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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YIKARAH ZENNIA,

Plaintiff,

- against -

CURTIS RAMSEY and "JOHN DOE", name being fictitious, true name unknown, person intended being the operator of the vehicle involved in the occurrence alleged in the complaint,

Defendant(s).

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INDEX NO. 66400/2018

DECISION/ORDER

Mot. Seq. 3
Return Date: 9/02/2020

ECKER, J.

In accordance with CPLR 2219 (a), the decision herein is made upon considering all papers filed in NYSCEF as submitted regarding the motion of defendant CURTIS RAMSEY (Mot. Seq. 3), made pursuant to CPLR 3212 (b), for an order granting summary judgment dismissing the complaint of plaintiff YIKARAH ZENNIA on the ground that plaintiff did not sustain a "serious injury" under Insurance Law § 5102 (d).

This is an action seeking damages for personal injuries which plaintiff alleges she sustained as a result of having been involved in a motor vehicle accident with defendant's automobile. The accident occurred on September 23, 2017, at or about 5:00 p.m., near the intersection of South 1st Avenue and West 1st Street in the City of Mount Vernon. Defendant is the owner of the vehicle operated by an unidentified driver, the unnamed "John Doe" named herein, who drove off immediately after the collision.

Plaintiff commenced this negligence action in November 2018. Following discovery, defendant now moves for summary judgment dismissing the complaint against him, claiming that plaintiff failed to demonstrate that she sustained a serious injury as is defined in Insurance Law § 5102 (d) — which plaintiff contests. In support of his motion, defendant submitted, inter alia, the pleadings, the bill of particulars, the transcript of plaintiff's deposition testimony, and the affirmed medical report of his expert, Ronald I. Jacobson, M.D., a doctor licensed to practice in this State, that is dated August 28, 2019. Jacobson's report is based upon his independent physical examination of plaintiff in August 2019.

Plaintiff opposes the motion, arguing that Jacobson's report is based on conclusions that contradict plaintiff's medical records in connection with this accident, are unsupported by medical reasoning, and that his report does not refute that she has a significant limitation as is defined in Insurance Law § 5102 (d). In opposition to defendant' motion, plaintiff submitted her attorney's affirmation, together with certified medical records of: Lower Hudson Medical Associates (Chris Lee, M.D.) from November 4, 2019 to December 14, 2017; Symmetry Physical Therapy from November 17, 2017 through December 28, 2017; and Westmed Physical Therapy (Michael Cushner, M.D.), dated November 17, 2017. In addition, plaintiff produced the magnetic resonance imaging (MRI) reports of her cervical spine from White Plains Hospital that were ordered by Dr. Christopher Lee; and of her lumbar spine and her left shoulder, which were both ordered by Dr. Elia.

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it should be granted only where the moving party "has tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). To grant summary judgment, it must clearly appear that no material or triable issue of fact exists. Issue finding, rather than issue determination, is the key to such procedure (*see Matter of Suffolk County Dept. of Social Servs. v James M.*, 83 NY2d 178, 182 [1994]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]; *Vumbico v Estate of Wiltse*, 156 AD3d 939 [2d Dept 2017]). In making this determination, the court must view the evidence in the light most favorable to the non-moving party, and must give that party the benefit of every favorable inference which can be drawn from the evidence (*see Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]; *Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]; *Gelstein v City of New York*, 153 AD3d 604 [2d Dept 2017]; *see also De Lourdes Torres v Jones*, 26 NY3d 742, 763 [2016]; *Medina-Ortiz v Seda*, 157 AD3d 499 [1st Dept 2018]).

Here, the record reveals that plaintiff was operating her vehicle on the day in question with a passenger sitting in her vehicle. She alleges that while her vehicle was at a full stop at an intersection controlled by a signal light with the stead red facing her direction, her vehicle was suddenly hit in the rear by the vehicle owned by defendant. Plaintiff testified at her deposition that the impact of the collision thrusted her vehicle forward, that her chest hit the steering wheel, that the seat belt snatched her back into the seat, that her head struck the headrest, and that the airbags did not deploy. Plaintiff avers that as she was taking pictures of the aftermath of the collision using her cell phone, the other driver returned to defendant's vehicle and drove away. According to plaintiff, she immediately felt pain in her neck, back, and chest and that she relayed these complaints to the medical staff when she was at the hospital later that night. X rays were taken of plaintiff's back and shoulder, she was provided a sling, and administered painkillers. Plaintiff did not stay overnight at the hospital.

Plaintiff testified that she thereafter sought medical assistance from others, namely Dr. Elia, an orthopedist[1] and Dr. Lee, also an orthopedist. MRI studies were conducted of plaintiff's left shoulder, lower back, and neck. Dr. Lee advised plaintiff that she had a herniated disc in her neck and two herniated discs in her back. Notably, plaintiff had been previously involved in a motor vehicle

[1] Dr. Elia performed arthroscopic surgery on plaintiff's right knee, when she was in high school. Plaintiff's date of birth is April 29, 1995.

accident when an MRI was done of her neck. As to the underlying accident, plaintiff presented to Symmetry in Pelham for physical therapy where she was treated previously for a knee condition. When she testified at her examination before trial on June 20, 2019, plaintiff stated that she was no longer taking physical therapy, that she saw Dr. Lee about 5 times who conducted a nerve test on one occasion, that she was administered one epidural injection, and was told she would need two more injections which she did not get, and that if the injections did not alleviate her pain, she would require surgery. Plaintiff testified that she would opt to get the additional injections; that she has not consulted with anyone as to possible surgery; that Dr. Lee prescribed naproxen, lidocaine patches, and a muscle relaxer pill; that she has not treated her left shoulder and applied hot and cold packs and received massages for her neck; she received no treatment for her chest; she last treated with a physician in winter 2018; she missed one month from work over the span of "a little over two months" or three months non-consecutive; and that she did not leave her home for the first three days following the accident. Plaintiff added that she has difficulties in many of her daily activities, including as an assistant basketball coach which she continues to do, exercising at the gym, playing basketball, drumming, and sleeping at night due to neck pain. Plaintiff stated that she has trouble getting out of bed; bending and lifting due to back pain; and difficulty performing household cleaning tasks. She testified that she sustained no injuries or sued as a result of her prior accident in 2015. Plaintiff asserted she was advised that she had nerve damage with numbness in her legs, that she experiences numbness in her left shoulder and left arm; and she saw Dr. Kushner at the hospital on the night of the accident.

In his affirmation, Jacobson states that "MRI findings represent degenerative changes and cannot be ascribed necessarily to the accident" and that plaintiff "continues her subjective complaints of pain," but "[t]his also cannot be validated on an objective exam today." Jacobson's report is not on a professional letterhead and there is no indication as to whether he is board certified in a specialty. He states that he reviewed the accident photos, bill of particulars, physicians' examinations, the hospital and physical therapy records, the MRI studies from October 2017 and January 1, 2018; the GEICO no-fault file and associated notes from May 2019, and miscellaneous notes and prescriptions. Ultimately, Jacobson bases his opinion to a reasonable degree of medical certainty, but states he is "not offering an orthopedic opinion regarding joint motion or shoulder injuries."

On examining plaintiff in August 2019, who was 24 years old at the time and weighing 233 pounds, Jacobson notes that plaintiff has a normal tone, strength and deep tendon reflexes; 2+ flexing capability; briefly had "give-way weakness of her quadriceps but 5/5 strength in all muscle groups"; and no atrophy of her distal extremities. Jacobson's report reflects that the sensory exam revealed normal modalities of the sensory organs, normal coordination to touch and gait, and no tenderness over plaintiff's scalp, neck, or muscle spasm. Jacobson notes that plaintiff complained of "pain with motion with lateral back flexion, extension and flexion of her body," but that range of motion was not specifically measured for the neurological examination. Jacobson opines that there are no findings which are a direct result of the automobile accident, despite plaintiff's complaints of mild subjective discomfort with movement of the lower back laterally or with neck flexion or extension. Jacobson notes that plaintiff continues to receive medication and treatment for her chronic pain, that

she has resumed most of her activities at work, continues to enjoy a career as a singer, and is attending school part-time.

Jacobson's affirmation states that he is "a doctor duly licensed to practice medicine in the State of New York and "based his opinion to reasonable degree of medical certainty." He specifies that he is not offering a medical opinion regarding joint motion or shoulder injury as he is not an orthopedic surgeon. His affirmation does not include what is typically found in an expert's opinion, namely his training and specialty and whether he is board certified.[2] A physician need not be a specialist in a particular field in order to qualify as a medical expert; rather such is to be weighed by the trier of fact and goes to the weight of the testimony, but not its admissibility (*see Bodensiek v Schwartz*, 292 AD2d 411, 411 [2d Dept 2002]).

Applying the governing legal principles here, the court finds that defendant established his 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 v Avis Rent A Car, Sys.*, 98 NY2d 345, 350 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 956-957 [1992]). Defendant submitted competent medical evidence establishing that the alleged injuries to plaintiff's neck, shoulder and back, as alleged in her bill of particulars and her deposition, did not constitute a serious injury (*see Hoque v Achiron*, 117 AD3d 802 [2d Dept 2014]). Defendant is thus entitled to summary judgment.

As for plaintiff's submissions, generally "the certification of the medical records and reports by the records custodian of the subject medical facility was not sufficient to properly place the medical conclusions and opinions contained in those records and reports before the court, since those opinions must be sworn to or affirmed under the penalties for perjury. Consequently, the various unaffirmed conclusions and opinions of the plaintiff's treating physicians were not submitted in a form necessary to oppose the motion" (*Irizarry v Lindor*, 110 AD3d 846, 847 [2d Dept 2013] [internal citations omitted]; *see Nicholson v Kwarteng*, 180 AD3d 695 [2d Dept 2020]).

Here, plaintiff did not submit an affirmation or affidavit from a physician. Her purported excuse for not doing so is stated in her attorney's affirmation as follows: "it should be noted that Plaintiff was unable to obtain a recent narrative evaluation by her treating physician due to appointments being rescheduled due to the ongoing COVID-19 pandemic, and protests over the death of George Floyd (emphasis omitted)."[3] Critically, the absence of an affidavit from plaintiff or her treating physician confirming the hearsay statement in her attorney's affirmation is insufficient to defeat summary judgment. The failure to include an expert's affirmation does not support plaintiff's claim of serious injury. It is not incumbent upon the court to examine the medical records in order to determine whether plaintiff has met her burden of rebutting defendant's prima facie showing that she did not

[2] It appears from Jacobson's report that he conducted a general physical and a neurological examination of plaintiff in August 2019, but that is unspecified.

[3] The court notes that a letter e-signed by Betsy Varghese, dated August 19, 2019, on the letterhead of Lower Hudson Medical Associates, states that plaintiff is "currently under [Varghese's] medical care and is cleared to return to work at this time," and "may return to work 8/20/2019 full duty no restrictions." Indeed, plaintiff confirmed at her deposition that she has been working after the accident.

sustain a serious injury (*see Yakubov v CG Trans Corp.*, 30 AD3d 509, 510 [2d Dept 2006]). Notwithstanding, the court waded through plaintiff's medical records and is unable to find a single entry that offers an opinion that plaintiff's symptoms and objective findings were proximately caused by the accident. It may be true that she sought treatment after the accident; however, that in and of itself does not prove causation. The medical records standing alone, albeit admissible as having been certified, are nonetheless hearsay, and in the absence of foundation established by an expert witness, do not constitute competent evidence of the facts sought to be established by plaintiff as the non-moving party (*see Phillips v Zilinsky*, 39 AD3d 728, 729 [2d Dept 2007]; *Khan v Finchler*, 33 AD3d 966, 966-967 [2d Dept 2006]).

In sum, plaintiff failed to provide an objective medical basis supporting her claims (*see Pommells v Perez*, 4 NY3d 566, 579-580 [2005]; *Franchini v Palmieri*, 1 NY3d 536, 537 [2003]). Given the insufficiency of plaintiff's submissions, the court finds that plaintiff has failed to establish by competent evidence that she sustained a serious injury, as is defined by Insurance Law § 5102 (d) (*see Perl v Meher*, 18 NY3d 208, 219-220 [2012]). Accordingly, defendant's motion is granted.

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by the parties was not addressed by the court, it is hereby denied. Accordingly, it is hereby:

ORDERED that the motion of defendant CURTIS RAMSEY (Mot. Seq. 3), made pursuant to CPLR 3212 (b), for an order granting summary judgment dismissing the complaint of plaintiff YIKARAH ZENNIA on the ground that plaintiff did not sustain a "serious injury" under Insurance Law § 5102 (d), is granted; and it is further

ORDERED that this action is dismissed.

The foregoing constitutes the decision and order of this Court.

Dated: November 9, 2020
White Plains, New York

E N T E R:

/s/ Lawrence H. Ecker
_____
HON. LAWRENCE H. ECKER, J.S.C.
November 9, 2020, 2:01 p.m.

APPEARANCES:
All parties appearing via NYSCEF.