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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT: HON. ROBERT A. BRUNO, J.S.C.

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JEONGYI KANG,

Plaintiff,

-against-

SEVILLE CENTRAL and MICHAEL V. BUFFOLENO,

Defendants.

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TRIAL/IAS PART 12

Index No.: 607144-15
Submission Date: 12/3/18
Motion Sequence: 002

DECISION & ORDER

	Papers Numbered
Sequence #002	
Notice of Motion, Affirmation & Exhibits.....	1
Affirmation in Opposition	2
Reply Affirmation.....	x

Upon the foregoing papers, defendants' motion for an Order pursuant to CPLR §3212, granting summary judgment dismissing plaintiff's complaint with prejudice on the ground that plaintiff did not sustain a "serious injury" as defined in NY Insurance Law §5102, is determined as set forth below.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff in a motor vehicle accident that occurred on September 21, 2015, on Orchid Road near Aster Lane, in Nassau County, New York. Plaintiff claims that she was stopped behind defendants' vehicle, a cement truck, when the defendants' vehicle backed-up and struck her vehicle. (*Plaintiff's EBT, Mot. Exh. D, pp. 35-36*).

In her Bill of Particulars dated March 30, 2017 (*Mot. Exh. C*), plaintiff alleges injuries primarily to her left shoulder, including pain and swelling, loss of sensation, and limitation of movement, which are alleged to be permanent in nature. The pleading reiterates the findings of an MRI study of her left shoulder performed on October 22, 2015 (*Aff. In Opp., Exh C*), which include: joint effusion; moderate swelling involving the acromioclavicular joint associated with inferior bulging of the joint capsule causing pressure effect on the supraspinatus tendon; increased signal intensity involving the mid segment of the supraspinatus tendon, indicative of a focal intrasubstance tear in this region; and increased signal intensity involving the biceps tendon, indicative of biceps tendonitis (*Mot. Exh. C, ¶9*). The Bill of Particulars does not state

whether plaintiff was confined to bed or home as a result of her injuries, and denies any claim for lost wages.

Defendants now move for an order dismissing the complaint pursuant to CPLR §3212 on the ground that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law §5102(d).

Insurance Law §5102(d) provides that a "serious injury" means a personal injury which results in (1) death; (2) dismemberment; (3) significant disfigurement; (4) a fracture; (5) loss of a 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 ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment" (numbered by the Court).

Based upon the allegations of the Bill of Particulars (*Mot. Exh. C, ¶ 8*), as amplified by counsel's Affirmation in Opposition, the Court's consideration in this action is confined to whether plaintiff's injuries constitute a permanent loss of use of a body organ, member, function or system (6); a permanent consequential limitation of use of a body organ or member (7); a significant limitation of use of a body function or system (8); or a medically determined injury which prevented plaintiff from performing all of the material acts constituting her usual and customary daily activities for ninety days of the first one hundred eighty days following the accident (9).

In support of the motion, defendant's submissions include: (i) the affirmed report of examination of orthopedist Alvin M. Bregman, MD dated January 30, 2018, covering an examination of plaintiff conducted on that date (*Mot. Exh. E*); (ii) the affirmed report of radiologist Jonathan S. Luchs, MD, dated June 23, 2017, covering his radiology review of the MRI study of plaintiff's left shoulder conducted on October 22, 2015 (*Mot. Exh. F*); and (vi) a copy of the transcript of plaintiff's deposition conducted on October 16, 2017 (*Mot. Exh.* D).

Dr. Bregman reported that on January 30, 2018, the then 51 year old plaintiff presented with complaints of pain in her left shoulder. Dr. Bregman examined plaintiff's left shoulder as well as the cervical, thoracic and lumbar spine. Range of motion was assessed with the aid of an orthopedic goniometer, and normal range of motion values were based on AMA Guidelines.

Kang v Seville Central
Index No.: 607144-15

Dr. Bregman found normal ranges of motion in all planes of the cervical, thoracic and lumbar spine. With respect to the left shoulder, Dr. Bregman found restrictions in anterior flexion (115/170, a 32% loss); abduction (80/180, a 55% loss); abduction (30/45, a 33% loss); internal rotation (20/45, a 55% loss), and posterior extension (25/45, a 44% loss). Drop arm and impingement tests were positive. Other test results were negative.

Based upon his clinical examination, the records reviewed, and the history provided by plaintiff, Dr. Bregman provided the following impression:

- Resolved sprain of the cervical spine.
- Resolved sprain of the thoracic spine.
- Resolved sprain of the lumbar spine.
- Internal derangement of the left shoulder.

Dr. Bregman did not opine as to causation or permanence of the left shoulder condition.

Dr. Luchs reviewed the MRI study performed on 10/22/15, one month after plaintiff's accident. Based upon this review, Dr. Luchs reports that the MRI of the left shoulder demonstrates anatomic findings of subacromial impingement resulting in mild supraspinatus tendinosis. Dr. Luchs found no evidence for tendon tear, labral tear or joint effusion. Dr. Luchs concludes:

> "The findings on this exam are chronic and degenerative and predate the claimant's alleged injury. There are no posttraumatic findings evident on this exam. The findings on this exam are not secondary to the claimant's alleged injury. There are no findings on this exam causally related to the claimant's alleged injury."

At her deposition on October 16, 2017, Plaintiff testified that:

(i) As a result of the accident on September 21, 2015, she missed about one week of work (pp. 14-15);

(ii) She did not feel any pain immediately after the accident. When she got home, she felt pain in her left shoulder. She called New York Pain Clinic, where she had treated previously, and was seen on the same day. She received physical therapy, chiropractic care and possibly acupuncture. The pain clinic referred plaintiff to Dr. Rhee, who recommended that she continue treatment two or three times per week. Plaintiff was sent for an MRI of the left shoulder, after which, Dr. Rhee referred her to Dr. Stanford Wert. Dr. Wert told plaintiff that she had a tear in

her left shoulder and recommended surgery. Plaintiff did not have the surgery because she was afraid. Dr. Wert prescribed no medication, and plaintiff did not see Dr. Wert again (pp. 58-71). Other than treating at the New York Pain Clinic, and at Dr. Rhee's and Dr. Wert's offices, plaintiff did not receive any treatment elsewhere. Her last treatment was in July, 2016, and she had no further appointments scheduled at the time of the deposition (p.75). She discontinued treatment because "the insurance company cutoff" (p. 67). She has health insurance (p. 81).

(iii) As a result of her injury, plaintiff can no longer lift weights. She discontinued her gym membership, but still goes to the gym occasionally. In response to the question "Is there anything that you used to do before the accident, that you still do, but you do it with pain or with limitation?" plaintiff answered "Everything" (pp. 78-79).

A defendant moving for summary judgment based upon the absence of a "serious injury" bears the initial burden to demonstrate, *prima facie,* that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law §5102(d) as a result of the subject accident (see *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 352 (2002); *Gaddy v Eyler*, 79 NY2d 955, 956-957 [1992]); *Alam v Karim*, 61 AD3d 904 (2d Dept. 2009). If that initial burden is not met, summary judgment may be denied without consideration of the sufficiency of plaintiff's proof. *Ciuffo v Testa*, 118 AD3d 737 (2d Dept. 2014); *Singh v Singh*, 117 AD3d 818 (2d Dept. 2014); *Alam*, 61 AD3d at 904.

The Court finds that defendants have met their *prima facie* burden to demonstrate the absence of an injury that falls within the "permanent loss of use" category. On the record presented, there is no evidence that plaintiff sustained a total loss of use of a body organ, member, function or system. Accordingly the primary criterion for this category of "serious injury" is not met. *Oberly v Bangs Ambulance, Inc.*, 96 NY2d 296, 299 (2001) ("permanent loss of use must be total"); *Albury v O'Reilly*, 70 AD3d 612, 612-613 (2d Dept. 2010); *Amato v Fast Repair Incorporated*, 42 AD3d 477 (2d Dept. 2007). The opposition fails to submit evidence in admissible form sufficient to raise an issue of fact.

With respect to the "permanent consequential limitation of use" and "significant limitation of use" categories, the Court finds that defendants fail to meet their *prima facie* burden. See *Toure v. Avis Rent a Car Sys.*, 98 NY2d 345, 352 (2002); *Gaddy v Eyler*, 79 NY2d 955 (1992). Specifically, defendant's own expert orthopedist, Dr. Bregman, found substantial limitations of motion in the body part claimed to be injured. *See Miller v. Bratsilova,* 118 AD3d 761 (2d Dept. 2014); *Wedderburn v Simmons,* 95 AD3d 1304 (2d Dept. 2012); *Caracciolo v Elmont Fire Dist.,*94 AD3d 799 (2d Dept. 2012); *Jones v Anderson*, 93 AD3d 640 (2d Dept.

2012); *Landman v Sarcona*, 63 AD3d 690 (2d Dept. 2009); *Zamaniyan v Vrabeck,* 41 AD3d 472 (2d Dept 2007); *Bentivegna v Stein,* 42 AD3d 555 (2d Dept 2007). Dr. Bregman does not find that such limitations were causally unrelated to the accident, or impermanent in nature. To the extent that Dr. Bregman implies that such restrictions were voluntary, he offers no specific and objective medical evidence, nor any other basis, for such conclusion. *See Williams v Fava Cab Corp.*, 90 AD3d 912 (2d Dept. 2011); *Artis v. Lucas*, 84 AD3d 845 (2d Dept. 2011); *Iannello v. Vazquez*, 78 AD3d 1121 (2d Dept. 2010); *Granovskiy v. Zarbaliyev*, 78 AD3d 656 (2d Dept. 2010).

Dr. Luchs's report highlights, rather than eliminates, issues of fact with respect to the existence of radiological findings that correlate to plaintiff's restricted range of motion in the left shoulder, and their causal relationship to the subject accident. Moreover, Dr. Luch's opinion that the left shoulder findings were pre-existing and not causally related to the subject accident is wholly conclusory. He offers no explanation or basis in the record for such opinion.

Based upon the insufficiency of defendant's *prima facie* proof with respect to the limitation of use categories, the Court need not reach the sufficiency of plaintiff's submissions. *Ciuffo v Testa*, 118 AD3d 737 (2d Dept. 2014); *Singh v Singh*, 117 AD3d 818 (2d Dept. 2014).

With respect to the "90/180" category, plaintiff's deposition testimony indicates that plaintiff's injuries did not prevent her from performing substantially all of the material acts which constituted her usual and customary activities for at least 90 of the 180 days immediately following the accident. *See Perl v Meher*, 18 NY3d 208 (2011); *Komina v Gil*, 107 AD3d 596 (1st Dept. 2013); *Omar v Goodman*, 295 AD2d 413 (2d Dept. 2002); *Curry v Velez*, 243 AD2d 442 (2d Dept. 1997). Plaintiff's testimony that she missed only one week of work satisfies defendants' *prima facie* burden. See *Dae Kyoo Kim v Lemon Transportation Corp.*, 156 AD3d 757 (2d Dept. 2017); *Williams v Perez,* 92 AD3d 528 (1st Dept. 2012); *Grant v United Pavers, Inc.,* 91 AD3d 499 (1st Dept. 2012). The opposition is insufficient to raise an issue of fact. Plaintiff's testimony that she was unable to participate in certain activities, such as lifting weights, is insufficient to show that she was unable to perform substantially all of her usual and customary daily activities. See *Burns v McCabe*, 17 AD3d 1111 (4th Dept. 2005); *Ceruti v Abernathy,* 285 AD2d 386 (1st Dept. 2001). Moreover, plaintiff provided no information regarding the duration of her alleged limitations, and no proof that her alleged limitations were medically determined. See *Perl v Meher*, 18 NY3d 208 (2011); *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350 (2002).

Kang v Seville Central
Index No.: 607144-15

The Court has considered the remaining contentions of the parties and finds that they do not require discussion or alter the determination herein. Based upon the foregoing, it is

ORDERED, that defendants' motion for an Order pursuant to CPLR §3212, granting defendants summary judgment dismissing the complaint on the basis that the plaintiff did not sustain a "serious injury" under Section 5102(d) of the Insurance Law is *granted in part*, with respect to the "permanent loss of use" and "90/180" categories of serious injury. In all other respects, the motion is *denied.*

All matters not decided herein are denied.

This constitutes the Decision and Order of this Court.

Dated: March 14, 2019
Mineola, New York

ENTER:

Hon. Robert A. Bruno, J.S.C.

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