SUPREME COURT- STATE OF NEW YORK

PRESENT: ***Honorable James P. McCormack***
Justice

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TRIAL/IAS, PART 23
NASSAU COUNTY

FELICIA L. GARRICK,

Plaintiff(s), **INDEX NO: 608110/16**

-against-

Motion Submitted: 11/19/18
Motion Seq.: 001

ANTHONY CONA and BM MAINTENANCE,

Defendant(s). **XXX**

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The following papers read on these motions:

Notice of Motion/Supporting Exhibits.....X

Defendants, Anthony Cona (Cona) and BM Maintenance (BMM), move this court for an order, pursuant to CPLR §3212, for summary judgment dismissing the complaint against them on the grounds that the injuries sustained by Plaintiff, Feliecia L. Garrick (Garrick) fail to satisfy the serious injury threshold requirement of Insurance Law § 5102(d). The motion is unopposed.

This is an action to recover for personal injuries allegedly sustained by Garrick in a motor vehicle accident on August 5, 2016 on Broadway, near its intersection with Ritter Avenue, County of Suffolk. According to Garrick, on that date she was stopped at a red light on Broadway when the vehicle driven by Cona and owned by BMM rear ended her.

As a result of the accident, Garrick claims she suffered serious injuries.

Garrick commenced this action by service of a summons and complaint dated October 20, 2016. Issue was joined by service of an answer dated November 22, 2016. The case certified ready for trial on February 15, 2018 a note of issue was filed on December 13, 2018.

Initially, Defendants argue the complaint should be dismissed because of Garrick's failure to timely file a note of issue. On the date the case certified, the court signed an order directing Garrick to file a note of issue within 90 days, or by May 16, 2018. Garrick neglected to do so, and on September 12, 2018, the court, *sua sponte*, issued an order, pursuant to CPLR §3216 directing Garrick to file her note of issue within 90 days of the date of the order. Ninety days from the date of the order was December 11, 2018. Assuming Garrick was under the impression that the date of the order was not included in the counting, the note of issue should have been filed by December 12, 2018.

Inexplicably, the note of issue was filed on December 13, 2018. Generally, a one or two day delay is something this court would overlook. However, the note of issue is actually six months late, and even one day late after being given a second 90 day period to file is inexcusable. The complaint will be dismissed for failure to timely file a note of issue after the issuance of a 90 day order. However, the complaint should also be dismissed on the merits.

In the bill of particulars, Garrick alleges, *inter alia*, injuries to her right hand, left hand, left ankle, left wrist, right wrist, right shoulder, left shoulder, cervical spine and

thoracic spine.

In seeking summary judgement, Defendants rely upon; the pleadings; the bill of particulars and the supplemental bill of particulars; Garrick's deposition testimony; the affirmed report of Dr. David Weissberg, an orthopedic surgeon who examined Garrick as part of an independent medical examination (IME) on April 3, 2018; the affirmed reports of Dr. Melissa Sapan Cohn, a radiologist, who examined X-Rays and MRIs taken of Garrick, as part of an IME, on April 8, 2018; and the affirmed report of Dr. Paul Lerner, a neurologist, who examined Garrick as part of an IME on January 15, 2018.

Using a goniometer, Dr. Weissberg found normal ranges of motion in the cervical spine, bi-lateral shoulders, bi-lateral wrists, thoracolumbar spine, and left ankle. Dr. Weissberg's impression was of sprains to her cervical spine thoracolumbar spine, wrist, shoulders and ankle, all of which were resolved. He further determined that the fusion/decompression surgery she underwent at the L2-3 level were for injuries that preexisted the subject accident.

Dr. Sapan Cohn reviewed x-rays of Garrick's cervical spine, lumbosacral spine, left wrist, left shoulder, thoracic spine, and bi-lateral ribs. Based upon those reviews, Dr. Sapan Cohn found and all x-rays were negative for pathology or trauma-related injury. Dr. Sapan Cohn also reviewed MRIs of Garrick's cervical spine, left wrist, right wrist, right shoulder, left shoulder, lumbosacral spine, thoracic spine, left ankle, right hand, and left hand. None of the MRIs indicated any trauma-related injury. The MRI of the cervical spine showed no evidence of disc herniation or trauma-related injury. While the

MRI for the lumbosacral spine and thoracic spine showed certain disc herniation and bulges, Dr. Sapan Cohn found these were related to degenerative disc disease and not trauma.

Dr. Lerner performed a neurological IME of Garrick and found mostly normal ranges of motions. There were some tests Garrick refused to do due to alleged fear of pain. However, Dr. Lerner found that his exam failed "to reveal any objective abnormalities to support" Garrick's subjective complaints of pain and diminished ranges of motion. His impression was of cervical and lumbar spine sprains that have since resolved.

"Serious injury" is defined in Insurance Law § 5102(d) as: (1) death; (2) dismemberment; (3) significant disfigurement; (4) fracture; (5) loss of 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 90 days during the 180 days immediately following the occurrence of the injury or impairment.

The issue of whether a claimed injury falls within the statutory definition of serious injury is, in the first instance, a question of law for the court which may be decided on a summary judgment motion *(Licari v. Elliot*, 57 N.Y.2d 230, 237 [1982];

Carter v. Adams, 123 A.D.3d 967, 967 [2nd Dept. 2014]). A defendant seeking summary judgment based on a lack of serious injury bears the initial burden of establishing that plaintiff did not sustain a serious injury as defined in Insurance Law § 1502 (d). (*Gaddy v. Eyler*, 79 N.Y.2d 955, 956-57 [1997]; *Young Mi Hwang v. Vasconex-Vallejo*, 124 A.D.3d 769, 769 [2nd Dept. 2015]; *Datiskashvili v. Vijungco*, 121 A.D.3d 637, 638 [2nd Dept. 2014]; *Jilani v. Palmer*, 83 A.D.3d 786, 787 [2nd Dept. 2011]).

As a proponent of the summary judgment motion, Defendants had the initial burden of establishing that Garrick did not sustain causally related serious injuries under the significant disfigurement, fracture, permanent loss of use of a body organ, member, function or system, significant limitation of use of a body function or system and 90/180-day categories (*see Toure v Avis Rent a Car Sys.*, 98 N.Y.2d 345, 352 [2002]). Evidence submitted in support of a motion for summary judgment must be in admissible form. (*Pagano v. Kinsbury*, 182 A.D.2d 268, 270 [2nd Dept. 1992]; see also *Friends of Animals v. Assoc. Fur. Mfrs.*, 46 N.Y.2d 1065, 1067 [1979]; *Zuckerman v. City of New York*, 49 N.Y.2d 557, 563 [1980]). A defendant can satisfy the initial burden by relying on either the sworn statements of defendant's examining physician, or plaintiff's sworn testimony or the unsworn reports of plaintiff's own examining physicians (*Id.*) A defendant can demonstrate that plaintiff's own medical evidence does not indicate that plaintiff suffered a serious injury and that the alleged injuries were not, in any event, causally related to the accident (*Franchini v Palmieri*, 1 N.Y.3d 536, 537 [2003]).

In support of summary judgment, a defendant's medical expert must specify the

objective tests upon which the stated medical opinions are based and, when rendering an opinion with respect to plaintiff's range of motion, the expert must compare any findings to those ranges of motion considered normal for the particular body part (*Browdame v. Candura*, 25 AD3d 747, 748 [2nd Dept. 2006]). Further, "[t]he mere existence of a bulging or herniated 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" (*Rivera v Bushwick Ridgewood Props. Inc.*, 63 AD3d 712 [2nd Dept. 2009]; *Smeja v Fuentes,* 54 AD3d 326 [2nd Dept. 2008]; *see Sharma v Diaz*, 48 A.D.3d 442 [2nd Dept. 2008]*; Kearse v New York City Tr. Auth.*, 16 A.D.3d 45 [2nd Dept. 2005]). Once the defendant has made the required showing, the burden shifts to plaintiff to rebut the presumption that there is no issue of fact as to the threshold serious injury question. (*Franchini v. Palmieri*, 1 N.Y.3d 537, 537 [2003]).

Herein, based upon the reports of Dr. Weissberg, Dr. Sapan Cohn and Dr. Lerner, the court finds Defendants have established entitlement to summary judgment as a matter of law. The burden now shifts to Garrick to demonstrate, by the submission of objective proof of the nature and degree of the injury, that she sustained a serious injury or there are questions of fact as to whether the purported injury, in fact, is serious (*Perl v Meher,* 18 N.Y.3d 208, 218-219 [2011]). To satisfy the statutory standard for serious injury, a plaintiff must submit objective and admissible proof of the duration of the alleged injury, and the extent or degree of the limitations associated with the alleged injury. (*Dufel v. Green,* 84 N.Y.2d 795, 798 [1995]; *Rovelo v. Volcy*, 83 A.D.3d 1034, 1035 [2nd Dept

2011]). Neither subjective complaints of pain nor a self-serving affidavit of the plaintiff are sufficient to meet this requirement. (*Washington v. Mendoza*, 57 A.D.3d 972, 973 [2nd Dept. 2008]; s*ee Toure v Avis Rent A Car Sys., Inc., supra; Scheer v Koubek*, 70 N.Y.2d 678, 679 [1987]; *Munoz v Hollingsworth,* 18 A.D.3d 278, 279 [1st Dept. 2005]).

A plaintiff cannot defeat a motion for summary judgment, and successfully rebut a *prima facie* showing that she did not sustain a serious injury, merely by relying on documented subjective complaints of pain (*Uddin v Cooper*, 32 A.D.3d 270, 271 [1st Dept. 2006] *lv to appeal denied* 8 N.Y.3d 808 [2001]). Plaintiffs must come forth with objective evidence of the extent of alleged physical limitation resulting from injury and its duration. That objective evidence must be based upon a recent examination of the plaintiff (*Sham v B&P Chimney Cleaning*, 71 A.D.3d 978 [2nd Dept. 2010]; *Cornelius v Cintas Corp.* 50 A.D.3d 1085 [2nd Dept. 2008]; *Sharma v Diaz, supra*; *Amato v Fast Repair, Inc.,* 42 A.D.3d 477 [2nd Dept. 2007]) and upon medical proof shortly after the subject accident (*Perl v Meher, supra*).

"[E]ven when there is medical proof, when additional contributory factors interrupt the chain of causation between the accident and the 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 N.Y.3d 566, 572 [2005]). Whether a limitation of use or function is significant or consequential relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of a body

part (*Dufel v Green*, 84 N.Y.2d 795, 798 [1995]).

To prove the extent or degree of physical limitation with respect to the limitation of use categories, either objective evidence of the extent, percentage or degree of the limitation, or loss of range of motion and its duration, based on a recent examination, must be provided or there must be 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 or system (*Perl v Meher, supra; Estrella v Geico Ins. Co.*, 102 A.D.3d 730, 731 [2nd Dept. 2013). A mild, minor or slight limitation of use is considered insignificant within the meaning of insurance Law §5102(d) (*Il Chung Lim v Chrabaszcz*, 95 A.D.3d 950, 951 [2nd Dept. 2012]).

Further, in order to defeat a summary judgment motion, a plaintiff's opposition, "to the extent that it relies solely on the findings of the plaintiff's own medical witnesses, must be in the form of affidavits or affirmations, unless an acceptable excuse for failure to comply with this requirement is furnished." *(Pagano v. Kinsbury*, 182 A.D.2d at 270; *supra; see also Zuckerman v. City of New York,* 49 N.Y.2d 557, 563 ([1980]).

Once a plaintiff establishes proof that an injury meets at least one category of the no-fault threshold, it is unnecessary to address whether the plaintiff's proof in regard to other alleged injuries is sufficient to defeat defendant's *prima facie* showing (*Linton v Nawaz*, 14 N.Y.3d 821, 822 [2015]).

Herein, Garrick does not oppose the motion and is therefore unable to raise an issue of fact.

Defendants have also met their *prima facie* showing that Garrick did not suffer a serious injury under the 90/180 category set forth in Insurance Law 5102(d). A defendant may establish through presentation of a plaintiff's own deposition testimony that a plaintiff did not sustain an injury of a non-permanent nature which prevented plaintiff from performing substantially all of the material acts which constitute plaintiff's usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence (*Kuperberg v Montalbano*, 72 AD3d 903 [2d Dep't. 2010]; *Sanchez v Williamsburg Volunteer of Hatzolah, Inc.*, 48 AD3d 664 [2d Dep't. 2008]). Herein, Garrick was not employed at the time of the accident, and her claimed limitations involve trouble doing laundry, trouble lifting anything "heavy" and an inability to drive "for too long".

"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/her usual activities to a great extent, rather than some slight curtailment" (*Thompson v Abbasi*, 15 AD3d 95 [1st Dep't. 2005]; *Gaddy v Eyler, supra*).

Furthermore, a plaintiff's allegations of recreation and daily activities including an inability to lift objects, carry things, walk, sit and socialize are generally insufficient to demonstrate the 90/180-day claim (*see Omor v Goodman*, 295 AD2d 413 [2d Dep't. 2002]; *Lauretto v County of Suffolk*, 273 AD2d 204 [2d Dep't. 2015]).

Garrick has failed to offer credible medical evidence establishing she was disabled, unable to work or unable to perform daily activities for the first 90 out of 180 days.

While she complains of certain limitations, none of the limitations are medically determined, as required by the statute. (*Sainte-Aime v. Ho*, 274 A.D.2d 579 [2nd Dept. 2000]). Herein, Defendants have established entitlement to summary judgment as a matter of law on the 90/180 day category. The burden shifts to Garrick to raise a material issue of fact requiring a trial of the action. As the motion is unopposed, she is unable to do so.

Accordingly, it is hereby

ORDERED, that Defendants' to dismiss the complaint for Garrick's failure to timely file a note of issue, is GRANTED; and it is further

ORDERED, that Defendants' motion for summary judgment pursuant to CPLR §3212 is GRANTED in its entirety. The complaint is dismissed.

This constitutes the decision and order of this court.

Dated: December 26, 2018
Mineola, N.Y.

Hon. James P. McCormack, J. S. C.

ENTERED
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NASSAU COUNTY
COUNTY CLERK'S OFFICE