

Passmore v Mejia

2017 NY Slip Op 30145(U)

January 4, 2017

Supreme Court, Suffolk County

Docket Number: 11-23341

Judge: Joseph C. Pastorella

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INDEX No. 11-23341
CAL. No. 16-00146MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

MOTION DATE 2-1-16 (006)
MOTION DATE 2-8-16 (007)
MOTION DATE 3-1-16 (008)
MOTION DATE 6-8-16 (009)
ADJ. DATE 6-8-16
Mot. Seq. #006 - MG
Mot. Seq. #007 - MD
Mot. Seq. #008 - MD
Mot. Seq. #009 - MD; CASEDISP

-----X
ADRIENNE PASSMORE,

Plaintiff,

- against -

GILBERTO MEJIA, ROSA LEMUS-
CEBALLOS, L.A. BROWN-JACQUES, &
DEBRA A. BROWN,

Defendants.
-----X

LAW OFFICE OF ROBERT E. SCHLEIER PLLC
Attorney for Plaintiff
52 Elm Street, Suite 6
Huntington, New York 11743

DESENA & SWEENEY, LLP
Attorney for Defendants Mejia & Lemus-Ceballos
1500 Lakeland Avenue
Bohemia, New York 11716

CULLEN & DYKEMAN, LLP
Attorney for Defendants Brown-Jacques & Brown
44 Wall Street, 15th Floor
New York, New York 10005

Upon the following papers numbered 1 to 75 read on these motions for summary judgment; Notice of Motion and supporting papers 1 - 19, 20 - 41, 42 - 57; Notice of Cross Motion and supporting papers 58 - 67; Answering Affidavits and supporting papers 58 - 67, 68 - 69, 70 - 71; Replying Affidavits and supporting papers 72 - 73, 74 - 75; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motions (seq. 006 and seq. 008) by defendants Gilberto Mejia and Rosa Lemus-Ceballos, the motion (seq. 007) by defendants L.A. Brown-Jacques and Debra A. Brown, and the motion (seq. 009) by plaintiff Adrienne Passmore, are consolidated for purposes of this determination; and it is

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ORDERED that the motion by defendants Gilberto Mejia and Rosa Lemus-Ceballos for summary judgment dismissing all claims against them on the ground that plaintiff did not suffer a serious injury is granted; and it is

ORDERED that the motion by defendants L.A. Brown-Jacques and Debra A. Brown for summary judgment dismissing all claims against them on the ground that plaintiff did not suffer a serious injury is denied as moot; and it is

ORDERED that the motion by defendants Gilberto Mejia and Rosa Lemus-Ceballos for summary judgment dismissing all claims against them on the ground that they were not negligent is denied as moot; and it is further

ORDERED that the motion by plaintiff Adrienne Passmore for partial summary judgment in her favor as to defendants' liability is denied as moot.

This action was commenced by plaintiff Adrienne Passmore to recover damages for injuries she allegedly sustained on May 1, 2011 while she was a passenger in a motor vehicle operated by L.A. Brown-Jacques and owned by Debra Brown. The vehicle in which plaintiff was riding allegedly collided with a motor vehicle owned by defendant Rosa Lemus-Ceballos and operated by defendant Gilberto Mejia. In her bill of particulars, plaintiff claims she sustained various injuries and conditions as a result of said accident, including L5-S1 disc bulge, lumbar radiculopathy, aggravation of an asymptomatic C5-C6 disc herniation, cervical radiculopathy, and left ankle sprain.

Defendants Gilberto Mejia and Rosa Lemus-Ceballos filed a third-party action against defendants L.A. Brown-Jacques and Debra Brown for indemnification. Said third-party defendants were subsequently added as party defendants by order of this Court dated January 16, 2014. Defendants Gilberto Mejia and Rosa Lemus-Ceballos then asserted a cross claim against defendants L.A. Brown-Jacques and Debra Brown in their answer to the amended complaint.

Defendants Gilberto Mejia and Rosa Lemus-Ceballos now move for summary judgment dismissing the complaint on the ground that Insurance Law § 5104 precludes plaintiff from recovering for non-economic loss, as she did not suffer "serious injury" within the meaning of Insurance Law § 5102 (d). In support of their motion, defendant submits copies of the pleadings, a report of an independent medical evaluation conducted by Michael J. Katz, M.D., a report of an independent neurological evaluation conducted by Mathew M. Chacko, M.D., a report of an MRI review conducted by David A. Fisher, M.D., and a transcript of plaintiff's deposition testimony. Defendants L.A. Brown-Jacques and Debra Brown also move for summary judgment dismissing the complaint on the ground that Insurance Law § 5104 precludes plaintiff from recovering for non-economic loss, as she did not suffer "serious injury" within the meaning of Insurance Law § 5102 (d).

At her deposition held on April 19, 2013, plaintiff Adrienne Passmore testified that on May 1, 2011, at about 2:30 p.m., she was a front seat passenger in a motor vehicle operated by her friend, Leslie Brown. Plaintiff indicated that prior to the accident, she and Ms. Brown were traveling on Peninsula Boulevard in Hempstead, New York, and were about to turn onto Washington Street. Plaintiff stated

that she was unable to see anything at the time, due to her eye condition. Regardless, plaintiff testified that Ms. Brown brought her vehicle to a stop in response to a red traffic light at the intersection of Peninsula Boulevard and Washington Street. She stated that Ms. Brown eventually began to move her vehicle “into a turn” and “20 to 30 seconds” later, the accident occurred. She stated that she believes the other vehicle came from behind and struck the front driver’s side of Ms. Brown’s vehicle with a “light to medium” amount of force. Plaintiff stated that after attending church services, she sought medical attention at Good Samaritan Hospital in West Islip, complaining of pain in her lower back and neck, as well as “a little pain” in both of her legs and left arm. Plaintiff testified that x-rays taken at Good Samaritan Hospital revealed no fractures and she was discharged. Plaintiff indicated that “[t]wo or three days” after the accident, she sought treatment from Dr. Jamie Skurka, a chiropractor. She testified that Dr. Skurka ordered x-ray and MRI examinations before commencing any treatment. She stated that she was told those exams revealed a “[h]erniated disc” in her neck, and a “bone spur” in her lumbar spine. Upon questioning, plaintiff testified that she had an MRI study of her cervical spine performed on August 26, 2010, less than a year before the accident in question, in response to “neck problems” she began experiencing shortly before. She stated that such MRI examination revealed a herniated disc in her cervical spine, prompting her to attend physical therapy for six weeks afterwards.

Plaintiff testified that following the instant accident, she was confined to her home for “[t]wo or three weeks.” Plaintiff stated that she is prevented from running, entirely, by her injuries. She also stated that housecleaning, sitting or standing for more than an hour, laying down for long periods of time, bending over, and walking are all more difficult due to her injuries. Plaintiff reported that she saw Dr. Patrick Read of South Shore Brain and Spine twice, in May and September of 2011, and that he informed her that “if [she] wasn’t willing to have the surgery, there was nothing he could do for [her].” Plaintiff stated that, in seeking a second opinion, she began seeing Dr. Leone, a spinal surgeon, in February of 2013. She explained that, after reviewing her medical records, Dr. Leone did not recommend surgery. She indicated that she saw Dr. Leone two additional times but, as of the date of her deposition, she has discontinued treatment with him, continuing treatment with Dr. Skurka instead. Plaintiff further testified that she underwent three procedures, namely facet blocks and epidurals, with a Dr. Shalmi between November 2011 and May 2012.

Michael J. Katz, M.D., an orthopedic surgeon, states that he examined plaintiff on June 18, 2013 and conducted range of motion measurements using a goniometer. Testing of plaintiff’s cervical spine revealed the following measurements: flexion to 50 degrees, where the normal range of motion is 50 degrees; extension to 60 degrees, where normal is 60 degrees; right and left lateral flexion to 45 degrees, where normal is 45 degrees; and left and right rotation to 80 degrees, where the normal range is 80 degrees. No tenderness about the cervical spine was noted, and no paravertebral spasm was present. As to plaintiff’s thoracolumbosacral spine, range of motion testing revealed forward flexion to 90 degrees, where the normal range of motion is 90 degrees; extension to 30 degrees, where normal is 30 degrees; lateral and side bending to 30 degrees, where normal is 30 degrees; and right and left rotation to 30 degrees, where normal is 30 degrees. Testing of plaintiff’s left ankle revealed ankle dorsiflexion to 30 degrees, where the normal range of motion is 30 degrees; plantar flexion to 45 degrees, where normal is 45 degrees; inversion to 20 degrees, where normal is 20 degrees; and eversion to 20 degrees, where normal is 20 degrees. Dr. Katz diagnosed plaintiff with cervical strain with radiculopathy, resolved, which predated the accident in question; thoracolumbosacral strain with radiculopathy, resolved, which

predated the accident in question; and left ankle contusion, resolved. Dr. Katz notes that plaintiff “walked normally into and out of the examining room,” that she “changed positions normally,” and that she “was using no canes, walkers, or crutches.” In conclusion, he states that plaintiff shows “no signs or symptoms of permanence,” “no positive objective findings,” a “full range of motion,” and absence of any disability resulting from the subject accident.

Dr. Mathew M. Chacko conducted an independent neurological evaluation of plaintiff on June 3, 2013. Dr. Chacko conducted range of motion measurements of plaintiff using a goniometer. With regard to plaintiff’s cervical spine, testing revealed flexion to 50 degrees, where the normal range of motion is 50 degrees; extension to 60 degrees, where normal is 60 degrees; lateral rotations to 80 degrees, where the normal range is 80 degrees; and lateral flexions to 45 degrees, where normal is 45 degrees. With regard to plaintiff’s lumbar spine, testing revealed flexion to 50 degrees, where the normal range of motion is 60 degrees; lateral flexions to 25 degrees, where normal is 20 degrees; and extension to 20 degrees, where normal is 25 degrees. Plaintiff reported tenderness on palpation of the cervical and lumbar areas, but no muscle spasm was detected. Dr. Chacko diagnoses plaintiff with cervical and lumbar strains, both resolved. Dr. Chacko states that there were no findings consistent with cervical or lumbar radiculopathy or myelopathy. Dr. Chacko also states that plaintiff walked with a normal gait and no sign of cerebellar dysfunction was noted. In conclusion, Dr. Chacko opines that plaintiff exhibits “no objective clinical evidence of any disability” relating to the subject accident and “no objective clinical evidence of any neurological sequelae.”

Dr. David A. Fisher states that on December 12, 2012 he performed a review of plaintiff’s radiology films. With regard to the August 26, 2010 MRI results, Dr. Fisher finds “moderate degenerative changes” at the C5-C6 level. As to plaintiff’s May 6, 2011 MRI and x-ray results, Dr. Fisher reports that “[n]o interval change is seen,” that the moderate degenerative changes at C5-C6 were “redemonstrated,” that there were “moderate degenerative changes at the L5-S1 level,” that no new herniations are present, and that there is “no radiographic evidence of traumatic or causally related injury to the cervical spine.” As to the results of plaintiff’s lumbar spine MRI taken on June 8, 2016, Dr. Fisher finds “degenerative changes” at L5-S1 with “accompanying mild annular bulge.” In conclusion, Dr. Fisher opines that the degenerative changes present at plaintiff’s L5-S1 level “clearly represent a chronic preexisting condition,” that there are no disc herniations, that the “mild disc bulge noted at L5-S1 is compatible with the amount of degenerative change present,” and that there is “no radiographic evidence of traumatic or causally related injury to the lumbar spine.”

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP*, 26 NY3d 40; *Alvarez v Prospect Hosp.*, 68 NY2d 320). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (*Nomura, supra*; see also *Vega v Restani Constr. Corp.*, 18 NY3d 499). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (*Daliendo v Johnson*, 147 AD2d 312). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (*Nomura, supra*; see also *Ortiz v Varsity Holdings, LLC*, 18 NY3d

335). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851).

It is for the Court to determine in the first instance whether a plaintiff claiming personal injury as a result of a motor vehicle accident has established a prima facie case that he or she sustained "serious injury" and may maintain a common law tort action (*see Licari v Elliott*, 57 NY2d 230; *Tipping-Cestari v Kilhenny*, 174 AD2d 663). 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 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."

A plaintiff claiming injury within the "limitation of use" categories must substantiate his or her complaints of pain with objective medical evidence showing the extent or degree of the limitation of movement caused by the injury and its duration (*see Ferraro v Ridge Car Serv.*, 49 AD3d 498; *Mejia v DeRose*, 35 AD3d 407; *Laruffa v Yui Ming Lau*, 32 AD3d 996; *Cerisier v Thibiu*, 29 AD3d 507). To prove significant physical limitation, a plaintiff must present either objective quantitative evidence of the loss of range of motion and its duration based on a recent examination of plaintiff or a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (*see Perl v Meher*, 18 NY3d 208; *Toure v Avis Rent A Car Systems, Inc.*, *supra*; *Rovelo v Volcy*, 83 AD3d 1034). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*see Licari v Elliott*, *supra*; *Cebon v Tuncoglu*, 109 AD3d 631). Furthermore, a plaintiff claiming serious injury who ceases treatment after the accident must offer a reasonable explanation for having done so (*Pommells v Perez*, 4 NY3d 566; *see Vasquez v John Doe #1*, 73 AD3d 1033; *Rivera v Bushwick Ridgewood Props., Inc.*, 63 AD3d 712).

A defendant moving for summary judgment on the ground that a plaintiff's negligence claim is barred by the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a "serious injury" (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345; *Gaddy v Eycler*, 79 NY2d 955). When a defendant seeking summary judgment based on the lack of a serious injury relies on the findings of defendant's own witnesses, "those findings must be in admissible form, i.e., affidavits and affirmations, and not unsworn reports" to demonstrate entitlement to judgment as a matter of law (*Pagano v Kingsbury*, 182 AD2d 268, 270). A defendant also may establish entitlement to summary judgment using a plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (*see Elshaarawy v U-Haul Co. of Miss.*, 72 AD3d 878; *Fragale v Geiger*, 288 AD2d 431; *Torres v Micheletti*, 208 AD2d 519; *Craft v Brantuk*, 195 AD2d 438; *Pagano v Kingsbury*, *supra*). Once a defendant meets this burden, plaintiff must present proof in admissible form which creates a material issue of fact (*see Gaddy v Eycler*, *supra*; *Pagano v Kingsbury*, *supra*; *see generally Zuckerman v City of New York*, 49 NY2d 557).

Defendants Gilberto Mejia and Rosa Lemus-Ceballos have established a prima facie case of entitlement to summary judgment by submitting evidence that plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the accident in question (*see Marrow v Torres*, 140 AD3d 833). Those defendants provided multiple affirmations from medical professionals attesting to plaintiff's pre-existing disc herniation at C5-C6, virtually unchanged pre- and post-accident MRI results, and objective range of motion tests revealing minor, if any, limitations (*see Kabir v Vanderhost*, 105 AD3d 811; *Hayes v Vasilios*, 96 AD3d 1010; *Staff v Yshua*, 59 AD3d 614). As to plaintiff's 90/180 claim, plaintiff's own testimony is that she was confined to her home for only "two or three weeks." Further, plaintiff's testimony regarding her physical limitations following the accident, including being unable to run, do not rise to the level of being prevented from performing "substantially all of her daily activities" (*see Grant v New York City Tr. Auth.*, 89 AD3d 1058, 1059; *Dembele v Cambisaca*, 59 AD3d 352).

Defendants Gilberto Mejia and Rosa Lemus-Ceballos having established a prima facie case, the burden then shifted to plaintiff to raise a triable issue (*see generally Alvarez v Prospect Hosp.*, *supra*). In opposition to defendants' motion, plaintiff submits her own affidavit, an affidavit of Jamie Skurka, D.C., various medical records of varying certification, an affirmation of Vinodkumar Velayudhan, M.D., an affirmation of Michael A. Shapiro, M.D. and an affirmation of Vincent J. Leone, M.D.

In his affidavit, Jamie Skurka, D.C., states that plaintiff first presented to his office on May 5, 2011 with complaints of "neck pain, lower back pain and headaches," as well as "occasional sharp pain into her right leg . . . and intermittent mild numbness in her right arm." Dr. Skurka states that plaintiff had a prior history of "mild intermittent cervical pain that had resolved six months prior to her May 1, 2011 motor vehicle accident," and that she stated her cervical spine pain "had resumed and notably increased in severity and constant (sic) following the motor vehicle accident." Dr. Skurka states that he reviewed plaintiff's August 26, 2010 MRI study, "which revealed a C5/6 disc herniation." Dr. Skurka further states that at his initial meeting with plaintiff on May 5, 2011, he conducted range of motion testing of her cervical spine which revealed flexion to 40 degrees, where the normal motion is 50 degrees; extension to 20 degrees, where the normal motion is 60 degrees; left lateral flexion to 25 degrees, where normal is 45 degrees; right lateral flexion to 15 degrees, where normal is 45 degrees; left rotation to 50 degrees, where the normal motion is 80 degrees; and right rotation to 40 degrees, where the normal motion is 80 degrees. With regard to plaintiff's lumbar spine, testing revealed flexion to 70 degrees, where the normal range of motion is 60 degrees; extension to 30 degrees, where normal is 25 degrees; lateral flexion to 25 degrees bilaterally, where normal is 25 degrees; and normal left and right rotation.

Dr. Skurka states that, subsequent to his evaluation and testing of plaintiff on May 5, 2011, his initial diagnosis was "cervical, lumbosacral sprain/strain, cervical radiculopathy, exacerbation of cervical disc herniation, headaches and spinal intersegmental joint dysfunction of the cervical and lumbar spine." Dr. Skurka states that MRI studies were performed on plaintiff's cervical spine on May 6, 2011, which revealed no new disc herniations compared to the prior MRI examination on August 26, 2010. Dr. Skurka further states that an MRI study was conducted of plaintiff's lumbar spine on June 8, 2011, which revealed "mild stenosis at L5-S1 level from a generalized circumferential bulge and osteophyte formation."

Dr. Skurka states that his final range of motion testing of plaintiff was conducted on October 18, 2012. That testing of plaintiff's cervical spine revealed flexion to 35 degrees, where the normal range is 50 degrees; extension to 45 degrees, where normal is 60 degrees; left lateral flexion to 40 degrees, where normal is 45 degrees; right lateral flexion to 35 degrees, where normal is 45 degrees; left rotation to 55 degrees, where the normal range is 80 degrees; and right rotation to 55 degrees, where the normal range is 80 degrees. With regard to plaintiff's lumbar spine, testing revealed flexion to 60 degrees, where the normal range of motion is 60 degrees; extension to 25 degrees, where normal is 25 degrees; lateral flexion to 20 degrees bilaterally, where normal is 25 degrees; and normal left and right rotation.

Dr. Skurka states that he reviewed the results of a February 5, 2013 MRI study conducted of plaintiff's lumbar spine and concluded that plaintiff has "L5-S1 diffuse disc bulge and facet arthropathy resulting in mild bilateral neural foraminal stenosis." He further states that he continued treating plaintiff until March 12, 2013, after which time he deemed her treatments to be palliative only and unavailable due to her personal financial status and the cessation of her no-fault benefits. In conclusion, Dr. Skurka opines that "the findings, exacerbations and sequelae could only have come from the subject May 1, 2011 accident" and that plaintiff's symptoms during his time treating her "are causally related to" that accident.

Dr. Vinodkumar Velayudhan, a board certified radiologist, states that he reviewed the results of plaintiff's MRI study conducted on May 6, 2011, and opines that plaintiff had "redemonstration of a broad, large C5-C6 central disc herniation that results in spinal canal narrowing with flattening of the ventral cord contour and right neural foraminal stenosis." In similar fashion, Dr. Michael A. Shapiro, a board certified radiologist, provided an affirmation in which he states that he reviewed the results of plaintiff's MRI study conducted on June 8, 2011, and concludes that she had "mild stenosis seen at the L5-S1 level from a generalized circumferential bulge and osteophyte formation."

Dr. Vincent J. Leone supplied an affirmation in which he states that he performed two "comprehensive medical examinations" of plaintiff, one on January 25, 2013 and the other on February 8, 2013. Dr. Leone states that following plaintiff's examination on January 25, 2013, he opined that she had "a post-traumatic cervical sprain and lumbar sprain rule out worsening cervical herniation and lumbar herniation." Dr. Leone states that following plaintiff's examination on February 8, 2013, and his review of plaintiff's February 7, 2013 MRI study, he "confirmed a C5-6 disc herniation without mass effect on the cord but there was a C5-6 cord change and a T2 hyperintensity consistent with myelomalacia." He further states that he concluded that "the myelomalacia was permanent spinal damage." Dr. Leone's certified medical records regarding plaintiff's January 25, 2013 examination state that plaintiff's cervical herniations as visible in her 2011 MRI study "do not show any significant change compared to [her] 2010 [MRI study]." That examination's records also state that plaintiff's "range of motion to the neck is full to flexion, extension, rotation and lateral tilting." Dr. Leone's notes regarding plaintiff's February 8, 2013 examination state that his review of her February 7, 2013 MRI study revealed "a much smaller C5-6 disc herniation" and "no new disc herniation or stenosis compared to [plaintiff's] 2010 [MRI study]."

Here, plaintiff has failed to raise a triable issue. Dr. Skurka's affidavit fails to supply any reasoning, other than speculation based upon plaintiff's subjective complaints, to attribute plaintiff's

maladies to her incident (see *John v Linden*, 124 AD3d 598; *Kabir v Vanderhost*, *supra*; *Faulkner v Steinman*, 28 AD3d 604). Plaintiff’s physician witnesses affirm that no significant change in plaintiff’s cervical spine was visualized in MRI studies conducted subsequent to her accident, compared to those conducted prior. Thus, plaintiff’s witnesses “failed to explain, in a specific and nonconclusory manner, how the subject accident exacerbated the plaintiff’s pre-existing condition” (*Inzalaco v Consalvo*, 115 AD3d 807, 808-809; see *Pommells v Perez*, *supra*; *Franchini v Palmieri*, 1 NY3d 536; *Frisch v Harris*, 101 AD3d 941).

Plaintiff’s opposition to this motion includes her own affidavit, dated May 16, 2016, in which she expressly states that she experienced pain from May 1, 2011 until June of 2013. Plaintiff, however, has failed to come forward with a recent examination documenting her current limitations (see *Pertl v Meher*, *supra*; *Toure v Avis Rent A Car Sys.*, *supra*; *McEachin v City of New York*, 137 AD3d 753; *Brand v Evangelista*, 103 AD3d 539; *Rovelo v Volcy*, *supra*; *Young v Russell*, 19 AD3d 688; *Farozes v Kamran*, 22 AD3d 458). The most recent medical examination was conducted in 2013, nearly three years prior to the filing of this motion. Plaintiff’s affidavit, coupled with the lack of a medical exam subsequent to June of 2013, defeats her Insurance Law § 5102 (d) claims, save for the 90/180 basis.

As to her 90/180 claim, plaintiff argues that defendants did not conduct a medical examination of plaintiff within the first 180 days following the accident and, therefore, cannot disprove plaintiff’s 90/180 claim. This argument is unpersuasive. Many of the cases cited by plaintiff in support of that argument actually favor defendants (see *Uddin v Cooper*, 32 AD3d 270; *Blanchard v Wilcox*, 283 AD2d 821). Plaintiff’s own deposition testimony describes her exact limitations during the first 180 days following the incident in question. None of that testimony supports her counsel’s contention that she was prevented from performing “substantially all of her daily activities” for 90 of those first 180 days, nor does her affidavit in opposition to this motion, in which she states that she was unable to “lift or carry items over five (5) pounds, run, or walk for long distances” from May 2011 until June 2013 (see *Licari v Elliott*, *supra*; *Grant v New York City Tr. Auth.*, *supra*; *Pacheco v Connors*, 69 AD3d 818; *Dembele v Cambisaca*, *supra*). Accordingly, the motion by defendants Gilberto Mejia and Rosa Lemus-Ceballos for summary judgment in their favor on the ground that plaintiff did not suffer a serious injury is granted.

Defendants Gilberto Mejia and Rosa Lemus-Ceballos, having prevailed on the issue of plaintiff’s alleged serious injury, the Court need not address the remaining motion by defendants L.A. Brown-Jacques and Debra A. Brown for summary judgment as to the same issue, nor the motions for summary judgment as to liability. Accordingly, the three remaining motions are denied as moot.

Dated: January 4, 2017



HON. JOSEPH C. PASTORESSA, J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION