SHORT FORM ORDER

INDEX No. 617119-2016
CAL. No.

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 29 - SUFFOLK COUNTY

PRESENT:

HON. LINDA KEVINS
Justice of the Supreme Court

MOTION DATE 1-31-19
ADJ. DATE 5-28-19
Mot. Seq. #002-MG
Mot. Seq. # 003-MG
Mot. Seq. # 004-MG
Mot. Seq. # 005-MG; CASEDISP

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LYNN A. KOLESAR,

Plaintiff,

- against -

WILLIAM A. PENA and ANTHONY M. PINEDA

Defendants.

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Upon the following papers e-filed and read on these motions for summary judgment; **Notice of Motion and supporting papers** for motion (#002) by defendant William Pena, dated October 22, 2018; motion (#003) by defendant, Anthony Pineda, dated, January 2, 2019; motion (#004) by plaintiff, dated December 28, 2018 ; motion (#005) by defendant, Anthony Pineda, dated October 25, 2018; **Answering Affidavits and supporting papers** for (#002) and (#003) by plaintiff, dated February 19, 2019; for (#004) by William Pena, dated January 9, 2019; by Anthony Pineda, dated January 2, 2019; for (#005) by plaintiff, dated February 14, 2019; **Replying Affidavits and supporting papers** for (#002) by William Pena, dated March 7, 2019; for (#003) by Anthony Pineda, dated February 20, 2019; for (#004) by Anthony Pineda, dated January 17, 2019; by plaintiff, dated February 19, 2019; for (#005) by Anthony Pineda, dated February 25, 2019; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#002) by defendant William Pena, the motion (#003) by defendant Anthony Pineda, the motion (#004) by plaintiff and the motion (#005) by defendant Anthony Pineda are consolidated for purposes of this determination; and it is

ORDERED that the motion (#002) by defendant William Pena for an order granting him summary judgment dismissing the complaint as against him is granted; and it is further

ORDERED that the motion (#003) by defendant, Anthony Pineda, for an order granting him summary judgment dismissing the complaint as against him is granted; and it is further

ORDERED that plaintiff's motion (#004) for an order pursuant to CPLR 3212 (e) granting partial summary judgment in her favor on the issue of liability against defendant, William Pena, is granted; and it is further

ORDERED that the motion (#005) by defendant, Anthony Pineda, for an order granting him summary judgment dismissing the complaint on the ground that plaintiff did not suffer a serious injury is granted; and it is further

ORDERED that if this Order has not already been entered, plaintiff is directed to promptly serve a certified copy of this Order, pursuant to CPLR §§8019(c) and 2015, upon the Suffolk County Clerk who is directed to hereby directed to enter such order; and it is further

ORDERED that upon Entry of this Order, plaintiff is directed to promptly serve a copy of this Order with Notice of Entry upon all parties and to promptly file the Affidavits of Service with the Clerk of the Court.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff as a result of a motor vehicle accident which occurred on March 19, 2015. The accident allegedly happened when a vehicle owned and operated by defendant Anthony Pineda struck the rear of plaintiff's vehicle after a vehicle driven by defendant William Pena struck the rear of Pineda's vehicle pushing it into the rear of plaintiff's vehicle.

Plaintiff now moves for summary judgment on the issue of liability, arguing that defendants negligently operated their motor vehicles and were the sole proximate cause of the accident. In support of the motion, plaintiff has submitted copies of the pleadings, a verified bill of particulars and transcripts of the parties' deposition testimony.

It is well settled that a party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Once such a showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595).

When the driver of a vehicle approaches another vehicle from the rear, he or she is bound to maintain a reasonably safe rate of speed and control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle (***Tumminello v City of New York***, 148 AD3d 1084, 49 NYS3d 739 [2d Dept 2017]; ***Brothers v Bartling***, 130 AD3d 554, 13 NYS3d 202 [2d Dept 2015]; ***Gutierrez v Trillium USA, LLC***, 111 AD3d 669, 974 NYS2d 563 [2d Dept 2013]; ***Macauley v ELRAC, Inc.***, 6 AD3d 584, 585, 775 NYS2d 78 [2d Dept 2003]). A rear-end collision with a stopped vehicle

creates a prima facie case of negligence with respect to the operator of the rear vehicle and imposes a duty on that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision (***Tutrani v County of Suffolk***, 10 NY3d 906, 861 NYS2d 610 [2008]; ***Edgerton v City of New York***, 160 AD3d 809, 74 NYS3d 617 [2d Dept 2018]; ***Nowak v Benites***, 152 AD3d 613, 60 NYS3d 48 [2d Dept 2017]; *Le Grand v Silberstein*, 123 AD3d 773, 999 NYS2d 96 [2d Dept 2014]).

In a multi-vehicle accident involving rear-end collisions, the driver of the rear-most vehicle is "bears a presumption of responsibility" (***Gustke v Nickerson***, 159 AD3d 1573, 72 NYS3d 733 [4th Dept 2018], quoting ***Ferguson v Honda Lease Trust***, 34 AD3d 356, 357, 826 NYS2d 10 [1st Dept 2006]). Furthermore, the operator of the middle vehicle that is propelled into the lead vehicle will not bear responsibility for the accident if the vehicle was properly stopped (***Morales v Amar***, 145 AD3d 1000, 44 NYS3d 184 [2d Dept 2016]; ***Niosi v Jones***, 133 AD3d 578, 19 NYS3d 550 [2d Dept 2015]; ***Raimondo v Plunkitt***, 102 AD3d 851, 958 NYS2d 460 [2d Dept 2013]).

At her deposition, plaintiff testified that on the date of the accident, at approximately 8:30 p.m., she was driving a vehicle that was owned by her boyfriend, and that she was going to PC Richards. She testified that she was traveling westbound on Pine Aire Drive near its intersection with North Thompson Drive in Brentwood, New York, that it was dark outside, the weather was clear, and the roads were dry. Plaintiff testified that her vehicle was stopped behind another vehicle that was stopped in the intersection to turn left, and that there was a vehicle behind her that was also stopped. She testified that her vehicle was stopped for several seconds when she felt an impact to the rear of her vehicle which caused it to be pushed it into the front vehicle causing a second impact. She testified that she did not hear the sounds of screeching tires or horns before the accident occurred, and that she was wearing a seat belt. She testified that the impact caused her body to be pushed forward against the seat belt and that that the back of her head came in contact with the head rest. She testified that no other part of her body came in contact with the inside of the car, that the air bag did not deploy, and that no glass, windows or windshields broke.

Plaintiff testified that after the impact, she removed her seatbelt and exited her vehicle to observe its front end, and that the bumper was cracked. She testified that four vehicles were involved in the accident, and that her vehicle was the second one. She testified that the driver of the lead vehicle left the scene, and that she observed the third vehicle, which had substantial damage to its rear but does not recall the extent of damages to its front end. She testified that she spoke to the driver and he seemed upset. Plaintiff testified that the driver of the rear-most vehicle remained at the scene, and that the police arrived fifteen minutes after the accident. She testified that she told the police officer how the accident happened, and that she took pictures of her vehicle with her cell phone camera. Plaintiff testified that she was able to drive, and that she continued with her plan and went to PC Richards.

Defendant Anthony Pineda testified that on the evening of the accident he was driving home from a wake, and that he was stopped at the intersection of Pine Aire Drive and North Thompson waiting to turn on to North Thompson. He testified that his vehicle was completely stopped behind plaintiff's vehicle which was also completely stopped. Pineda testified that without warning, his vehicle was struck from behind, and that the impact caused it to be pushed into the rear of plaintiff's vehicle. He testified that immediately prior to the accident, he did not hear the sound of screeching tires or the sound of a horn, and the accident happened without warning.

Here, plaintiff's submissions are sufficient to establish, prima facie, her entitlement to judgment as a matter of law on the issue of negligence regarding defendant, Willam Pena (*see* ***Motta v Gomez***, 161 AD3d 725, 72 NYS3d 840 [2d Dept 2018]; ***Singh v Avis Rent A Car Sys., Inc.***, 119 AD3d 768, 989 NYS2d 363 [2d Dept 2014]; ***Markesinis v Jaquez***, 106 AD3d 961, 965 NYS2d 363 [2d Dept 2013]). With respect to defendant, Anthony Pineda, plaintiff's submissions establish that he was not a proximate cause of the accident, as the testimony establishes that his vehicle was completely and properly stopped and was propelled into plaintiff's vehicle after it was struck in the rear by the Pena vehicle (***Arellano v Richards***, 162 AD3d 967, 79 NYS3d 288 [2d Dept 2018]). Therefore, the burden shifts to defendant, Pena, to rebut the inference of negligence by providing a nonnegligent explanation for the accident (*see* ***Arslan v Costello***, 164 AD3d 1408, 84 NYS3d 229 [2d Dept 2018]).

In opposition, defendant Pena merely submits an affirmation by counsel. No affidavit by Pena or other competent proof is submitted. It is well settled that an affirmation of an attorney who lacks personal knowledge of the facts has no probative value (*see* ***Cullin v Spiess***, 122 AD3d 792, 997 NYS2d 460 [2d Dept 2014]). To defeat a motion for summary judgment, a party opposing such motion must lay bare his proof in evidentiary form; conclusory allegations are insufficient to raise a triable issue of fact (*see* ***Friends of Animals, Inc. v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790; ***Burns v City of Poughkeepsie***, 293 AD2d 435, 739 NYS2d 458 [2d Dept 2002]). Accordingly, plaintiff's motion for summary judgment on the issue of liability against defendant, William Pena, is granted.

In view of the aforementioned, the motion by defendant, Anthony Pineda, for summary judgment dismissing the complaint as against him is granted.

The motions by defendants, William Pena and Anthony Pineda for summary judgment dismissing the complaint on the ground that plaintiff did not suffer a "serious injury" within the meaning of Insurance Law § 5102 (d), and, therefore, is precluded from recovering for non-economic loss under Insurance Law §5104, are granted. In support of the motion, defendant Pena submits the entire transcript of plaintiff's deposition testimony, an affirmation by Gary Kelman, M.D., a board-certified orthopedic surgeon and an affirmation by Jean-Robert Desrouleaux, M.D., a neurologist and psychiatrist.

To recover for non-economic loss resulting from an automobile accident, Insurance Law § 5104 requires that a plaintiff establish, as a threshold matter, that the injury he or she suffered was a "serious injury" within the meaning of the statute. 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. The court determines, in the first instance, whether a plaintiff has sustained a serious injury and may maintain an action under the statute (***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Ammonds v Rodriguez***, 126 AD2d 504, 510 NYS2d 480 [2d Dept 1987]).

The bill of particulars alleges that plaintiff's injuries are serious under the "permanent consequential limitation" and "significant limitation of use" categories. To qualify as a permanent consequential limitation of use of a body organ or member, the limitation must be permanent, and important or significant (***Countermine v Galka***, 189 AD2d 1043, 593 NYS2d 113 [3d Dept 1993]). To qualify as a significant limitation of use, permanence need not be established nor is a total loss required. The determination of whether a loss is significant or consequential, for both categories, 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. Either objective evidence of the extent, percentage or degree of plaintiff's limitation or loss of range of motion must be provided or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, 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.***, 98 NY2d 345, 746 NYS2d 865 [2002]). Strictly subjective complaints of a plaintiff unsupported by credible medical evidence do not suffice to establish a serious injury (***Scheer v Koubek***, 70 NY2d 678, 518 NYS2d 788 [1987]). Further, proof of a herniated disc, without additional objective medical evidence establishing that the accident resulted in significant physical limitations, is not alone sufficient to establish a serious injury (***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]).

In a personal injury action, a defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred by the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that plaintiff did not sustain a "serious injury" (*see* ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]). Here, defendant submits the affirmed reports of Dr. Gary Kelman and Dr. Jean-Robert Desrouleaux. In his report, Dr. Kelman, an orthopedist, states that he conducted a physical examination of plaintiff at defendants' request on April 16, 2018. He states that he reviewed plaintiff's medical records, including Magnetic Resonance Imaging examinations (MRI) reports, x-ray reports, plaintiff's medical records from treating physicians, chiropractors, and other health care providers, which he specifically designates.

Dr. Kelman states that plaintiff told him that she was in a motor vehicle accident on March 19, 2015, and she complained of injuries to her head, neck, middle back, lower back, bilateral shoulders, right elbow, right wrist, bilateral hips, bilateral knees and bilateral ankles. He tested plaintiff's range of motion using a standard hand-held goniometer, and he tested the cervical spine, thoracic spine, lumbar spine, both shoulders, both hips, both knees, both ankles and lumbosacral spine. He specifies the results of plaintiff's range of motion and compares them to the normal values which are based on both the New York Worker's Compensation guidelines and the AMA guidelines. Each of the areas tested for range of motion resulted in values that are identical to the normal values. Dr. Kelman states that he palpated all of the areas which revealed no muscle spasms, no tenderness and that a neurological examination revealed no abnormalities. His diagnosis was that "cervical spine sprain/strain resolved", "thoracic spine sprain/strain resolved" and specified all other subject areas that he tested and determined such injuries to be resolved. Dr. Kelman concludes that plaintiff has no orthopedic disabilities from the subject accident, and that she has pre-existing conditions of calcific tendonitis of the right shoulder and lumbar spondylosis.

In his sworn report, Dr. Desrouleaux states that he performed a neurological examination on plaintiff on April 23, 2018 at defendant's request. In his affirmation, he enumerates all of the medical reports and diagnostic tests that he reviewed, and he states that plaintiff complained of pain at the middle back, lower back, right shoulder, right elbow, bilateral hips, bilateral knees and bilateral ankles. He states that plaintiff complained of headaches, and she denied having any radiating pain from her neck or back.

Dr. Desrouleaux discusses the results of his examination and found that the sensory examination was normal, that cervical spine myofasciitis, thoracic spine myofasciitis, lumbar spine myofasciitis and post-traumatic headaches are resolved, and that his examination of plaintiff did not reveal any neurological disabilities.

The defendants submitted competent medical evidence establishing, prima facie, that the alleged injuries to the cervical region, lumbar region and shoulder did not constitute a serious injury under the permanent consequential limitation of use or significant limitation of use categories of Insurance Law § 5102 (d) (*see* ***Duciau v Levano***, 177 AD3d 700, 110 NYS3d 557 [2d Dept 2019]; ***Staff v Yshua***, 59 AD3d 614, 874 NYS2d 180 [2d Dept 2009]). Additionally, the reports and plaintiff's own deposition testimony establish, prima facie, that plaintiff did not suffer a serious injury under the 90/180-day category of the statute (***Ferazzoli v Hamilton***, 141 AD3d 686, 35 NYS3d 654 [2d Dept 2016]; ***John v Linden***, 124 AD3d 598, 1 NYS3d 274 [2d Dept 2015]).

Defendants, having met their burden, shifted the burden to plaintiff to raise a triable issue of fact (*see* ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990). In opposition to the motion, plaintiff submits her own affidavit, the entire transcript of her deposition testimony, and affidavits from treating physicians, chiropractors, physical therapists and two physicians' assistants.

Plaintiff testified at her deposition that she did not make any complaints of pain to the police officer who arrived at the scene, and she did not request medical attention. She testified that after the accident, her vehicle was drivable, and that she drove to PC Richards to pick up a dishwasher. She testified that she experienced pain later in the day, and that her body felt achy, particularly in her neck, back, and shoulder areas, and that she suffered a headache. Plaintiff testified that she did not seek medical attention until August 2015 when she presented to Dr. Puchir, a general practitioner.

Plaintiff testified that she complained of headaches, confusion, neck problems, pains in the shoulder and arm, the upper back, lower back and discomfort which made it harder to live a normal life and function like she had. She testified that she presented to Dr. Puchir on two or three occasions, and that in the Fall she presented to Dr. Moreta, a neurologist who ordered MRIs of her cervical spine and lumbar spine. Plaintiff testified that Dr. Moreta referred her to physical therapy, and that she received treatments twice per week. She testified that physical therapy has provided relief, that it helps her feel more comfortable, and that it improves her flexibility and range of motion. She testified further that she presented to Dr. Subbiah, an orthopedist who prescribed muscle relaxers and physical therapy, and that she also sees a pain management physician who offered to provide muscular injections, but she testified that she has declined such treatment.

Regarding the subject accident, plaintiff testified that she was not confined to her bed after the accident, that she did not miss any days from work, and that she was not prescribed any medical devices such as crutches, collars, braces, canes, or the like. Plaintiff testified that she experiences pain after certain activities such as cleaning her house and traveling on an airplane.

Plaintiff testified that she was involved in an automobile accident in the 1990s and that she received physical therapy and chiropractic treatments, and that at some point, she was involved in a "bumper hit" but there were no injuries. Further, she testified that prior to the subject accident, she regularly treated with a chiropractor, Dr. Statler, for allergy symptoms and general wellness, and that she was treated during the summer of 2015, but that she did not inform him that she was in an automobile accident. She testified that she sees Dr. Statler every Wednesday, barring unforeseen circumstances.

The Court has reviewed the following submissions: affidavit by Richard Statler, DC with narrative report dated January 24, 2019; affirmation by Marc Puchir, D.O.; affirmation of Henry Moreta, M.D. a neurologist, affirmation of Vincent Frazzini, Jr. M.D., radiologist, and his MRI report; Robert Peyster, M.D., radiologist; affidavit of Richard Sears, DC; affirmation of Thomas Dowling, M.D. orthopedist and partner at Long Island Spine Specialists, PC; affidavit of John Scalamandre, P.T.; affidavit of Kristopher Stillwell, PA,; affidavit of Leah Gustavson, PA; Dr. Christopher Frendo, D.O.; Neil Frauwirth, M.D; Richard Kanoff, D.O.

None of the affidavits or affirmations are sufficient to raise a triable issue of fact. The affidavit by Richard Statler, plaintiff's chiropractor, who she had been treating with since 2008, states that he performed a post-accident examination of plaintiff on October 11, 2015, and he attaches a narrative report, which he incorporates by reference. The narrative report refers to treatment that plaintiff received from other health care providers, and he "certifies their contents to be true and accurate to the best of his knowledge." No sworn reports created by physicians or other providers are annexed, however.

Dr. Statler's affidavit is conclusory, and his narrative report is not competent proof of serious injury (see ***Cotto v JND Concrete & Brick, Inc.***, 41 AD3d 415, 837 NYS2d 728 [2d Dept 2007]). Dr. Statler also annexes his notes of treatment for October 11, 2015, November 25, 2015, and April 11, 2016 which are insufficient to raise a triable issue of fact as they are not based upon objective medical proof and are conclusory. Dr. Statler does not set forth the tests performed to test plaintiff's range of motion nor does he explain the results of "pinwheel" examination. Furthermore, the majority of the notes regard plaintiff's subjective complaints of pain with no indication that plaintiff's injuries are permanent or significant.

More significantly, and applicable to all of the treating health care providers, without proof of contemporaneous, post-accident treatment or evaluation of plaintiff's alleged injuries, plaintiff cannot raise a triable issue of fact as to whether her conditions were causally related to the accident (*see* ***Jackson v Doe***, 173 AD3d 505, 104 NYS3d 90 [1st Dept 2019]; ***Santos v Traylor-Pagan***, 152 AD3d 406, 58 NYS3d 350 [1st Dept 2017]; *see also*, ***Yaroslav Shvartsman v Vildman***, 47 AD3d 700, 849 NYS3d 600 [2d Dept 2008]). It is undisputed that plaintiff did not seek medical treatment until six months after the accident, and the affirmations and affidavits indicate that most of her treatment did not begin until seven months following the accident.

In the affirmation of Marc Puchir, D.O., he states that plaintiff first presented to his office on August 13, 2015. In any event, his affirmation does not raise a triable issue of fact as his impression was "cervical strain" and he referred her for a neurological examination. Dr. Puchir's other statements are conclusory. Dr. Henry Moreta states in his affirmation that he first saw plaintiff on September 18, 2015. Additionally, his affirmation is conclusory. He states that plaintiff underwent an MRI of her brain, but he does not discuss the results of the examination or attach a report. Furthermore, plaintiff denied having such MRI.

The affidavits by John Scalamandre, a physical therapist, Dr. Thomas Dowling and Leah Gustavason, PA, also reveal that plaintiff did not present for treatment until October 11, 2015, and November 22, 2016. The MRIs of plaintiff's cervical spine and lumbar spine were not conducted until September 22, 2015 and September 23, 2015.

Furthermore, the only objective medical proof submitted is the MRI report prepared by Dr. Vincent Frazzini. However, the report does not raise a triable issue of fact. It reveals minimal spondylosis at disks C2-C3, minimal disk degeneration at C3-C4 and C4-C5, C5-C6 mild spondylosis, and a disk bulge at C6-C7. However, the mere existence of a herniated or bulging disc is not proof of serious injury absent objective evidence of the extent and duration of the alleged physical limitations resulting from the disc injury (*see* ***Saunders v Mian***, 176 AD3d 994, 113 NYS3d 82 [2d Dept 2019]; ***Scheker v Brown***, 91 AD3d 751, 936 NYS2d 283 [2d Dept 2012]; ***Pierson v Edwards***, 77 AD3d 642, 909 AD3d 726 [2d Dept 2010]). Neither the affirmation or the MRI report indicate whether the alleged disc injuries in the cervical region are causally related to the subject accident (*see* ***John v Linden***, 124 AD3d 598, 1 NYS3d 274; ***Smeja v Fuentes***, 54 AD3d 326, 863 NYS2d 689 [2d Dept 2008]), and Dr. Frazzini failed to proffer any conclusion as to the cause of the disc pathology noted in his report (***Scheker v Brown***, 91 AD3d 751, 936 NYS2d 283; ***Collins v Stone***, 8 AD3d 321, 778 NYS2d 79 [2d Dept 2004).

The affirmation of Dr. Robert Peyster, the radiologist who states that he reviewed the films of an MRI examination of the lumbar spine, is insufficient to raise a triable issue of fact, as no report from the MRI examination of plaintiff's lumbar region is submitted. Furthermore, Dr. Peyster's affirmation is conclusory, and it does not establish causation. Additionally, as noted above, the MRI was taken nearly seven months after the subject accident, and, therefore, it fails to establish causation.

Finally, plaintiff's self-serving affidavit, which states that she continues to experience pain, headaches, confusion, among other things as a result of the accident is insufficient to raise a triable issue as to whether she sustained a serious injury as a result of the accident (*see* ***Strenk v Rodas***, 111 AD3d 920, 976 NYS2d 151 [2d Dept 2013]; ***Shvartsman v Vildman***, 47 AD3d 700, 849 NYS2d 600 [2d Dept 2008]). Plaintiff testified that she has declined an MRI of her brain, and further, subjective complaints of headaches that cannot be observed by treating physicians do not qualify as sufficient proof (*see* ***Rumford v Singh***, 130 AD3d 1002, 14 NYS3d 462 [2d Dept 2015]; ***Alcombrack v Swarts***, 49 AD3d 1170, 856 NYS2d 357 [4th Dept 2008]).

Accordingly, the motions by defendants for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury are granted.

Anything not specifically granted herein is hereby denied.

This constitutes the Decision Order of the Court.

Dated: 3/9/2020

J.S.C.

HON. LINDA KEVINS

__X__ **FINAL DISPOSITION** ____ **NON-FINAL DISPOSITION**