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 ORANGE

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LEBRA GRANT,

Plaintiff,

-against-

ANN MCHUGH and CONNOR MCHUGH,

Defendants.

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DECISION AND ORDER
Index No.:EF004941-2019

Motion Date: 4/15/2021
Sequence No. 1

SCIORTINO, J.

The following papers numbered 1 to 11 were considered in the defendants' application seeking summary judgment on the ground that the plaintiff failed to establish a serious personal injury as required by Insurance Law §5102:

PAPERS	NUMBERED
Notice of Motion /Affirmation (Fugelsang)/Exhibits A - E	1 - 7
Affirmation in Opposition(Lapp)/ Exhibit A	8 - 9
Reply Affirmation (Fugelsang)	10 - 11

This personal injury action arises out of a motor vehicle accident that took place on April 18, 2017, on Brookside Avenue in the Village of Chester, County of Orange. Plaintiff commenced this action by filing a Summons and Complaint on April 18, 2017. An Amended Verified Complaint was filed on June 25, 2019. Issue was joined with the filing of defendants' Answer on July 24, 2019. Bill of Particulars dated October 7, 2019 was served.

The Examination Before Trial of plaintiff was held on October 5, 2019. Note of Issue was filed on January 19, 2021.

Plaintiff alleges that she suffered various injuries to the cervical and lumbar spine and both

shoulders.

The plaintiff specifically claims that she sustained a serious injury as defined in the Insurance Law §5102(d): (1) permanent loss of use of a body organ, member, function or system; (2) permanent consequential limitation to a body organ, member or system; (3) significant limitation of use; or (4) a medically-determined injury or impairment of a non-permanent nature that prevented plaintiff from performing substantially all of the material acts which constitute her usual and customary daily activities for not less than 90 of the 180 days immediately following the accident.

As the proponent of the summary judgment motion, defendants have the threshold burden to establish, by competent medical evidence, that plaintiff did not suffer a causally related serious injury under the categories claimed in the Bill of Particulars. (*see Toure v. Avis Rent a Car Sys.*, 98 NY2d 345, 352 [2002]; *Peterson v. Cellery*, 93 AD3d 911, 912 [3d Dept. 2012] The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, in this case, the plaintiff. (*Makaj v. Metropolitan Transportation Authority*, 18 AD3d 625 [2d Dept. 2005])

A defendant can satisfy the initial burden by relying on the sworn statements of defendant's examining physician and plaintiff's sworn testimony or by the affirmed reports of plaintiff's own examining physicians (*Pagano v. Kingsbury*, 182 AD2d 268 [2d Dept. 1992]) Defendant's medical expert must specify the objective tests upon which the stated medical opinions are based and, when rendering an opinion with respect to plaintiff's range of motion, must compare any findings to those ranges of motion considered normal for the particular body part. (*Browdame v. Candura*, 25 AD3d 747 [2d Dept. 2006])

It is well-established that proof under the significant limitation of use category requires "comparative determination of the degree or qualitative nature of the injury based on the normal

function, purpose and use of the body part and must be supported by objective medical evidence." (*Toure,* 98 NY 2d at 350-351) "[A]ny assessment of the significance of a bodily limitation necessarily requires consideration not only of the extent or degree of limitation, but of its duration as well." (*Estrella v. GEICO Ins. Co.*, 102 AD3d 730 [2d Dept. 2013]) A "significant limitation" need not be permanent in order to constitute a serious injury. (*Toure,* 98 NY 2d at 351) A "permanent consequential limitation" requires a greater degree of proof than a "significant limitation" as only the former requires proof of permanency. (*Vasquez v. Almanzar*, 107 AD3d at 539]) To qualify as a serious injury, a "permanent loss of use" must be total. (*Oberly v. Bangs Ambulance Inc.*, 96 NY2d 295, 298 [2001])

Plaintiff Lebra Grant Deposition

On April 18, 2017, at approximately 11:00 a.m., plaintiff was traveling on Brookside Avenue. As plaintiff was decelerating in response to a turning vehicle, her vehicle was rear-ended by another vehicle. Prior to the impact, that vehicle had been struck by a truck operated by the defendant. After the impact, plaintiff exited the vehicle and called 911. She was shaken and requested the EMS who arrived at the scene to examine her. She then, driving the vehicle involved in the accident, drove her daughter to school before driving home. When she got home, plaintiff had "a bad headache and just wanted to sit and rest."

At her deposition, the plaintiff was unable to provide an exact time line of her treatment for the claimed injuries. Approximately a day or two after the accident, she sought treatment with Dr. Gasper Polici, plaintiff's primary care doctor, complaining of neck and back pain. She subsequently sought treatment with Dr. Spina at Dolson Avenue Medical. An MRI was taken and plaintiff began receiving physical therapy. She was referred to Dr. Gottlieb, who recommended injections. Plaintiff

was then referred to Dr. Rudnick at Crystal Run for pain management. Dr. Rudnick reviewed the MRI, recommended continuation of physical therapy, and prescribed pain medication and muscle relaxers. He also referred the plaintiff to Dr. Faskowitz in June of 2017, who prescribed medical marijuana. At some point, plaintiff received four to five injections during two visits with Dr. Rangavajjula at Crystal Run.

As of the date of deposition, plaintiff was treating with Dr. Rudnick every month and a half and Dr. Faskowitz once a year. She had an upcoming injection scheduled with Dr. Gottlieb. She was then experiencing pain in her back and in her neck that radiated to her shoulders and caused a constant headache.

The day of the accident was plaintiff's first day at Access Support for Living. Plaintiff had been unemployed for approximately ten years before the date of the accident due to her rheumatoid arthritis. At the time of deposition, plaintiff was unemployed. As a result of the accident, she can no longer walk for more than ten to fifteen minutes without experiencing pain, and has difficulty lifting laundry baskets and performing housework without experiencing pain. Her daughters now assist her with these activities. She can no longer drive for more than thirty minutes and is unable to drive while on her medications. She also has difficulty taking care of her special needs daughter and is unable to wash her daughter's hair.

Discussion

In order to establish serious injury under the 90/180 category of the insurance law, plaintiff must establish that she "has been curtailed from performing [her] usual activities to a great extent." (*Lanzarone v. Goldman*, 80 AD3d 667, 669 [2d Dept. 2011]; *citing, Licari v. Elliott*, 57 NY2d 230 [1982]) The applicable time period is that "immediately following the occurrence of the injury or

impairment. (Ins. Law §5102[d]) At her deposition, the plaintiff testified that, at that time, she was unable to perform her usual and customary activities as easily as she had before the accident, and that she suffers from pain. The complaints did not reference the time period immediately after the accident.

Viewing the evidence in the light most favorable to the plaintiff, plaintiff's deposition testimony establishes that her 90/180 claim must fail. (*Lanzarone*, 80 AD3d at 669)

Dr. Robert Hendler, defendant's examining orthopedic surgeon, examined the plaintiff on June 15, 2020. On the date of examination, plaintiff, a 42 year-old female, complained of neck, lower back and bilateral shoulder pain.

Dr. Hendler conducted a physical examination. Neurologically, plaintiff was entirely within normal limits and non-focal. Motor systems were 5+/5+ in upper and lower extremities. Hand grip was within normal limits. There were no sensory deficits. Reflexes were equal and normal. Cerebellar functions were intact. Gait was normal.

Ranges of motion testing of the cervical and lumbar spine was performed, measured by goniometer and compared to normal.[1] Range of motion testing of the cervical spine showed 0-50/0-60 flexion, 0-50/0-60 extension, and left and right rotation 0-35/0-45. Dr. Hendler concluded that the decreased motion appeared to be voluntary as there was no spasm of the cervical paravertebral musculature noted. All joints of the upper extremities had a full range of motion.

Range of motion testing of the lumbar spine showed full range of motion. No muscle spasm was noted.

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[1]Using the standards of the American Medical Association Guidelines for the Evaluation of Permanent Impairment

Range of motion testing, performed of both shoulders, revealed full range of motion. Plaintiff did complain of pain at the extremes of motion in both shoulders. There were, however, no palpable trigger zones or crepitus.

X-ray testing was performed in Dr. Hendler's office on June 15, 2020. The cervical spine findings were normal. The lumbosacral spine x-ray showed the overall alignment of the spine to be within normal limits. The shoulders showed no evidence of any fractures or dislocations. There was no evidence of periarticular soft tissue calcifications.

Dr. Hendler opines, that at the time of the accident, the plaintiff may have sustained a cervical and lumbosacral sprain and possible contusions/sprains of her shoulders. All have resolved. The decreased range of motion in her cervical spine on motion testing was seen as voluntary. Dr. Hendler found no present disability and that the plaintiff will have no permanent findings in her neck, back, or shoulders that would be causally related to the accident of record.

Dr. Hendler sufficiently substantiated his conclusion regarding the "voluntary" limited range of motion of the cervical spine with objective medical evidence. (*Colon v. Chuen Sum Chu*, 61 AD3d 805, 806 [2d Dept. 2009) By their reliance on Dr. Hendler's affirmed report, as well as plaintiff's deposition testimony, defendants met their *prima facie* burden of showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102(d) as a result of the accident under the "permanent loss of use," "permanent consequential limitation of use," "significant limitation of use," or 90/180 categories with respect to any of the injuries claimed in her Bill of Particulars. (*see Toure v. Avis Rent A Car Sys.*, 98 N.Y.2d 345 [2002]; *Gaddy v. Eyler*. 79 NY 2d 955 [1992])

Defendants having demonstrated *prima facie* entitlement to summary judgment, plaintiff

must submit objective and admissible proof of the nature and degree of the alleged injury in order to meet the threshold of the statutory standard. (*Farozes v. Kamran*, 22 AD3d 458 [2d Dept. 2005]) A plaintiff cannot defeat a motion for summary judgment and successfully rebut a *prima facie* showing by relying solely on documented subjective complaints of pain. (*Uddin v. Cooper*, 32 AD3d 270 [1st Dept. 2006])

In opposition, plaintiff submits the affirmed report of Dr. Scott Gottlieb, board certified in Anesthesiology and Pain Management. Dr. Gottlieb has treated plaintiff since January 3, 2018, approximately nine months after the underlying accident. At her initial visit, plaintiff complained of sudden onset neck, low back, and bilateral upper and lower extremity pain resulting from the underlying accident. Her examination was significant for trigger point in the bilateral cervical and lumbar paravertebral musculature. There was a positive spurling sign bilaterally, and a positive straight leg raise test at 45 degrees bilaterally. Plaintiff has received continuous chiropractic care and physical therapy. She has been treated with neuropathic pain medications and muscle relaxants, and has received a series of two cervical epidural steroid injections.

Plaintiff was last seen by Dr. Gottlieb on June 29, 2020. She then complained of significant neck, low back, and bilaterial upper and lower extremity pain. She stated that she relied on her husband to do all of the cooking, cleaning, and household chores. Physical examination showed trigger points in the bilateral cervical and lumbar paravertebral areas, and a positive spurling sign bilaterally, and a positive straight leg raise test bilaterally. Dr. Gottlieb concludes that her condition is causally related to the underlying accident, she will require further treatment, and she has "a marked permanent disability."

Plaintiff relies on *Brown v. Achy*, 9 AD3d 30 (1st Dept. 2004) for the contention that a

positive straight leg test is sufficient to establish a "serious" injury under the insurance law. However, the court in *Brown* stated, "We emphasize that our conclusion in this case is based not only on straight-leg raising tests, but on positive MRI and EMG/NCV test results as well." (*id.* at 33) Plaintiff has failed to submit admissible evidence of disc herniations, bulges, or that plaintiff experienced limited range of motion as a result of the underlying accident. The affirmation of plaintiff's treating pain management specialist is without probative value as to the alleged herniations and bulges, as the physician's conclusions rely on uncertified medical records not part of the motion record. (*Gonzales v. Fiallo*, 47 AD3d 760 [2d Dept. 2008])

Plaintiff has failed to submit admissible proof of the nature and degree of the alleged injury in order to raise a triable issue of fact. (*Farozes*, 22 AD3d 458)

Conclusion

On the basis of the foregoing, it is hereby

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

Any matter not addressed herein is denied.

This decision shall constitute the order of the Court.

Dated: June 7, 2021
Goshen, New York

ENTER

HON. SANDRA B. SCIORTINO, J.S.C.

To: *Counsel of Record Via NYSCEF*