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

PRESENT: HON. PAUL WOOTEN PART 22
Justice

JUDITH SALTZMAN,

Plaintiff,

- v -

GARDELLA'S ELITE LIMOUSINE SERVICE and JEAN CALIXTE,

Defendants.

INDEX NO. 108000/2007

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

The following papers, numbered 1 to 2 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
Answering Affidavits — Exhibits (Memo)	2
Replying Affidavits (Reply Memo)	

Cross-Motion: ☐ Yes ■ No

On April 25, 2006, plaintiff Judith Saltzman ("plaintiff"), while walking as a pedestrian, was involved in a motor vehicle accident with a vehicle owned by defendant Gardella's Elite Limousine Service and operated by defendant Jean Calixte (collectively "defendants"). The accident occurred near the intersection of Washington Square North and Washington Square West 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 August 18, 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).

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 that the motor vehicle accident resulted in permanent injuries to her rib cage, neck and head, which include a left 7th rib fracture, cervical spine sprain/strain, concussive head injury and persistent vertigo (*see* defendants' motion, exhibit A, bill of particulars at ¶ 7). Within the bill of particulars, she claims a "serious injury" under the following relevant categories: (1) fracture; (2) permanent loss; (3) permanent consequential limitation; (4) significant limitation; and (5) 90/180-day (*id.* at ¶ 12.) 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 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 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).

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 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 defendant's prima facie case, 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 plaintiff is an acceptable method to provide a physician's opinion regarding the existence and extent of plaintiff's 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]).

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 medical report of Dr. Francisco H. Santiago dated January 5, 2007 and amended January 9, 2007; an affirmed medical report of Dr. R.C. Krishna dated January 16, 2007; an unaffirmed medical report of Dr. Kenneth L. Schneider dated June 24, 2008; a medical report of plaintiff's treating physician Dr. Louise M. Klebanoff dated May 4, 2006; plaintiff's records from the New York Eye & Ear Infirmary ("NY Eye & Ear") dated May 12, 2006 through October 26, 2006; plaintiff's progress notes from Beth Israel Hospital ("Beth Israel") dated June 5, 2006 through October 11, 2006; plaintiff's April 15, 2008 deposition; and the bill of particulars. (*See* defendants' motion, exhibits A, B, C, D.)

Dr. Santiago performed a physiatric/acupuncture independent medical examination ("IME") on January 5, 2007. Dr. Santiago reviewed plaintiff's medical records which included records from the Saint Vincent's Hospital ("St. Vincent's") emergency room, and noted that "X-rays taken on her did not show any fracture" (*id.*, exhibit D). Dr. Santiago indicated that plaintiff's cervical range of motion was full in flexion at 45/45, extension at 45/45, right/left lateral rotation at 80/80 and right/left lateral flexion at 45/45, with no spasm or tenderness to palpation of the neck and upper trapezius area. Back examination showed no kyphoscoliosis. There was no tenderness or spasm to thoracic area palpation. The iliac crests were level.

Lumbosacral range of motion showed flexion to 80/90 degrees in the sitting position, extension at 30/30, right/left lateral rotation at 30/30 and right/left lateral flexion at 30/30. There was no spasm or tenderness to lumbosacral area palpation. Straight leg raising in the sitting position was to 90 degrees bilaterally. Dr. Santiago opined that plaintiff had achieved pre-accident status and diagnosed: 1. Normal neuromuscular and physiatric examination; and 2. II/O closed head injury and concussion, resolved. Dr. Santiago concluded that plaintiff had no disability from the effects of the accident, and that she could perform her activities of daily living with no physical restrictions.

Dr. Krishna conducted a neurological IME on January 16, 2007, and also reviewed plaintiff's St. Vincent's records. Dr. Krishna set forth range of motion findings of the cervical spine and thoracolumbar spine and compared them to the normal range, and all were within normal limits. None of the objective tests used to measure the ranges of motion were specified. There were no signs of meningeal irritation. Cranial nerve examination showed that the strength of the head, neck and jaw were all within normal limits. Dr. Krishna opined that plaintiff may have sustained cephalgia and cervical/lumbar strain injury, all of which had resolved. Dr. Krishna concluded that the neurological examination was normal; that there was no disability or contraindication from working; and that there were no neurological deficits identifiable on examination that would constitute a disability or permanency.

Plaintiff also underwent an IME with Dr. Schneider on June 24, 2008. Since Dr. Schneider's report is unsworn, it will not be considered (*see Pagano*, 182 AD2d at 270).

Defendants additionally submit a report of plaintiff's treating physician, Dr. Klebanoff, who conducted a neurological evaluation on May 4, 2006. Plaintiff presented with complaints of persistent vertigo, and Dr. Klebanoff indicated that plaintiff had chronic tinnitus in the left ear which was unchanged since the accident. Dr. Klebanoff also noted that plaintiff was able to read and work, although her concentration was not back to normal and she felt slightly imbalanced when walking. Neurological review of systems was otherwise negative.

Examination of the head revealed no Battle sign, no hemotympanum, no racoon eyes, no bruit, no sinus tenderness, no TMJ tenderness and normal temporal arteries. The neck had moderate cervical spasms. There was no point tenderness in the back. Cranial nerve examination revealed vertigo without nystagmus with head back with either ear down. Cerebellar examination showed no dysmetria on finger-nose-finger or heel-shin testing. There was no tremor or abnormal involuntary movements. Dr. Klebanoff diagnosed a concussive head injury due to closed head trauma, a post concussive syndrome and persistent vertigo likely due to trauma to the peripheral vestibular system.

Plaintiff was treated at NY Eye and Ear on May 12, 2006, where she was referred for vestibular testing and therapy. She had signs consistent with bilateral peripheral posterior canal BPPV, canalithiasis. She was discharged from treatment on October 25, 2006, and was asymptomatic in all testing positions and during functional activities. In addition, an August 7, 2006 progress note from Beth Israel stated that plaintiff felt 100% at work.

In the bill of particulars, plaintiff asserted that she was confined to home and bed intermittently following the accident, but she did not set forth any periods of confinement (bill of particulars at ¶ 8). She alleged incapacity from employment for two weeks immediately after the accident, and worked limited hours for the following four weeks (*id.* at ¶ 9).

At her deposition, plaintiff denied being confined to home or bed as a result of the accident (plaintiff's deposition at 46). She was employed full-time as an architect on the date of the accident, and worked part-time and in a limited capacity after the accident though 2006 (*id.* at 11). She did not recall how many days of work she missed, and believed it was a couple of weeks (*id.* at 11-12). She returned to work full-time around January 2007 (*id.* at 68).

At the time of the deposition, plaintiff complained of injuries to her head and vertigo (*id.* at 67, 75-76). She also indicated that a rib fracture was reflected in her medical records, though she had no recollection of it (*id.* at 67). Activities at work that were limited due to her injuries included leaning over, walking in areas that were not secure on construction sites and

climbing ladders (*id.* at 74-75). She also had limitations with hiking and riding on airplanes (*id.* at 75-78). There were no activities that she could do before the accident but could not do at all now (*id.* at 80).

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 fracture, permanent loss, permanent consequential limitation or significant limitation (*see* Insurance Law § 5102 [d]).

With respect to the category of fracture, defendants' evidence is insufficient to establish, prima facie, that plaintiff did not suffer a left 7th rib fracture. It is well established that a "fracture, by definition, constitutes a 'serious physical injury' under the statute" (*Elias v Mahlah*, 58 AD3d 434, 434 [1st Dept 2009]; *see also Joyce v Lacerra*, 41 AD3d 236, 237 [1st Dept 2007]; *Ruffino v Green*, 54 AD3d 745, 745-46 [2d Dept 2008]).

Here, in the bill of particulars, plaintiff clearly alleged a serious injury based on a left 7th rib fracture (*see* bill of particulars ¶ 7 [a] [iii]). Although Dr. Santiago indicated that X-rays taken at St. Vincent's did not show any fractures, the St. Vincent's records -- which both Dr. Santiago and Dr. Krishna indicated they reviewed -- in fact contained CT scans of the abdomen and pelvis taken two days after the accident that specifically identified a remote left-sided rib fracture deformity (*see infra*).[1] Since defendants did not address the CT scans indicating the existence of a rib fracture, they have failed to meet their initial burden of proof under the fracture category (*see Patterson v Rivera*, 49 AD3d 337, 337 [1st Dept 2008] [defendants did not meet initial burden where their expert "did not address the MRI reports showing herniated discs, which in conjunction with other evidence was indicative of serious injury"]; *Shumway v Bungeroth*, 58 AD3d 431, 431 [1st Dept 2009]; *Nix v Yang Gao Xiang*, 19 AD3d 227, 227 [1st Dept 2005]; *cf. Haddadnia v Saville*, 29 AD3d 1211, 1211 [3d Dept 2006] [defendants

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[1]Plaintiff also submits an affirmation from a radiologist indicating that the fracture was caused by the accident (*see infra*).

established prima facie case with evidence that included affidavit from expert who set forth the reasons for his opinion that the fracture did not occur at the time of the accident]; *Glover v Capres Contracting Corp.*, 61 AD3d 549, 550 [1st Dept 2009] [evidence of fracture was equivocal]).

Defendants have also failed to meet their burden of proof under the categories of permanent loss, permanent consequential limitation and significant limitation. The IME reports of Dr. Santiago and Dr. Krishna do not establish the nonexistence of a serious injury because, in addition to failing to address the rib fracture, both reports are conclusory and fail to properly indicate the objective tests relied upon (*see Nix*, 19 AD3d at 227 [defendant did not meet burden of proof where examining neurologist's report was conclusory, failed to indicate what objective tests were relied upon and did not address the findings of plaintiff's MRI and CT scan showing disc herniations and bulges; and where defendant's radiologist failed to consider CT scan and only partially addressed the MRI]; *Torres v Garcia*, 59 AD3d 705, 706 [2d Dept 2009]; *Webb v Johnson*, 13 AD3d 54, 54 [1st Dept 2004]). In particular, Dr. Santiago and Dr. Krishna fail to specify the objective tests performed to arrive at their conclusions that plaintiff had normal range of motion and that her injuries were resolved (*see Linton v Nawaz*, 62 AD3d 434, 439 [1st Dept 2009] [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 resolved]; *see also Caballero v Fev Taxi Corp.*, 49 AD3d 387, 387 [1st Dept 2008]; *Lamb v Rajinder*, 51 AD3d 430, 430 [1st Dept 2008]; *Perez v Fugon*, 52 AD3d 668, 669 [2d Dept 2008]).

Because defendants have failed to make a prima facie showing, their summary judgment motion with respect to the categories of fracture, 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 Patterson*, 49 AD3d at 337).

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 sets forth no periods of confinement to bed or home in her deposition or the bill of particulars. She alleges incapacity from employment for only two weeks. These time periods are far less than the 90/180 days required by the statute, and are sufficient to meet defendants' burden of establishing a prima facie case. (*See 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"]; *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]).

Since the Court finds that 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 (*see Gaddy*, 79 NY2d at 957).

In opposition to summary judgment, plaintiff submits, *inter alia*, an affirmation of radiologist Dr. Robert D. Solomon dated December 24, 2008; an affirmed medical report of her treating physician Dr. Klebanoff dated December 3, 2008; uncertified records and CT scan reports from Saint Vincent's dated April 25, 2006 and April 27, 2006; an unaffirmed May 4, 2006 report of Dr. Klebanoff; uncertified records from NY Eye & Ear dated May 12, 2006 through October 26, 2006, including progress notes dated May 19, 2006 thorough June 16, 2006; uncertified progress notes from Beth Israel dated June 5, 2006 through October 11, 2006; and the bill of particulars. (*See* plaintiff's affirmation in opposition, exhibits 2, 3, 4, 5, 6.)

Though unsworn, the Court finds the following records admissible: (1) the St. Vincent's records; (2) Dr. Klebanoff's May 4, 2006 report; (3) the NY Eye & Ear records dated May 12, 2006 through October 26, 2006; and (4) the Beth Israel records. These records are admissible because Dr. Santiago's report expressly references radiological studies taken at St. Vincent's, and, further, Dr. Klebanoff's report and the records from NY Eye & Ear and Beth Israel are the exact same records that were submitted by defendants (*see Silkowski v Alvarez*, 19 AD3d 476, 476 [2d Dept 2005] [plaintiff's expert was entitled to rely on unaffirmed MRI reports because defendant's expert referred to them]; *Ayzen*, 299 AD2d at 381).

The St. Vincent's records indicate that plaintiff was admitted on April 25, 2006, and underwent CT scans of the head and cervical spine which reveled no acute fractures. The CT scan of the cervical spine also showed pleural/scarring in the right lung apex, degenerative changes with neuroforaminal stenosis, and reversal of normal cervical curvature that may have been secondary to spasm or positioning.

Plaintiff underwent additional CT scans at St. Vincent's on April 27, 2006. CT scans of the abdomen and pelvis taken on that date reveled no CT evidence of acute intraabdominal and/or pelvic solid organ injuries, and no evidence of hemoperitoneum or hemothorax. However, there were indications of a left rib fracture, and both CT scan reports stated: "No acute fracture deformities are identified however *there is a remote left-sided rib fracture deformity*" (plaintiff's affirmation in opposition, exhibit 5 [emphasis added]).

Dr. Solomon affirmed that he reviewed the April 27, 2006 CT film sheets taken at St. Vincent's. Dr. Solomon concluded that plaintiff sustained a left sided 7th rib fracture, and that the fracture was caused by the accident.

In addition to the May 4, 2006 report of Dr. Klebanoff and the records from NY Eye & Ear and Beth Israel, plaintiff submits a recent report of Dr. Klebanoff. The report indicates that Dr. Klebanoff initially evaluated plaintiff on May 4, 2006, and that the examination was notable for vertigo induced by neck extension or when turning to either side. The remainder of the examination was normal and Dr. Klebanoff diagnosed benign paroxysmal positional vertigo. A MRI of the brain performed on May 8, 2006 was normal. After receiving canalith repositioning and vestibular therapy, plaintiff was again examined by Dr. Klebanoff on June 5, 2006 for persistent vertigo with changes in head position. When seen in follow-up on August 7, 2006, her symptoms had improved significantly. She had recurrent vertigo on October 11, 2006 following air travel, and was again referred to vestibular therapy with improvement in her symptoms. She had another episode of vertigo December 3, 2006, which resolved after five additional vestibular therapy sessions.

Dr. Klebanoff examined plaintiff again on December 3, 2008. Plaintiff's neurological examination was normal. Visual fields were full, eye movements intact and pupillary reflexes normal. Her facial sensation and strength were normal. Her gait was normal, including tandem walking. Sensory examination was intact. Dr. Klebanoff diagnosed benign positional vertigo due to closed head injury sustained in the accident, and concluded that the injury was causally

related to the accident.

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 as to the 90/180-day category (*see Elias*, 58 AD3d at 435).

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 sets forth no periods of confinement to home or bed in her deposition or the bill of particulars, and she has conceded that she returned to work, albeit on a limited basis, after only two weeks. (*See Taylor v Vasquez*, 58 AD3d 406, 406 [1st Dept 2009] [plaintiff's deposition testimony that he was confined to home and bed for just one or two weeks was an admission that defeated his 90/180-day claim]; *Linton*, 62 AD3d at 443 ["Plaintiff's reduced work schedule fails to raise a triable issue of fact as to whether he sustained a 90/180-day injury]).

Moreover, plaintiff's claim that she could not perform substantially all of her customary and daily activities for the required time period is not substantiated by objective medical proof (*see Depena v Sylla*, 63 AD3d 504, 506 [1st Dept 2009]; *Mickens v Khalid*, 62 AD3d 597, 598 [1st Dept 2009]; *Nelson*, 308 AD2d at 340). Dr. Klebanoff's May 4, 2006 report indicates that plaintiff was able to read and work, and the August 7, 2006 progress note from Beth Israel indicated that plaintiff was 100% at work.

Furthermore, the limitations of which plaintiff complains -- *i.e.*, limitations on activities such as hiking, riding on airplanes and leaning over -- do not constitute a curtailment of "substantially all" of her usual and customary daily activities sufficient to support a 90/180-day claim. (*See Cartha v Quin*, 50 AD3d 530, 530 [1st Dept 2008] [even if claim was medically substantiated, "minor curtailment" of plaintiff's usual activities during 90/180 day time frame does not satisfy the statute]; *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]; *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"]).

Lastly, the Court notes that were it necessary to consider plaintiff's submissions regarding the fracture category, the Court would find that plaintiff has raised a triable issue of fact sufficient to defeat summary judgment under this category. Plaintiff has submitted CT scans of the abdomen and pelvis taken two days after the accident revealing a remote left-sided rib fracture deformity. Plaintiff also proffers an affirmation from a radiologist who reviewed the CT film sheets and opined that plaintiff sustained a left sided 7th rib fracture that was caused by the accident. This evidence of fracture is sufficient to raise a triable issue of fact (*see I Mei Chou v Welsh*, 15 AD3d 622, 622 [2d Dept 2005] [although defendants made prima facie showing, plaintiff raised issue of fact by submitting an affirmation from a physician stating that he examined a CT scan revealing a fracture which he attributed to the accident]; *Bojorquez v Sanchez*, 65 AD3d 1179, 1180 [2d Dept 2009]; *Kaplun v Septama*, 38 AD3d 847, 847 [2d Dept 2007]; *Joyce*, 41 AD3d at 237; *Ruffino*, 54 AD3d at 745-46).

Further, to the extent that defendants' expert opined that there was *no* evidence of fracture, the conflicting medical evidence presents a factual dispute which precludes summary judgment (*see Garcia v Long Island MTA*, 2 AD3d 675, 675 [2d Dept 2003]).

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 fracture, 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**

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