SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS
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DENNESHA GAYLE,

Plaintiff,

-against-

RALPH WARREN, CASANDRA DUNFORD and HERMOGENES BRAVO-JIMENEZ,

Defendants.

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Index No.: 510455/17
Motion Date: 4-15-19
Mot. Cal. No.: 12-14

DECISION/ORDER

The following papers numbered 1 to 6 were read on these motions:

Papers:	**Numbered:**
Notice of Motion/Cross-Motion/Affidavits/Affirmations/Exhibits/ Memorandum of Law.....	1-3
Answering Affidavits/Affirmations/Exhibits/ Memorandum of Law.....	4-6
Reply Affidavits/Affirmations/Exhibits/ Memorandum of Law.....	
Other.....	

Upon the foregoing papers, the motion and cross-motions are decided as follows:

In this action to recover damages for personal injuries sustained as a result of a motor vehicle accident that occurred on April 5, 2016, three motions appeared on the court's calendar on April 15, 2019: the motion of defendants, RALPH WARREN and CASANDRA DUNFORD, for summary judgment dismissing plaintiff's complaint on the ground that the evidence demonstrated their freedom from negligence as a matter of law and on the ground that the plaintiff, DENNESHA GAYLE, did not sustain a serious injury

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within the meaning of Insurance Law §5102(d); the cross-motion of the plaintiff for partial summary judgment on the issue of liability against all of the defendants and the motion of defendant, HERMOGENES BRAVO-JIMENEZ, for summary judgment dismissing the complaint on the ground that the plaintiff did not sustain a serious injury.

By short form order dated April 15, 2019, the motion of defendants Warren and Dunford for summary judgment on the ground that the evidence demonstrated their freedom from negligence and the motion of the plaintiff for partial summary judgment on the issue of liability against all of the defendants were **DENIED**. The motions of defendants' for summary judgment dismissing the complaint on the ground that the plaintiff did not sustain a serious injury were marked submitted and will now be addressed.

The defendants failed to meet their prima facie burden of showing that the plaintiff did not sustain a serious injury under the 90/180 day category of Insurance Law § 5102(d) as a result of the subject accident (*see Toure v. Avis Rent A Car Sys.*, 98 N.Y.2d 345, 746 N.Y.S.2d 865, 774 N.E.2d 1197; *Gaddy v. Eyler*, 79 N.Y.2d 955, 956–957, 582 N.Y.S.2d 990, 591 N.E.2d 1176; *Yeu Jin Baik v. Enriquez*, 124 A.D.3d 880, 880–81, 2 N.Y.S.3d 216, 217–18). The papers submitted by the defendants failed to adequately address plaintiff's claim, set forth in the bill of particulars, that she sustained a serious injury under this category of Insurance Law § 5102(d) (*see Che Hong Kim v. Kossoff*, 90 A.D.3d 969, 934 N.Y.S.2d 867). Since the defendants failed to meet their prima facie burden with respect to the 90/180–day category of serious injury, it is unnecessary to consider the plaintiff's opposing papers in this regard (*see Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642).

The reports of Dr. Lerner and Dr. Keilson, which were submitted by the defendants in support of their respective motions for summary judgment on the issue of serious injury, however, constituted competent medical evidence establishing, prima facie, that the alleged injuries to plaintiff's lumbosacral spine did not constitute serious injuries under either the permanent consequential limitation of use or significant limitation of use categories of Insurance Law § 5102(d) (*see Staff v. Yshua,* 59 A.D.3d 614, 874 N.Y.S.2d 180). In opposition, plaintiff failed to raise a triable issue of facts.

Plaintiff's opposition included the report of Dr. Delman, who found significant range of motion restrictions to plaintiff's low back when he examined her on February 4, 2019. He opined that plaintiff was suffering from radiculopathy, a lumbar disc bulge and lumbar spine myofascial derangement. Dr. Delman, however, failed to address the findings of degenerative changes at the L5–S1 level as noted by Dr. Lerner, a radiologist, in his report interpreting the MRI films. This rendered Dr. Delman's opinion speculative that the plaintiff's injuries to her lumbosacral spine were caused by the subject accident (*see Giraldo v. Mandanici*, 24 A.D.3d 419, 805 N.Y.S.2d 124; *Zarate v. McDonald*, 31 A.D.3d 632, 633, 819 N.Y.S.2d 288, 290). Thus, those branches of the defendants' motions which were for summary judgment dismissing so much of the complaint as alleged that the plaintiff sustained serious injuries under the permanent consequential limitation of use and significant limitation of use categories of Insurance Law § 5102(d) is **GRANTED.**

For all of the above reasons, it is hereby

ORDERED that defendants' motion to dismiss plaintiff's complaint on the ground that the plaintiff did not sustain a serious injury under the permanent consequential

limitation of use and significant limitation of use cateories of Insurance Law §5102(d) is **GRANTED** and is in all other respects **DENIED**.

This constitutes the decision and order of the Court.

Dated: May 28, 2019

PETER P. SWEENEY, J.S.C.

HON. PETER P SWEENEY

KINGS COUNTY CLERK
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