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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ANNY M. ROJAS DE MOREL,

Plaintiff,

-against-

ANGELICA DEMURO-GALARZA,

Defendant.

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DECISION and ORDER

Motion Sequence Nos. 1 & 2
Index No. 64369/2018

RUDERMAN, J.

The following papers were considered in connection with the motion by defendant Angelica Demuro-Galarza for an order pursuant to CPLR 3212, granting her summary judgment dismissing the complaint of plaintiff Anny M. Rojas De Morel, on the ground that plaintiff's injuries do not meet the serious injury threshold of Insurance Law § 5102 (motion sequence 1), and plaintiff's cross-motion for an order granting her summary judgment on the issues of liability and serious injury (motion sequence 2):

Papers - Sequence 1	Numbered
Notice of Motion, Affirmation, Exhibits A - G, and Memorandum of Law	1
Affirmation in Opposition, Affidavit, Dr.'s Affirmation, Exhibits 1 - 14	2
Reply Affirmation	3
- Sequence 2	
Notice of Cross-Motion, Affirmation, Affidavit, Dr.'s Affirmation, Exhibits 1 - 14	4
Affirmation in Opposition to Cross-Motion, Exhibit A	5
Reply Affirmation on Cross-Motion	6

This is an action for personal injuries allegedly sustained by plaintiff as a result of a collision between her vehicle and that of defendant that occurred on February 15, 2018 at

Tuckahoe Road and Winnebago Road in Yonkers, New York. Plaintiff was traveling along Tuckahoe Road with the right of way, with no traffic device controlling her direction of travel, when she collided with defendant's vehicle, which was in the process of crossing Tuckahoe Road on Winnebago Road, after stopping at the controlling stop sign. At her deposition, defendant repeated what she reported having told the police:

> "I was at the stop sign. I stopped. I proceeded to look right and left, saw her at my far right; thought I had enough time to proceed straight, which in reality did not turn out to be true, as she then hit me."

In the collision, the front of plaintiff's vehicle struck the passenger side of defendant's vehicle.

Plaintiff claims that as a result of the accident, she sustained serious injuries to her back and hips.

In moving for summary judgment, defendant relies on the reports of Dr. Jeffrey Salkin, a board certified orthopedist who conducted an independent medical examination of plaintiff on January 24, 2020. Dr. Salkin acknowledged that plaintiff had experienced a lumbar spine sprain and left hip pain that were causally related to the February 15, 2018 accident, but reported that he obtained negative objective test results and found "no orthopedic disability," as well as no causal relationship between plaintiff's cervical and thoracic spine pain and the accident. Dr. Salkin also remarked that he found symptom magnification, and observed that plaintiff's subjective complaints were not consistent with his objective findings.

Defendant also relies on the report of radiologist Dr. Melissa Sapan Cohen, in which she indicated that she reviewed the lumbosacral spine MRI of this 26-year-old plaintiff and found only degenerative disc disease at L4-5 and L5-S1, and disc bulging at L4-5 unrelated to trauma, and no evidence of acute traumatic-related injury.

In opposition, and in support of the branch of her cross-motion seeking summary

judgment in her favor on the serious injury issue, plaintiff points out that the no fault provider's experts, Dr. Uriel Davis and Dr. Debra Ann Pollack, both acknowledged the existence of orthopedic injuries causally related to the accident. Both physicians reported positive testing results for percussion tenderness, and a reduced range of motion with straight leg raises on the left, associated with referred lower back pain. Dr. Davis's March 26, 2019 report stated that plaintiff continued to need physical therapy for her lower back. Dr. Pollack's January 8, 2020 report recognized that while – in her view – plaintiff had reached an "endpoint to treatment" as of that date, the previously provided treatment up to that point had been necessary for her injuries or conditions related to the accident. Plaintiff only stopped attending physical therapy when her no-fault benefits discontinued covering it.

In addition, plaintiff submits the affirmation and reports of her treating physician, Dr. Michael Daras, who attests to permanent, disabling injury to plaintiff's lumbar spine and left hip. He describes plaintiff's antalgic gait due to back pain, straight leg raises which elicit pain at seventy five degrees on the left, spasms and tenderness of the paraspinal muscles in the thoracic, lumbar, and cervical region, flexion-extension to seventy-five degrees in the lumbar region (normal 90 degrees), lateral flexion to twenty degrees bilaterally in lumbar region (normal 30 degrees), and limitations with lifting, bending, and prolonged standing.

Dr. Daras explains in his affirmation how diagnostic studies had to be postponed because plaintiff was four months pregnant at the time of the accident. Although he first examined plaintiff on April 5, 2018, and her initial physical therapy evaluation took place on April 9, 2018, diagnostic testing was not performed until September 2018.

An MRI of plaintiff's lumbar spine was performed on September 6, 2018; according to Dr. Daras, it showed: 1 to 2mm posterolisthesis of L4 upon L5; 1mm posterolisthesis of L5 upon

S1; disc bulging at L2-L3 flattening the thecal sac; disc bulging at the L3-L4 disc space flattening the thecal sac; more prominent disc bulging at L4-L5 flattening the thecal sac. Dr. Daras also arranged for a somatosensory evoked potential study and nerve conduction velocity study (SSEP/NCV) of plaintiff's lower extremities, which was conducted by Dr. Sarala Devi on September 25, 2018. Dr. Daras explains that the SSEP report revealed "[a]bnormal bilateral segmental lower extremity somatosensory evoked potential studies[,] ... consistent with the presence of radicular pathology involving the right L4 and left L5 sensory roots."

Dr. Daras's care of plaintiff has been continuous, and his diagnosis to date continues to include persistent lumbar spine injury with signs of radiculopathy, L2-L3, L3-L4 & L4-L5 disc bulging and left hip pain, creating limitations with lifting, bending and prolonged standing. It continues to be his opinion, with a reasonable degree of medical certainty, that plaintiff is totally disabled, and that her limitations and functional disabilities were causally related to the accident. He specifies that plaintiff "sustained a permanent consequential limitation of use of one body part as a result of the February 15, 2018 accident: her lumbar spine."

Discussion

Liability

On plaintiff's application for partial summary judgment on the issue of defendant's liability, the applicable case law is not the cases cited by plaintiff regarding rear-end collisions, but the rules of the road as reflected in the Vehicle & Traffic Law (*see e.g.* Vehicle & Traffic Law § 1142). Plaintiff here had the right of way, and therefore was entitled to assume that the other drivers would obey the traffic laws requiring them to yield (*see Ballentine v Perrone*, 179 AD3d 993, 994 [2d Dept 2020]). Moreover, "a driver with the right-of-way who has only seconds to react to a vehicle which has failed to yield is not comparatively negligent for failing

to avoid the collision" (*Rohn v Aly*, 167 AD3d 1054, 1056 [2d Dept 2018] [citations and internal quotation marks omitted]). The suggestion by defendant's counsel that it was the defendant who "had control over" the intersection is not a valid construct. That defendant arrived at the point of impact a moment before plaintiff does not put her in the right. She entered the intersection knowing that the vehicle that was approaching had the right of way, but she wrongly estimated the amount of time she would take to cross the roadway as compared to the amount of time it would take plaintiff's vehicle to reach that spot.

While plaintiff also had "an obligation to keep proper lookout and see what can be seen through the reasonable use of his or her senses to avoid colliding with other vehicles" (*see Miron v Pappas*, 161 AD3d 1063, 1064 [2d Dept 2018]), defendant has not provided any evidentiary materials from which it could be inferred that plaintiff contributed to causing the collision, whether by failing to make reasonable use of her senses, keeping a proper lookout, or otherwise. Therefore, defendant has not established that any question of fact exists as to whether plaintiff was comparatively negligent. The rule of *Rodriguez v City New York* (31 NY3d 312 [2018]) may not be used to avoid summary judgment on the issue of comparative negligence where no evidence is submitted that would support such a finding at trial.

Plaintiff is therefore entitled to partial summary judgment on the issue of defendant's liability, and dismissing the defense of comparative negligence.

Serious Injury

Plaintiff's bill of particulars alleges that she sustained a permanent loss of a body member, function or system; permanent consequential limitation of use of a body member; significant limitation of use of a body member, function or system; or a medically determined injury or impairment of a non-permanent nature which prevents her from performing substantially all of

the material acts which constitute her 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. However, both parties' present motion papers focuses only on the permanent consequential limitation and significant limitation categories of serious injury; there is no discussion of the 90/180 category of serious injury.

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]).

On such a summary judgment motion, the 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). Defendant maintains that plaintiff has not sustain serious injury as defined in Insurance Law § 5102 (d), because objective evidence of significant limitations is lacking (*see Kearse v New York City Tr. Auth.*, 16 AD3d 45, 49 [2d Dept 2005]). Defendant's expert, Dr. Salkin asserted that plaintiff's injuries consisted solely of a resolved lumbar spine sprain, and radiologist Dr. Sapan Cohen opined that the injuries were all degenerative.

Initially, the opinion of defendant's radiologist, Dr. Sapan Cohen, asserting that all of plaintiff's spinal problems are degenerative, is contradicted in part by defendant's own IME physician, Dr. Salkin, who conceded that the diagnosed lumbar spine injuries were causally related to the accident on February 15, 2018.

Moreover, Dr. Salkin reported limitations in plaintiff's ranges of motion of her lumbar spine during his examination two years after the accident, including reduced flexion (30 degrees where normal is 60 degrees), extension (10 degrees where normal is 25 degrees), right lateral bending (10 degrees where normal is 25 degrees), and left lateral bending (same). Dr. Salkin also found reduced range of motion in plaintiff's left hip. Although Dr. Salkin remarked that he believed plaintiff to be engaged in "symptom magnification," and noted that "[r]ange of motion is voluntary, active, and subjective," his comments did not entirely negate the foregoing findings regarding reduced range of motion. When a defense expert acknowledges a decreased range of motion, that observation cannot be negated simply by calling that limitation "subjective"; the expert must "explain or substantiate with . . . objective medical evidence the basis for his conclusion that the noted limitations in the plaintiffs' respective ranges of motion were self-imposed" (*Roc v Domond*, 88 AD3d 862, 862 [2d Dept 2011]). Here, in view of the

objective MRI results, summary judgment in defendant's favor is precluded by Dr. Salkin's acknowledgment that plaintiff has decreased range of motion in her lumbar spine, and the lack of proof demonstrating that her range of motion limitations was entirely self-imposed (*see Mangione v Bua*, 148 AD3d 799 [2d Dept 2017]; *see also Lombardi v Columbo*, 259 AD2d 524, 525 [2d Dept 1999]).

In any event, plaintiff's showing in opposition successfully established the existence of questions of fact on the serious injury issue.

Notably, there was no unexplained "gap in treatment" such as the Court in *Pommells v Perez* (4 NY3d 566, 574 [2005]) held could invalidate a plaintiff's claims. Dr. Daras explained that diagnostic studies were postponed because plaintiff was four months pregnant at the time of the accident, but plaintiff obtained medical care the night of the accident, and then consulted Dr. Daras on April 5, 2018, appeared for her initial physical therapy evaluation on April 9, 2018, and began therapy shortly thereafter.

Remarks included in the reports of the no-fault physicians actually lend credence to plaintiff's claims. Dr. Davis, one of the no-fault physicians, reported on March 26, 2019 that plaintiff continued to need physical therapy for her lower back. Although he characterized her condition as of that date as a "mild, temporary disability," and suggested that she could return to work "in a sedentary position (i.e. desk job)," it is notable that he recognized the continued existence of a disabling injury at that time, over one year after the accident. Additionally, plaintiff's actual employment, as a cashier in her husband's grocery store, did not qualify as the type of "sedentary" desk job Dr. Davis suggested that plaintiff could perform. Further, the report of Dr. Pollack from January 8, 2020 recognized that while – in the physician's view – plaintiff had reached an "endpoint to treatment" as of that date, the previously provided treatment up to

that point had been necessary for her injuries or conditions related to the accident.

More importantly, Dr. Daras's assessment of plaintiff's injuries, condition and prognosis, to a reasonable degree of medical certainty, creates an issue of fact as to whether there is objective evidence of significant limitations caused by the injury to plaintiff's spine resulting from the accident. Dr. Daras diagnosed disc injuries in plaintiff's lumbar spine, leading to limitations with lifting, bending and prolonged standing, all causally related to the accident. Measurements of limitations in range of motion were found in each of Dr. Daras's examinations: in his initial examination of plaintiff, he observed that her straight leg raises elicited pain at seventy five degrees on the left; that she had a positive Patrick sign on the left; that she had spasm and tenderness of the paraspinal muscles in her thoracic and lumbar region; that she had flexion-extension to seventy-five degrees (normal 90 degrees) in the lumbar region; and that her lateral flexion was limited to twenty degrees (normal 30 degrees) bilaterally in the lumbar region. Almost all of those findings persisted throughout his examinations of plaintiff.

This Court rejects defendant's suggestion that the numerical reductions in plaintiff's range of motion were too insignificant to establish the existence of actionable limitations. The Court of Appeals has held that where it is properly supported, a physician's measurement of 10-degree limitation of movement of the neck may be sufficient for the denial of summary judgment to defendants (*see Lopez v Senatore*, 65 NY2d 1017, 1020 [1985]). While measured limitations in cervical range of motion of 2% and 4% have been termed a "minor limitation" (*see Duncan v New York City Tr. Auth.*, 273 AD2d 437, 437 [2d Dept 2000]), it is notable that in that matter, a claimed 10% limitation of spinal range of motion was rejected *not* due to the size of the claimed reduction, but because the chiropractor who offered that finding did not indicate that tests were performed or identify the areas of the spine that were purported to be so limited (*id.*).

While plaintiff has demonstrated the existence of questions of fact precluding summary judgment in defendant's favor on the issue of serious injury, her evidence does not establish as a matter of law that the serious injury threshold is satisfied. Rather, the issue must be determined at trial.

Based upon the foregoing, it is hereby,

ORDERED that defendant's motion for summary judgment dismissing the complaint for failure to satisfy the serious injury threshold is denied; and it is further

ORDERED that the branch of plaintiff's cross-motion seeking partial summary judgment on the issue of defendant's liability and plaintiff's non-liability is granted; and it is further

ORDERED that the branch of plaintiff's cross-motion seeking summary judgment in her favor on the issue of serious injury is denied; and it is further

ORDERED that the parties shall appear in the Settlement Conference Part of the Westchester Supreme Court in the Courthouse located at room 1600, 111 Dr. Martin Luther King Jr. Boulevard, White Plains, New York, 10601, on a date of which they will be notified by that part, to schedule a damages trial.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York
September 10, 2020

Terry Jane Ruderman
HON. TERRY JANE RUDERMAN, J.S.C.