[* 1]

SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 4
NASSAU COUNTY

KIMBERLY BRANNON,

Plaintiff,

MOTION DATE: 3/24/11

-against-

MOTION SEQ. NO.: 005, 006
INDEX NO.: 013755/08

JUAN E. QUINTANILLA, BIRTHA A. LOPEZ, BARRY DEVONE and NICOLE DEVONE,

Defendants.

The following papers read on this motion (numbered 1-5):

Notice of Motion (#005).....1
Notice of Cross Motion (#006).....2
Affirmation in Opposition.....3
Affirmation in Opposition.....4
Reply Affirmation.....5

Motion by defendants BARRY DEVONE and NICOLE DEVONE for summary judgment pursuant to **CPLR §3212** on the issue of liability or, alternatively, for summary judgment on grounds that plaintiff KIMBERLY BRANNON failed to sustain a "serious injury" within the meaning of **Insurance Law §5102(d)** (Seq. No. 005), and cross motion for summary judgment pursuant to **CPLR §3212** by defendants JUAN E. QUINTANILLA and BIRTHA A. LOPEZ on grounds that plaintiff failed to sustain a "serious injury" within the meaning of **Insurance Law §5102(d)** (Seq. No. 006), are determined as follows.

Plaintiff alleges that on August 1, 2005 at approximately 7:00 p.m., she was a passenger in a motor vehicle operated by defendant NICOLE DEVONE and owned by defendant BARRY DEVONE, which came into contact with a vehicle operated by defendant BIRTHA A. LOPEZ and owned by defendant JUAN E. QUINTANILLA. The accident occurred on Broadway at or near its intersection with Graffing Place, Freeport.

Motion and cross motion by all defendants for summary judgment on the grounds that plaintiff failed to demonstrate a serious injury within the meaning of **Insurance Law**

§5102(d)

Insurance Law §5102(d) provides that a "serious injury means a personal injury which results in (1) death; (2) dismemberment; (3) significant disfigurement; (4) a fracture; (5) loss of a fetus; (6) permanent loss of use of a body organ, member, function or system; (7) permanent consequential limitation of use of a body organ or member; (8) significant limitation of use of a body function or system; or (9) 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" (numbered by the Court). The Court's consideration in this action is confined to whether plaintiff's injuries constitute a permanent consequential limitation of use of a body organ or member (7), a significant limitation of use of a body function or system (8), or a medically determined injury which prevented plaintiff from performing all of the material acts constituting her usual and customary daily activities for ninety days of the first one hundred eighty days following the accident (9).

In support of their motion for summary judgment, defendants BARRY DEVONE and NICOLE DEVONE (collectively, the "Devone Defendants") submit (1) an affirmed report of examination, dated April 23, 2010, of orthopedist Robert Israel, MD, covering an examination conducted on that date [Motion Exh. F]; and (2) an affirmed report, dated November 9, 2009, of radiologist Steven L. Mendelsohn, MD, covering a review of an MRI of plaintiff's cervical spine conducted on October 13, 2005 [Motion Exh. Ex. G]. The cross motion by defendants JUAN E. QUINTANILLA and BIRTHA A. LOPEZ adopts arguments raised by the DEVONE Defendants on the issue of serious injury.

Dr. Israel reported that physical examination of plaintiff's cervical, lumbar and thoracic spines, and right shoulder revealed normal range of motion results, comparing the results to norms. Dr. Israel's other reported findings, which specified the tests performed, also revealed normal findings. Dr. Israel diagnosed resolved sprains of the cervical and lumbar spines and right shoulder, and stated that plaintiff has no disability as a result of the accident, requires no orthopedic treatment or physical therapy and is capable of work activities and 'ADLs' without restriction.

Dr. Mendelsohn opined that the MRI of plaintiff's cervical spine demonstrated a "straightening, cervical lordosis, due to elevation of patient's head by a pillow; otherwise, normal MRI of the cervical spine." Dr. Mendelsohn stated further that he "takes issue with the interpretation provided by Dr. Samuel Mayerfield insofar as I find no evidence of herniation of the C3-4 disc."

The Devone Defendants also submit the deposition testimony of plaintiff conducted on March 22, 2010. After the accident, plaintiff went by ambulance to the emergency room of South Nassau Communities Hospital ("South Nassau") and was released after "a couple of hours" with painkillers [Devone Exh. D pp. 47-51]. Plaintiff testified that in or about August 2005, she went to, what she referred to, as a 'rehab center', where she saw Dr. Ledon, had x-rays of her neck and shoulders and was prescribed painkillers [Devone Exh. D pp. 58-60]. Plaintiff had physical therapy at the rehab center from August 2005 until approximately January or February of 2006 [Devone Exh. D pp. 61-66]. Plaintiff also had an MRI of her back and neck [Devone Exh. p. 58]. From approximately February 2006 until August 2009, plaintiff did not receive any medical treatment [Devone Exh. p. 69]. Plaintiff testified that she did not seek medical attention during that period because she had no insurance but that she never made inquiries as to the scope of her no-fault coverage [Devone Exh. D pp. 72-73]. In August 2009 (one year after filing of the summons and complaint), plaintiff's attorney gave her the name of a chiropractor, Dr. Lambert, whom she treated with once per week until October 2009 when she stopped due to a change in her work schedule [Devone Exh. D pp. 70-71]. Plaintiff testified that she obtained free medical insurance in the summer of 2009 with 'Health First' [Devone Exh. D pp. 75-76, 101-102] but did not see further medical treatment until two weeks prior to her deposition on March 22, 2010 when she saw Dr. Gorkin whom she found in her medical insurance book [Devone Exh. D pp. 75-80].

The Court finds that the report of defendants' examining physician is sufficiently detailed in the recitation of the various clinical tests performed and measurements taken during the examination to satisfy the Court that an "objective basis" exists for his opinion. Furthermore, defendants' motion papers have adequately addressed plaintiff's claim asserted in her bill of particulars that she suffered a medically determined injury or impairment of a non-permanent nature which prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the August 1, 2005 accident. In making a determination with respect to this category of serious injury, the Court notes that the Second Department has considered a totality of a defendant's motion papers, including sworn deposition testimony and statements made by a plaintiff to a defendant's examining physician. *See generally* **Breedy v. Jenkins**, 70 AD3d 618; **Encarnacion v. Smith**, 70 AD3d 628; **Pinder v. Salvatore**, 69 AD3d 823; **Belafrikh v. Tarzan Cab Corp.**, 69 AD3d 777.

Accordingly, the Court finds that defendants have made a *prima facie* showing, that plaintiff KIMBERLY BRANNON did not sustain a serious injury within the meaning of **Insurance Law §5102(d)**. With that said, the burden shifts to plaintiff to come forward

with some evidence of a "serious injury" sufficient to raise a triable issue of fact. **Gaddy v. Eyler**, 79 NY2d 955, 957.

In opposition, plaintiff submits (1) unaffirmed and uncertified medical records from South Nassau, dated August 1, 2005 [Plaintiff's Opposition Exh. C]; (2) an affirmation of physical medicine and rehabilitation physician, Juan L. Ledon, MD, dated March 7, 2011, covering examinations of August 10, 2005, September 14, 2005, October 20, 2005 and January 24, 2011 [Plaintiff's Opposition Exh. D]; and (3) an affirmation of radiologist, Samuel Mayerfield, MD, dated January 20, 2011, covering an MRI of plaintiff's cervical spine conducted on October 13, 2005 [Plaintiff's Opposition Exh. E].

It is the determination of this Court that plaintiff has failed to submit *objective* medical evidence (of either a quantitative or qualitative nature) sufficient to raise a triable issue as to whether or not plaintiff sustained a "serious injury" within the meaning of **Insurance Law §5102(d)**. The Court notes at the outset that the report of a physician which is not affirmed, or subscribed before a notary or other authorized official, or a hospital record which is not certified, is not competent evidence. **CPLR 2106**; **Grasso v. Angerami**, 79 NY2d 814; **Husbands v. Levine**, 79 AD3d 1098; **Vasquez v. John Doe # 1**, 73 AD3d 1033; **Lozusko v. Miller**, 72 AD3d 908; **Keith v. Duval**, 71 AD3d 1093; **Little v. Locoh**, 71 AD3d 837. Accordingly, the Court can only consider Drs. Ledon and Mayerfield's reports and not the medical records from South Nassau.

The Court notes that with respect to plaintiff's right shoulder, while Dr. Ledon provided numerical range of motion results, he failed to compare them to normal ranges. *See* **Calabro v. Peterson**, 82 AD3d 1030; **Perl v. Meher**, 74 AD3d 930; **Malave v. Basikov**, 45 AD3d 539; **Nociforo v. Penna**, 42 AD3d 514. In addition, it is not clear that Dr. Ledon reviewed the actual MRI films of plaintiff's cervical spine. *See* **Umanzor v. Pineda**, 39 AD3d 539.

Most significantly, although Dr. Ledon's reports deficits in plaintiff's range of motion of her cervical and lumbar spines and right shoulder, the Court finds that his affirmation fails to raise an issue of fact. Dr. Ledon fails to explain the more than five year gap in treatment between plaintiff's visit to him on October 20, 2005 and her recent visit on January 24, 2011. As to Dr. Ledon's examination of plaintiff on January 24, 2011, Dr. Ledon reports "despite regularly utilizing the home exercise program that I prescribed for her, over the past five years, the patient remains symptomatic", but provides no explanation with respect to why plaintiff did not seek any medical treatment for that length of time. In fact, although Dr. Ledon's report of his examination of plaintiff on October 2005 states that "patient will be re-examined in four weeks," there is no evidence that Dr. Ledon saw plaintiff again until January 24, 2011.

The Court finds that the "gap in treatment" is fatal to plaintiff's claim that the evidence submitted is sufficient to raise a triable issue as to whether or not plaintiff sustained a "serious injury" within the meaning of **Insurance Law §5102(d)**. "Even where there is objective medical proof, when additional contributory factors interrupt the chain of causation between the accident and claimed injury–such as a gap in treatment, an intervening medical problem or a pre-existing condition–summary dismissal of the complaint may be appropriate." **Pommells v. Perez**, 4 NY3d 566 at 572. The Court finds that plaintiff's conclusory assertion that she had no insurance, without more, such as deposition testimony that plaintiff could not afford further treatment or a statement from a medical provider to substantiate plaintiff's claims, is an inadequate explanation for this gap. Plaintiff gave no testimony that she was either unable to obtain insurance or could not afford to personally pay for treatments after no-fault coverage terminated. *Cf* **Tai Ho Kang v. Young Sun Cho**, 74 AD3d 1328; **Garza v. Taravella**, 74 AD3d 1802; **Jules v. Barbecho**, 55 AD3d 548; **Francovig v. Senekis Cab Corp.**, 41 AD3d 643; **Black v. Robinson**, 305 AD2d 438. Plaintiff also admitted in her deposition testimony that she stopped treating with Dr. Ledon after approximately four months because of her "workload and school" [Devone Exh. D p. 66].

The Court finds that Dr. Ledon's affirmation is "clearly tailored to meet the statutory requirements." **Knopf v. Sinetar**, 69 AD3d 809, 810. *See* **Lopez v. Senatore**, 65 NY2d 1017, 1019; **Picott v. Lewis**, 26 AD3d 319; **Sainte-Aime v. Ho**, 274 AD2d 569; **Marte v. New York City Transit Authority**, 253 AD2d 519. Five years after the accident, Dr. Ledon's opinion that the injuries to plaintiff's cervical spine were the result of the accident is not credible. Dr. Ledon's assertion that plaintiff has suffered a permanent consequential limitation of use and a permanent partial disability of the cervical spine is conclusory as he fails to offer any evidence of permanency other than his assertion that, as a result of the accident, plaintiff has difficulties "sitting, bending, walking and standing for prolonged periods of time." *See* **Gaddy v. Eyler**, 79 NY2d 955; **Lopez v. Senatore**, 65 NY2d 1017.

Likewise, the Court finds that plaintiff has failed to raise an issue of fact as to whether she sustained a serious injury under the 90/180 category of **Insurance Law 5102(d)**. Plaintiff testified at her deposition that as a result of the accident she missed only approximately two weeks of work as a receptionist/manager/salesperson at Dubin Optical Partners ("Dubin") [Deposition pp.11-12]. *See* **Kreimerman v. Stunis**, 74 AD3d 753 (missed two weeks of work); **Yunatanov v. Stein**, 69 AD3d 708 (missed at most one month of work); **McIntosh v. O'Brien**, 69 AD3d 585 (missed less than ninety days of work); **LaMarre v. Michelle Taxi, Inc.**, 60 AD3d 911 (missed approximately sixty days of work); **Leeber v. Ward**, 55 AD3d 563 (missed at most one month of full-time work).

Although plaintiff claimed that when she returned to work at Dubin Optical, she

reduced her hours from 30-35 hours per week to 15 hours per week, she also started school full time in September 2005 at the 'Art Institute' which she attended continuously until she graduated in December 2007 [Devone Exh. D pp. 8-10, 12]. While at school, plaintiff worked 15 hours per week for Dubin, and in December 2005, she obtained a job at her school and also worked 15 hours per week [Devone Exh. D pp. 12, 15, 17-18]. Plaintiff testified that she commuted four hours each way to school [Devone Exh. D pp. 13-14, 97-98]. The Court notes that plaintiff's testimony is vague and contradictory as to what affect, if any, the accident had on the number of hours she was able to work while attending school. When she graduated from school in December 2007, she became a freelance videographer requiring her to carry equipment and set up sets which she could only do with pain [Devone Exh. D pp 81-85]. Any statements of permanency of plaintiff's injuries in Dr. Ledon's affirmation are belied by plaintiff's deposition testimony that she missed only two weeks of work and enrolled in school full time approximately one month after the accident while continuing to work part-time. Plaintiff's deposition testimony that subsequent to the accident, she could not touch her back and lift things that weigh more than ten pounds, and that she is only able to clean mirrors and bathrooms with difficulty, is self serving and is insufficient by itself to satisfy this category of serious injury [Deposition testimony, pp. 81-86].

In addition, the affirmation of plaintiff's radiologist Dr. Mayerfield fails to express an opinion as to causation of plaintiff's alleged cervical spine injury. *See* **Knox v. Lennihan**, 65 AD3d 615; **Ferber v. Madorran**, 60 AD3d 725; **Garcia v. Lopez**, 59 AD3d 593; **Luizzi-Schwenk v. Singh**, 58 AD3d 811; **Sapienza v. Ruggiero**, 57 AD3d 643; **Collins v. Stone**, 8 AD3d 321. The existence of a radiologically confirmed disc injury alone will not suffice to defeat summary judgment. *See* **Pommells v. Perez**, 4 NY3d 566 at 574; **Pierson v Edwards**, 77 AD3d 642; **Lozusko v. Miller**, 72 AD3d 908; **Bleszcz v. Hiscock**, 69 AD3d 890; **Knopf v. Sinetar**, 69 AD3d 809; **Chanda v. Varughese**, 67 AD3d 947. The Court notes that Dr. Mayerfield also fails to address the opinion by defendants' radiologist that the MRI of plaintiff's cervical spine revealed no evidence of a herniated disc.

Motion by defendants BARRY DEVONE and NICOLE DEVONE for summary judgment on the issue of liability

Having granted defendants' motion for summary judgment on grounds that plaintiff failed to demonstrate that she sustained a serious injury within the meaning of **Insurance Law §5102(d)**, it is unnecessary for the Court to consider the DEVONE Defendants' alternate ground for dismissal, namely on liability. *See* **McCloud v. Reyes**, 82 AD3d 848; **Berson v. Rosada Cab Corp.**, 62 AD3d 636.

On the basis of the foregoing, it is

ORDERED, that the motion by defendants BARRY DEVONE and NICOLE DEVONE and the cross motion by defendants JUAN QUINTANILLA and BIRTHA A. LOPEZ for summary judgment pursuant to **CPLR §3212** dismissing the complaint of plaintiff KIMBERLY BRANNON on the grounds that plaintiff failed to sustain a "serious injury" within the meaning of **Insurance Law §5102(d)** is **granted**. The motion for summary judgment by BARRY DEVONE and NICOLE DEVONE on liability grounds is **denied** as academic.

This constitutes the Order of the Court.

Dated: June 2, 2011

J.S.C.

ENTERED

JUN 27 2011

NASSAU COUNTY
COUNTY CLERK'S OFFICE