To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

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WENDY FREYHAGEN,

Plaintiff,

-against-

JUDITH NADLER,

Defendant.

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DECISION AND ORDER

Index No.: 2016-52491

Motion Sequence #1

ACKER, J.

The following papers, numbered 1 to 18, were read on the motion for summary judgment of Defendant JUDITH NADLER on the grounds that Plaintiff WENDY FREYHAGEN did not suffer a serious injury within the meaning of Insurance Law §5102(d):

Notice of Motion-Affirmation of Patrick J. Welch, Esq.-Exhibits A-K 1-13
Affirmation of Robert A. Becher, Esq.-Exhibit A-Affidavit of Wendy Freyhagen-
Plaintiff's Memorandum of Law 14-17
Reply Affirmation 18

Plaintiff commenced this personal injury action against Defendant JUDITH NADLER as a result of a motor vehicle accident which occurred on January 23, 2014 on the Saw Mill River Parkway in Westchester County. Plaintiff claims to have suffered injuries to her cervical spine, shoulders, arms and hands.

The proponent of a summary judgment motion "must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *Winegrad v. New York Univ. Medical Ctr.*, 64 NY2d 851,

852 (1985); *Zuckerman v. City of New York*, 49 NY2d 557 (1980). Once such a showing has been made, the burden of proof shifts such that an opponent to a motion for summary judgment must demonstrate the existence of a genuine triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986).

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and it should only be employed when there is no doubt as to the absence of triable issues. *Castlepoint Ins. Co. v. Command Sec. Corp.*, 144 AD3d 731, 733 (2d Dept. 2016). Issue finding, as opposed to issue determination, is the key to summary judgment. *Gitlin v. Chirinkin*, 98 AD3d 561, 561 (2d Dept. 2012). In deciding the motion, a court must view the evidence in the light most favorable to the non-moving party. *See Kutkiewicz v Horton*, 83 AD3d 904 (2nd Dept. 2011).

Whether a claimed injury falls within the statutory definition of "serious injury" is a question of law that may be decided by the court on a motion for summary judgment. *See Licari v. Elliott*, 57 NY2d 230, 237 [1982]. A defendant seeking summary judgment bears the initial burden of establishing a *prima facie* case that the plaintiff did not sustain a "serious injury." *Toure v. Avis Rent A Car Sys, Inc.*, 98 NY2d 345 [2002]; *Gaddy v. Eyler*, 79 NY2d 955 [1992]. In order to meet the burden, a defendant may rely upon the sworn or affirmed statements of their own examining physician, the plaintiff's sworn testimony or the plaintiff's unsworn physician's records. *McGovern v. Walls*, 201 AD2d 628 [2d Dept 1994]; *Grossman v. Wright*, 268 AD2d 79 [2d Dept 2000]; *Pagano v. Kingsbury*, 182 AD2d 268 [2d Dept 1992].

In support of her summary judgment application, the Defendant submits the accident report; copies of the pleadings; the Bill of Particulars; the transcript of Plaintiff's deposition;

photographs of Plaintiff's vehicle; portions of Plaintiff's medical records from a prior accident; two affirmed reports of Marc A. Berezin, M.D., an orthopedic surgeon who examined Plaintiff (hereinafter referred to as "IME reports") and Plaintiff's MRI reports from 2011 and 2014.

Plaintiff opposes the motion, alleging that the Defendant has failed to establish a *prima facie* case that Plaintiff did not meet the "serious injury" threshold of the Insurance Law. Further, Plaintiff submits her own affidavit and her medical records[1] from Dr. Robert Tompkins arguing that these documents establish that there are issues of fact as to whether her injuries meet the threshold.

The New York Insurance Law 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.
>
> N.Y. Ins. Law § 5102(d) (McKinney's 2018)

Defendant contends that Plaintiff sustained injuries in a 2010 accident which involve the same "body parts" as the 2014 accident at issue here. Defendant maintains that the Plaintiff cannot prove that her injuries were caused by the 2014 accident and that the IME reports show that the injuries are not significant or permanent pursuant to Insurance Law § 5102.

Defendant has failed to establish that Plaintiff did not sustain either a permanent

[1] While the records include a "certification," the certification does not comport with CPLR 4518. The records are not otherwise sworn or affirmed. *See Grasso v. Angerami*, 79 NY2d 813, 814-815 (1991); *Verette v. Zia*, 44 AD3d 747, 748 (2d Dept. 2007).

consequential limitation of use of a body organ or member or a significant limitation of use of a body function or system as a result of the accident. Notably, the IME report sets forth limitations in Plaintiff's range of motion in her neck, right shoulder and back. The report does not otherwise address these limitations. Dr. Berezin diagnoses Plaintiff with "Cervical Strain" which "would be in part causally related to the accident of 1/23/14." See Defendant's Exhibit H, IME report at pg. 9. However, the report identifies MRIs taken after the 2014 accident which disclose C4-5 and C5-6 anterolisthesis, collapsed disc space C6-7, disc herniation C6-7 and a disc bulge. Dr. Berezin concludes that the accident exacerbated Plaintiff's preexisting neck injury and preexisting degenerative disease.[2] Of significance, the IME reports fail to specify how the limitations observed by Dr. Berezin were the result of Plaintiff's preexisting injuries as opposed to exacerbation caused by the 2014 accident. *Edouzin v. Champlain*, 89 AD3d 892 (2d Dept. 2011); *Little v. Ajah*, 97 AD3d 801 (2d Dept. 2012). This omission is fatal to Defendant's application. *Id.*

As Defendant did not sustain her *prima facie* burden as to these categories of serious injury, it is unnecessary to address the sufficiency of the evidence submitted in opposition by Plaintiff to the instant motion. *See Winegrad, supra; Kharzis v. PV Holding Corp.*, 78 AD3d 1122 (2d Dept. 2010).

However, Defendant has established, *prima facie*, that Plaintiff did not sustain a serious injury under the 90/180-day category of Insurance Law § 5102 (d). Defendant submits the Plaintiff's deposition testimony, which demonstrates that she was not prevented from performing substantially all of her usual and customary daily activities. *Frisch v. Harris*, 101 AD3d 941 (2d

[2] Plaintiff's Bill of Particulars alleges aggravation of preexisting degenerative disease.

Dept. 2012). Plaintiff only missed one day of work following the accident and her complaints of limitation were subjective. Plaintiff alleges difficulty driving, performing household tasks and working on a computer. Plaintiff fails to raise a triable issue of fact as to whether her injuries prevented her from performing substantially all of her usual and customary daily activities during at least 90 of the first 180 days following the subject accident. *Valera v Singh*, 89 AD3d 929, 930-31 (2d Dept. 2011) . Plaintiff's opposition consists of her affidavit which is largely duplicative of the deposition testimony. She did not provide any competent medical evidence sufficient to raise a triable issue of fact. *Strenk v Rodas*, 111 AD3d 920 (2d Dept. 2013).

NOW, THEREFORE, it is hereby

ORDERED that Defendant's summary judgment motion as to Plaintiff's 90/180 claim is granted and the remainder of her motion is denied; and it is further

ORDERED that the parties are directed to appear on **September 19, 2018 at 9:30 a.m.** for a settlement conference and to schedule a trial date. Please refer to Section III(F) of the Court's Individual Part Rules regarding the documents due on or before that date.

The foregoing constitutes the Decision and Order of the Court.

Dated: Poughkeepsie, New York
August 27, 2018

Christi J. Acker

HON. CHRISTI J. ACKER, J.S.C.

To: All Parties VIA ECF