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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

MARY McKENNA,

Plaintiff,

- against -

LOUELLA WILLIAMS and ECONOMIC OPPORTUNITY COMMISSION OF NASSAU,

Defendants.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 16832/08
Motion Seq. No.: 01
Motion Date: 05/05/10
XXX

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion for Summary Judgment, Affirmations and Exhibits	1
Affirmation in Opposition and Exhibits	2
Reply Affirmation	3

The motion by defendants Louella Williams ("Mrs. Williams") and the Economic Opportunity Commission of Nassau ("E.O.C.") for summary judgment on the grounds that the plaintiff did not sustain a serious injury is granted for the reasons set forth herein.

Plaintiff commenced this action for damages due to a collision between E.O.C.'s van driven by Mrs. Williams and plaintiff. Plaintiff was on a bicycle at the time. The incident occurred at approximately 4:00 p.m. on December 17, 2007, on West Broadway, Hewlett, New York.

Defendants offer the sworn report dated January 7, 2010 of Dr. Leon Sultan, an orthopedist. *See* Defendants' Affirmation in Support Exhibit F. Dr. Sultan stated, after his examination of plaintiff, that there were no causally related orthopedic or neurological impairment to plaintiff due to the incident of December 17, 2007. Dr. Sultan found plaintiff orthopedically stable and neurologically in tact.

Plaintiff's deposition is revealing (*see* Defendants' Affirmation in Support Exhibit E; the following pages refer to that exhibit); plaintiff was struck by the mini-bus (p. 37); she was transferred to the hospital by ambulance (p. 38); plaintiff was treated and released from the hospital and went home (p. 42); plaintiff claims she was confined to bed for four (4) weeks and to her house for four (4) weeks but she states no physician advised such confinement (pp. 65-66, 69). As to things plaintiff cannot do, she is terrified to ride a bicycle, no physician advised her not to ride a bike, and she can no longer lift up her nieces and nephews (p. 70); plaintiff has difficulty with household chores, cooking, gardening and walking the dog (which she, plaintiff, had to give away) (p. 72).

In a serious injury matter, when a defendant seeks summary judgment on the issue that the plaintiff did not sustain a serious injury, the burden is placed on the defendant to prove through admissible evidence that the plaintiff failed to meet the statutory threshold of "serious injury." *See Gaddy v. Eyler*, 79 N.Y.2d 955, 582 N.Y.S.2d 990 (1992); *Lagois v. Public Administrator of Suffolk County*, 303 A.D.2d 644, 760 N.Y.S.2d 52 (2d Dept. 2003).

The affirmed medical reports of defendants' physician (here, an orthopedist) as well as the plaintiff's deposition testimony can be sufficient to establish *prima facie* that the plaintiff did not sustain a serious injury in a motor vehicle collision within the meaning of Insurance Law

§ 5102(d). *See Park v. Orellana*, 49 A.D.3d 721, 854 N.Y.S.2d 447 (2d Dept. 2008); *Tarhen v. Kabashi*, 44 A.D.3d 847, 844 N.Y.S.2d 89 (2d Dept. 2007).

A defendant moving for summary judgment on the grounds that the plaintiff did not sustain a "serious injury" under Insurance Law § 5102(d) must meet the initial burden of establishing *prima facie* entitlement to judgment. *See Matthews v. Cupie Transportation Corp.*, 302 A.D.2d 566, 758 N.Y.S.2d 66 (2d Dept. 2003)). In an automobile negligence case, it is only after a defendant has made a *prima facie* showing of entitlement to summary judgment that it becomes incumbent on the plaintiff to present medical evidence to support plaintiff's claim of serious injury. *See Franchini v. Palmieri*, 307 A.D.2d 1056, 763 N.Y.S.2d 381 (3d Dept. 2003).

A defendant in an automobile negligence/serious injury case can establish his or her entitlement to judgment by a physician's report, from the qualitative assessment therein, that the plaintiff has not sustained a serious injury. *See Toure v. Avis Rent-a-Car* Systems, 98 N.Y.2d 345, 746 N.Y.S.2d 865 (2002); *Gonzales v. Fiallo*, 47 A.D.3d 760, 849 N.Y.S.2d 182 (2d Dept. 2008).

Examining the report of defendants' physician, there are enough tests set forth therein to provide an objective basis so that his respective qualitative assessment of plaintiff could readily be challenged by any of plaintiff's expert(s) during cross-examination at trial as well as to provide enough to be evaluated by the trier of fact. *See Toure v. Avis Rent A Car Systems, Inc., supra; Gonzales v. Fiallo, supra.*

Thus, as noted, defendant's submission of relevant portions of plaintiff's deposition (*see Jackson v. Colvert*, 24 A.D.3d 420, 805 N.Y.S.2d 424 (2d Dept. 2005); *Batista v. Olivo*, 17 A.D.3d 494, 795 N.Y.S.2d 54 (2d Dept. 2005) and affirmations of defendants' physician are

sufficient herein to make a *prima facie* showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d). *See Paul v. Trerotola*, 11 A.D.3d 441, 782 N.Y.S.2d 773 (2d Dept. 2004). The plaintiff is now required to come forward with viable, valid objective evidence to verify her complaints of pain and limitations of motion. *See Farozes v. Kamran*, 22 A.D.3d 458, 802 N.Y.S.2d 706 (2d Dept. 2005). Here, plaintiff has not met her burden.

Here, the affirmation of Dr. David Steiner dated August 5, 2010 (*see* Plaintiff's Affirmation in Opposition Exhibit F) does not proffer competent medical evidence that revealed the existence of significant limitations which were contemporaneous with the December 17, 2007 subject incident. *See Pierson v. Edwards*, ___ NYS2d ___, 2010 WL3910185 (2d Dept.); *Srebnick v. Quinn*, 75 A.D.3d 637, 904 N.Y.S.2d 675 (2d Dept. 2010).

Plaintiff had been a patient of Dr. Steiner since March 24, 2008 (*see* Exhibit F, ¶ 3), some three (3) months after the incident.

The same lack of contemporaneousness is lacking in the post-dated report of Dr. F. David Hannanian. *See* Plaintiff's Affirmation in Opposition Exhibit G. Dr. Hannanian's neurological consult was February 20, 2008 or two months after the incident.

Robert Marks, D.C., (*see* Plaintiff's Affirmation in Opposition Exhibit H) did not examine plaintiff until June 14, 2010. His post-sworn data does not present contemporaneous data on plaintiff. *See Pierson v. Edwards, supra; Srebnick v. Quinn, supra.*

Dr. Leo Belogianis' post sworn physician's affidavit (*see* Plaintiff's Affirmation in Opposition Exhibit I) offers a "paraspinal digital infrared imaging report" dated January 25, 2008. Here, Dr. Belogianis should be required to explain his "paraspinal digital infrared

imaging" report. *See Duldulao v. City of New York*, 284 A.D.2d 296, 725 N.Y.S.2d 380 (2d Dept. 2001).

Dr. Belogianis also offers an undated report (*see* Plaintiff's Affirmation in Opposition Exhibit I) which alleges the collision of December 17, 2007 caused subluxation, muscle and ligament strains, inflammation and pain. The report directed to a "claim's representative" must be disregarded as its date is missing. Defendants' expert, Dr. Sultan concluded all strains and sprains were resolved in his report of July 7, 2010. A "chiropractic subluxation" is not a dislocation. "Accordingly, a chiropractic vertebral subluxation is a misalignment or a malpositioning of a vertebra within its joint; it is a condition of a vertebra that has lost its proper juxtaposition with the one above or the one below, or both, to an extent less than [a] medical . . . subluxation since there is no separation of joint surfaces." S*ee Coyoc v. New York City Housing Authority*, _____ Misc 2nd ____, 2002 WL1396031.

As to the subluxation and the allegation of inflammation, the lack of a date on the report renders the information useless in determining if plaintiff did indeed suffer a serious injury.

Plaintiff has offered the MRI reports of Dr. Daniel Beyda. *See* Plaintiff's Affirmation in Opposition Exhibit J. The report reflects an MRI that occurred on April 16, 2008 – four plus months after the December 17, 2007 incident. The MRI report does not causally relate to the issue of plaintiff's herniation and disc bulges to the December 17, 2007 incident. *See Garcia v. Lopez*, 59 A.D.3d 593, 872 N.Y.S.2d 719 (2d Dept. 2009); *Munoz v. Koyfman*, 44 A.D.3d 914, 844 N.Y.S.2d 111 (2d Dept. 2007).

Plaintiff's reports indicate a herniated or bulging disc. Also the mere existence of a herniated or bulging disc is not evidence of a serious injury in the absence of objective evidence

of the extent of the alleged physical limitations resulting from the disc injury and its duration. *See Luizzi-Schwenk v. Singh*, 58 A.D.3d 811, 872 N.Y.S.2d 176 (2d Dept. 2009); *Luna v. Mann*, 58 A.D.3d 699, 872 N.Y.S.2d 467 (2d Dept. 2009).

The plaintiff's own affidavit (*see* Plaintiff's Affirmation in Opposition Exhibit E) is insufficient to raise triable issues of fact as to whether he sustained a serious injury. *See Niles v. Lam Pakie Ho*, 61 A.D.3d 657, 877 N.Y.S.2d 139 (2d Dept. 2009), *Cantave v. Gelle*, 60 A.D.3d 988, 877 N.Y.S.2d 129 (2d Dept. 2009).

Plaintiff must set forth competent medical evidence to establish that she sustained a medically determined injury or impairment of a nonpermanent nature which prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for 90 of the 180 days following the subject collision. *See Ly v. Holloway*, 60 A.D.3d 1006, 876 N.Y.S.2d 482 (2d Dept. 2009); *Rabolt v. Park*, 50 A.D.3d 995, 858 N.Y.S.2d 197 (2d Dept. 2008).

The plaintiff offers no viable medical evidence on the 90/180 day issue. Clearly, the plaintiff's deposition does not support a 90/180 day issue in plaintiff's favor. Even if the deposition did so, the deposition testimony does not indicate "competent medical evidence" that she was unable to perform substantially all of her daily activities for 90 out of 180 days after the December 17, 2007 incident.

Here, as noted, the defendant made a *prima facie* showing, through the plaintiff's deposition testimony, that the plaintiff did not sustain a serious injury as defined under Insurance Law § 5101(d) in that she did not miss much time from work right after the collision, and her alleged injuries did not prevent her from performing "substantially all" of the material

acts constituting her customary daily activities during at least 90 out of the first 180 days following the collision. *See Sanchez v. Williamsburg Volunteer of Hatzolah, Inc.*, 48 A.D.3d 664, 852 N.Y.S.2d 287 (2d Dept. 2008).

Based on the above, the Court is not stating that the plaintiff did not sustain an "injury." The Court is stating that the record supports defendants' position that the plaintiff has not sustained a "serious injury" as defined in Insurance Law § 5102(d).

Accordingly, it is hereby

ORDERED, that the motion by defendants, made pursuant to CPLR § 3212 and Article 51 of the Insurance Law of the State of New York, which seeks dismissal of the complaint for alleged personal injuries sustained by plaintiff on the ground that he did not sustain a "serious injury" in the subject accident as defined by New York State Insurance Law § 5102(d) is hereby granted.

This constitutes the decision and order of this Court.

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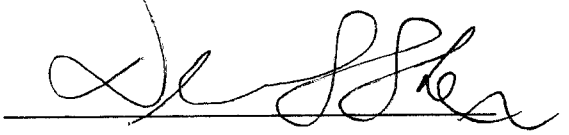

DENISE L. SHER, A.J.S.C.
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Dated: Mineola, New York
October 25, 2010