SHORT FORM ORDER

INDEX No. 17-621312
CAL. No. 19-00055MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - SUFFOLK COUNTY

***PRESENT:***

Hon. MARTHA L. LUFT
Acting Justice of the Supreme Court

MOTION DATE 5-21-19
ADJ. DATE 5-21-19
Mot. Seq. # 002 - MG; CASEDISP

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ALEXA NICIFORO,

Plaintiff,

- against -

VANESSA M. ORELLANA and MABEL ORELLANA,

Defendants.

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Upon the following papers read on this motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers by defendants, dated April 30, 2019 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers by plaintiff, dated June 3, 2019 ; Replying Affidavits and supporting papers ___; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

***ORDERED*** that the motion by defendants Vanessa Orellana and Mabel Orellana seeking summary judgment dismissing the complaint is granted.

Plaintiff Alexa Niciforo commenced this action to recover damages for injuries she allegedly sustained as a result of a motor vehicle accident that occurred on the Southern State Parkway, near the Sagtikos State Parkway exit, in the Town of Islip on December 7, 2016. It is alleged that the vehicle operated by plaintiff was struck in the rear by the vehicle owned by defendant Mabel Orellana and operated by defendant Vanessa Orellana while it was slowing down due to traffic conditions in the right lane of eastbound Southern State Parkway. By her bill of particulars, plaintiff alleges that she sustained various personal injuries as a result of the subject accident, including disc bulges at levels C4 through C6 and levels L5-S1.

Defendants now move for summary judgment on the basis that the injuries plaintiff alleges to have sustained as a result of the subject accident do not come within the meaning of the serious injury

threshold requirement of Insurance Law § 5102 (d). In support of the motion, defendants submit copies of the pleadings, plaintiff's deposition transcript, a certified copy of the police accident report, uncertified copies of plaintiff's medical records regarding the injuries at issue, and the sworn medical reports of Dr. Kenneth Kamler and Dr. Jessica Berkowitz. At defendants' request, Dr. Kamler conducted an independent orthopedic examination of plaintiff on September 22, 2018. Also at defendants' request, Dr. Berkowitz performed an independent radiological review of the X-Ray films of plaintiff's cervical, thoracic, and lumbar spines, left shoulder, and pelvis and hips taken on January 11, 2017. Plaintiff opposes the motion on the grounds that defendants have failed to meet their prima facie burden, and that the evidence submitted in opposition demonstrates that she sustained injuries within the "limitations of use" and the "90/180" categories of the Insurance Law as a result of the subject accident. In opposition, plaintiff submits uncertified copies of her medical record regarding the injuries at issue, and the affidavit of Dr. Ronald Mazza.

The purpose of New York State's No-Fault Insurance Law is to "assure prompt and full compensation for economic loss by curtailing costly and time-consuming court trial[s]" (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]), and requiring every case, even those with minor injuries, to be decided by a jury would defeat the statute's effectiveness (*see* ***Licari v Elliott***, *supra)*. Therefore, the No-Fault Insurance law precludes the right of recovery for any "non-economic loss, except in the case of serious injury, or for basic economic loss" (*see* Insurance Law § 5104 [a]; ***Martin v Schwartz***, 308 AD2d 318, 766 NYS2d 13 [1st Dept 2003]). Any injury not falling within the definition of "serious injury" is classified as an insignificant injury, and a trial is not allowed under the No-Fault statute (*see* ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Martin v Schwartz***, *supra*).

Insurance Law § 5102 (d) defines a "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."

A defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred under the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a "serious injury" (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant's own witnesses, "those findings must be in admissible form, [such as], affidavits and affirmations, and not unsworn reports" to demonstrate entitlement to judgment as a matter of law (***Pagano v Kingsbury***, 182 AD2d 268, 270, 587 NYS2d 692 [2d Dept 1992]). A defendant may also establish entitlement to summary judgment, using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (*see* ***Fragale v Geiger***, 288 AD2d 431, 733 NYS2d 901 [2d Dept 2001]; ***Grossman v Wright***, 268 AD2d 79, 707 NYS2d 233 [2d Dept 2000]; ***Vignola v Varrichio***, 243 AD2d 464, 662 NYS2d 831 [2d Dept 1997];

***Torres v Micheletti***, 208 AD2d 519, 616 NYS2d 1006 [2d Dept 1994]). Once a defendant has met this burden, the plaintiff must then submit objective and admissible proof of the nature and degree of the alleged injury in order to meet the threshold of the statutory standard for "serious injury" under New York's No-Fault Insurance Law (*see* ***Dufel v Green***, 84 NY2d 795, 622 NYS2d 900 [1995]; ***Tornabene v Pawlewski***, 305 AD2d 1025, 758 NYS2d 593 [2d Dept 2003]; ***Pagano v Kingsbury***, 182 AD2d 268, 270, 587 NYS2d 692 [2d Dept 1992]). However, if a defendant does not establish a prima facie case that the plaintiff's injuries do not meet the serious injury threshold, the court need not consider the sufficiency of the plaintiff's opposition papers (*see* ***Burns v Stranger***, 31 AD3d 360, 819 NYS2d 60 [2d Dept 2006]; ***Rich-Wing v Baboolal***, 18 AD3d 726, 795 NYS2d 706 [2d Dept 2005]; *see generally* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

Here, defendants have established, prima facie, their entitlement to judgment as a matter of law that plaintiff did not sustain a serious injury within the meaning of the Insurance Law as a result of the subject collision (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, *supra*; ***Oginsky v Rasporskaya***, 85 AD3d 990, 928 NYS2d 638 [2d Dept 2011]; ***Al-Khilewi v Turman***, 82 AD3d 1021, 919 NYS2d 361 [2d Dept 2011]). Defendants' orthopedist, Dr. Kamler, states in his report that an examination of plaintiff reveals she has full range of motion in her spine and left shoulder, that upon palpation of the paraspinal muscles there was no tenderness or muscle spasm, and that there was no localized swelling, tenderness, defects, masses, crepitus, or atrophy of the left shoulder. Dr. Kamler states that the straight leg raising test is negative, that plaintiff walks with a normal gait, and that she is able to heel-toe walk. Dr. Kamler opines that the strains plaintiff sustained to her spine and left shoulder as a result of the accident have resolved, that she does not have any objective evidence of an orthopedic disability and does not require any further orthopedic treatment, and that she may continue to perform her normal activities of daily living and work without restriction.

Additionally, Dr. Berkowitz, defendants' radiologist, states in her report that a review of the radiological films and examinations of plaintiff's spinal region, left shoulder, and pelvis and hip, demonstrate that there is no evidence that plaintiff sustained any acute traumatic injury to either her spine, left shoulder or hip and pelvic area, and that there is no causal relationship between the findings on the radiographic studies and the subject accident. Dr. Berkowitz further states that the finding of straightening with slight reversal of the normal cervical lordosis on plaintiff's cervical spine is a nonspecific finding.

Furthermore, reference to plaintiff's own deposition testimony sufficiently refutes the allegations that she sustained injuries within the limitations of use categories (*see* ***Colon v Tavares***, 60 AD3d 419, 873 NYS2d 637 [1st Dept 2009]; ***Sanchez v Williamsburg Volunteer of Hatzolah, Inc.***, 48 AD3d 664, 852 NYS2d 287 [2d Dept 2008]), and the 90/180 category under Insurance Law § 5102(d) (*see* ***Bleszcz v Hiscock***, 69 AD3d 639, 894 NYS2d 481 [2d Dept 2010]; ***Jack v Acapulco Car Serv., Inc.***, 63 AD3d 1526, 897 NYS2d 648 [4th Dept 2010]; ***Nguyen v Abdel-Hamed***, 61 AD3d 429, 877 NYS2d 26 [1st Dept 2009]; ***Kuchero v Tabachnikov***, 54 AD3d 729, 864 NYS2d 459 [2d Dept 2008]). At an examination before trial plaintiff testified that she was enrolled in nursing school as well as employed part-time as receptionist at The Estee Lauder Companies and as a waitress at Verace: True Italian Restaurant at the time of the accident, that the only time she missed from work was the day of the accident, and that she did not miss any time from school as a result of any of the injuries she sustained in

the accident. Plaintiff further testified she stopped receiving chiropractic care once her no-fault benefits were discontinued, but that she continues to receive physical and massage therapy.

Thus, defendants have shifted the burden to plaintiff to come forward with evidence in admissible form to raise a material triable issue of fact as to whether she sustained an injury within the meaning of the Insurance Law (*see* ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]; *see generally* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). A plaintiff claiming a significant limitation of use of a body function or system must substantiate his or her complaints with objective medical evidence showing the extent or degree of the limitation caused by the injury and its duration (*see* ***Ferraro v Ridge Car Serv.***, 49 AD3d 498, 854 NYS2d 408 [2d Dept 2008]; ***Mejia v DeRose***, 35 AD3d 407, 825 NYS2d 772 [2d Dept 2006]; ***Laruffa v Yui Ming Lau***, 32 AD3d 996, 821 NYS2d 642 [2d Dept 2006]; ***Kearse v New York City Tr. Auth.***, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]). "Whether a limitation of use or function is 'significant' or 'consequential' (i.e. important . . .), relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part" (***Dufel v Green***, *supra* at 798). To prove the extent or degree of physical limitation with respect to the "limitations of use" categories, either objective evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration based on a recent examination of the plaintiff must be provided 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, 936 NYS2d 655 [2011]; ***Toure v Avis Rent A Car Systems, Inc.***, *supra* at 350; *see also* ***Valera v Singh***, 89 AD3d 929, 923 NYS2d 530 [2d Dept 2011]; ***Rovelo v Volcy***, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*see* ***Licari v Elliott***, *supra*). However, evidence of contemporaneous range of motion limitations is not a prerequisite to recovery (*see* ***Perl v Meher***, *supra*; ***Paulino v Rodriguez***, 91 AD3d 559, 937 NYS2d 198 [1st Dept 2012]).

In opposition, plaintiff has failed to raise a triable issue of fact (*see* ***Sylvain v Maurer***, 165 AD3d 1203, 85 NYS3d 203 [2d Dept 2018]; ***Romero v Braithwaite***, 154 AD3d 894, 62 NYS3d 170 [2d Dept 2017]; ***Small v City of New York***, 148 AD3d 959, 49 NYS3D 176 [2d Dept 2017]; ***Washington v Pichardo***, 140 AD3d 950, 32 NYS3d 508 [2d Dept 2016]). A plaintiff is required to present nonconclusory expert evidence sufficient to support a finding not only that the alleged injury is within the serious injury threshold of Insurance Law § 5102 (d), but also that the injury was causally related to the subject accident in order to recover for noneconomic loss related to personal injury sustained in a motor vehicle accident (*see* ***Valentin v Pomilla***, 59 AD3d 184, 873 NYS2d 537 [1st Dept 2009]). Although plaintiff has submitted the affidavit of her treating chiropractor, Dr. Mazza, wherein he states that plaintiff sustained a permanent partial disability to her spine and left shoulder, which will continue to worsen without continued treatment, and that her condition is chronic, she failed to submit any objective admissible medical proof demonstrating the existence of such limitations based upon a contemporaneous examination (*see* ***Capriglione v Rivera***, *supra*; ***Srebnick v Quinn***, 75 AD3d 637, 904 NYS2d 675 [2d Dept 2010]; ***Bleszcz v Hiscock***, 69 AD3d 890, 894 NYS2d 481 [2d Dept 2010]). In fact, Dr. Mazza fails to state when plaintiff began treating with him. The earliest treatment date that Dr. Mazza refers to in his affidavit in regards to plaintiff's treatment is March 15, 2017, which is approximately three months after the subject accident's occurrence. Moreover, throughout Dr. Mazza's

report there are only approximately three dates, March 15, 2017, November 11, 2018, and May 6, 2019, listed as treatment dates for plaintiff. Thus, absent findings from a contemporaneous examination, Dr. Mazza cannot substantiate the extent or degree of the limitations in plaintiff's spine or left shoulder caused by the alleged injury and its duration (*see* ***Wong v Cruz***, 140 AD3d 860, 32 NYS3d 641 [2d Dept 2016]; ***Schilling v Labrador***, 136 AD3d 884, 25 NYS3d 331 [2d Dept 2016]; ***Bacon v Bostany***, 104 AD3d 625, 960 NYS2D 190 [2d Dept]).

Furthermore, although a plaintiff may rely upon his or her examining physicians' unsworn medical reports once the defendant has proffered such evidence to establish his or her prima facie case (*see* ***Dietrich v Puff Cab Corp.***, 63 AD3d 778, 881 NYS2d 463 [2d Dept 2009]; ***Kearse v New York City Tr. Auth.***, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]; ***Pagano v Kingsbury***, 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]), in this instance, defendants did not submit any of the uncertified medical reports that plaintiff relied upon to attempt to raise a triable issue of fact as to whether she sustained an injury within the serious injury threshold requirement of Section 5102 (d) of the Insurance Law (*see* ***Khan v Finchler***, 33 AD3d 966, 824 NYS2d 340 [2d Dept 2006]). As a result, the numerous unsworn medical reports submitted by plaintiff in opposition are not sufficient to defeat defendants' motion for summary judgment (*see* ***Shamsoodeen v Kibong***, 41 AD3d 577, 839 NYS2d 765 [2d Dept 2007]; ***Luckey v Bauch***, 17 AD3d 411, 792 NYS2d 624 [2d Dept 2005]; ***Elfiky v Harris***, 301 AD2d 624, 754 NYS2d 59 [2d Dept 2003]).

Finally, plaintiff failed to produce any objective medical evidence to substantiate the existence of an injury which limited her usual and customary daily activities for at least 90 of the first 180 days immediately following the subject accident (*see* ***Catalano v Kopmann***, 73 AD3d 963, 900 NYS2d 759 [2d Dept 2010]; ***Haber v Ullah***, 69 AD3d 796, 892 NYS2d 531 [2d Dept 2010]). The subjective complaints of pain and impaired joint function expressed by plaintiff during her deposition are insufficient to raise a triable issue of fact (*see* ***Sheer v Koubek***, 70 NY2d 678, 518 NYS2d 788 [1987]; ***Rovelo v Volcy***, 83 AD3d 1034, 1035, 921 NYS2d 322 [2d Dept 2011]; ***Young v Russell***, 19 AD3d 688, 689, 798 NYS2d 101 [2d Dept 2005]; ***Sham v B&P Chimney Cleaning & Repair, Co., Inc.***, 71 AD3d 979, 979, 900 NYS2d 72 [2d Dept 2010]). Accordingly, defendants' motion for summary judgment dismissing the complaint is granted.

Dated: 1/3/20

Martha L. Luft
A.J.S.C.
HON. MARTHA L. LUFT

**__X__ FINAL DISPOSITION _____ NON-FINAL DISPOSITION**