Plaintiff had

decreased range of motion in the cervical spine. Lateral bend and extension rotation to the left was 25 degrees (normal is 80 degrees), and to the right 45 degrees (normal is 80 degrees). Extension of her neck to 40 degrees caused pain. Spurling maneuver was positive. There was also spasming of the lower left quadratus lumborum. Extension was limited to 20 degrees (normal is 25 degrees) and forward flexion to 80 degrees (normal is 90 degrees). Dr. Scilaris diagnosed cervical radiculopathy with limited motion and lumbar derangement.

Dr. Scilaris next examined plaintiff on May 31, 2007. Plaintiff's cervical spine was limited to 50% of normal with respect to bending and rotation. Plaintiff was also examined by Dr. Scilaris' office on July 12, 2007 and August 16, 2007.

Dr. Scilaris conducted a recent examination July 3, 2008. Plaintiff continued to have decreased range of motion of her cervical and lumbosacral spine. Lateral bend and rotation to the right range of motion was limited to 45 degrees (normal is 80 degrees), and to the left was limited to 30 degrees (normal is 80 degrees). Range of motion of the cervical spine revealed flexion 60 degrees (normal is 90 degrees) and extension 60 degrees (normal is 80 degrees). The lumbar spine range of motion revealed flexion 80 degrees (normal is 90 degrees) and extension 15 degrees (normal is 25 degrees). Dr. Scilaris diagnosed residual cervical radiculopathy and lumbar spasms, and concluded that plaintiff had sustained a permanent limitation, permanent consequential limitation and significant limitation in that she had permanent, significant limitations of motion of her cervical spine due to an impairment of her musculoskeletal and nervous system which were causally related to the accident.

The Park East records indicate that plaintiff was initially examined by Dr. Liu on May 23, 2007. Examination revealed tenderness to touch in the paraspinous area. Range of motion of the neck was functional with difficulty doing extension. Light touch sensation of the upper extremity was intact. Babinski was down-going, and Hoffman was negative. Dr. Liu diagnosed neck pain.

Plaintiff was again examined by Dr. Liu on July 20, 2007. Examination revealed tenderness to touch in the intrascapular area and limited range of motion, especially at extension level. Light touch sensation in the upper extremity was intact. Dr. Liu diagnosed neck pain, facet syndrome and disc bulges. Plaintiff underwent cervical facet block procedures on October 5, 2007, October 19, 2007 and November 2, 2007. Post-operative diagnosis was cervical facet block for facet syndrome.

An examination with Dr. Liu on January 30, 2008 revealed functional range of motion in the cervical spine with some discomfort experienced with rotation. Paraspinal muscles were minimally tender to touch in the cervical area. Muscle strength and tone were within normal limits in all major muscle groups. No gait disturbance was noted. Spurling's test was negative. Dr. Liu's impression was neck pain, facet syndrome and disc bulge.

Plaintiff was again examined by Dr. Liu on March 12, 2008. Examination revealed functional range of motion in the cervical spine with some discomfort experienced with flexion and extension. Paraspinous area was minimally tender to palpation in the cervical area. Babinski sign was negative. Muscle strength and tone were within normal limits in all major muscle groups. No gait disturbance was noted and sensory examination was intact. Dr. Liu's impression was neck pain, facet syndrome and disc bulge.

Considering the evidence in the light most favorable to plaintiff (*see Kesselman v Lever House Restaurant*, 29 AD3d 302, 304 [1st Dept 2006]), the Court finds plaintiff's submissions insufficient to raise an issue of fact sufficient to defeat summary judgment under the 90/180-day category (*see Elias*, 58 AD3d at 435). There is an absence of sufficient objective medical proof relevant to the 90/180-day time period (*see Nelson*, 308 AD2d at 340 [claims that plaintiff could no longer dance, mop or walk like before was not supported by objective proof substantiating 90/180-day claim]).

Moreover, plaintiff has not established a sufficient limitation of "substantially all" of her

customary and daily activities for the required 90/180-day time period (*see Licari*, 57 NY2d at 236). Plaintiff has conceded that she was not confined to home following the accident. She missed only one day of work and 2 weeks from the after-school program, and continued to work part-time as a fitness instructor. In any event, the limitations of which she complains -- *i.e.*, limitations on activities such as exercising, weight lifting, bicycling, grading papers and preparing lesson plans -- do not constitute a curtailment of "substantially all" of her usual and customary daily activities sufficient to support a 90/180-day claim. (*See Alloway v Rodriguez*, 61 AD3d 591, 592 [1st Dept 2009] ["plaintiff's subjective claims of pain and a limitation on sports and exercise activities do not prove a restriction on her usual and customary daily activities for at least 90 days of the 180 days following the accident"); *Rennell v Horan*, 225 AD2d 939, 940 [3rd Dept 1996] ["even accepting that plaintiff had to curtail some of her activities and sports, the record failed to show that such restrictions were medically indicated or affected a significant portion of her usual activities"]; *Burns v McCabe*, 17 AD3d 1111, 1111 [4th Dept 2005] [although there was evidence that plaintiff could not participate in some activities, such as gym class and dancing, plaintiff raised no triable issue as to 90/180-day claim where plaintiff returned to school after a week and to work after five weeks]).

The Court therefore grants summary judgment dismissing plaintiff's claim of a serious injury under the 90/180-day category. Summary judgment with respect to the categories of permanent loss, permanent consequential limitation and significant limitation is denied.

For these reasons and upon the foregoing papers, it is,

ORDERED that defendants' motion for summary judgment is denied, except as to plaintiff's 90/180-day claim which is dismissed; and it is further,

ORDERED that the Clerk of the Court is directed to enter partial summary judgment in favor of defendants on the 90/180-day claim, without costs and disbursements to defendants as taxed by the Clerk; and it is further,

ORDERED that defendants shall serve a copy of this order, with notice of entry, upon

plaintiff.

This constitutes the Decision and Order of the Court.

Dated: January 15, 2010

Paul Wooten J.S.C. Paul Wooten J.S.C.

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST**