| **Brown v Williams** |
|---|
| 2019 NY Slip Op 34476(U) |
| July 9, 2019 |
| Supreme Court, Suffolk County |
| Docket Number: Index No. 619838/17 |
| Judge: Carmen Victoria St. George |
| Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service. |
| This opinion is uncorrected and not selected for official publication. |

**SUPREME COURT – STATE OF NEW YORK**
**TRIAL TERM, PART 56 SUFFOLK COUNTY**

**PRESENT:**

***Hon. Carmen Victoria St. George***
**Justice of the Supreme Court**

---------------------------------------------------------------x

**LORRAINE BROWN,**

**Plaintiffs,**

**-against-**

**JAIQUELL WILLIAMS and CELENIA RAMOS,**

**Defendants.**

---------------------------------------------------------------x

**Index No.**
**619838/17**

**Motion Seq: 001**
**MG**
**Decision/Order**

The following numbered papers were read upon this motion:

| | |
|---|---|
| Notice of Motion/Order to Show Cause........... | 11-12, 14-22; 31 |
| Answering Papers........................................ | 25-28 |
| Reply............................................................. | 29 |
| Briefs: Plaintiff's/Petitioner's....................... | |
| Defendant's/Respondent's................. | 13 |

Defendant Ramos moves for summary judgment dismissal of the complaint pursuant to CPLR 3212 on the basis that plaintiff has not sustained a serious injury within the meaning of Insurance Law § 5102 (d). Defendant Williams has filed an affirmation in support of Ramos' summary judgment motion and requests the same relief. Plaintiff opposes the requested relief.

After review and consideration of the submitted papers, defendants' summary judgment motion concerning plaintiff's bodily injury claims is granted.

Plaintiff claims to have suffered injuries to her cervical spine, her left face/chin in the form of an abrasion/scar, low back pain, spasm, stiffness, tenderness, and bilateral upper extremity pain as the result of a motor vehicle accident that occurred on January 14, 2017, at 7:05 p.m. Plaintiff specifically claims that she sustained a serious injury as defined in Insurance Law 5102 (d) under the following statutory categories of injury: 1) scar[1]; 2) permanent loss of use of a body organ, member, function or system; 3) permanent consequential limitation of a

[1] The Insurance Law § 5102 (d) category of injury under which plaintiff's "scar" claim falls is denominated in the statute as "significant disfigurement."

body organ or member; 4) significant limitation of use of a body function or system, and 5) a medically determined injury or impairment of a non-permanent nature which prevented plaintiff from performing substantially all of the material acts which constituted plaintiff'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 (90/180 claim).

Defendants move to dismiss the complaint, arguing that the alleged injuries sustained do not rise to the level of "serious injury" under any of the categories claimed by plaintiff.

As a proponent of the summary judgment motion, the defendants herein have the initial burden of establishing that plaintiff did not sustain a causally related serious injury under the categories of injury claimed in the Bill of Particulars (*see* ***Toure v Avis Rent a Car Sys***., 98 NY2d 345, 352 [2002]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact (***Cauthers v. Brite Ideas, LLC,*** 41 AD3d 755 [2d Dept 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein the plaintiff (***Makaj v. Metropolitan Transportation Authority***, 18 AD3d 625 [2d Dept 2005]).

A defendant can satisfy the initial burden by relying on the sworn statements of defendants' examining physician and plaintiff's sworn testimony, or by the affirmed reports of plaintiff's own examining physicians (***Pagano v Kingsbury***, 182 AD2d 268, 270 [2d Dept 1992]). 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 NY3d 536, 537 [2003]). Defendants' 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, must compare any findings to those ranges of motion considered normal for the particular body part (***Browdame v. Candura***, 25 AD3d 747, 748 [2d Dept 2006]).

The Court notes that, a tear in tendons, as well as a tear in a ligament or bulging disc is not evidence of a serious injury under the no-fault law in the absence of objective evidence of the extent of the alleged physical limitations resulting from the injury and its duration (***Little v. Locoh***, 71 AD3d 837 [2d Dept 2010]; ***Furrs v. Griffith***, 43 AD3d 389 [2d Dept 2007]; ***Mejia v. DeRose***, 35 AD3d 407 [2d Dept 2006]). Thus, a plaintiff must still exhibit physical limitations to sustain a claim of serious injury within the meaning of the Insurance Law. Furthermore, to qualify as a serious injury within the meaning of the statute, "permanent loss of use" must be total (***Oberly v. Bangs Ambulance Inc.***, 96 NY2d 295, 299, [2001]).

Here, defendants have made a *prima facie* showing that plaintiff did not sustain any injuries under any of the categories claimed in her Bill of Particulars by submitting for the Court's consideration the pleadings, the affirmed reports of Dorothy Scarpinato, M.D. and Gregory J. Diehl, M.D., and plaintiff's own deposition transcript.

Dr. Scarpinato, defendants' examining orthopedic physician, conducted an independent medical examination of plaintiff on December 14, 2018. According to Dr. Scarpinato's affirmed report, she reviewed the Bill of Particulars, Brookhaven Hospital records, an evaluation dated January 19, 2017 through October 9, 2017 authored by a Dr. Racaniello, handwritten notes, and

physical therapy notes dated from February 17, 2017 through April 10, 2017. Plaintiff was twenty-five (25) years old on the date of Dr. Scarpinato's examination. She made no complaints to Dr. Scarpinato concerning her physical condition, but she stated that she injured her neck, back and bilateral shoulders because of the subject motor vehicle accident.

Dr. Scarpinato examined plaintiff's cervical spine, shoulders, and lumbar spine. Dr. Scarpinato performed orthopedic testing, and measured plaintiff's range of motion in those areas of plaintiff's body. All the orthopedic tests yielded normal results. Dr. Scarpinato did not detect any tenderness, swelling, muscle spasms or sensorial deficits in the areas examined. Additionally, Dr. Scarpinato states that plaintiff's muscle strength was good with no noted atrophy in the upper and lower extremities, and that her reflexes were present, equal and symmetrical in the upper and lower extremities. Range of motion testing of plaintiff's cervical spine, lumbar spine and shoulders yielded normal results without complaints of pain. Range of motion was measured with a goniometer and/or an inclinometer, and the values obtained were compared to normal values as per the American Medical Association's "Guides to the Evaluation of Permanent Impairment, fifth Edition."

Dr. Scarpinato's impression is that her examination of plaintiff "was normal revealing no positive objective findings. My diagnosis is resolved cervical spine strain, resolved lumbar spine strain and resolved bilateral shoulders sprain. Ms. Brown had no current complaints at the time of this examination. She had full range of motion of all planes tested and there was no objective evidence of cervical/lumbar radiculopathy or bilateral shoulder impingement. Neurologically, she is intact with full muscle strength and normal sensation throughout her bilateral upper and lower extremities."

Dr. Scarpinato also states that plaintiff did not reveal any evidence of an orthopedic disability, that she can work without restrictions, and that she is able to perform her usual activities of daily living without restrictions.

Dr. Diehl performed an independent plastic surgical evaluation on plaintiff on January 3, 2019. Annexed to his affirmed report are four photographs of plaintiff's chin area. Dr. Diehl reviewed the emergency department records from Brookhaven Hospital and plaintiff's Bill of Particulars. Plaintiff did not make any complaints to Dr. Diehl. According to his report, the examination of plaintiff's chin/lower lip area "is normal. Muscle function is normal. Sensation is normal. The skin has no changes. There is no pigmentation. The area is non-tender." Dr. Diehl's assessment is as follows: "Resolution of injury to the right lower lip and chin with no residual sequelae."

The photographs submitted with Dr. Diehl's report depict plaintiff's face from the eyes down to the upper portion of her neck. The photos are clear, and no scar is visible in these photographs.

Since plaintiff did not exhibit any physical limitations during the independent orthopedic examination, and there is no visible scarring on plaintiff's face as alleged, or any sequelae from the injury to her face, there is no evidence of a serious injury in the categories of significant

disfigurement, permanent loss of use, permanent consequential limitation of use, or significant limitation of use provided for by Insurance Law § 5102 (d) (***Little*, *supra***).

Defendants have also established their *prima facie* entitlement to summary judgment as to plaintiff's 90/180 claim by submitting plaintiff's deposition testimony (***Kuperberg v. Montalbano***, 72 AD3d 903 [2d Dept 2010]; ***Sanchez v. Williamsburg Volunteer of Hatzolah, Inc.***, 48 AD3d 664 [2d Dept 2008]).

Plaintiff testified that Williams' vehicle coming from the opposite direction of travel contacted her vehicle on a two-way roadway as snow began to fall on January 14, 2017, at approximately 7:00 p.m. The back end of Williams' car contacted the front driver's side of plaintiff's vehicle as Williams' vehicle swerved. The airbag in plaintiff's vehicle deployed. Plaintiff did not lose consciousness and she did not experience any pain at the accident scene. She was bleeding from her chin area, but she declined medical attention although an ambulance responded to the accident scene along with police personnel. Plaintiff's car was towed from the scene and her mother picked her up and took her home.

Plaintiff applied ice to her face and neck when she went home because she began to feel soreness in her back, neck and chin area. According to her testimony, the application of ice to those areas helped slightly. The next morning plaintiff presented herself to Brookhaven Hospital's emergency department where she was examined, given some pain medication and told to see her primary care doctor. No radiological studies were undertaken at the hospital, and plaintiff has never had any radiological studies performed anywhere because of the subject accident.

Either the same day that plaintiff went to the hospital, or the next day, plaintiff went to her primary care physician, Annette Racinello, D.O. Plaintiff testified that Dr. Racinello gave her "a shot" to ease the pain in plaintiff's neck area and referred plaintiff to physical therapy.

Plaintiff attended physical therapy for only two months, three times per week. The physical therapy consisted of stretching and massage. There was no electrical stimulation performed, and no assistive devices, including braces or collars, were prescribed to plaintiff. Although plaintiff testified that she was still in pain after two months of physical therapy she stopped treating. According to her testimony, "it was just hard to keep up with still working. I was going in between my lunch breaks. It just kind of got too much to kind of do both." Since she ceased attending physical therapy, plaintiff has not received any other medical treatment related to the subject accident, and she did not have any plans to consult with any other healthcare professionals for any condition related to this accident at the time of her deposition in November 2018. Although she testified that she still has neck pain, she stated, "it's not severe enough to, you know, go to physical therapy because, you know, they did teach me a lot of the stretches to get through it." Further according to her testimony, no health care provider ever advised her that she required surgery as a result of this accident.

Plaintiff did not miss any time from her employment as an assistant account executive at a media company. Her duties prior to the accident included working on a computer six hours per day and attending meetings for another approximate hour per day. Her duties remained the same after the accident. Although she testified that she brought a pillow into the office for her chair

and purchased a device to elevate her laptop computer so that she could stand part of the work day, she did not testify that either the pillow or laptop device were prescribed/recommended by any health care provider.

Plaintiff left her employment at the media company sometime in 2018 and was employed as a photographer for LifeTouch at the time of her deposition on November 12, 2018. Her employment with LifeTouch is a full-time position, five days per week, approximately forty (40) hours per week. She travels by herself to different schools to take portrait photographs of students. In connection with her duties, she carries her own equipment consisting of several light stands, a computer, camera, backdrops and a backdrop stand, a chair prop, and a duffel bag containing combs and mirrors. Plaintiff sets up and takes down the equipment on a daily basis.

When asked about the claim of scarring on her chin, and where that scar was located, plaintiff answered, "I believe it was on my right-hand side," and that it was treated "[j]ust with topical cream." When asked if there is a visible scar, plaintiff answered, "No."

After the subject accident, plaintiff curtailed her gym activities. She testified that she could not go to the gym at all for the first few months afterward, whereas she stated that she went to the gym every day prior to the accident. At the time of her deposition, however, she stated that she goes to the gym approximately three times per week. She has engaged the services of a personal trainer once per week, and she runs and lifts weights. When she trains with the personal trainer, thirty-five (35) minutes of the session are devoted to weight training involving plaintiff's biceps, triceps, back and shoulders. The remainder of the approximate hour training involves running. When plaintiff goes to the gym but is not receiving training from the personal trainer, she runs and lifts weights on her own. Plaintiff also testified that she practices yoga at the gym. She began attending yoga classes for approximately four months prior to her deposition in late 2018. During the two months immediately preceding her deposition, plaintiff increased her attendance at the one-hour long yoga classes to twice per week.

Although plaintiff testified that she has neck pain when she drives and neck stiffness when she showers, styles her hair, and puts on makeup, she can perform all of those activities without assistance.

Since the subject accident, plaintiff has also been on vacation to Jamaica, Florida and Mexico. She has not had to make any special arrangements with airlines to fly to these locations, but she testified that she brought a neck pillow on the flights to these locations. While on vacation, plaintiff has engaged in swimming and sightseeing activities. Also, plaintiff has gone to Six Flags amusement park twice, gone on rides at the amusement park, and danced at various family functions, including at a family wedding.

Plaintiff's own deposition testimony demonstrates that she was not prevented from performing substantially all her customary daily activities for not less than 90 days during the 180 days immediately following the subject accident. A plaintiff's allegation of curtailment of recreation and household activities is generally insufficient to demonstrate that he or she was prevented from performing substantially all of his/her customary daily activities for not less than 90 days during the 180 days immediately following the accident (***Omar v. Goodman***, 295 AD2d

413 [2d Dept 2002]; ***Lauretta v. County of Suffolk***, 273 AD2d 204 [2d Dept 2000]). Moreover, plaintiff's testimony demonstrates that she does not suffer from any of the other categories of injury claimed in her Bill of Particulars.

Based upon the moving papers, defendants have established their *prima facie* entitlement to summary judgment dismissal of the complaint as a matter of law.

Plaintiff is now required to come forward with viable, valid objective evidence to verify her complaints of pain, permanent injury and incapacity (***Farozes v. Kamran***, 22 AD3d 458 [2d Dept 2005]).

In opposition, plaintiff submits the affirmation of counsel, which is not evidence, plaintiff's affidavit sworn to on April 24, 2019, and a photograph of plaintiff's face taken one day after the subject accident.

Plaintiff's affidavit primarily concerns what she refers to as "the laceration and pain to my chin." Notably, plaintiff testified at deposition that the injury to her chin was treated with a "topical cream," not stitches or any other invasive procedure. She also admitted at deposition that there is no scar, and that she "believe[d]" it was on the right side of her chin. Plaintiff's present attestation that she was "very self-conscious and embarrassed of the scarring on my face" is insufficient to raise a triable issue of fact. Being "self-conscious" and/or "embarrassed" does not constitute a serious injury within the meaning of Insurance Law § 5102 (d). Plaintiff has not alleged any emotional injuries in her Bill of Particulars. Importantly, plaintiff also never testified at her deposition that she was "self-conscious" or "embarrassed," or suffered any other adverse psychological/emotional effects based upon the condition of her chin after the subject accident. These new claims made in her self-serving affidavit are designed to raise feigned issues of fact.

Based upon Dr. Diehl's January 3, 2019 examination of plaintiff, together with the photographs taken on that day, it is obvious that plaintiff's abrasion has completely healed. There is presently no scarring on plaintiff's lower lip/chin.

To the extent that plaintiff argues that the condition of her chin depicted in the photograph submitted as Exhibit 1 in opposition constitutes a "temporary disfigurement" that may qualify as a "serious injury" (*see* ***Caruso v. Hall***, 101 AD2d 967 [3d dept 1984], *aff'd* 64 NY2d 843 [1985]), the Court does not find that to be the case here. The Court finds that a reasonable person viewing that single photograph would not regard the condition depicted therein as unattractive, objectionable, or as the object of pity and scorn (*see* ***Maldonado v. Piccirilli***, 70 AD3d 785 [2d Dept 2010]; ***Lynch v. Iqbal***, 56 AD3d 621 [2d Dept 2008]). At worst, the photograph depicts a scab on plaintiff's chin. Even plaintiff acknowledges in her affidavit that her skin "eventually scabbed over." The term "significant," as used to define other aspects of serious injury, pertains to something more than that which is minor, mild or slight (*see* ***Licari v Elliott***, 57 NY2d 230, 236 [1986]), and that standard also applies to the significant disfigurement category of injury (***Caruso***, ***supra*** at 968).

Plaintiff's affidavit also undermines her 90/180 claim when she states that, "due to the scarring on [her] face, along with the pain [she] was experiencing in [her] neck and [her] back, [she] was unable to go out and enjoy my normal social activities for approximately two months." Not only did plaintiff fail to provide such testimony at deposition concerning her social activities, but curtailment of social and recreational activities is insufficient to establish a 90/180 claim (***Omar***, ***supra***; ***Lauretta***, ***supra***). Even if curtailment of these activities was enough to establish the claim, plaintiff attests that the curtailment lasted for only approximately two months, as opposed to the minimum of 90 days required by the Insurance Law to establish such a claim.

Glaringly absent is any evidence that plaintiff suffered a *medically determined* injury or impairment of a non-permanent nature which prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury.

Also absent from her affidavit is any statement concerning the other categories of injury alleged by her in the Bill of Particulars, namely, 1) permanent loss of use of a body organ, member, function or system; 2) permanent consequential limitation of a body organ or member and 3) significant limitation of use of a body function or system. Plaintiff makes no claims of permanency in her affidavit and she does not provide any affirmations or affidavits from medical providers in contravention of the defendants' examining orthopedic physician.

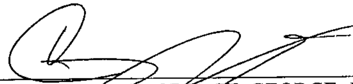
Plaintiff's affidavit is self-serving in the absence of any competent medical evidence demonstrating evidence of injury (***Strenk v. Rodas***, 111 AD3d 920 [2d Dept 2013]; ***Fisher v. Williams***, 289 AD2d 288 [2d Dept 2001]).

Finally, plaintiff has completely failed to explain the lengthy gap in treatment from on or about early April 2017 to the present (***Pommels v. Perez***, 4 NY3d 566 [2005]).

Defendants' summary judgment motion is granted, and the complaint is dismissed.

The foregoing constitutes the Decision and Order of this Court.

Dated: July 9, 2019
Riverhead, NY



CARMEN VICTORIA ST. GEORGE, J.S.C.

FINAL DISPOSITION [ X ] NON-FINAL DISPOSITION [ ]