SUPREME COURT: STATE OF NEW YORK
IAS PART WESTCHESTER COUNTY
PRESENT: HON. JOAN B. LEFKOWITZ, J.S.C.

To commence the statutory time period 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.

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ERICA MITCHELL,

Plaintiff,

-against-

JOSE R. MARTINEZ,

Defendant.

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DECISION & ORDER

Index No: 61756/2018

Motion Return Date:
March 5, 2021
Sequence No. 1

The following papers (NYSCEF document nos. 46-64) were read on the motion by the defendant for an order granting summary judgment dismissing the complaint upon the grounds that plaintiff did not sustain a serious injury within the meaning of Insurance Law 5102 (d).

Notice of Motion-Affirmation-Exhibits (A-M)-Affidavit of Service
Opposition-Exhibits (1-6)-Affidavit of Service
Reply Affirmation-Exhibits (A-B)-Affidavit of Service

Upon reading the foregoing papers, it is

ORDERED the motion is granted and the complaint is dismissed; and it is further

ORDERED that defendant shall serve a copy of this order upon the plaintiff within five (5) days from the date following entry hereof.

Plaintiff *pro se* sues for injuries allegedly sustained in a motor vehicle accident that occurred on December 14, 2017, on Sedgwick Avenue located about fifty feet north of West Kingsbridge Road in Bronx, New York. On August 2, 2018, plaintiff commenced this action by filing a summons and complaint with the Westchester County Clerk. On December 18, 2018, defendant interposed an answer to the complaint asserting, *inter alia*, the affirmative defense of failure to sustain a serious injury pursuant to Insurance Law 5102 (d).

In her bill of particulars, plaintiff alleged that as a result of the subject accident, she sustained injuries to her leg and to her back—specifically, a disc bulge to the L4-L5 and L5-S1 disc interspaces. In addition, plaintiff claimed she sustained the following injuries:

> "Continued pain while sleeping, walking, sitting, daily life and the inability to drive/long an extended period of time without significant pain and down time required for recuperation. It has also affected me wearing heels. I was unable to wear heels for about a year. It has limited the time I can wear heel[s]. My lower back and hip area is in constant pain while sitting. My leg from my hip to my ankle becomes numb after driving for on[e] (1) hour and beyond. It has caused me considerable pain and hardship and limited my mobility and flexibility. How I presently walk has been permanently altered" (Bill of Particulars, at ¶ 7, NYSCEF Doc No. 18).

Following the completion of discovery, defendant moves for an order granting summary judgment dismissing the complaint upon the grounds that plaintiff did not sustain a serious injury within the meaning of Insurance Law 5102 (d). Plaintiff opposes the motion.

On a motion for summary judgment the court's function is to determine whether triable issues of fact exist or whether judgment can be granted to a party on the proof submitted as a matter of law (*see* CPLR 3212 [b]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). In determining the motion, the court must view the evidence in a light most favorable to the nonmovant and is obliged to draw all reasonable inferences in the nonmovant's favor (*see Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]; *Stukas v Streiter*, 83 AD3d 18, 22 [2d Dept 2011]). Such a motion may be granted only if the movant tenders sufficient evidence in admissible form demonstrating, *prima facie*, the absence of triable issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If that burden is met, the burden of going forward shifts to the opponent of the motion to produce evidentiary proof in admissible form establishing the existence of material issues of fact requiring a trial (*see Zuckerman*, 49 NY2d at 562).

Whether a claimed injury meets the statutory definition of a serious injury is a question of law which may properly be decided by the court on a motion for summary judgment (*see Licari v Elliott*, 57 NY2d 230, 235 [1982]). A party moving for summary judgment under Insurance Law 5102 (d) must establish, *prima facie*, that the non-movant has not suffered a serious injury within the meaning of Insurance Law 5102 (d) (*see Gaddy v Eyler*, 79 NY2d 955, 956-57 [1992]; *Macchio v Ndukwu*, 114 AD3d 647, 647 [2d Dept 2014]). A defendant meets his *prima facie* burden by submitting affidavits or affirmations of medical experts, who, through objective medical testing, conclude that plaintiff's injuries are not serious within the meaning of Insurance Law 5102 (d) (*see Ranford v Tim's Tree & Lawn Serv., Inc.*, 71 AD3d 973, 974 [2d Dept 2010]; *Morris v Edmond*, 48 AD3d 432 [2d Dept 2008]).

Here, defendant established his *prima facie* entitlement to judgment as a matter of law through the submission of affirmed medical reports of an orthopedic surgeon, a neurologist, and a radiologist, and through the plaintiff's deposition testimony, which demonstrate that plaintiff did not sustain a serious injury within the meaning of Insurance Law 5102 (d) as a result of the subject accident. The plaintiff's deposition testimony that she missed somewhere between one week and one month from work as a result of the subject accident (*see* plaintiff deposition tr at 40-41), was sufficient to establish, *prima facie*, that her alleged injuries did not prevent her from performing substantially all of the material acts constituting her customary daily activities during at least 90 of the first 180 days following the accident (*see Richards v Tyson*, 64 AD3d 760, 761 [2d Dept 2009]).

Further, the affirmed medical reports proffered by defendants establish, *prima facie*, that plaintiff did not sustain a serious injury under the permanent consequential limitation of use and/or significant limitation of use categories of Insurance Law 5102 (d) as a result of the subject accident (*see Ranford*, 71 AD3d at 974). Dr. Nipper, an orthopedic surgeon, who conducted a physical examination of the plaintiff, concluded, based upon range of motion testing with the use of a goniometer, that plaintiff's ranges of motion in her cervical and lumbar spine, shoulders, elbows, wrists, hands, hips, knees, and ankles/feet were all within normal ranges. Based on the clinical findings and review of plaintiff's medical records, Dr. Nipper affirmed that plaintiff sustained low back sprain and hip sprains all of which have resolved, and that plaintiff is not disabled and is capable of performing her usual activities of daily living (*see Cantave v Gelle*, 60 AD3d 988 [2d Dept 2009]; *Staff v Yshua*, 59 AD3d 614 [2d Dept 2009]; *cf. Meskovic v Walman*, 116 AD3d 1012 [2d Dept 2014]). Similarly, Dr. Agrawal, a neurologist, who conducted a physical examination of the plaintiff, concluded, based upon range of motion testing with the use of a goniometer, that plaintiff's ranges of motion in her cervical, thoracic, and lumbar spine were all within normal ranges and that plaintiff has no neurological disability which would impair her from working or from performing activities of daily living (*see Cantave*, 60 AD3d at 988; *Staff*, 59 AD3d at 614). Last, defendant proffers the affirmation of Dr. Warhit, a radiologist, who reviewed various radiological studies including, x-rays of the plaintiff's lumbar and cervical spine taken December 19, 2017, x-rays of plaintiff's pelvis and hips taken March 2, 2018, and a MRI of plaintiff's lumbar spine taken February 4, 2018, and concluded that each of the studies were negative for the existence of a traumatically induced injury. Accordingly, the burden of going forward shifted to plaintiff to raise a triable issue of material fact (*see Zuckerman*, 49 NY2d at 562).

In opposition, plaintiff failed to raise a triable issue of material fact (*see* CPLR 3212 [b]). Notwithstanding the fact that the opposition is not in admissible form insofar as plaintiff has not submitted an affidavit, the narrative report of Dr. Andrew Miller is otherwise insufficient to raise a material issue of fact as to whether plaintiff sustained a serious injury within the meaning of Insurance Law 5102 (d). Initially, plaintiff has proffered an incomplete report as it appears pages four through six of Dr. Miller's report

are missing. In any event, Dr. Miller concluded, based upon range of motion testing with the use of a goniometer, that plaintiff's range of motion in her cervical spine was within a normal range. To the extent not specifically addressed herein, the court finds defendant's remaining arguments unavailing. Accordingly, defendant's motion is granted and the complaint is dismissed.

ENTER,

Dated: White Plains, New York
April 20, 2021

HON. JOAN B. LEFKOWITZ, J.S.C.