**SUPREME COURT OF THE STATE OF NEW YORK**
**COUNTY OF BRONX: PART 23A**

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Fatima Diallo,

Index No.: 21898/12E

Plaintiff,

Decision and Order

-against-

Clodomiro Fernandez, Pedro A. Sanchez and Sung H. Kim,

Defendants.

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**HON. ALEXANDER W. HUNTER, JR.**

The motion by defendant Clodomiro Fernandez ("Fernandez") for an order pursuant to CPLR 3212, granting summary judgment in his favor and dismissing the complaint on the ground that plaintiff has not sustained a serious injury, is denied. The cross-motion by defendant Pedro A. Sanchez ("Sanchez") for an order pursuant to CPLR 3212, granting summary judgment in his favor and dismissing the complaint on the ground that plaintiff has not sustained a serious injury, is denied.

The cause of action is for personal injuries allegedly sustained by plaintiff in a three-car accident that occurred on the Bruckner Expressway at or near its intersection with East 149th Street in Bronx County on March 29, 2012 at approximately 10:30 P.M. In her verified bill of particulars, plaintiff alleges to have undergone surgery to the left knee and sustained injuries to her cervical spine, lumbar spine, left shoulder, left wrist, left elbow, left ankle, and jaw. (Verified bill of particulars, pgs. 4-7).

At her deposition on April 10, 2013, plaintiff testified that the vehicle she was operating was struck in the rear by another vehicle. (Plaintiff tr at 41, lines 18-20). She described the impact as heavy. (Plaintiff tr at 47, lines 12-18). Plaintiff was restrained and the air bags did not deploy. (Plaintiff tr at 27, lines 20-22; at 28, lines 12-22). As a result of the impact, the back of her head struck the headrest and her face struck the steering wheel. (Plaintiff tr at 47, lines 19-25; at 48, lines 2-7). Her left knee also struck the interior of the vehicle and her left ankle twisted. (Plaintiff tr at 51, lines 6-16). Plaintiff did not lose consciousness, bleed, or sustain any contusions or abrasions. (Plaintiff tr at 53, lines 2-14).

She was taken by ambulance to Lincoln Hospital. (Plaintiff at 67, lines 12-18). Upon arrival at the hospital, plaintiff complained of pain in her neck, lower back, and ankle. (Plaintiff tr at 67, lines 21-25; at 68, lines 2-14). She was discharged from the hospital with ibuprofen only. (Plaintiff tr at 71, lines 1-25; at 72, lines 2-8). She first complained of knee pain the next day. (Plaintiff tr at 68, lines 19-25; at 69, lines 2-3).

One week after the accident, plaintiff presented to the office of Dr. Goldenberg for

physical therapy. At first, plaintiff saw Dr. Goldenberg four times per week. At the time of the deposition, plaintiff was seeing Dr. Goldenberg two times per week. (Plaintiff tr at 84). She underwent surgery to her left knee on August 28, 2012. (Plaintiff tr at 85, lines 17-21). Although her knee has improved, she still complains of pain to the knee as well as her neck, left shoulder, and lower back. (Plaintiff tr at 102, lines 18-25; at 103, lines 2-12; at 104, lines 14-23). She also experiences problems with her jaw. (Plaintiff tr at 103, lines 16-24). Plaintiff denies any previous injuries to her neck, back, left shoulder, left knee, and left ankle. (Plaintiff tr at 97, lines 14-22).

Defendant Fernandez argues that none of the injuries claimed by plaintiff fall within any of the categories of serious injury set forth in Insurance Law § 5102. Defendant Fernandez asserts that he has made a prima facie showing of entitlement to summary judgment on the threshold issue. Defendant further argues that plaintiff cannot demonstrate through objective medical evidence that she has suffered a serious injury as a result of the accident.

In support, defendant Fernandez submits the affirmation of radiologist A. Robert Tantleff, M.D. (Defendant Fernandez's Exhibit C). Dr. Tantleff reviewed MRI films of plaintiff's left knee, left shoulder, cervical spine, lumbar spine, left ankle, left TMJ, right TMJ, and brain. All MRI film studies were performed within two months of the accident. Dr. Tantleff opined, "The MRI examination of the [l]eft [k]nee is normal and unremarkable without any definable evidence of acute or recent injury or traumatic tears or ruptures of the regional ligaments, tendons or menisci." With respect to the left shoulder, Dr. Tantleff found no evidence of acute or recent injury or post-traumatic abnormality related to the accident. Regarding her cervical spine, Dr. Tantleff found "regional discogenic changes not inconsistent with the individual's age of no definitive significance; unrelated to the current date of incident...and without evidence of post-traumatic abnormality." Moreover, he found no evidence of disc bulge, protrusion, or herniation. Similarly, he found the MRI of the lumbar spine to be unremarkable and normal. With respect to the left ankle, Dr. Tantleff found no evidence of recent or acute injury. He noted an absence of soft tissue swelling, edema, or hematoma. The MRI films of the left and right TMJ showed no evidence of abnormality of the joint, fractures, or dislocations. Finally, the MRI film of the brain was normal and unremarkable.

Defendant Fernandez also submits the affirmed report of orthopedic surgeon John H. Buckner, M.D. (Defendant Fernandez's Exhibit D). Dr. Buckner conducted an independent orthopedic examination of plaintiff on July 15, 2013. At the time of the examination, plaintiff was undergoing physical therapy twice per week. She was not taking any medications. Plaintiff complained of head pain, neck pain, back, pain, left leg pain, and left knee pain. All range of motion measurements were taken with a standard goniometer. Dr. Buckner diagnosed plaintiff with "normal musculoskeletal examination with neither history, nor documentation of any injury and reported left knee surgery, unrelated." Based upon his examination and a review of all medical records, Dr. Buckner concluded that plaintiff did not sustain any serious injury as a result of the accident. He further noted that the current subjective complaints made by plaintiff were wholly unsupported by the objective findings in his examination.

Defendant Fernandez also submits the affirmed report of Isaac Seinuk, D.D.S.

(Defendant Fernandez's Exhibit S). After performing a temporomandibular examination, Dr. Seinuk opined that plaintiff had no current dental or temporomandibular joint condition. He stated that plaintiff is not disabled by any dental conditions and can resume her activities of daily living.

Defendant Fernandez submits the affirmed report of Ronald A. Paynter, M.D. (Defendant Fernandez's Exhibit T). Dr. Paynter is board certified in emergency medicine and was requested to conduct a peer review of the emergency room records, the EMS report, the police accident report, and the verified bill of particulars. Dr. Paynter found that the claimed injuries set forth in the verified bill of particulars were inconsistent with the complaints made in the emergency room and to EMS immediately after the accident. He further opined that the claimed injuries are not causally related to the accident.

Defendant Fernandez also submits the affirmed report of biomechanical engineer Gordon D. Moskowitz, Ph.D. (Defendant Fernandez's Exhibit U). In his report, Dr. Moskowitz writes at length explaining Newton's Three Laws of Motions and its application to the subject accident. Based upon his analysis, Dr. Moskowitz concluded that plaintiff's body did not move in such a manner that would have caused the injuries complained of by plaintiff.

Defendant Sanchez cross-moves for summary judgment dismissal of the complaint. He adopts and incorporates by reference all of the arguments and exhibits contained in the motion filed by defendant Fernandez.

In opposition, plaintiff argues that the motion by defendant Fernandez and the cross-motion by defendant Sanchez must be denied because she has submitted objective medical evidence sufficient to raise a triable issue of fact on the threshold issue. In support, plaintiff submits the affirmation of her treating physician, Joyce Goldenberg, M.D., the affirmation of radiologist Thomas M. Kolb, M.D., EMG and nerve conduction tests of the cervical spine and lumbar spine, and the affirmation of orthopedic surgeon Richard Seldes, M.D. Plaintiff notes that the findings of Drs. Goldenberg and Seldes conflict with the findings of defendants' experts and are therefore sufficient to raise triable issues of fact to preclude summary judgment dismissal.

In her affirmed report, Dr. Goldenberg details her findings after an initial visit on April 5, 2012 and a recent visit on October 28, 2013. (Plaintiff's Exhibit A). During the initial visit, Dr. Goldenberg conducted range of motion testing with the use of an inclinometer or a goniometer. She noted limited ranges of motion in the cervical spine, lumbar spine, left shoulder, left knee, and left ankle. During the recent examination, Dr. Goldenberg still found limited ranges of motion in the cervical spine, lumbar spine, and left knee. Based upon her physical examinations, reviews of the diagnostic studies, and the history provided by plaintiff, Dr. Goldenberg opined that the accident is the sole cause of the claimed injuries. In conclusion, Dr. Goldenberg stated that plaintiff "developed limitation of use of cervical spine, lumbar spine, left shoulder, left knee, and left ankle, which prevents her from performing her activities of daily living without pain. The loss in mobility that [plaintiff] suffered is permanent. She will live the rest of her life with pain and reduced range of motion in the aforementioned areas. [Plaintiff] is disabled from her

injuries and still has sufficient limitation of motion and sufficient symptoms remaining that indicate permanency."

Plaintiff also submits the affirmed report of Thomas M. Kolb, M.D. (Plaintiff's Exhibit B). Dr. Kolb performed MRI studies of the left ankle, cervical spine, lumbar spine, left knee, and the left shoulder on April 6, 2012, April 30, 2012, April 30, 2012, May 10, 2012, and May 10, 2012, respectively. Dr. Kolb found partial tears of anterior talo-fibular ligament and the flexor halluces longus tendon in the left ankle. He noted disc bulges in the cervical spine and lumbar spine. With respect to the left knee, Dr. Kolb found an intrasubstance tear of posterior horn of medial meniscus and a partial tear of the anterior cruciate ligament. He also found partial rotator cuff tears in the left shoulder.

Plaintiff also submits the affirmed report of Richard Seldes, M.D. (Plaintiff's Exhibit D). Plaintiff first presented to the office of Dr. Seldes on June 27, 2012 for a left knee and left shoulder consultation. After an examination, Dr. Seldes referred plaintiff for physical therapy. Due to persistent and continuing pain, Dr. Seldes performed arthroscopic surgery of the left knee on August 28, 2012. The surgery involved partial lateral meniscectomy and arthroscopic synovectomy of multiple components. Dr. Seldes opined that the injuries sustained to the left knee in the motor vehicle accident necessitated the surgery.

In reply, defendant Fernandez argues that plaintiff has failed to raise a triable issue of fact with respect to whether she sustained a serious injury. Defendant Fernandez asserts that the reports submitted in opposition are conclusory and merely parrot the language of Insurance Law § 5102(d) in an effort to defeat the instant motions. Movant also notes that no objective medical evidence was submitted with respect to the bilateral TMJ. Moreover, none of plaintiff's experts addressed the findings of degeneration by Dr. Tantleff, which renders their opinions on the issue of causation speculative. Finally, movant points to the testimony of plaintiff to demonstrate that she did not sustain a medically determined injury which prevented her from performing substantially all of her usual and customary daily activities for not less than 90 days during the first 180 days immediately following the accident.

Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue of act. **Rotuba Extruders v. Ceppos, 46 N.Y.2d 233 (1978); Andre v. Pomeroy, 35 N.Y.2d 361 (1974); CPLR 3212(b).** The function of the court on a motion for summary judgment is issue finding rather than issue determination. **Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957).** For summary judgment to be granted, the moving party must establish his or her cause of action or defense by presenting evidentiary proof in admissible form that would be sufficient to warrant the court in directing judgment in favor of the moving party. **Friends of Animals, Inc. v. Associated Furniture Manuf., Inc., 46 N.Y.2d 1065 (1979).** Where the moving party fails to make such a showing, the motion must be denied regardless of the sufficiency of the opposition papers. **Winegrad v. New York University Medical Center, 64 N.Y.2d 851 (1985).** Once the movant has made this showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that would require a trial of the action. **Alvarez v. Prospect Hosp., 68 N.Y.2d 320 (1986); Zuckerman v. City of**

**New York, 49 N.Y.2d 557 (1980)**. In considering a motion for summary judgment, the evidence must be viewed in the light most favorable to the party opposing the motion. **People v. Grasso, 50 A.D.3d 535 (1st Dept. 2008)**. However, mere conclusory allegations or defenses are insufficient to preclude summary judgment. **Zuckerman, 49 N.Y.2d 557**.

When moving for summary judgment dismissal, the defendant has the initial burden of showing that the plaintiff has not sustained a "serious injury." **Spencer v. Golden Eagle, Inc., 82 A.D.3d 589 (1st Dept. 2011)**. A defendant can satisfy his or her initial burden by submitting sworn or affirmed statements of their examining physician, the sworn testimony of plaintiff, or the unsworn medical records of plaintiff. **Brown v. Achy, 9 A.D.3d 30 (1st Dept. 2004); Arjona v. Calcano, 7 A.D.3d 279 (1st Dept. 2004); Nelson v. Distant, 308 A.D.2d 338 (1st Dept. 2003)**. In opposition, plaintiff must submit objective medical evidence sufficient to raise a triable issue of fact as to whether he or she sustained a serious injury. **Toure v. Avis Rent A Car Systems, Inc., 98 N.Y.2d 345 (2002); Gaddy v. Eyler, 79 N.Y.2d 955 (1992)**. The objective medical findings must include "either a specific percentage of the loss of range of motion or a sufficient description of the qualitative nature of plaintiff's limitations based on the normal function, purpose and use of the body part." **Bent v. Jackson, 15 A.D.3d 46, 49 (1st Dept. 2005) (internal quotations omitted)**. The subjective testimony of a plaintiff as to his or her own pain or inability to perform specific tasks is insufficient to sustain a claim of serious injury. **Glover v. Capres Contracting Corp., 61 A.D.3d 549 (1st Dept. 2009)**.

Defendants have established his prima facie entitlement to summary judgment as a matter of law with respect to plaintiff's claims of a "permanent consequential limitation" and a "significant limitation of use" of her cervical spine, lumbar spine, left knee, left ankle, and jaw by the submission of the affirmed reports of his orthopedic surgeon, radiologist, and dentist. Dr. Buckner "detailed the specific objective tests used in [his] personal examinations, as well as the underlying data from those tests, to show full range of motion." **DeJesus v. Paulino, 61 A.D.3d 605, 607 (1st Dept. 2009)**; **see also, Toure v. Avis Rent A Car Systems, Inc., 98 N.Y.2d 345**; **Porter v. Bajana, 82 A.D.3d 488 (1st Dept. 2011)**. Defendants also established a lack of causation by submitting the affirmed report of Dr. Tantleff who found regional discogenic changes unrelated to the accident in the cervical spine and no evidence of acute or recent injury in any of the areas examined. **Kone v. Rodriguez, 107 A.D.3d 537 (1st Dept. 2013); Pannell-Thomas v. Bath, 99 A.D.3d 485 (1st Dept. 2012)**.

The burden then shifted to plaintiff to set forth sufficient evidence to raise a triable issue of fact to preclude summary judgment. **See, Gaddy v. Eyler, 79 N.Y.2d 955 (1992)**. This court finds that plaintiff has raised an issue of fact as to the alleged left knee injury by the submission of the affirmation of her radiologist who found a meniscus tear and the affirmed report of her orthopedic surgeon who stated that he repaired the meniscus tear during arthroscopic surgery. In addition, her treating physician found diminished ranges of motion in the left knee. **Ortiz v. Salahuddin, 102 A.D.3d 617 (1st Dept. 2013); Biascochea v. Boves, 93 A.D.3d 54 (1st Dept. 2012)**.

Plaintiff has also raised an issue of fact as to the injuries to her cervical spine and lumbar spine. Her treating physician, Dr. Goldenberg, found diminished ranges of motion in the

cervical spine and lumbar spine both shortly after the accident and then approximately 19 months after the accident. The review by Dr. Kolb of the MRI studies taken shortly after the accident indicate the presence of bulging discs at multiple levels in the cervical spine and lumbar spine. Diminished ranges of motion when coupled with evidence of positive MRI and EMG results are sufficient to raise an issue of fact as to whether plaintiff sustained a significant limitation in use or a permanent consequential limitation of use of her cervical and lumbar spine. **Duran v. Kabir, 93 A.D.3d 566 (1st Dept. 2012); Fuentes v. Sanchez, 91 A.D.3d 418 (1st Dept. 2012); Colon v. Bernabe, 65 A.D.3d 969 (1st Dept. 2009); Brown v. Achy, 9 A.D.3d 30 (1st Dept. 2004).**

Plaintiff has also sufficiently raised an issue of fact as to causation. In her affirmation, her treating physician concluded, based upon her own examination, the absence of any symptoms prior to the accident, the age of plaintiff at the time of the accident, and a review of the medical records, that the claimed injuries are casually linked to the accident. **Kone, 107 A.D.3d 537; James v. Perez, 95 A.D.3d 788 (1st Dept. 2012); Yuen v. Arka Memory Cab Corp., 80 A.D.3d 481 (1st Dept. 2011); Linton v. Nawaz, 62 A.D.3d 434 (1st Dept. 2011); Jacobs v. Rolon, 76 A.D.3d 905 (1st Dept. 2010); June v. Akhtar, 62 A.D.3d 427 (1st Dept. 2009).** Dr. Goldenberg rejected the opinion of defendants' experts that the disc bulges were degenerative in nature "by attributing the injuries to a different, yet altogether equally plausible, cause, that is, the accident. **Linton, 62 A.D.3d at 440.**

Furthermore, where a "plaintiff establishe[s] that at least some of his [or her] injuries meet the 'No Fault' threshold, it is unnecessary to address whether his [or her] proof with respect to other injuries he [or she] allegedly sustained would have been sufficient to withstand defendant[']s motion for summary judgment." **Linton, 14 N.Y.3d 821, 822 (2010).** "[O]nce a prima facie case of serious injury has been established and the trier of fact determines that a serious injury has been sustained, plaintiff is entitled to recover for all injuries incurred as a result of the accident." **Obdulio v. Fabian, 33 A.D.3d 418, 419 (1st Dept. 2006).**

In order to establish a serious injury under the 90/180-day category, the plaintiff "must present objective evidence of 'a medically determined injury or impairment of a non-permanent nature'" that prevented the plaintiff from performing substantially all of his usual and customary daily activities. **Toure, 98 N.Y.2d at 357.** Findings based upon the subjective testimony of the plaintiff as to his or her own pain or inability to perform specific tasks is insufficient to sustain a claim of serious injury. **Brown v. Covington, 82 A.D.3d 406 (1st Dept. 2011).** "When construing the statutory definition of a 90/180-day claim, the words 'substantially all' should be construed to mean that the person has been prevented from performing his usual activities to a great extent, rather than some slight curtailment." **Thompson v. Abassi, 15 A.D.3d 95, 100-101 (1st Dept. 2005).**

Defendants have established prima facie that plaintiff did not sustain a serious injury under the 90/180-day category by the submission of plaintiff's deposition testimony. **Vaughn v. Leon, 94 A.D.3d 646 (1st Dept. 2012); Merrick v. Lopez- Garcia, 100 A.D.3d 456 (1st Dept. 2012); Arenas v. Gauman, 98 A.D.3d 461 (1st Dept. 2012); McCree v. Sam Trans Corp., 82 A.D.3d 601 (1st Dept.2011).** At her deposition, plaintiff testified that she was confined to her

home for approximately one month. (Plaintiff tr at 94, lines 5-13). She denied being confined to her bed for any period of time. (Plaintiff tr at 94, lines 17-24). Moreover, none of the evidence submitted by plaintiff supports a claim that she was unable to perform substantially all of the material acts that constituted her usual and customary daily activities due to a medically determined injury during the relevant time period. **De La Cruz v. Hernandez, 84 A.D.3d 652 (1st Dept. 2011); Valentin v. Pomilla, 59 A.D.3d 184 (1st Dept. 2009).**

Accordingly, the motion by defendant Fernandez for summary judgment on the issue of denied. The cross-motion by defendant Sanchez is denied. The claim by plaintiff of a serious injury under the 90/180-day category is hereby dismissed.

Movant is directed to serve a copy of this order with notice of entry on all parties and file proof thereof with the clerk's office.

This constitutes the decision and order of this court.

Dated: April 1, 2014

ENTER:

J.S.C.

ALEXANDER W. HUNTER JR