ORIGINAL

SHORT FORM ORDER

INDEX No. 620860/2017
CAL. No. 201902414MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 12/17/20
ADJ. DATE 3/11/21
Mot. Seq. # 002 MG; CASEDISP

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LISA MARIE RADKE,

Plaintiff,

- against -

WILLIAM M. FRIBERG,

Defendant.

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Upon the following papers read on the e-filed motion for summary judgment: Notice of Motion/Order to Show Cause and supporting papers by defendant, filed October 19, 2020; Notice of Cross Motion and supporting papers___; Answering Affidavits and supporting papers by plaintiff, filed March 4, 2021, and March 8, 2021; Replying Affidavits and supporting papers by defendant, filed March 9, 2021; Other ____; it is

ORDERED that the defendant's motion for summary judgment dismissing the complaint is granted.

In this action to recover changes for personal injuries it is alleged that on November 26, 2014, at the intersection of Route 25 and Alpine Way in the Town of Huntington, New York, a vehicle operated by the plaintiff, Lisa Marie Radke, was hit in the rear by a vehicle operated by the defendant, William Friberg. According to her bill of particulars, as a result of the accident, the plaintiff suffered various injuries to her cervical spine, including sprains, strains, reversal of lordosis, an annular tear, and a foraminal protrusion. The plaintiff alleges that she suffered a serious injury under Insurance Law § 5102 (d) through a permanent loss of use of a body organ, member, function, or system; a permanent consequential limitation of use of a body organ or member; a significant limitation of use of a body organ, member, function, or system; and a medically-determined injury that prevented her from performing substantially all of her customary daily activities for at least 90 days in the 180 days immediately after the accident.

The defendant seeks summary judgment dismissing the complaint on the ground that the plaintiff has not suffered a serious injury under Insurance Law § 5102 (d). In support of the motion, the defendant submits, *inter alia*, the pleadings, a bill of particulars, a transcript of the plaintiff's deposition, and a report from Dr. Edward Toriello. In opposition, the plaintiff submits, *inter alia*, medical records, a report from Dr. Lisa Marie Sheppard, a report from Dr. Todd Richardson, and an amended report from Dr. Richardson.

On a motion for summary judgment, the movant has the burden to show that it is entitled to judgment as a matter of law and that there are no disputed issues of material fact (CPLR 3212; ***Matter of New York City Asbestos Litig.***, 33 NY3d 20, 99 NYS3d 734 [2019]). If the movant meets its burden, then the non-movant must show that there is a material issue of fact to be resolved at trial (***Matter of Eighth Jud. Dist. Asbestos Litig.***, 33 NY3d 488, 105 NYS3d 353 [2019]). If the movant does not meet its burden, then the motion must be denied without consideration of any opposing papers (***Vega v Restani Constr. Corp.***, 18 NY3d 499, 942 NYS2d 13 [2012]). On summary judgment, the Court must view the evidence in the light most favorable to the non-moving party (*id.*).

Insurance Law § 5102 (d) defines a "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."

A plaintiff claiming injury within the "limitation of use" categories must substantiate his or her complaints of pain with objective medical evidence showing the extent of the limitation of movement and its duration (*see* ***Ferraro v Ridge Car Serv.***, 49 AD3d 498, 854 NYS2d 408 [2d Dept 2008]; ***Mejia v DeRose***, 35 AD3d 407, 825 NYS2d 722 [2d Dept 2006]; ***Laruffa v Yui Ming Lau***, 32 AD3d 996, 821 NYS2d 642 [2d Dept 2006]; ***Cerisier v Thibiu***, 29 AD3d 507, 815 NYS2d 140 [2d Dept 2006]). Absent that additional corroboration, "the mere existence of a herniated or bulging disc is not evidence of a serious injury" (***Catalano v Kopmann***, 73 AD3d 963, 964, 900 NYS2d 759 [2d Dept 2010]). To prove significant physical limitation, a plaintiff must present either objective quantitative evidence of the loss of range of motion and its duration based on a recent examination of plaintiff or a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, 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]; ***Rovelo v Volcy***, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]). A slight limitation of use is considered insignificant within the meaning of the Insurance Law (*see* ***Cebron v Tuncoglu***, 109 AD3d 631, 970 NYS2d 826 [2d Dept 2013]). Furthermore, a plaintiff claiming serious injury who ceases treatment after the accident must offer a reasonable explanation for having done so (***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]; *see* ***Vasquez v John Doe #1***, 73 AD3d 1033, 905 NYS2d 188 [2d Dept 2010]). Additionally, a plaintiff seeking to recover damages based on the inability to perform daily

activities for at least 90 of the 180 days after the accident must prove the injury is "medically determined," meaning that the condition must be substantiated by a physician and is causally related to the accident (*see* ***Pryce v Nelson***, 124 AD3d 859, 2 NYS3d 214 [2d Dept 2015]; ***Strenk v Rodas***, 111 AD3d 920, 976 NYS2d 151 [2d Dept 2013]). Summary judgment may be appropriate "when additional contributory factors interrupt the chain of causation between the accident and claimed injury–such as a preexisting condition" (***Pommells v Perez***, *supra* at 572).

Contrary to the plaintiff's argument, the defendant's motion is timely. Pursuant to executive orders issued by the Governor, the time for the defendant to move for summary judgment was tolled from March 20, 2020, through November 3, 2020, due to the coronavirus pandemic (***Brash v Richards***, __ AD3d __, 2021 NY Slip Op 03436 [2d Dept 2021]). The note of issue was filed on December 10, 2019. The defendant filed the instant motion on October 19, 2020, during the pendency of the coronavirus toll. As fewer than 120 days elapsed between December 10, 2019, and March 20, 2020, the defendant's motion is timely.

The defendant has satisfied his prima facie burden. Specifically, the defendant submitted a report from Dr. Edward Toriello, who examined the plaintiff on September 23, 2019. The report stated that the plaintiff had normal ranges of motion in her cervical spine, right shoulder, left shoulder, right elbow, left elbow, right wrist and hand, left wrist and hand, and lumbosacral spine. Dr. Toriello also reviewed two CT scans and an MRI examination of the plaintiff. Dr. Toriello opined that the plaintiff had "a resolved cervical strain" with "no objective evidence of continued disability" (*see* ***Bianchi v Mason***, 179 AD3d 567, 118 NYS3d 559 [1st Dept 2020]; ***Saunders v Mian***, 176 AD3d 994, 113 NYS3d 82 [2d Dept 2019]). In addition, the plaintiff's deposition testimony shows that she did not suffer a medically-determined injury that prevented her from performing her daily activities for at least 90 of the 180 days after the accident (*see* ***Small v City of New York***, 148 AD3d 959, 49 NYS3d 176 [2d Dept 2017]; ***Frisch v Harris***, 101 AD3d 941, 957 NYS2d 235 [2d Dept 2012]). The plaintiff drove back to Delaware two or three days after the accident, is not claiming any lost wages, and was only confined to bed for two days (*see* ***Jung Ung Moon v Kumbee Ree P Some***, 189 AD3d 628, 139 NYS3d 24 [1st Dept 2020]).

In opposition, the plaintiff failed to raise a triable question of fact. The Court will not consider Dr. Todd Richardson's original or amended reports. The original report was not notarized or in affidavit form (CPLR 2106; ***Stradtman v Cavaretta***, 179 AD3d 1468, 118 NYS3d 828 [4th Dept 2020]; ***Pierson v Edwards***, 77 AD3d 642, 909 NYS2d 726 [2d Dept 2010]). In the original report, Dr. Richardson's signature is dated February 17, 2021, the same date as the report itself. The original report consisted of only three pages; there are page numbers on the bottom of each page, and the page numbers also indicate the total number of pages in the report. Dr. Richardson's signature is on a page noted as "3 of 3." The amended report contains two important differences from the original report. First, the amended report consists of four pages. Second, Dr. Richardson's signature, which is still on the third page, purports to be notarized on the fourth page. The Court will not consider Dr. Richardson's amended report because it was erroneously notarized. The notarization is dated February 5, 2021, 12 days before the unnotarized original report was generated. Furthermore, the plaintiff did not mistakenly omit the fourth page in submitting the original report. As noted above, the original report's page numbers were written in a way that included the total number of pages, and the original report included all three pages. The amended

report's fourth page, with the notarization, was apparently only added later, further showing that the February 5 notarization was faulty. Thus, the Court will not consider Dr. Richardson's original or amended reports.

The report of Dr. Sheppard, who reviewed two MRI reports, did not show that the plaintiff suffered a serious injury. One of the MRI examinations predated the accident; the other was performed after the accident. The post-accident MRI examination was compared to the pre-accident MRI, and the MRI report referred to the plaintiff's disc injuries as "unchanged" or "essentially unchanged." Dr. Sheppard also opined that "both studies reveal straightening and reversal of the normal cervical lordosis." Although the reversal of lordosis was more pronounced after the accident, the plaintiff failed to submit any evidence that "relate[d] [the reversal of lordosis] to the accident or to [her] symptoms" (***Burford v Fabrizio***, 8 AD3d 784, 786, 777 NYS2d 810 [3d Dept 2004]; *see* ***Barbarulo v Allery***, 271 AD2d 897, 707 NYS2d 268 [3d Dept 2000]; *see generally* ***Leeber v Ward***, 55 AD3d 563, 865 NYS2d 614 [2d Dept 2008]; *cf.* ***Harris v Carella***, 42 AD3d 915, 839 NYS2d 886 [4th Dept 2007]). Although some of the plaintiff's medical records indicate that she had limitations in certain ranges of motion after the accident, they "are insufficient to establish serious injury in the absence of any current, corresponding limitations" (***Henry v Sorge***, 90 AD3d 1355, 1356, 935 NYS2d 381 [3d Dept 2011]; *see* ***Schilling v Labrador***, 136 AD3d 884, 25 NYS3d 331 [2d Dept 2016]; ***Estrella v GEICO Ins. Co.***, 102 AD3d 730, 959 NYS2d 210 [2d Dept 2013]; ***Griffiths v Munoz***, 98 AD3d 997, 950 NYS2d 787 [2d Dept 2012]). The plaintiff did not otherwise raise a triable question of fact as to whether she suffered a serious injury. Thus, the defendant's motion is granted.

Dated: JUN 28 2021

HON. JOSEPH A. SANTORELLI
J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION