

Pineda-Cuello v M.T.E. Transp. Corp.

2020 NY Slip Op 33461(U)

October 20, 2020

Supreme Court, Kings County

Docket Number: 514167/18

Judge: Bruce M. Balter

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At an IAS Term, Part 13 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 20th day of October, 2020.

P R E S E N T:

HON. BRUCE M. BALTER

Justice.

-----X

ALTAGRACIA PINEDA-CUELLO

Plaintiff,

- against -

Index No.514167/18

M.T.E. TRANSPORTATION CORP., AND BERNARDO SANTANA,

Defendants.

-----X

The following e-filed papers read herein:

NYSCEF Doc. Nos.

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| Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed_____ | <u>30-34</u> |
| Opposing Affidavits (Affirmations)_____ | <u>47-54</u> |
| Reply Affidavits (Affirmations)_____ | <u>55</u> |
| _____ Affidavit (Affirmation)_____ | _____ |
| Other Papers_____ | _____ |

Upon the foregoing papers, defendants M.T.E Transportation (MTE) and Bernardo Santana (Santana) (collectively, defendants) move (in motion sequence no. 2), pursuant to CPLR 3212, for an order granting summary judgment in their favor and dismissing the complaint of plaintiff, Altagracia Pineda-Cuello (plaintiff), pursuant to Insurance Law § 5104(a), on the ground that plaintiff did not sustain a serious injury as defined under Insurance Law § 5102 (d)¹.

¹ Insurance Law § 5102 (d) 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

Background and Procedural History

On February 6, 2016, plaintiff, a pedestrian, was attempting to cross the street at the intersection of Nicholas Avenue and Grove Street in Brooklyn when she was struck by the passenger side mirror of a taxi. The taxi was owned by MTE and driven by Santana. During her deposition, the plaintiff testified that the impact caused her to be thrown down onto the ground. She was examined by emergency medical technicians at the scene, but declined to go to the hospital at that point. Later that day, plaintiff went to the Emergency Department at Woodhull Hospital as she was experiencing pain due to the injuries she sustained as a result of being struck by the vehicle. Specifically, plaintiff sought treatment for pain in her left shoulder, elbow and wrist. Plaintiff was examined and X-rays of her left shoulder, elbow and wrist were performed. All of the X-rays were negative for fracture or dislocation and plaintiff was released that day with a prescription for painkillers and a sling for her left arm.

By summons and complaint dated July 11, 2018, plaintiff commenced the instant action against defendants seeking to recover damages for the injuries that she sustained in the accident. Defendants interposed an answer, with demands, on about October 9, 2018. Subsequently, plaintiff filed a bill of particulars on November 28, 2018, alleging various injuries. With respect to the issue of serious injuries as defined in Insurance Law § 5102 (d), plaintiff alleged that she sustained, among other things, a fracture of her left wrist, a permanent loss of use of her left wrist and left knee and/or a permanent consequential limitation of use of her left wrist and left knee; and/or a significant limitation of use of her left wrist and left knee. Furthermore, plaintiff contends that she sustained an injury which

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."

prevented her from performing substantially all of the material acts which constitute her daily activities for not less than 90 days during the 180 days following the accident. Discovery ensued and plaintiff appeared for independent medical examinations and disclosed her medical records. Defendants retained physicians to conduct the examinations, review the records, and submit affirmed opinions regarding plaintiff's alleged injuries. Defendants have received the affirmations and consequently move for summary judgment on lack of "serious injury" grounds.

Defendants' Contentions

In support of their motion, defendants submit, among other things, plaintiff's verified bill of particulars, a transcript of plaintiff's examination before trial, and affirmed medical reports of either examinations of plaintiff or reviews of medical records done at the request of defendants. Plaintiff's verified bills of particulars assert that, as a consequence of the accident, plaintiff suffered (among other injuries) a capsular triquetral fracture with dorsal osteophyte and malunion left wrist, carpal tunnel syndrome, sprain and contusion and neuropathy in median and ulnar left wrist; a complex tear of the medial meniscus of the left knee.

Defendants argue that plaintiff did not sustain a serious injury as none of the alleged injuries rise to the level of impairment sufficient to qualify under any category of the statute. Specifically, defendants contend that plaintiff's medical records including the X-rays taken at Woodhull, as well as an MRI that was performed on March 1, 2016, show that plaintiff did not sustain a fracture. Moreover, they point to plaintiff's own deposition testimony that she was never told by any of her treating doctors that she had sustained a fracture or broken bone. Defendants note that the doctors who examined plaintiff reported normal findings on their objective tests performed to determine the range of motion of the affected areas. They

contend that she did not sustain a complete loss of use of a body organ or member, nor has she demonstrated a permanent consequential limitation.

Finally, defendants point out that plaintiff's own testimony reveals that an injury under the 90/180 category has not been demonstrated. Plaintiff testified that she was not employed at the time of the accident, and that she was never confined to bed or home as a result of any injuries from this accident (NYSCEF Doc. No. 35, Pineda-Cuello tr at p. 52, lines 12-14, p. 56, lines 11-20). She further testified that the only activity she could no longer do following the accident was to go to the gym, but conceded that she was not a gym member at the time of her accident (NYSCEF Doc. No. 35, Pineda-Cuello tr at p. 56, line 21, p. 57, lines 12-15).

In support of the motion, defendants submit the affirmed report of Dr. Pierce Ferriter, a board certified orthopedic surgeon. He reviewed plaintiff's verified bill of particulars and the police accident report, but noted that he was not provided any of her medical records to review. Dr. Ferriter performed an independent medical examination of plaintiff on July 15, 2019, using a goniometer to measure the range of motion of the affected body parts. Dr. Ferriter examined plaintiff's left wrist and found no heat, swelling, effusion, erythema, or crepitus and no complaint of tenderness upon palpation. He performed sensation testing which yielded a normal result. Dr. Ferriter's examination of plaintiff's left wrist revealed active range of motion in flexion to 60 degrees with normal being 60 degrees; extension to 60 degrees with normal being 60 degrees; pronation to 80 degrees with 80 degrees being normal; supination to 80 degrees with 80 degrees being normal; radial-deviation to 20 degrees with 20 degrees being normal, and ulnar deviation to 30 degrees with 30 degrees being normal. His testing further revealed grip strength and intrinsic muscle strength of 5/5 and no atrophy of her thenar muscles. Dr. Ferriter's examination of plaintiff's left hand

revealed no triggering of fingers. The range of motion of each of the digits of her left hand were all normal.

Dr. Ferriter's findings upon examination of plaintiff's left knee was that there was no heat, swelling, effusion, erythema, or crepitus and no complaint of tenderness upon palpation. The following orthopedic tests performed that had negative/normal results were: Lachman's, patella tracking, anterior drawer, posterior drawer, patella grind, McMurray's, pivot shift and bounce test. In addition Dr. Ferriter found no patella bursitis or varus/valgus stress or deformity. The examination of plaintiff's left knee revealed active range of motion in flexion to 140 degrees with 150 degrees being normal and extension to 0 degrees with 0 degrees being normal. Dr. Ferriter found that quadriceps and hamstring strength testing reveals 5/5 strength and that there was no atrophy noted in the quadriceps and hamstring muscles and that there was no chondromalacia present on palpation of the patella. He concluded that there were no clinical findings of bilateral carpal tunnel syndrome or left knee sprain.

Dr. Ferriter opined that plaintiff presented with a normal orthopedic examination on all objective testing and that there were no findings which would result in orthopedic limitations in use of the body parts examined. He opined that plaintiff is capable of functional use of the examined body parts for normal activities of daily living. Dr. Ferriter also performed the same examination and range of motion testing to plaintiff's right hand, wrist and knee, all of which revealed normal ranges of motion. However, the court notes that plaintiff does not allege any injuries to these body parts as a result of this accident, and thus these body parts appear to have been tested merely for comparison purposes.

Defendants also submitted the MRI studies of plaintiff's left knee and left wrist that were both performed on March 1, 2016, to Dr. Darren Fitzpatrick, a board certified radiologist for review. With regard to the MRI of plaintiff's left knee, Dr. Fitzpatrick found

normal marrow signal, no fluid collection or effusion, normal musculature and that tricompartmental cartilage was preserved. In addition, Dr. Fitzpatrick found that the cruciate ligaments, collateral ligaments, extensor mechanism, medial and lateral menisci were intact. Thus, his impression was that this was an unremarkable left knee MRI and that there was no traumatic injury. With regard to the MRI of plaintiff's left wrist, Dr. Fitzgerald found that it was an unremarkable left wrist MRI and that there was no traumatic injury. Specifically, Dr. Fitzgerald noted that there was normal marrow signal and normal musculature; the joint spaces and alignment as well as the fat planes around the neurovascular structures are preserved; the scapholunate and lunotriquetral ligaments and flexor and extensor tendons are intact.

Defendants argue that the medical proof establishes that plaintiff did not sustain a permanent loss of use of her left wrist, left elbow or left knee and/or a permanent consequential limitation of use of her left wrist, left elbow or left knee; and/or a significant limitation of use of her left wrist, left elbow or left knee, nor did she sustain any fracture. In this regard, defendants point to the reported normal findings of Dr. Ferriter on a myriad of objective tests, including full range of motion and no functional disability, as well as Dr. Fitzpatrick's finding that the MRIs, performed one month after plaintiff's accident, found no evidence of traumatic injury. Defendants also contend that plaintiff's own testimony demonstrates that she cannot satisfy the requirements for asserting a claimed injury under the 90/180 days category. Thus, defendants argue that, based upon the foregoing submissions, plaintiff cannot establish that she sustained a serious injury within the meaning of Insurance Law § 5102 (d). Finally, defendants note that the records demonstrate a cessation in plaintiff's treatment related to her alleged injuries that she must explain.

Plaintiff's Opposition

In opposition, plaintiff argues that defendants have failed to establish their prima facie entitlement to summary judgment dismissing her complaint. Specifically, plaintiff argues that she suffered a fractured left wrist, as well as permanent loss of use and significant limitation of her left wrist, left elbow, left shoulder, and left knee. In support of her opposition, she submits a copy of a narrative report from Dr. Jonathan Gordon, an orthopedic surgeon at Mount Sinai, which summarizes his treatment and evaluation of plaintiff. Dr. Gordon notes that at her initial evaluation, on February 25, 2016, plaintiff “showed signs of internal derangement of her left knee and left wrist,” and complained of weakness and inability to grasp with her left hand, weakness in her left leg, and severe pain in her left wrist and left knee. Upon physical examination of plaintiff, Dr. Gordon found that her “severe pain and swelling” was “consistent with a ligament injury in her wrist and knee.” He noted that plaintiff had X-rays of her left hand, left wrist, left elbow and left shoulder from the time of the accident, which were negative for fracture dislocation and arthritis. Dr. Gordon gave plaintiff a wrist brace, knee brace and crutches.

Dr. Gordon next examined plaintiff on March 8, 2016, and noted that she continued to complain of pain and tenderness. Dr. Gordon reviewed the MRI, or the MRI report (it is unclear from the record which he actually reviewed) of plaintiff’s left wrist that was performed on March 1, 2016, and noted that it showed dorsal soft tissue swelling with ganglion, no fracture and fluid in the distal radioulnar joint. He also reviewed the MRI or MRI report, of plaintiff’s left knee from the same date, and found that it showed a small joint effusion with cartilage loss and lateral patella subluxation and increased signal within the lateral meniscus. Dr. Gordon noted that he provided plaintiff with a brace, prescribed pain medication and physical therapy.

Dr. Gordon's note indicates that he last examined plaintiff on June 8, 2020, and found that she continued to have left sided pain in the upper and lower extremity, as well as limited range of motion in the shoulder and the knee. Dr. Gordon recommended that plaintiff continue physical therapy and bracing as she is still experiencing wrist pain. Dr. Gordon's assessment of plaintiff's condition was that she has shown mild improvement with regards to her left knee, shoulder and wrist and that she suffered multiple joint injuries as a result of the accident, which he opined was the direct cause of all her extremity trauma. His prognosis of plaintiff was guarded noting that she "runs a risk of further progressive degenerative changes in both joints" and that those degenerative changes "would likely mean further limits in range of motion, limits in activity and intermittent episodes of pain." Dr. Gordon stated that in the future plaintiff may require treatment including cortisone shots in the left knee and left wrist, and Hyalgen injections in the knee, as well as continued physical therapy and bracing. Finally, he noted that if these treatments failed, plaintiff might need joint replacement.

In addition, plaintiff underwent an independent medical examination on April 4, 2016, which was conducted by Dr. Julio Westerband, a board certified orthopedic surgeon. Dr. Westerband examined plaintiff, using a goniometer to measure range of motion. Dr. Westerband's findings with regard to plaintiff's left elbow were as follows: no heat, swelling, effusion, erythema, or crepitus appreciated, but plaintiff complained of tenderness upon palpation in the olecranon. Range of motion testing revealed: flexion to 120 degrees with 135-145 degrees being normal; pronation to 90 degrees with 80-90 degrees being normal; supination to 90 degrees with 80-90 degrees being normal and extension to 0 degrees with 0 degrees being normal.

Dr. Westerband's examination of plaintiff's left wrist/hand revealed no heat, swelling, effusion, erythema, or crepitus appreciated. With regard to range of motion testing, he found palmar flexion to 80 degrees with 80-90 degrees being normal; dorsi flexion to 70 degrees with 70-85 degrees being normal; pronation to 80 degrees with 80-90 degrees being normal; supination to 80 degrees with 80-90 degrees being normal; radial-lateral motion to 20 degrees with 20 degrees being normal; ulnar motion to 30 degrees with 30 degrees being normal. Dr. Westerband noted that the range of motion of the digits on plaintiff's left hand were within normal limits and that her grip strength was 4/5. He noted her complaint of tenderness upon palpation over the dorsum ulnar aspect.

Dr. Westerband's examination of plaintiff's left knee showed no heat, swelling, effusion, erythema, or crepitus, but that she complained of tenderness upon palpation over the lateral aspect. Range of motion testing revealed flexion to 120 degrees with 130-140 degrees being normal and extension to 0 degrees which is normal. He also performed the following: Lachman's test - negative.; Patella tracking - negative; McMurray test - negative and stable on varus/valgus - yes. Ultimately Dr. Westerband diagnosed plaintiff with resolving contusions of the left elbow, wrist and knee. He found evidence of a mild orthopedic disability and recommended physical therapy twice a week for six weeks.

Plaintiff also submits the narrative reports from Dr. Nelson Botwinick, the Director of the New York Downtown Hand Center, who first saw plaintiff on April 10, 2017. Dr. Botwinick stated that he reviewed the report from plaintiff's IME performed by Dr. Howard Levin on July 13, 2016, as well as electrodiagnostic testing that had been performed on September 7, 2016, which showed evidence of left-sided median neuropathy. He noted that although plaintiff brought her MRI films, he could not access them. On examination Dr. Botwinick found range of motion at plaintiff's left elbow was 80 degrees of supination, 90

degrees of pronation, 125 degrees of flexion and full extension.² He found that she was tender over the olecranon which was mildly swollen posteriorly, which he opined was suggestive of some bursitis. He further noted a negative Tinel's sign.

With regard to plaintiff's wrist, Dr. Botwinick found a positive Tinel's sign and that the Phalen's test and Finkelstein's test were negative. Plaintiff's wrist had 70 degrees of flexion and 70 degrees of extension and full range of motion of the fingers, but he noted that her grip strength was diminished. Dr. Botwinick noted a firm mass on plaintiff's wrist which he opined was either an osteophyte or a dorsal ganglion. Specifically, he noted a "dorsal osteophyte best seen on the lateral view suggestive of a carpal fracture that was probably missed on the original MRI." Dr. Botwinick sent plaintiff for further electrical studies due to signs of persistent neuropathy, which was performed on April 13, 2017.

Plaintiff saw Dr. Botwinick again on April 19, 2017, and he reviewed the electrical study from April 13, 2017, and found that plaintiff "definitely had median neuropathy and probably had ulnar neuropathy." He reviewed treatment options with plaintiff including splinting, therapy, and surgery. Dr. Botwinick advised her that she would probably benefit from removal of the osteophyte through a dorsal incision, as well as a carpal tunnel release and an ulnar nerve transposition. He noted that she expressed reservations regarding surgery due to underlying health conditions.

Plaintiff was next seen by Dr. Botwinick on June 22, 2020, at which time he noted that he had not treated her since April 2017, because the only treatment that would have changed her situation was surgery. On this date, he noted that she complained of pain in her left upper extremity, primarily her wrist but also her hand and shoulder. Dr. Botwinick examined plaintiff and performed range of motion testing using a goniometer and found with regard

² The court notes that Dr. Botwinick fails to set forth the normal range of motion in his report.

to her left shoulder 130 degrees of abduction with the normal range being 180 degrees, 130 degrees of forward flexion with normal range being 180 degrees, internal and external rotation to the sacrum of 45 degrees with 70 degrees being normal range. At plaintiff's left elbow there was 125 degrees of flexion with a normal range of 150 degrees. Plaintiff's left wrist showed 55 degrees of flexion with a normal range of 80 degrees and 55 degrees of extension with a normal range of 70 degrees. Dr. Botwinick noted that plaintiff "localized her pain to the dorsum of the wrist, where the fracture is located." In conclusion, he stated that the findings noted on this examination "are directly and causally related to the accident that occurred on February 06, 2016. The findings on today's examination have not significantly changed in 3 years. It can therefore safely be stated that these findings are permanent. They are causally related to the accident. They are unlikely to change without surgical intervention."

In further opposition to defendants' motion, plaintiff argues that the court should disregard Dr. Ferriter's report and opinion because he opined that plaintiff presented with a normal orthopedic examination on all objective testing despite the fact that his examination revealed a range of motion deficit in plaintiff's left knee flexion wherein he found it to be 140 degrees, which is ten degrees below the normal value of 150 degrees. Moreover, plaintiff contends that Dr. Ferriter did not review any of her medical records, and thus cannot, and did not, opine as to causality between the accident and plaintiff's injuries. Next, plaintiff asserts that although Dr. Fitzpatrick found plaintiff's MRIs to be unremarkable, a radiologist alone cannot make a prima facie case for dismissal on a threshold motion.

Defendants' Reply

In reply to plaintiff's opposition, defendants argue that they have met their burden of presenting evidence showing that plaintiff has not sustained any fracture, nor has she

sustained “permanent” injury based on objective medical examination testing. They further argue that they have established that the plaintiff was not significantly limited or curtailed for a minimum of 90/180 days following the accident through the affirmed reports of Drs. Ferriter and Fitzpatrick. Specifically, defendants argue that the affirmed reports have an objective basis inasmuch as Dr. Ferriter performed range of motion testing on all affected areas and compared his findings of plaintiff’s range of motion to the normal range of motion. Defendants note that Dr. Ferriter performed comprehensive medical evaluations and found no permanency. In particular, he found that plaintiff exhibited full ranges of motion in her left wrist and left hand. With regard to his examination of plaintiff’s left knee, Dr. Ferriter noted only a slight decrease in flexion at 140 degrees, with 150 degrees being normal while the range of motion on extension in the left knee was normal. Additionally, all objective testing of the left knee was normal. Thus, Dr. Ferriter concluded that the sprain to plaintiff’s left knee was resolved. In addition, defendants point out that Dr. Fitzpatrick’s review of the left knee MRI showed that the study was unremarkable and that there was no traumatic injury. Further, they point out that plaintiff, in opposition, failed to submit a competing MRI report.

Next, defendants refute plaintiff’s assertion that the court should disregard the affirmed medical reports of their expert physicians. In this regard, defendants argue that reviewing plaintiff’s medical records is not required where, as here, the physicians detailed the specific tests they used in their personal examination of plaintiff, which revealed full range of motion in the left wrist and left hand.

With regard to plaintiff’s allegation that she was prevented from performing her usual and customary activities for a period of 90 out of the first 180 days immediately following the accident, defendants argue that plaintiff’s own testimony establishes that she was never

confined to her bed or home as a result of her alleged injuries from the subject accident. Moreover, she testified that she was not employed at the time of the accident, and thus was not caused to miss any work as a result thereof. Defendants point out that the only activity that plaintiff alleges she can no longer do is go to the gym, but that she testified that she did not belong to a gym at the time of her accident (NYSCEF Doc. No. 35, Pineda-Cuello tr at p. 56, line 25, p. 57, lines 2-3, 13-15). Thus, defendants contend that plaintiff cannot sustain a claim based on a curtailment of her usual activities for a period of not less than 90 out of the first 180 days following the accident.

Finally, defendants argue that plaintiff has failed to submit satisfactory evidentiary proof in admissible form to defeat defendants' motion. Specifically, defendants assert that with regard to the three separate reports from Dr. Botwinick³, the only affirmed report is the one dated June 22, 2020, under sub-exhibit C. Defendants contend that plaintiff is impermissibly attempting to use the certification of the June 22, 2020 report as a bootstrap to affirming the contents of the two reports from 2017. Accordingly, defendants argue that Dr. Botwinick's reports dated April 10, 2017 and April 2017, found as sub exhibits A & B to plaintiff's Exhibit 7 in opposition, are inadmissible as they are not affirmed. Moreover, defendants assert that Dr. Botwinick relied on the unsworn reports of Drs. Kurzweil and Levinson, as well as the unsworn MRI reports. Further, defendants assert that as there is no evidence that either Dr. Gordon or Dr. Botwinick personally reviewed the MRI films., defendants argue that their diagnosis based thereon must be disregarded.

Additionally, defendants argue that plaintiff was required to present a physician's affirmation based on examinations conducted both shortly after the accident and a recent

³ These documents were submitted as Exhibit 7 to plaintiff's opposition and listed as sub-exhibits A, B and C (NYSCEF Doc. No. 54).

examination and must explain any gap in treatment. In this regard, defendants point out that Dr. Gordon examined plaintiff on February 25, 2016, March 8, 2016, and June 8, 2020, but failed to address the over four-year gap in treatment. With regard to Dr. Botwinick, he first examined plaintiff over one year after her accident. Thus, defendants maintain that his opinion, as to causation, does not have a rational basis as it is not based on any findings contemporaneous with the accident.

Defendants assert that plaintiff fails to prove alleged limitations contemporaneous to the date of the accident. Specifically, they point out that Dr. Gordon failed to quantify any limitations of plaintiff's range of motion of the affected areas in his report, and merely points to plaintiff's subjective complaints of pain and the findings contained in the MRI reports. Significantly, defendants point out that plaintiff fails to offer any admissible medical evidence showing restricted range of motion of the left wrist that is contemporaneous with the date of the accident. In this regard, defendants note that the first time any restricted ranges of motion of the left wrist is noted is over four years after the date of the accident in Dr. Botwinick's June 22, 2020 Report. Furthermore, Dr. Westerband's range of motion testing of plaintiff's left elbow and left knee was almost completely normal, shortly after the accident, with all objective testing yielding negative results.

Finally, defendants argue that all of the objective and admissible evidence demonstrates that plaintiff did not sustain a fracture to the left wrist, including plaintiff's Emergency Room records, which clearly indicate that imaging of the left wrist revealed no evidence of acute fracture or dislocation. Additionally, an MRI report from StandUp MRI of Manhattan states "no fracture identified" and that the carpal tunnel is intact. Moreover, plaintiff actually testified that no doctor ever told her that she sustained a fracture or broken bone (NYSCEF Doc. No. 35, Pineda-Cuello tr at p. 46, lines 2-7). Defendants note that

even Dr. Gordon's report, submitted in opposition, indicates that plaintiff did not sustain a fracture to the left wrist. Defendants point out that the only time that plaintiff was "diagnosed" with any fracture to the left wrist was April 10, 2017, over one year subsequent to the subject accident, when Dr. Botwinick, in his unsworn report, stated that he reviewed the MRI report of the MRI performed on March 1, 2016. Although Dr. Botwinick notes that this report describes soft tissue swelling with a ganglion and that no fracture was identified, he goes on to opine that there is "dorsal osteophyte best seen on the lateral view suggestive of a carpal fracture that was probably missed on the original MRI". It is undisputed that Dr. Botwinick did not review the actual MRI films. As such, defendants argue that his conclusory statement, based on no actual evidence, is a feigned issue of fact.

Discussion

"A defendant can establish that the plaintiff's injuries are not serious within the meaning of Insurance Law 5102 (d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (*Nuñez v Teel*, 162 AD3d 1058, 1059 [2018], quoting *Grossman v Wright*, 268 AD2d 79, 83 [2000]). Once the defendant has established this, the burden shifts to the plaintiff to come forward with objective evidence to overcome the defendant's submissions by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law (*see Grossman*, 268 AD2d at 84). A plaintiff seeking to recover under the "permanent loss of use" category, must demonstrate a total loss of use of a body organ, member, function or system (*Oberly v Bangs Ambulance*, 96 NY2d 295, 299 [2001]). A plaintiff claiming injury within the "permanent consequential limitation" or "significant limitation" of use categories of the statute must substantiate his or her complaints of pain with objective medical evidence demonstrating the extent or degree of the limitation

of movement caused by the injury and its duration (*see Schilling v Labrador*, 136 AD3d 884 [2016]; *Rovelo v Volcy*, 83 AD3d 1034, 1035 [2011]; *McLoud v Reyes*, 82 AD3d 848, 849 [2011]). In order to prove the extent or degree of physical limitation with respect to the “permanent consequential limitation of use of a body organ or member” or a “significant limitation of use of a body function or system” categories, either a specific percentage of the loss of range of motion must be determined, 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 (*see Perl v Meher*, 18 NY3d 208, 217 [2011]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute and will not suffice to demonstrate a serious injury (*Licari v Elliott*, 57 NY2d 230,236 [1982]; *Cebron v Tuncoglu*, 109 AD3d 631, 632 [2013]). Finally, a plaintiff seeking to recover under the 90/180 category must submit competent objective medical evidence of "a medically determined injury or impairment of a non-permanent nature" that prevented her from performing her usual and customary activities for 90 of the 180 days following the subject accident (Insurance Law § 5102 [d]; *see also Toure v Avis Rent a Car Sys.*, 98 NY2d 345, 357 [2002]; *Licari*, 57 NY2d at 238 [1982]; *John v Linden*, 124 AD3d 598, 599 [2015]; *Strenk v Rodas*, 111 AD3d 920, 921[2013]; *Gavin v Sati*, 29 AD3d 734, 735 [2006]).

The court finds that based upon the adduced evidence, defendants have met their prima facie burden of showing 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*, 98 NY2d at 357; *Gaddy v Eyler*, 79 NY2d 955, 956-957 [1992]). Here, defendants presented the affirmation of Dr. Ferriter, an orthopedist, who, with a goniometer, tested the range of motion of the plaintiff’s left elbow, left wrist and left knee. He reported that the ranges of

motion were within normal ranges, with the exception of a minor limitation in the flexion of plaintiff's left knee, and set forth his specific measurements, and compared them to the norms. Dr. Ferriter also described other objective orthopedic tests that he performed, and reported that the results were all negative. He concluded that there were no findings which would result in orthopedic limitations in use of the body parts examined and that plaintiff is capable of functional use of the examined body parts for normal activities of daily living. Moreover, there is no competent evidence in the record demonstrating that plaintiff sustained a fracture (*see Jay C. Carlisle II v Garcia*, __ AD3d __ [2020], 2020 NY Slip Op 05180 [2d Dept 2020]; *Toussaint v Zomah*, 183 AD3d 657, 658 [2020]; *Staff v Yshua*, 59 AD3d 614, 614 [2009]). Additionally, the court notes that the minor (approximately 7%⁴) limitation in the range of motion of plaintiff's knee is insignificant within the meaning of Insurance Law 5102 (d) (*see Cebron v Tuncoglu*, 109 AD3d 631 [2013]; *Il Chung Lim v Chrabaszc*, 95 AD3d 950, 951 [2012] [holding that an approximate 13% limitation in range of motion of the left knee was insignificant within the meaning of the no-fault statute]; *McLoud v Reyes*, 82 AD3d 848, 849 [2011] [holding that an approximate 12% limitation in range of motion was insignificant within the meaning of the no-fault statute]). Accordingly, defendants have established that plaintiff did not sustain a fracture of her wrist, a permanent loss of use of her left wrist, left elbow or left knee and/or a permanent consequential limitation of use of her left wrist, left elbow or left knee; and/or a significant limitation of use of her left wrist, left elbow or left knee. Furthermore, defendants have established, through plaintiff's own deposition testimony, that she did not sustain an injury which prevented her from performing substantially all of the material acts which constitute her daily activities for

⁴ Dr. Ferriter's examination of plaintiff's left knee revealed active range of motion in flexion to 140 degrees with 150 degrees being normal.

not less than 90 days during the 180 days following the accident (*see Narvaez-Reyes v Palomino*, 186 AD3d 492 [2020]; *John v Linden*, 124 AD3d 598, 599 [2015]; *Il Chung Lim*, 95 AD3d at 951).

The court further finds that plaintiff has failed to offer competent evidence in opposition demonstrating that she sustained a serious injury. In this regard, the court notes that neither of the two reports she submitted from Dr. Botwinick from 2017 are affirmed. Moreover, the attempt to cure this defect by referencing these reports in Dr. Botwinick's affirmed June 2020 report is impermissible (*see Buntin v Rene*, 71 AD3d 938, 939 [2010] [holding that a certification did not cure the defect of an unaffirmed medical report]; *see also Grasso v Angerami*, 79 NY2d 813, 814-815 [1991]; *Fraleigh v Casson*, 186 AD3d 676 [2020] [holding that unaffirmed medical reports are insufficient to raise a triable issue of fact]; *Washington v Mendoza*, 57 AD3d 972, 973 [2008]; *Matter of Bronstein-Becher v Becher*, 25 AD3d 796, 797 [2006]).

With regard to Dr. Gordon's reports related to his examinations of plaintiff, he fails to quantify any limitations of plaintiff's range of motion of the affected areas in his reports and merely points to plaintiff's subjective complaints of pain and the findings contained in the MRI reports. Thus, this is insufficient to demonstrate a serious injury (*see Browdame v Candura*, 25 AD3d 747, 748 [2006])[court held that where a physician fails to specify the degree of range of motion, or where a numerical range of motion is specified but the physician fails to compare such findings against the normal range of motion, this is insufficient to objectively demonstrate a permanent consequential or significant limitation of use of an affected body part]; *Spanos v Harrison*, 67 AD3d 893, 893-894 [2009]; *Giammanco v Valerio*, 47 AD3d 674 [2008]).

Moreover, the report of Dr. Westerband's examination of plaintiff two months after her accident found normal range of motion on pronation, supination, and extension of her left elbow and only a slight limitation on flexion at 120 degrees with 135-145 degrees being normal. He further noted that Tinel's sign was negative. Upon examination of plaintiff's left knee, Dr. Westerband found normal range of motion on extension, with only a slight decrease on flexion at 120 degrees with 130-140 degrees being normal and Lachman's test, Varus/Valgus testing, Patella tracking, and McMurray test were all negative/normal. Dr. Westerband found normal range of motion on all testing of plaintiff's left wrist and hand including, Palmar flexion, dorsi flexion, Pronation, Supination, Radial lateral motion, and Ulnar motion, and the range of motion of the digits of her left hand were also within normal limits. Dr. Westerband concluded that plaintiff merely had resolving contusions on the affected body parts. Accordingly, plaintiff has failed to raise a triable issue of fact in this regard (*see Cebron*, 109 AD3d at 631; *Il Chung Lim*, 95 AD3d 950 at 951; *McLoud*, 82 AD3d at 849). Additionally, the court finds that plaintiff has not offered any admissible medical evidence showing restricted range of motion of her left wrist contemporaneous with the date of the accident. Finally, it is clear, on this record, that plaintiff has failed to offer competent evidence that she sustained injuries that prevented her from performing her normal daily activities for at least 90 of the 180 days immediately following the accident (*see Narvaez-Reyes*, 186 AD3d at 492; *John*, 124 AD3d at 599; *Il Chung Lim*, 95 AD3d at 951). The court has considered the parties' remaining contentions and finds them unavailing.

Accordingly, it is hereby

ORDERED that defendants' summary judgment motion to dismiss plaintiff's complaint is granted in its entirety. All relief not expressly granted herein is denied.

The foregoing constitutes the decision, order and judgment of the court.

E N T E R,



J. S. C.