To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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TATIANA PANICH and OLEG PANICH,

Plaintiffs,

-against-

ANGELO MATERIA,

Defendant.

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DECISION and ORDER

Motion Sequence No. 1
Index No. 51673/2019

RUDERMAN, J.

The following papers were considered in connection with the motion by defendant Angelo Materia for an order pursuant to CPLR 3212, granting him summary judgment on the issue of damages, dismissing the complaint on the grounds that as a matter of law plaintiff Tatiana Panich's injuries do not meet the serious injury threshold of Insurance Law § 5102, and that plaintiff Oleg Panich has failed to show that he incurred property damage to his motor vehicle as a result of the subject accident:

Papers	Numbered
Notice of Motion, Affirmation, Exhibits A - G	1
Affirmation in Opposition, Affidavit, Exhibit A, and Memorandum of Law	2
Reply Affirmation, Exhibit A	3

This is an action for personal injuries allegedly sustained by plaintiff Tatiana Panich, as well as property damage allegedly sustained by plaintiff Oleg Panich,[1] as a result of a collision that occurred on September 21, 2015 at approximately 9:00 a.m., on Main Street at its

[1] Reference hereinafter to "plaintiff" in the singular will refer to Tatiana Panich.

intersection with Bank Street in White Plains, New York, when defendant's vehicle struck plaintiffs' vehicle in the rear as it waited at a traffic light. Plaintiff claims that the accident resulted in injury to her neck and back, and that the injuries she sustained qualify as serious injury under both the significant limitation and 90/180 categories.

In moving for summary judgment, defendant contends that plaintiff's injuries do not satisfy the serious injury threshold defined by Insurance Law § 5102 (d). Defendant quotes from plaintiff's deposition testimony in an effort to establish that her claimed pain and discomfort are merely subjective, and to establish that after the accident she went for chiropractic treatment twice a week for only two or three months, and to physical therapy for only three months. Defendant also relies on the report of his expert, Dr. John R. Denton, a board certified orthopedic surgeon who performed an examination of plaintiff on October 21, 2019. Dr. Denton acknowledged that an MRI report from April 6, 2017 reported central disc herniation at L3-4 impinging upon the thecal sac, central/left paracentral disc herniation at L4-5 with extrusion into the left lateral recess and compression/posterior displacement of the left L5 nerve root; and L5-S1 shallow left paracentral disc herniation superimposed on annular disc bulge that contacts the left S1 nerve root. However, he asserted that his examination of plaintiff revealed a full range of motion except for a slightly limited range of motion in her cervical spine, with right and left rotation at 70 degrees (normal: 80 degrees), and right and left lateral bending at 40 degrees (normal: 45 degrees). Dr. Denton concluded that the accident had caused cervical and lumbar spine sprains, which have resolved, that plaintiff's subjective complaints of pain are not supported by positive, objective, correlative findings, and that there is no permanency of plaintiff's diagnosed injuries, or any medical necessity for further orthopedic treatment.

Defendant also challenges plaintiff's claim under the 90/180 category, in reliance on

plaintiff's deposition testimony in which she stated that she returned to work after the accident.

In opposition, plaintiff submits her own affidavit stating that although she missed only a limited time from work during the six months following the accident and thereafter, she returned to her job in the accounts payable department at a law firm because she could not survive on no-fault benefits, although she was only able to work at 30-40% efficiency. She also asserts that she experiences great difficulty performing her daily activities, being unable to run or walk fast, having trouble climbing stairs, having difficulty with personal hygiene, and being unable to do cooking, laundry or household chores; she adds that it is extremely difficult for her to lift or carry objects, including relatives' children. Further, plaintiff explains that after the accident she was treated by a chiropractor for three months, until her no-fault benefits ended, after which she saw a different chiropractor for the next three months, and also went to a third chiropractor for two visits. She thereafter attended to yoga therapy, and then saw a physical therapist.

Plaintiff also submits an affirmed report of a physician, Yanina Kotlyar, M.D., who reviewed plaintiff's treatment history since the accident, performed a physical examination of her on July 29, 2020, and referred plaintiff for an MRI of the lumbar spine and an Electromyography and Nerve Conduction Studies, which were conducted on August 5, 2020 and August 25, 2020, respectively. Dr. Kotlyar noted that plaintiff's range of motion was limited with respect to lumbar spine flexion at 45 degrees (normal: 60 degrees), extension at 20 degrees (normal: 25 degrees), and left and right lateral flexion at 20 degrees (normal: 25 degrees). The MRI revealed lumbar disc bulging and protrusion impinging on the thecal sac, as well as left side disc herniation. The report of the electronic study indicated that the results were "consistent with chronic lumbosacral radiculopathy limited to the left paraspinals muscles only," and "with sensorimotor peripheral neuropathy affecting bilateral lower extremities involving the peroneal

and superficial peroneal nerves." Dr. Kotlyar's affirmed report dated September 9, 2020 concludes, based on a reasonable degree of medical certainty, that as a result of the accident at issue, plaintiff sustained lumbosacral myofasciitis and radiculopathy which are permanent in nature.

In reply, defendant notes that Dr. Kotylar, in reporting plaintiff's observed range of motion limitations, does not indicate any objective measurement used to obtain those values. Defendant challenges as self-serving and subjective plaintiff's affidavit complaining of pain and restrictions, observing that plaintiff did not mention during her deposition the limitations she claims in her affidavit. Defendant argues that plaintiff's claimed limitations in her activities establish, at best, a light curtailment which is insufficient to raise a genuine issue regarding whether she was prevented from performing substantially all of the material acts which constituted her usual and customary daily activities.

Defendant adds that Dr. Kotylar failed to exclude plaintiff's subsequent accident, which occurred on October 8, 2015 – less than three weeks following the subject accident – as the cause of plaintiff's injuries. Finally, defendant highlights plaintiffs' failure to provide any evidentiary materials in support of Oleg Panich's property damage claim.

Analysis

To satisfy the statutory serious injury threshold based on the significant limitation and permanent consequential limitation categories, "there must be some objective proof of a plaintiff's injury" (*see McEachin v City of New York*, 137 AD3d 753, 756 [2d Dept 2016], citing *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 352 [2002] and *Perl v Meher*, 18 NY3d 208, 216 [2011]). In addition, the mere fact that an MRI reveals the presence of soft tissue injury such as bulging or herniated discs is insufficient in itself to establish these categories of serious injury

(*see Kearse v New York City Tr. Auth.*, 16 AD3d 45, 46 [2d Dept 2005]). Where a claim of significant limitation or permanent consequential limitation is based on such a soft tissue injury, the plaintiff must also submit objective evidence of the extent and duration of physical limitations resulting from the claimed injury (*see Clervoix v Edwards*, 10 AD3d 626, 627 [2d Dept 2004]). Even if the plaintiff's claim is based on the "significant limitation of use" category of serious injury, which does not require permanence (*see Miller v Miller*, 100 AD2d 577, 578 [2d Dept 1984]), objective evidence of physical limitations resulting from the disc injury must also establish its duration in order to demonstrate the significance of the claimed limitation (*see Monette v Keller*, 281 AD2d 523 [2d Dept 1984]).

The moving defendant bears the initial burden of establishing, prima facie, that the plaintiff did not sustain a serious injury caused by the accident (*Smith v Matinale*, 58 AD3d 829 [2d Dept 2009]). A defendant may satisfy that initial burden by a physician's finding that the plaintiff has a full range of motion and lacks disabilities causally related to the motor vehicle accident (*see Kearse v New York City Tr. Auth.*, 16 AD3d at 51). Here, the report of defendant's expert, Dr. Denton, concluding that Tatiana Panich's injuries consisted solely of resolved sprains, is sufficient to make a prima facie showing that plaintiff did not sustain a serious injury caused by the accident. Although Dr. Denton acknowledged that he found a 10-degree limitation in the left and right rotation of plaintiff's cervical spine, and a 5-degree limitation in the right and left lateral bending of her cervical spine, he added that these restrictions were not supported by any positive, objective, correlative findings. Moreover, the slight range of motion deficit Dr. Denton found in plaintiff's neck cannot serve as objective evidence of physical limitations resulting from her disc injuries, because plaintiff's established disc injuries as reflected in the MRIs are all in her lumbar spine, whereas her noted range of motion problem is in her cervical

spine, where no injuries have been objectively demonstrated.

Plaintiff's submissions in opposition fail to establish the existence of questions of fact on the issue of serious injury based on significant limitation. Plaintiff's subjective experience of pain in her neck and back after the accident does not suffice to establish that she sustained serious injury; nor is the threshold satisfied by MRI results reflecting the presence of bulging, protruding, or herniated discs, without more (*see Kearse v New York City Tr. Auth.*, 16 AD3d at 46). While the lumbar spine injuries reflected in the April 6, 2017 MRI report could be sufficient *if* plaintiff provided objective evidence of physical limitations resulting from those injuries, a physician asserting a range of motion limitation must identify the objective tests utilized to measure the plaintiff's range of motion (*see Nicholson v Kwarteng*, 180 AD3d 695, 696 [2d Dept 2020]; *Gersbeck v Cheema*, 176 AD3d 684, 686 [2d Dept 2019] ["plaintiff's chiropractor failed to identify the objective tests that were utilized to measure range of motion and, thus, did not support the conclusion that the plaintiff sustained a range-of-motion limitation as a result of the accident"]). Dr. Kotlyar's report of range of motion limitations in plaintiff's lumbar spine fails to indicate what objective tests were utilized to arrive at those measurements. Nor does Dr. Kotlyar's report discuss any other positive objective test results attributable to the injuries caused by the accident.

Therefore, Dr. Kotlyar's conclusion that plaintiff sustained lumbosacral myofasciitis and radiculopathy of a permanent nature as a result of the accident fails to satisfy the showing necessary to establish that plaintiff sustained a serious injury as that term is defined in Insurance Law § 5102 (d).

Defendant also made a prima facie showing that plaintiff's serious injury claim pursuant to the 90/180 category should be dismissed, based on plaintiff's acknowledgment at her

deposition that she returned to work after the accident, and the burden therefore shifted to plaintiff to submit evidentiary materials sufficient to establish the existence of a question of fact. To satisfy that burden, plaintiff must proffer competent objective evidence that she sustained a medically-determined injury which prevented her from performing her usual and customary activities for 90 of the 180 days following the subject accident (*see Larkin v Goldstar Limo Corp.*, 46 AD3d 631, 632 [2d Dept 2007], citing *Sainte-Aime v Ho*, 274 AD2d 569 [2d Dept 2000]; *Nunez v Motor Veh. Acc. Indem. Corp.*, 96 AD3d 917, 919 [2d Dept 2012]). Plaintiff has not submitted objective evidence that the medically-determined injury she sustained prevented her from performing her usual and customary activities for 90 of the 180 days following the subject accident. A plaintiff's mere assertion that he or she returned to work on "limited light duty" (*see Thomas v City of New York*, 99 AD3d 580 [1st Dept 2012]) or on a "reduced work schedule" (*Perez v Corr*, 84 AD3d 646 [1st Dept 2011]), has been held insufficient to raise a triable issue of fact (*see also DeFilippo v White*, 101 AD2d 801 [2d Dept 1984]). Plaintiff's recitation of activities that now she finds more difficult is not enough: "Even assuming that plaintiff's self-serving testimony and affidavit sufficiently allege that she was unable to perform substantially all of her regular activities for the required period of time, such conclusion is not supported by [her submitted medical] records" (*Larrabee v Bradshaw*, 96 AD3d 1257, 1261 [3d Dept 2012]).

Since plaintiffs have not offered the necessary evidence creating an issue of fact as to either the 90/180 category or the significant limitation category, defendant's motion seeking summary judgment dismissing the personal injury cause of action for failure to satisfy the serious injury threshold is granted.

As to the property damage cause of action, defendant submits photographs which

plaintiff Tatiana Panich testified portray plaintiffs' vehicle after the accident, which photographs appear to show, at worst, minor scratches and the rear bumper slightly detached from the body of the vehicle. Defendant asserts that Oleg Panich has made no attempts to prosecute his property damage claim, failing to provide any itemization of his alleged damages, or to testify as to his damages claim. Plaintiff has submitted nothing in opposition to defendant's motion with regard to this cause of action, and consequently, no question of fact has been shown to exist. This branch of defendant's motion must therefore be granted as well.

Based upon the foregoing, it is hereby,

ORDERED that defendant's motion for summary judgment is granted, and the complaint is dismissed.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York
November 5, 2020

HON. TERRY JANE RUDERMAN, J.S.C.