SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 9

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DAMIAN RAGABEAR and GANGAWATTIE CHARRAN,

Plaintiffs,

-against-

FARAZ LALLMAHAMAD, FRANK CAPUTO, JR. and THERESA COTRONE,

Defendants.

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DECISION/ORDER

Index No. 30462/08

Submitted 4/21/10

Motion Seq. # 5 and 7

HON. DEBRA SILBER, A.J.S.C.:

Recitation, as required by CPLR 2219(a), of the papers considered in the review of a defendants' motion and cross-motion for summary judgment dismissing the complaints of both plaintiffs.

Papers	Numbered
Notice of Motion, Affirmation and Exhibits Annexed.....	1-10
Notice of Cross-motion and Affirmation and Exhibits Annexed	11-13
Affirmation in Opposition and Exhibits Annexed.....	14-29
Replies.....	30-31
Memo of Law (Plaintiffs')	32

Upon the foregoing cited papers, the decision/order on these motions is as follows:

Defendant Lallmahamad moves, and defendants Caputo and Cotrone cross-move, for summary judgment dismissing the complaint of both plaintiffs on the grounds that neither of them have suffered a "serious injury" as defined by § 5102(d) of the NYS Insurance Law. Plaintiffs oppose.

For the reasons set forth herein, the motion and cross-motion are granted as to both plaintiffs.

Plaintiffs claim they sustained personal injuries as a result of an automobile

accident on December 8, 2007, at the intersection of South Conduit Avenue and 149th Avenue in Queens County. Although who actually was the driver is disputed, plaintiffs Charran and Ragabear were the driver and passenger in a vehicle which was involved in a collision involving two other vehicles, one owned and operated by the defendant Lallmahamad and the other by defendant Caputo (whose vehicle was co-owned by defendant Cotrone). Plaintiffs' vehicle was stopped at a red light at the time of the accident. Plaintiffs left the scene in an ambulance and were treated at Jamaica Hospital. Both plaintiffs subsequently sought treatment from Dr. Taufiq Azamy, and other doctors as noted herein. Both plaintiffs subsequently commenced the within negligence action against defendants. Examinations Before Trial and Independent Medical Examinations of the plaintiffs have been conducted.

Defendants contend the complaint must be dismissed because neither plaintiff has sustained a "serious injury" within the meaning of Insurance Law § 5102(d) which provides:

> "Serious 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.

As former Chief Justice Judith Kaye explained in *Pommelis v Perez*, 4 NY3d 566, 570 [2005], "No fault thus provides a compromise: prompt payment for basic economic loss to injured persons regardless of fault, in exchange for limitation on litigation to

cases involving serious injury...There is...abuse of the No-Fault Law in failing to separate "serious injury" cases, which may proceed in court, from the mountains of other auto accident cases, which may not."

Plaintiff Damian Ragabear

Dr. Robert Israel, an orthopedic surgeon, performed an Independent Medical Examination of plaintiff Ragabear to evaluate his claims. See affirmation of Dr. Israel, annexed to defendant Lallmahamad's moving papers as Exhibit F.

In his affirmation, Dr. Israel states his examination of plaintiff's cervical spine revealed a normal lordosis and no tenderness to palpation in the paraspinal region. Cervical compression testing was negative. Spurling and Valsalva tests were negative. Range of motion testing of the cervical spine revealed right and left lateral flexion to 45 degrees (45 normal); extension to 60 degrees (60 normal); right and left rotation to 80 degrees (80 normal). Muscle strength was graded to 5/5 in the biceps, triceps, wrist flexors and wrist extensors bilaterally. Deep tendon brachioradialis, biceps and triceps reflexes were symmetrical. Grasping power was normal in both hands. "There was normal proprioception[1] with no sensory deficit on light touch and pinprick." There was no radiation of pain or paresthesias.

Examination of the lumbar spine revealed the lordotic curve was normal and there were no spasms or tenderness present over the paraspinal musculature on palpation. Sitting LaSegue's testing was negative to 80 degrees (80 normal). Straight leg raising normal to 75 degrees (75 normal) in both seated and supine position. Range of motion testing of the lumbar spine revealed flexion to 90 degrees (90 normal);

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[1]Awareness of the position of one's body.

extension 30 (30 normal); right and left lateral flexion to 45 (45 normal). Examination showed bilateral patella and Achilles Deep Tendon reflexes to be symmetric. Proprioception was normal with no sensory deficit on light touch and pinprick. Muscle strength of both lower extremities was graded at 5/5. There was no atrophy present in the muscles of either of the lower extremities. There was no radiation of pain, numbness or tingling.

Examination of the left shoulder revealed "no deltoid atrophy and no tenderness on palpation of the acromioclavicular joint or over the greater tuberosity. Range of motion testing of the left shoulder revealed anterior flexion to 170 degrees (170 normal); abduction to 180 (180 normal); and adduction, internal and external rotation, and posterior extension to 45 degrees (45 normal). There was no instability present and impingement sign was negative. The drop arm, Yergason's, apprehension, Speed and O'Brien's tests were negative. There was no elevation, protraction, or retraction of the scapula. There was no winging of the scapula and no atrophy present."

Examination of the right knee revealed "no joint line tenderness or effusion. Muscle tone was normal and muscle strength was graded at 5/5. The knee was found to be stable on valgus and varus stress. Range of motion testing of the knee revealed flexion to 130 degrees (130 normal). McMurray, Lachman anterior drawer and posterior drawer were all negative. There was no patellofemoral crepitus."

Dr. Israel diagnosed plaintiff with resolved sprains of the cervical spine, lumbar spine, left shoulder and right knee.

At his EBT, plaintiff testified he was out of work for a month because of the injuries to his right knee, back and left shoulder. Following that, he was on light duty for a month. Two days after leaving the emergency room, he sought treatment and went to

a doctor he was referred to by his attorney. He went three of four time a week for treatment for three or four months. In February or March of 2008, he resumed his full duties at work. Prior to the filing of this motion, he last saw a doctor in connection with this accident in April of 2008. No surgery was recommended. Because of pain from the tear in the rotator cuff of his left shoulder, he twice got painkiller shots. He testified that his left shoulder still hurts two to three times per week, and his right knee still hurts "when the weather is bad." Sometimes, he gets a little back pain after eight or more hours of driving.

Plaintiff Ragabear opposes the motion. Plaintiff provides an affirmation from Dr. Taufiq Azamy. Dr. Azamy states he first saw plaintiff two days after the accident. Examination of the plaintiff's cervical spine at that first exam revealed "flexion 40 degrees (50 normal); extension 50 degrees (60 normal); right rotation 70 degrees (80 normal); left rotation 70 degrees (80 normal); right lateral flexion 40 degrees (50 normal); left lateral flexion 40 degrees (50 normal)." Upon palpation, Dr Azamy observed "tenderness in the cervical paraspinal muscle as well as hypertonicity in the paraspinal muscle located in the cervical region from C3 to C7." After the initial examination, Dr. Azamy sent plaintiff for an MRI, and prescribed a regime of physical therapy. Plaintiff treated until April 7, 2008, for a total of 43 treatments.

Examination of plaintiff's cervical spine by Dr. Azamy on December 28, 2009, showed, in his opinion, "flexion 40 degrees (50 normal); extension 50 degrees (60 normal); right rotation 70 degrees (80 normal); left rotation 70 degrees (80 normal); right lateral flexion 40 degrees (50 normal); left lateral flexion 40 degrees (50 normal)."

Dr Azamy concludes, based upon what he states is a reasonable degree of medical certainty, that the MRI finding of a disc bulge was causally related to the auto

accident, and that the disc bulge caused plaintiff to sustain a permanent consequential limitation of use of the cervical spine, and a significant limitation of use of the cervical spine. Further, he concludes that plaintiff is still continuing to experience pain from prolonged sitting as well as driving.

Dr. Azamy also states that his initial examination of plaintiff's lumbar spine revealed "flexion 80 degrees (90 normal); extension 80 degrees (90 normal); right lateral flexion 20 degrees (25 normal) and left lateral flexion 20 degrees (25 normal)." The examination also revealed tenderness in the lumbar paraspinal muscle as well as paraspinal muscle hypertonocity in L2 though L5. Straight leg testing revealed a 10 degree limitation of motion in both the left and right indicative of a lumbar abnormality. Dr Azamy recommended an MRI and physical therapy. Dr. Azamy again conducted range of motion tests on December 28, 2009, and found "flexion 80 degrees (90 normal); extension 80 degrees (90 normal); right lateral flexion 20 degrees (25 normal) and left lateral flexion 20 degrees (25 normal)." Dr. Azamy concludes, with what he calls a reasonable degree of medical certainty, that the lumbar condition consisting of an L5-S1 extruded disc herniation with effacement of the ventral sac and abutment of the right S1 nerve root was causally related to the accident and that the lumbar disc herniation is permanent in nature and constitutes a permanent consequential limitation of use of the lumbar spine and a significant limitation of use of the lumbar spine.

Dr. Azamy states that range of motion tests on plaintiff's left shoulder conducted at his initial examination revealed "abduction 135 degrees (normal 150); forward flexion 160 degrees (normal 180); internal flexion 78 degrees (normal 90) and external flexion 78 degrees (normal 90)." Dr. Azamy states that range of motion tests on plaintiff's left shoulder conducted at his examination on December 28, 2009, revealed "abduction 135

degrees (normal 150); forward flexion 170 degrees (normal 180); internal flexion 80 degrees (normal 90) and external flexion 80 degrees (normal 90)." Dr. Azamy concludes that the partial bursal tear of plaintiff's supraspinatous tendon was causally related to the accident, and that, with what he calls a reasonable degree of medical certainty, the tear constitutes a permanent consequential loss of use and a significant limitation of use of the left shoulder.

Dr. Azamy also notes that the last time plaintiff received physical therapy was April 2008, as any further treatment would have been palliative in nature, and since the injuries were permanent in nature, there was no medical benefit to continued treatment, as plaintiff had reached maximum medical improvement.

Plaintiff Ragabear provides the affirmation of Dr. John Athas, a radiologist who on January 10, 2010, reviewed the films of plaintiff's MRIs taken on February 13, February 29, and March 8 of 2008. Dr. Athas indicates that examination of the film of the cervical MRI revealed plaintiff had a C5-C6 broad based posterior disc bulge with effacement of the ventral thecal sac. He said examination of the lumbar MRI revealed an extruded disc herniation with abutment and mild compression of the right S1 nerve root as well as effacement of the ventral thecal sac. Dr. Athas' examination of the films of the MRI of plaintiff's left shoulder revealed a partial tear of the bursal surface of the supraspatinous tendon near its insertion.

Plaintiff also provides the affirmation of Dr. Sebastian Lattuga. Examination by Dr. Lattuga of plaintiff's cervical spine on March 27, 2008, revealed flexion 35 degrees (70 normal); extension 25 degrees (40 normal); right rotation 40 degrees (80 normal); left rotation 40 degrees (80 normal). Examination by Dr. Lattuga of plaintiff's lumbar spine revealed flexion 25 degrees (normal 90); extension 10 degrees (normal 40); left

turning 15 degrees (normal 60); right turning 15 degrees (normal 60).

Plaintiff provides the affirmation of Dr. Brian Haftel, a pain management specialist. Dr. Haftel states he saw the plaintiff on April 8, April 22 and April 29 of 2008. On the last two occasions, he administered to plaintiff cervical epidural steroid injections, due to his cervical disc bulges. According to the epidurogram performed on April 29, 2008, there was a mild blockage of the C6 neural foramina. Dr. Haftel states that the reason for the injections was due to the failure of the therapy plaintiff had been receiving.

Plaintiff provides the affirmation of Dr. Dov Berkowitz dated January 14, 2010. . Dr. Berkowitz had treated the plaintiff from December 2007, to March 2008 following the accident. Dr. Berkowitz noted that on March 17, 2008, plaintiff's abduction was 100-110 degrees, whereas normal is 180 degrees.

Where a motion for summary judgment is predicated on a determination of the absence of a "serious injury" the moving party has the initial burden of submitting sufficient evidentiary proof in admissible form to warrant a finding that the plaintiff has not suffered a "serious injury". *Lowe v Bennett,* 122 AD2d 728 [1st Dept], *affirmed* 69 NY2d 701 [1986].

In the instant matter, defendants' evidence, comprised of an expert's affirmation, supports the conclusion that plaintiff did not sustain a "serious" injury, and thus defendants have met their prima facie burden of proof.

In his affirmation, Dr. Israel states his examination of plaintiff's cervical spine revealed a normal lordosis and no tenderness to palpation in the paraspinal region. Cervical compression testing was negative. Spurling and Valsalva tests were negative Range of motion testing of the cervical spine revealed flexion and right and

left lateral flexion to 45 degrees (45 normal); extension to 60 degrees (60 normal); right and left rotation to 80 degrees (80 normal). Muscle strength was graded to 5/5 in the biceps, triceps, wrist flexors and wrist extensors bilaterally. Deep tendon brachioradialis, biceps and triceps reflexes were symmetrical. Grasping power was normal in both hands. There was normal proprioception with no sensory deficit on light touch and pinprick. There was no radiation of pain or paresthesias.

Examination of the lumbar spine revealed the lordotic curve were normal and there were no spasms or tenderness present over the paraspinal musculature on palpation. Sitting LaSegue's testing was negative to 80 degrees (80 normal). Straight leg raising normal to 75 degrees (75 normal) in both seated and supine position. Range of motion testing of the lumbar spine revealed flexion to 90 degrees (90 normal); extension 30 (30 normal); right and left lateral flexion to 45 (45 normal). Examination showed bilateral patella and Achilles Deep Tendon reflexes to be symmetric. Proprioception was normal with no sensory deficit on light touch and pinprick. Muscle strength of both lower extremities was graded at 5/5. There was no atrophy present in the muscles of either lower extremity. There was no radiation of pain, numbness or tingling.

Examination of the left shoulder revealed no deltoid atrophy and no tenderness on palpation of the acromioclavicular joint or over the greater tuberosity. Range of motion testing of the left shoulder revealed anterior flexion to 170 degrees (170 normal); abduction to 180 (180 normal); and adduction, internal and external rotation, and posterior extension to 45 degrees (45 normal). There was no instability present and impingement sign was negative. The drop arm, Yergason's, apprehension, Speed and O'Brien's tests were negative. There was no elevation, protraction, or retraction of the

scapula. There was no winging of the scapula and no atrophy present.

Examination of the right knee revealed no joint line tenderness or effusion. Muscle tone was normal and muscle strength was graded at 5/5. The knee was found to be stable on valgus and varus stress. Range of motion testing of the knee revealed flexion to 130 degrees (130 normal). McMurray, Lachman anterior drawer and posterior drawer were all negative. There was no patellofemoral crepitus. Dr. Israel diagnosed plaintiff with resolved sprains of the cervical spine, lumbar spine, left shoulder and right knee.

The plaintiff then has the burden of overcoming the motion. *Grossman v Wright* 288 AD2d 79 [2nd Dept 2000]. The has failed to meet that burden. Plaintiff has not alleged death, dismemberment or loss of a fetus. Nor has he alleged a significant disfigurement or fracture. Further, he does not claim a permanent and total loss of any body part.

The plaintiff also failed to proffer competent medical evidence that he sustained a medically-determined injury of a nonpermanent nature which prevented him, for 90 of the 180 days following the subject accident, from performing his usual and customary activities

At his deposition, the plaintiff acknowledged that he missed less than 90 days of work as a result of the subject motor vehicle accident; specifically, he acknowledged that he missed one month of work and had another month of light duty. *Morris v Edmond*, 48 AD3d 432 [2nd Dept 2008]; *McIntosh v O'Brien*, 2010 NY Slip Op 115 [2nd Dept]. For him to establish this prong of the statute, his doctor would have had to inform him that he could not return to work - that is the prerequisite for a medically determined injury. See *Sainte v. Ho,* 274 Ad2d 569 [2nd Dept 2000]; *Welcome v. Diab,*

273 AD2d 377 [2nd Dept 2000]. There is no such evidence in any of his medical reports. As such, plaintiff cannot claim a medically determined injury or impairment which prevented him from performing substantially all of the material acts which constituted his customary daily activities for not less than 90 days during the 180 days immediately following the accident.

Plaintiff contends that he suffered a permanent consequential limitation of use of a body organ or member, as well as a significant limitation of a body function or system, citing range of motion tests conducted by Dr. Azamy and Dr. Lattuga.

The medical evidence adduced by plaintiff is not sufficient to sustain his action in the face of defendants' summary judgment motion. The range of motion studies in Dr. Azamy's December, 2009 examination reveal only slight restrictions. The limited restrictions of plaintiff's range of motion described, is not, under the circumstances of this case, of sufficient magnitude to qualify as a "significant" or "important" limitation of use, or a permanent loss of use, within the meaning of the statute. See, *Licari v Elliott*, 57 NY2d 230; *Bandoian v Bernstein,* 254 AD2d 205 [1st Dept 1998] (10% restriction of extension and/or rotation is not of sufficient magnitude to qualify as a "significant" or "important" limitation of use); *Arrowood v Lowinger,* 294 AD2d 315 [1st Dept 2002] (7%-14% impairment of the ankle not of sufficient magnitude to qualify as a " 'significant' or 'important' limitation of use"); *Durham v New York East Travel, Inc.,* 2 AD3d 1113 [3rd Dept 2003] (50% limit in range of limitation of the neck is "significant"); *Jackson v Gross*, 11 Misc3d 136 A [Sup Ct, App Term 1st Dept] (30%-40% reduction in movement in the neck is "significant"); *Waldman v Dong Kook Chang*, 175 AD2d 204 [2nd Dept 1991]; *Medina v Zalmen Reis & Assocs.,* 239 AD2d 394 [2nd Dept 1997]. The court has been unable to find any cases in which a loss in range of motion of less than 25% has

been found to be significant.

Therefore, the evidence submitted by the plaintiff has failed to raise a triable issue of fact (*see* CPLR 3212[b]). The evidence submitted by defendant establishes prima facie that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d). *Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyler*, 79 NY2d 955 [1992]; *Yunatanov v Stein*, 2010 NY Slip Op 249 [2nd Dept]; *Yun v Barber*, 63 AD3d 1140 [2nd Dept 2009]; *Gavria v Alvarado*, 65 AD3d 567 [2nd Dept 2009]. As such, the plaintiff's claim is dismissed.

Plaintiff Gangawattie Charran

Dr. Robert Israel, an orthopedic surgeon, performed an Independent Medical Examination on plaintiff Charran to evaluate her claims. See affirmation of Dr. Israel, annexed to defendants' moving papers as Exhibit H.

In his affirmation, Dr. Israel states his examination of plaintiff's cervical spine revealed a normal lordosis and no tenderness to palpitation in the paraspinal region. Cervical compression testing was negative. Spurling and Valsalva tests were negative. Range of motion testing of the cervical spine revealed right and left lateral flexion to 45 degrees (45 normal); extension to 60 degrees (60 normal); right and left rotation to 80 degrees (80 normal). Muscle strength was graded to 5/5 in the biceps, triceps, wrist flexors and wrist extensors bilaterally. Deep tendon brachioradialis, biceps and triceps reflexes were symmetrical. Grasping power was normal in both hands. There was normal proprioception with no sensory deficit on light touch and pinprick. There was no radiation of pain or paresthesias.

Examination of the lumbar spine revealed the lordotic curve was normal and there were no spasms or tenderness present over the paraspinal musculature on

palpation. Sitting LaSegue's testing was negative to 80 degrees (80 normal). Straight leg raising normal to 75 degrees (75 normal) in both seated and supine position. Range of motion testing of the lumbar spine revealed flexion to 90 degrees (90 normal); extension 30 (30 normal); right and left lateral flexion to 45 (45 normal). Examination showed bilateral patella and Achilles Deep Tendon reflexes to be symmetric. Proprioception was normal with no sensory deficit on light touch and pinprick. Muscle strength of both lower extremities was graded at 5/5. There was no atrophy present in the muscles of both lower extremities. There was no radiation of pain, numbness or tingling.

Examination of the left shoulder revealed "no deltoid atrophy and no tenderness on palpitation of the acromioclavicular joint or over the greater tuberosity. Range of motion testing of the left shoulder revealed anterior flexion to 170 degrees (170 normal); abduction to 180 (180 normal); and adduction, internal and external rotation, and posterior extension to 45 degrees (45 normal). There was no instability present and impingement sign was negative. The drop arm, Yergason's, apprehension, Speed and O'Brien's tests were negative. There was no elevation, protraction, or retraction of the scapula. There was no winging of the scapula and no atrophy present." It is noted that plaintiff did not claim her left shoulder was injured.

Examination of the right knee revealed "two portal sites, well healed and not tender. There was no joint line tenderness or effusion. Muscle tone was normal and muscle strength was graded at 5/5. The knee was found to be stable on valgus and varus stress. Range of motion testing of the knee revealed flexion to 130 degrees (130 normal). McMurray, Lachman anterior drawer and posterior drawer were all negative. There was no patellofemoral crepitus."

Dr. Israel diagnosed plaintiff with resolved sprains of the cervical spine, lumbar spine, left shoulder, and status post arthroscopy of the right knee.

At her EBT, plaintiff testified that her right knee hit the dashboard. She had surgery for a torn meniscus of the knee. She wears a knee brace two times a week. No-fault insurance stopped paying for her therapy in May of 2008. She went to her own therapist for her neck one to two times a week until December, 2008, when her own insurance stopped paying for it. She was employed in that office, as a physical therapy assistant at the time. She got pain killers and received shots twice. In March, 2008, she had knee surgery. She needed a cane for a few weeks but now is fine. She claims that she could not exercise for a year. She says she still cannot run and cannot really dance, kneel or squat. Her neck still hurts, her back hurts once or twice a week and her knee hurts three to four times a week.

Plaintiff Charran opposes the motion. Plaintiff provides an affirmation from Dr. Taufiq Azamy. Dr. Azamy states he first saw plaintiff two days after the accident. After examination of plaintiff's right knee, Dr. Azamy recommended an MRI and conservative treatment. Dr. Azamy continued treating plaintiff's knee until May 30, 2008, and treatment encompassed 57 visits.

Examination of the plaintiff's cervical spine two days after the accident revealed flexion 40 degrees (50 normal); extension 50 degrees (60 normal); right rotation 70 degrees (80 normal); left rotation 70 degrees (80 normal); right lateral flexion 40 degrees (50 normal); left lateral flexion 40 degrees (50 normal).

Examination of plaintiff's cervical spine by Dr. Azamy on December 28, 2009, revealed "flexion 40 degrees (50 normal); extension 50 degrees (60 normal); right rotation 70 degrees (80 normal); left rotation 70 degrees (80 normal); right lateral flexion

40 degrees (50 normal); left lateral flexion 40 degrees (50 normal)."

Dr Azamy concludes, based upon what he states is a reasonable degree of medical certainty, that the plaintiff's cervical spine diagnosis, consisting of MRI findings of disc bulges at C4/C5, C5/C6 and C6/C7, were causally related to the accident. He also opines that these disc bulges caused the plaintiff to sustain limitations in the range of motion in her cervical spine. He concludes that the disc bulges "constitute a permanent consequential limitation of use, as well as a significant limitation of use, of her cervical spine."

Dr. Azamy also states that his initial examination of plaintiff's lumbar spine revealed "flexion 80 degrees (90 normal); extension 80 degrees (90 normal); right lateral flexion 20 degrees (25 normal) and left lateral flexion 20 degrees (25 normal). Straight leg raising test was 80 degrees for both right and left (90 normal). Dr. Azamy again conducted range of motion tests on December 28, 2009, and found" flexion 80 degrees (90 normal); extension 80 degrees (90 normal); right lateral flexion 20 degrees (25 normal) and left lateral flexion 20 degrees (25 normal)." Dr. Azamy concludes, with what he calls a reasonable degree of medical certainty, that the plaintiff's lumbar condition consisting of a herniated disc and disc bulges, "are causally related to the accident and that they constitute a permanent consequential limitation of use and a significant limitation of use of her lumbar spine."

Dr. Azamy also notes that the last time plaintiff received physical therapy was in April of 2008, as any further treatment would have been palliative in nature, and since the injuries were permanent in nature, there was no medical benefit to continued treatment, as plaintiff had reached maximum medical improvement.

Plaintiff Charran also provides the affirmation of Dr. John Athas, a radiologist,

who on January 10, 2010, reviewed the films of plaintiff's MRIs taken on February 14, 2008. Dr. Athas indicates that examination of the film of the cervical MRI revealed plaintiff had disc bulges at C4/C5, C5/C6 and C6/C7.

Plaintiff also provides the affirmation of Dr. Samuel Lasheen. Dr. Lasheen states that he examined the plaintiff on July 16, 2008, October 6, 2008, and December 15, 2008 with reference to her cervical spine, and determined it was necessary to give her trigger point injections due to continued pain as a result of the automobile accident. Injections were administered on October 6, 2008 and December 15, 2008.

Plaintiff Charran also provides the January 19, 2010 affirmation of Dr. John Lyons, a radiologist, who on January 11, 2008 reviewed the plaintiff's MRI. Dr. Lyons indicates that examination of the film of the lumbar MRI revealed an L5/S1 central subligamentous herniation, as well as disc bulges at L3/L4 and L4/L5.

Plaintiff further provides the affirmation of Dr. Dov Berkowitz dated January 14, 2010. . Dr. Berkowitz first saw plaintiff on December 17, 2007 and examined her right knee. At the time of the initial examination, Dr. Berkowitz noted crepitation and patellofemoral tenderness. On December 31, 2008, he noted flexion was only to 120 degrees (normal 135). He also found that plaintiff continued to have tenderness across the medial joint line, as well as in the patellofemoral region. On January 8, 2008, flexion was still 120, and the tenderness continued. On February 21, 2008, he still noted tenderness and a lack of improvement. He recommended an exploratory arthroscopic procedure to ascertain the cause of the right knee pain and tenderness.

On March 11, 2008, plaintiff underwent arthroscopic surgery of the right knee. Upon performing the surgery, Dr. Berkowitz diagnosed a partial thickness tear along the radial margin of the medial meniscus. In addition, he also diagnosed a chondrol flap

tear in the posterior aspect of the lateral tibial plateau which was just anterior to the meniscus, posteriorly. Upon rendering these conclusions, a partial medial meniscectomy, as well as an incision of the chondral flap tear of the lateral compartment was performed.

On March 20, 2008, Dr. Berkowitz observed the plaintiff's wounds were clean, with no signs of infection, and removed the sutures. He performed a flexion range of motion test, and found she tested at 100 degrees (135 normal) that day.

Dr. Berkowitz states that in his opinion the injuries sustained to plaintiff's right knee constitute a significant limitation of use. Furthermore, Dr. Berkowitz opines that the operative findings consisting of the partial thickness tear along the radial margin of the medial meniscus, as well as the chondral flap tear in the posterior aspect of the lateral tibial plateau, were causally related to the automobile accident. He further opines that the injuries sustained in the plaintiff's right knee limit the plaintiff in performing activities of daily living, such as walking up and down stairs and squatting. She is unable to perform these activities without difficulty, and these activities continue to cause her significant pain.

Where a motion for summary judgment is predicated on a determination of the absence of a "serious injury" the moving party has the initial burden of submitting sufficient evidentiary proof in admissible form to warrant a finding that the plaintiff has not suffered a "serious injury". *Lowe v. Bennett,* 122 AD2d 728 [1st Dept], *affirmed* 69 NY2d 701 [1986].

In the instant matter, defendants' evidence, comprised of an expert's affirmation, supports the conclusion that plaintiff did not sustain a "serious" injury, and thus defendants have met their prima facie burden of proof.

In his affirmation, Dr. Israel states that his examination of plaintiff's cervical spine revealed a normal lordosis and no tenderness to palpation in the paraspinal region. Cervical compression testing was negative. Spurling and Valsalva tests were negative. Range of motion testing of the cervical spine revealed right and left lateral flexion to 45 degrees (45 normal); extension to 60 degrees (60 normal); right and left rotation to 80 degrees (80 normal). Muscle strength was graded to 5/5 in the biceps, triceps, wrist flexors and wrist extensors bilaterally. Deep tendon brachioradialis, biceps and triceps reflexes were symmetrical. Grasping power was normal in both hands. There was normal proprioception with no sensory deficit on light touch and pinprick. There was no radiation of pain or paresthesias.

Examination of the lumbar spine revealed the lordotic curve was normal and there were no spasms or tenderness present over the paraspinal musculature on palpation. Sitting LaSegue's testing was negative to 80 degrees (80 normal). Straight leg raising normal to 75 degrees (75 normal) in both seated and supine position. Range of motion testing of the lumbar spine revealed flexion to 90 degrees (90 normal); extension 30 (30 normal); right and left lateral flexion to 45 (45 normal). Examination showed bilateral patella and Achilles Deep Tendon reflexes to be symmetric. Proprioception was normal with no sensory deficit on light touch and pinprick. Muscle strength of both lower extremities was graded at 5/5. There was no atrophy present in the muscles of both lower extremities. There was no radiation of pain, numbness or tingling.

Examination of the right knee revealed two portal sites, well healed and not tender. There was no joint line tenderness or effusion. Muscle tone was normal and muscle strength was graded at 5/5. The knee was found to be stable on valgus and

varus stress. Range of motion testing of the knee revealed flexion to 130 degrees (130 normal). McMurray, Lachman, anterior drawer and posterior drawer were all negative. There was no patellofemoral crepitus. Dr. Israel diagnosed plaintiff with resolved sprains of the cervical spine, lumbar spine, left shoulder, and status post arthroscopy of the right knee.

The plaintiff then has the burden of overcoming the motion. *Grossman v Wright* 288 AD2d 79 [2nd Dept 2000]. She has failed to meet that burden. Plaintiff has not alleged death, dismemberment or loss of a fetus. Nor has she alleged a significant disfigurement or fracture. Further, she does not claim a permanent and total loss of any body part, nor does she proffer any competent medical evidence that she sustained a medically-determined injury of a nonpermanent nature which prevented her, for 90 of the 180 days following the subject accident, from performing her usual and customary activities.

Plaintiff first contends that she suffered a permanent consequential limitation of use of a body organ or member, as well as a significant limitation of a body function or system, specifically her cervical and lumbar spine, citing range of motion tests conducted by Dr. Azamy.

The medical evidence adduced by plaintiff is not sufficient to sustain this action in the face of defendants' summary judgment motion. The range of motion studies in Dr. Azamy's December, 2009 examination reveal only slight restrictions. The limited restrictions of plaintiff's range of motion described, is not, under the circumstances of this case, of sufficient magnitude to qualify as a "significant" or "important" limitation of use, or a permanent loss of use, within the meaning of the statute. See, *Licari v Elliott*, 57 NY2d 230; *Bandoian v Bernstein,* 254 AD2d 205 [1st Dept 1998] (10% restriction of

extension and/or rotation is not of sufficient magnitude to qualify as a "significant" or "important" limitation of use); *Arrowood v Lowinger,* 294 AD2d 315 [1st Dept 2002] (7%-14% impairment of the ankle not of sufficient magnitude to qualify as a " 'significant' or 'important' limitation of use"); *Durham v New York East Travel, Inc.,* 2 AD3d 1113 [3rd Dept 2003] (50% limit in range of limitation of the neck is "significant"); *Jackson v Gross*, 11 Misc3d 136 A [Sup Ct, App Term 1st Dept] (30%-40% reduction in movement in the neck is "significant"); *Waldman v Dong Kook Chang*, 175 AD2d 204 [2nd Dept 1991]; *Medina v Zalmen Reis & Assocs.,* 239 AD2d 394 [2nd Dept 1997]. The court has been unable to find any cases in which a loss in range of motion of less than 25% has been found to be significant.

Plaintiff also contends that she suffered a permanent consequential limitation of use of a body organ or member, as well as a significant limitation of a body function or system, in regard to her right knee.

With reference to the knee, plaintiff principally relies on the affirmation of Dr. Berkowitz, who has not examined her since March 20, 2008, and failed to set forth any recent range-of-motion findings concerning plaintiff's knee. *Wallace v Adam Rental Transp., Inc.*, 2009 NY Slip Op 9217 [2nd Dept]. An affirmation of a treating physician is deficient when it fails to indicate that the opinion expressed therein was based upon a recent medical examination. *Mahoney v. Zerillo*, 6 AD3d 403 [2nd Dept 2004]. Since no description of her present physical condition, limitation of her range of motion, or course of treatment is described in Dr. Berkowitz's affidavit, and Dr Azamy's affidavit does not address the present condition of plaintiff's knee, neither affidavit has raised any triable issues of fact as to her claimed permanent consequential limitation of a use of a body organ or member or significant limitation of use of a body function or system, regarding

plaintiff's knee. *Byrd v J.R.R.* Limo, 61 AD3d 801 (2nd Dept 2009); *Covington v Cinnirella*, 146 A.D.2d 565 [2nd Dept 1989]; *Perez v Einhorn*, 123 AD2d 752 {2nd Dept 1986]; *Garcon v Girard*, 115 AD2d 636 [2nd Dept 1985]; *Glielmi v. Banner*, 254 A.D.2d 255 [2nd Dept 1998].

Therefore, the evidence submitted by the plaintiff has failed to raise a triable issue of fact (*see* CPLR 3212[b]). The evidence submitted by defendants establishes prima facie that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d). *Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyler*, 79 NY2d 955 [1992]; *Yunatanov v Stein*, 2010 NY Slip Op 249 [2nd Dept]; *Yun v Barber*, 63 AD3d 1140 [2nd Dept 2009]; *Gavria v Alvarado*, 65 AD3d 567 [2nd Dept 2009]. As such, the plaintiff's complaint is dismissed.

The foregoing constitutes the Decision and Order of this Court.

Dated: Brooklyn, New York
June 29, 2010

Hon. Debra Silber, A.J.S.C.

Hon. Debra Silber
Justice Supreme Court