

<b>Lee v WC Contr. Servs., Inc.</b>
2020 NY Slip Op 33991(U)
November 27, 2020
Supreme Court, Kings County
Docket Number: 514756/17
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 360 Adams Street, Brooklyn, New York, on the 27<sup>th</sup> day of November, 2020.

P R E S E N T:

HON. BRUCE M. BALTER,

Justice.

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NINO LEE,

Plaintiff,

- against -

Index No. 514756/17

WC CONTRACTING SERVICES, INC.,  
CARPIO GONZALO and "JOHN DOE",  
whose true name is unknown,

Defendants.

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The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and  
Affidavits (Affirmations) Annexed  
Opposing Affidavits (Affirmations) \_\_\_\_\_  
Reply Affidavits (Affirmations) \_\_\_\_\_

17-26  
28-39  
43

Upon the foregoing papers, defendants move, in motion (mot.) sequence (seq.) two, for an order, pursuant to CPLR 3212, for summary judgment to dismiss plaintiff's complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d).<sup>1</sup>

<sup>1</sup> 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 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."

### *Background and Procedural History*

On February 26, 2016, plaintiff, then 34 years old, allegedly sustained serious injury when the car she was driving was involved in a motor vehicle accident with a vehicle owned by defendant WC Contracting Services, Inc. and operated by defendants Carpio Gonzalo and John Doe. According to the complaint, the accident occurred at the intersection of East 74th Street and Park Avenue, in Manhattan, when defendants' vehicle came in contact with plaintiff's vehicle. Plaintiff commenced the instant action against defendants on July 31, 2017 by summons and complaint seeking to recover damages for injuries she allegedly sustained in the February 26, 2016 accident. On or about September 14, 2017, defendants interposed an answer, with demands, and, on January 19, 2018, plaintiff filed a bill of particulars alleging various injuries. Discovery ensued, and defendants moved on February 25, 2020 for summary judgment.

Plaintiff claims that her injuries meet the serious injury threshold requirements of Insurance Law Insurance Law § 5102 (d). These injuries, allegedly attributable to the February 26, 2016 accident, purportedly include damage to her neck, with a mild straightening of lordosis, i.e., spinal curvature, lower back damage with radial tear of annulus fibrosis, traumatic brain injury with loss of consciousness and emotional trauma. Such injuries, plaintiff claims, constitute (1) permanent loss of use of a body organ, member, function or system, (2) permanent consequential limitation of use of a body organ or member, (3) significant limitation of a use of a body function or system, and /or (4) an injury which 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.

*Defendant's Position*

Defendants, in support of their motion, submit, among other exhibits: plaintiff's verified bills of particulars and transcript of her examination before trial; an affirmed neurological evaluation from Dr. Daniel J. Feuer, a board-certified neurologist; an affirmed orthopedic evaluation from Dr. Jeffrey Passick, a board-certified orthopedic surgeon; and an affirmed radiological medical review by Dr. Melissa Sapan Cohn, a board-certified radiologist..

Defendants argue that plaintiff's injuries do not rise to the legal level required to meet the serious injury threshold, contend that injuries from two prior motor vehicle accidents belie her current claims, submit that her condition is degenerative and preexisted the February 26, 2016 accident and that, in any event, her currently claimed orthopedic injuries have resolved. More specifically, defendants reference plaintiff's August 14, 2015 motor vehicle accident which resulted in an emergency room visit, neck injury complaints and C5-C6 and C6-C7 stenosis. They also reference records relating to plaintiff's May 13, 2013 motor vehicle accident when she suffered a collapsed lung, rib fracture and left hand injuries requiring Dequervain release surgery (i.e. surgery to reduce pressure on the tendon running along the side of the wrist near the thumb to allow the tendon to move freely without pain).<sup>2</sup>

Defendants utilize their experts' findings to both challenge plaintiff's injury causation claim and support their position that her orthopedic injuries were resolved. Dr.

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<sup>2</sup> Defendants also claim that medical records indicate that plaintiff suffered a subsequent right calf burn on June 6, 2016, more than three months after the February 26, 2016 accident, when her leg touched a hot pipe on a motorcycle.

Feuer's November 12, 2018 report notes that plaintiff stated that her neck, lower back, or right hip were injured in the February 26, 2016 accident and that she did not suffer loss of consciousness. The report further notes that plaintiff traveled by taxi to Lutheran Hospital emergency room where a routine examination and X rays occurred. Dr. Feuer's report mentions that plaintiff's motor, sensory, coordination and gait were normal as was her mental status and cranial nerves II-XII; that her head was atraumatic; and that her cervical and lumbosacral spine were nontender with no spasm. He reports not observing evidence in plaintiff of an objective neurological disability or neurological permanency related to the February 26, 2016 accident. Dr. Feuer found plaintiff neurologically stable and stated that she can engage in full active employment as a professional track and field trainer and fully in her daily living activities without restrictions.

Dr. Passick, the orthopedic surgeon, notes in his January 31, 2020 examination report that plaintiff states that her head, neck, lower back and left shoulder were injured in the February 26, 2016 accident. He mentions having used a goniometer, provides specific comparative findings of plaintiff's cervical and lumbar spine range of motion and concludes that plaintiff's range of motion was normal in both the cervical and lumbar spine.<sup>3</sup> Dr. Passick states in his evaluation that plaintiff has preexisting cervical and

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<sup>3</sup> More specifically, Dr. Passick reports that his examination revealed lumbar spine flexion of 60 degrees with normal being 60 degrees; lumbar spine extension of 25 degrees with normal being 25 degrees; right lateral bending of 25 degrees with normal being 25 degrees, and left lateral bending of 25 degrees with normal being 25 degrees.

As to the cervical spine, Dr. Passick's report indicates flexion of 50 degrees with normal being 50 degrees; extension to 60 degrees with normal being 60 degrees, right rotation to 80 degrees with 80 degrees being normal and left rotation to 70 degrees with normal

lumbar spine degenerative disc disease, outlines the prior motor vehicle accidents involving plaintiff and mentions medical treatment she then received. His report also notes that “MRI report of the cervical spine performed 04/11/16 was compared to a prior study from November 2015 (predating the [February 26, 2016] accident) and was noted to be stable with right C5-6 and C6-7 foraminal stenosis from unciniate hypertrophy.<sup>4</sup> Dr. Passick additionally cites the records of plaintiff’s May 5, 2012 accident as indicating that she sustained a right shoulder separation and underwent a right shoulder reconstruction on May 29, 2013. His diagnosis concludes that plaintiff’s present cervical and lumbar sprain were both resolved.

Dr. Cohn’s May 3, 2018 radiological report states that plaintiff’s cervical spine MRI shows right uncovertebral joint hypertrophic changes at the C5-6, C6-7 levels. She explains that this condition involves bilateral facet degenerative changes, i.e., degeneration and enlargement of the facet joints along the back of the spine, and is consistent with spinal arthritis, chronic and longstanding disease and is degenerative in nature. Dr. Cohn notes that her examination of plaintiff found no evidence of disc herniation or acute traumatic related injury and opines that there are mild degenerative changes of plaintiff’s cervical spine.

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being 80 degrees; right lateral flexion to 45 degrees with 45 degrees being normal; and left lateral flexion to 45 degrees with 45 degrees being normal.

<sup>4</sup> In other words, narrowing or tightening of the openings, known as the foramen, between the bones in the spine from degeneration and enlargement of the facet joints (*see* Healthline, <https://www.healthline.com/health/foraminal-stenosis>).

Dr. Cohn's May 4, 2018 report states that the MRI films of plaintiff's lumbosacral spine show degenerative changes at the at the L5-S1 level but no evidence of disc herniation or acute traumatic related injury. That report also reviewed X ray films of plaintiff's cervical spine taken on March 7, 2016 and found that there is straightening of the normal cervical lordosis, i.e., straightening of the curvature. Dr. Cohn opined that this condition may have been identified because of plaintiff's positioning or could be due to muscular spasm. She concluded that the remainder of plaintiff's spine is completely normal and there is no evidence of fracture or acute traumatic related injury. Dr. Cohn's May 4, 2018 report also referenced her review of the March 7, 2016 X ray films of plaintiff's lumbosacral spine and concluded that plaintiff's lumbosacral spine was normal with no evidence of pathology or acute traumatic related injury.

Defendants argue that plaintiff has failed to provide evidence of a significant limitation of use of a body function or system; instead, has established that she suffered minor injuries of strain with minimal limitation of motion; that subjective claims of pain alone are not enough; and that there is no objective evidence of serious injury.

### *Plaintiff's Position*

In her opposition, plaintiff argues that defendants failed to meet their prima facie burden of showing that her psychological injury, including post-traumatic stress disorder (PTSD), did not constitute a serious injury within the meaning of Insurance Law § 5102 (d). Plaintiff asserts that her bill of particulars, her medical records and deposition testimony support her claims of emotional or psychological injury. She states in this regard that on January 19, 2018 she provided defendants medical records with duly

executed HIPPA authorizations for defendants to obtain records from her health care providers including psychological records from Dr. Daniel Kuhn, a board-certified psychiatrist. She argues that defendants are on notice of her psychological injuries, have failed to address or dispute this issue and have therefore failed to demonstrate that she did not sustain a “serious injury” within the meaning of Insurance Law § 5102 (d). Plaintiff submits that a causally-related emotional injury including post-traumatic stress disorder, alone or in combination with a physical injury, can constitute a serious injury because it constitutes a permanent loss of use of a body function or system or a significant limitation of use. She contends that defendants failed to meet their burden regarding her psychological injury because they relied entirely on Dr. Passick’s and Dr. Feuer’s reports, which, respectively, only concern issues of an orthopedic or neurologic disability. Plaintiff asserts that defendants’ motion fails as it lacks evidence concerning her claim of psychological injury.

Plaintiff alternatively argues that summary judgment should be denied because there are triable factual issues as to whether she sustained a serious injury within the meaning of Insurance Law § 5102 (d). She references her September 24, 2019 deposition testimony concerning her psychiatric and emotional injuries from the February 26, 2016 accident. That testimony recounted that Paul Brisson, an orthopedist referred her to Dr. Kuhn, that she consulted with Dr. Kuhn on a regular basis and that he treated her approximately two to three times per month. In addition, she testified that she suffers from anxiety, which affects her sleep and being around people, and depression that has interrupted her ability to work. Plaintiff further notes that she testified about complaining

to Dr. Kuhn concerning nightmares, anxieties, shortness of breath, stress, personality change, aggression and depression; that he prescribed medications which she still takes; and that she was still consulting with Dr. Kuhn on a monthly basis.

Plaintiff also asserts that five affirmed reports from Dr. Michael Bernstein, another board-certified psychiatrist, generated as part of his no-fault independent medical examinations of her, support the psychological injury claim herein.<sup>5</sup> Plaintiff notes that Dr. Bernstein concluded from his January 25, 2018 examination, nearly two years after the February 26, 2016 accident, that she continued to suffer from causally related PTSD and that it had not yet resolved. He expressed the same conclusion upon his June 4, 2018 examination and opined that there was evidence that plaintiff may have some residual brain injury symptoms. Dr. Bernstein, upon his October 25, 2018 examination and mental status evaluation, likewise maintained his PTSD diagnosis, mentioned significant, unresolved symptoms of depression and anxiety and noted that plaintiff was being seen by Dr. Kahn for psychiatric treatment, once or twice a month. Follow-up bi-weekly visits with Dr. Kahn for the next four months, in Dr. Bernstein's opinion, were appropriate for plaintiff for both psychiatric care with management of her medication and psychotherapeutic services. In addition, Dr. Bernstein's reported that plaintiff might benefit from a mood-stabilizing medication to address her affective lability (i.e. rapid shifts in outward emotional expressions).

Dr. Bernstein again concluded at plaintiff's March 14, 2019 and September 5, 2019 examinations that she continued to suffer from PTSD and that she would benefit

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<sup>5</sup>See NYSCEF Doc Nos. 34-38, attached as exhibits F-J to plaintiff's opposition papers.

from continued supportive psychotherapy and medication management. He noted at her September 5, 2019 examination that plaintiff was receiving appropriate therapy with Dr. Kuhn on a monthly basis and recommended that she have follow-up monthly visits with him for the next four months to continue those benefits.

Dr. Kuhn's ensuing May 15, 2020 affirmed report<sup>6</sup> summarizes that plaintiff, since the February 26, 2016 accident, has developed severe anxiety, stress and depressive disorder, all connected to her trauma from that motor vehicle accident. He relates that plaintiff had insomnia, headaches, inattention and poor concentration associated with impulsivity and was prone to making repeated errors because of that accident. He concludes that plaintiff's depression and PTSD have a great impact on her professional work and her personal and social life. Dr. Kuhn opines that plaintiff has a moderate partial and permanent psychiatric disability caused by the injuries she suffered from the February 26, 2016 motor vehicle accident. Hence, plaintiff argues that she has met her burden and submitted admissible evidence that demonstrates triable factual issues exist as to whether her emotional or psychological injury constituted a serious injury within the meaning of Insurance Law § 5102 (d) which thus requires denying defendants' motion.

### *Defendants' Reply*

Defendants maintain in reply that they have met their burden regarding serious injury by submitting their experts' affirmations showing that plaintiff's psychiatric, neurological and orthopedic examinations were normal. They contend summary judgment for them is warranted because plaintiff does not dispute the affirmed reports of

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<sup>6</sup> See NYSCEF Doc No. 39, attached as exhibit K to plaintiff's opposition papers.

Drs. Cohn, Feuer and Passick as to her cervical and lumbar spine. More specifically, defendants assert that Dr. Cohn's review of plaintiff's MRI films and X rays establishes that plaintiff's alleged cervical and lumbar spine injuries are not causally related to the February 26, 2016 accident; that Dr. Passick's report establishes that those injuries were not caused by such accident and are instead preexisting and degenerative; that her cervical and lumbar strains were resolved; that her range of motion results were all normal; and that this collective information satisfied their initial burden. Defendants state that, since plaintiff failed to submit medical proof to refute the findings of Drs. Cohn, Feuer and Passick concerning alleged injuries to her cervical and lumbar spine, these claims should be dismissed.

Further, defendants note that plaintiff's opposition does not dispute that they met their initial burden as to plaintiff's 90/180-day claim with evidence that she returned to work a month after the February 26, 2016 accident and that her alleged cervical and lumbar spine injuries are not causally related to the accident because of degeneration. Additionally, defendants argue that plaintiff was not confined to home and not incapacitated from work for the requisite period further negating the 90/180-day claim.

Additionally, defendants both cite the finding in Dr. Feuer's report as to plaintiff's mental status i.e., "Gross memory, speech, and concentration were within normal limits," and note that Dr. Feuer's objective medical testing supports this finding. Therefore, defendants argue they have satisfied their initial burden of establishing that plaintiff's alleged psychological injuries do not satisfy any category of serious injury. Defendants recount that Dr. Feuer, a board-certified neurologist, found that plaintiff had a normal

neurological examination, does not suffer from an accident-related neurological disability or permanency, is neurologically stable, and that no objective clinical findings support plaintiff's subjective complaints. Defendants further argue that Dr. Feuer found no objective symptoms of PTSD or any other psychological illness and thus submit that the burden of proof shifted to plaintiff to demonstrate that she sustained serious psychological and emotion injury as a result of the February 26, 2016 accident.

However, defendants maintain that plaintiff presents insufficient proof to raise a factual issue as to whether she suffered a serious psychological or emotional injury from the accident. More specifically, they aver that plaintiff's evidence fails to show that these alleged injuries constituted a "permanent loss of use of a body organ, member, function or system," because there is no evidence that the loss of use is "total." Defendants note in this regard that Dr. Kuhn's report states that the degree of psychic disability is "partial" and that plaintiff's own proof demonstrates that the disability or injury was not total. Likewise, defendants argue that plaintiff's medical proof is insufficient under the "significant limitation" and "permanent consequential limitation" categories because Dr. Kuhn does not explain how plaintiff's alleged condition limited her professional, personal and social life, especially considering that plaintiff's own proof simply showed that she missed only about one month from work as a personal trainer and presently continues to work without limitation. Defendants thus assert that plaintiff's alleged psychological limitations are not "significant" or "consequential" within the meaning of Insurance Law § 5102 (d).

Lastly, defendants assert that plaintiff has also failed to raise a factual issue under the 90/180- day category because no competent medical evidence was provided to show that her alleged psychological and emotional injuries rendered her unable to perform substantially all of her usual and customary daily activities for not less than 90 of the first 180 days after the February 26, 2016 accident. Defendants reiterate that plaintiff's own proof that she missed only about a month from work because of the accident requires denying her 90/180-day claim.

### *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 [2d Dept 2018], quoting *Grossman v Wright*, 268 AD2d 79, 83 [2d Dept 2000]). Once a defendant has established this point, the burden shifts to plaintiff to offer objective evidence raising a triable factual issue as to the existence of a serious injury within Insurance Law § 5102 (d)'s meaning (*see Grossman*, 268 AD2d at 84). Where a serious psychological injury is claimed defendant must present evidence to establish that the injury does not meet the threshold (*see Haque v City of New York*, 97 AD3d 636, 636 (2d Dept 2012)).

A plaintiff seeking to recover under the "permanent loss of use" category, must show 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 complaints of pain with objective medical evidence demonstrating the extent or degree of the movement limitation caused by the injury and its duration (*see Schilling v Labrador*, 136 AD3d 884, 885 [2d Dept 2016]; *Rovelo v Volcy*, 83 AD3d 1034, 1035 [2d Dept 2011]; *McLoud v Reyes*, 82 AD3d 848, 849 [2d Dept 2011]). To prove the extent or degree of physical limitation regarding 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, 633 [2d Dept 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 plaintiff from performing his or 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 238-239 [1982]; *John v Linden*, 124 AD3d 598, 599 [2d Dept 2015]; *Strenk v Rodas*, 111 AD3d 920, 921 [2d Dept 2013]; *Gavin v Sati*, 29 AD3d 734, 735 [2d Dept 2006]).

Plaintiff's sole argument herein focuses on whether her alleged psychological injury constitutes a serious injury within the meaning of Insurance Law §5102 (d). Plaintiff argues that a causally related emotional injury, including PTSD, alone or in combination with a physical injury, can constitute a serious injury because it constitutes a permanent loss of use of a body function or system or a significant limitation of use. However, the evidence from defendants' expert, Dr. Feuer, a board-certified neurologist, shows that plaintiff's "Mental Status: Gross memory, speech, and concentration were within normal limits." Dr. Feuer found that plaintiff had a normal neurological examination, that she does not suffer from an accident-related neurological disability or permanency, that she is neurologically stable, and that there were no objective, clinical findings to support plaintiff's subjective complaints. Defendants argue that Dr. Feuer found no objective symptoms of PTSD or any other psychological illness, and they thus met their initial burden of establishing the absence of serious psychological injury.

Plaintiff, in response, must show that she sustained serious psychological and emotional injury as a result of the February 26, 2016 accident, and, under the "permanent loss of use" category, that the psychological and emotional injury resulted in a total loss of use. However, plaintiff's evidence negates total loss of use as her expert, Dr. Kuhn, asserts that the degree of psychic disability is "partial." In other words, plaintiff's own proof demonstrates that her disability or injury was not total. Consequently, that part of defendants' motion for dismissing plaintiff's total loss of use claim should be granted.

However, plaintiff has provided evidence to support a claim of "significant limitation" and "permanent consequential limitation" as her evidence reveals that she

required ongoing psychiatric counseling and medication as a result of the February 26, 2016 accident. More specifically, the diagnosis that plaintiff suffers from PTSD and other emotional conditions and her ongoing need for medical care serves as evidence of a “significant limitation” and “permanent consequential limitation.” Plaintiff’s expert, Dr. Kuhn, reports that plaintiff has a moderate, partial psychiatric disability that is permanent. His report also notes plaintiff’s insomnia, headaches, inattention and poor concentration associated with impulsivity and that she was prone to making repeated errors all attributable, i.e. causally related to the February 26, 2016 accident. Indeed, Dr. Kuhn states that “[t]here is no evidence that the prior accidents caused or contributed to her current psychiatric condition, and the patient was able to function normally prior to her injury in the MVA [motor vehicle accident on 2.26.2016” (NYSCEF Doc No. 39, Dr. Kuhn’s affirmed report at 7, third paragraph from bottom, annexed as exhibit K to plaintiff’s opposition). He most notably adds that “the lack of a prior contributory and relevant medical history, and based on the neuropsychiatric and medical symptoms that developed subsequent to the injury, it is determined with a high degree of medical certainty that the patient’s current disability was caused by the injuries she suffered on 2.26.2016” (*id.* at 7 penultimate paragraph). Dr. Kuhn concludes that plaintiff’s depression and PTSD have a great impact on her professional work and her personal and social life. The record also includes plaintiff’s testimony that she suffers from anxiety that affects her sleep and being around people and from depression, which collectively has interrupted her ability to work.

Defendants argue that Dr. Kuhn does not explain how plaintiff's alleged condition limited her professional, personal and social life, that she missed only about a month from work and that she continues to work as a personal trainer. However, there is competing evidence that plaintiff's alleged psychological and emotional injury is serious. The contradictory findings of defendants' and plaintiff's examining physicians present triable factual issues and therefore make summary judgment inappropriate regarding permanent consequential limitation of use of a body organ or member and significant limitation of a use of a body function or system (*see Chapman v Capoccia*, 283 AD2d 798, 799-801 [3d Dept 2001] [claimed PTSD and emotional injury, causally related to automobile accident, can constitute serious injury under same categories as herein and issues of credibility and weight of evidence for jury to resolve]). Consequently, that part of defendants' motion should be denied concerning plaintiff's claim of psychological and emotional injury.

Plaintiff testified regarding her claim of serious injury under the 90/180-day category that she returned to work as a professional track and field trainer a month after the accident, but, she did not testify that her treating physicians directed her not to return to work following the accident. The limited evidence fails to establish that plaintiff sustained a 90/180-day injury, as the statute requires showing that the injured person was prevented "from performing substantially all of the material acts which constitute such person's usual and customary daily activities" for not less than 90 of the 180 days after the injury (*see Knijnikov v Mushtaq*, 35 AD3d 545, 548 [2d Dept 2006]; *Felix v New York City Tr. Auth.*, 32 AD3d 527, 528 [2d Dept 2006]; *Thompson v Abbasi*, 15 AD3d 95,

100-101 [1st Dept 2005] [holding that “(w)hen construing the statutory definition of a 90/180 day claim, the words 'substantially all' should be construed to mean that the person has been prevented from performing his usual activities to a great extent, rather than some slight curtailment”). In opposition, plaintiff submits no evidence of a medically determined injury that prevented her from performing substantially all of her customary daily activities within the relevant period (*see Toussaint v Zomah*, 183 AD3d 657, 658 [2d Dept 2020]; *Marin v Ieni*, 108 AD3d 656, 657 [2d Dept 2013]; *Amato v Fast Repair Inc.*, 42 AD3d 477, 478 [2d Dept 2007]). Accordingly, that branch of defendants’ summary judgment motion to dismiss plaintiff’s complaint relating to an alleged serious injury under the 90/180 category is granted.

The court has considered the parties’ remaining contentions and finds them unavailing. All relief not expressly granted herein is denied. Accordingly, it is

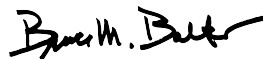
**ORDERED** that the branch of defendant’s summary judgment motion, mot. seq. two, to dismiss plaintiff’s serious injury claims concerning physical injury to her cervical spine and lumbar spine is granted; and it is further

**ORDERED** that the branch of defendant’s summary judgment motion, mot. seq. two, to dismiss plaintiff’s serious injury claims concerning psychological and emotional injury based upon permanent consequential limitation of use of a body organ or member and significant limitation of a use of a body function or system is denied; and it is further

**ORDERED** that the branch of defendant's summary judgment motion, mot. seq. two, to dismiss plaintiff's complaint relating to an alleged serious injury under the 90/180 category is granted.

This constitutes the decision and order of the court.

E N T E R,



J. S. C.