Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS** IAS PART 30
Justice

----------X Index No. 703624/2021
JENNY M. FRANCOIS,

Motion
Date: August 18, 2021

Plaintiff,

Motion Cal. No. 17

-against- Motion Sequence No.: 1

DAVID A. BITTER and MICHELLE N. BITTER,

Defendant.
----------X

The following e-file papers numbered EF 4-32 submitted and considered on this motion by defendants DAVID A. BITTER and MICHELLE N. BITTER (collectively referred to as "Defendants") seeking an Order pursuant to Civil Practice Law and Rules ("CPLR") 3212 for summary judgment finding that plaintiff JENNY M. FRANCOIS(hereinafter referred to as "Plaintiff") did not sustain a serious injuries as defined by NY Insurance Law 5102 (d) and for such other and further relief as this Court deems just and proper.

	Papers Numbered
Notice of Motion-Aff.- Exhibits.....	EF 4-20
Stipulations.....	EF 21-22
Aff. In opp- Exhibits.....	EF 23-27
Reply.....	EF 28-32

Timeliness

The Note of Issue was filed on December 17, 2019. Governor Andrew M. Cuomo's Executive Order 202.67, dated October 4, 2020, wherein Temporary Suspension and Modification of Laws Relating to Disaster Emergency issued on March 7, 2020 under Executive Order 200, declared a State disaster emergency for the entire State of New York, included the tolling of the specific time limit for commencement, filing or service of any legal action, was continued and effective for civil cases, until November 3, 2020. The Executive Order included the tolling of time limits contained in the CPLR.

Taking into account the tolling of the time limit this summary judgment motion was to be filed in December of 2020. This, summary judgment motion is not timely.

"' [G]ood cause' in CPLR 3212 (a) requires a showing of good cause for the delay in making the motion- a satisfactory explanation for the untimeliness- rather than simply permitting meritorious, nonprejudicial filings, however tardy. That reading is supported by the language of the statute- only the movant can *show* good cause- as well as by the purpose of the amendment, to end the practice of eleventh-hour summary judgment motions. No excuse at all, or a perfunctory excuse, cannot be 'good cause'" (*Ona Brill et al. v City of New York,* 2 NY3d 648 [2004]).

Defendants assert a staff member allegedly filed the original motion on June 10, 2020 and received a filing confirmation. That, the threshold motion was served upon Plaintiff on June 11, 2020. According to Defendants, shortly thereafter the staff member quit the firm and it was later discovered that the threshold motion was erroneously filed in Queens Civil Court.

This Court finds that Defendants have demonstrated good cause. In *Grskovic v. Holmes* (111 A.D.3d 234 [2d Dept 2013]) the court held there are two tests that can be employed when a court is deciding how to proceed when dealing with a mistake. In *Grskovic*, the plaintiff attempted to comply with the then new efiling requirements in Westchester County. Despite paying the required fee and receipt of a confirmation of filing from the efiling website, 26 days prior to the expiration of the statute of limitation, Counsel was not provided with an index number (*id* at 237). Counsel made several calls to the County Clerks office attempting to retrieve its index number. Three days after expiration of the statute of limitations the County Clerks office discovered the efiling was done on the training site not the live site and therefore the documents were not received and the complaint was not filed within the statute of limitations time period (*id*). Defendants opposed the plaintiff's motion that the complaint be deemed filed nunc pro tunc pursuant to CPLR 2001 before the expiration of the statute of limitations (*id* at 238). The court distinguishes between "correcting" and "disregarding" a mistake. According to the court, the former does not require consideration of prejudice to the non moving party and enjoys a broader degree of judicial discretion, while the latter requires consideration of prejudice (*id* at 242).

This Court finds that Plaintiff will not be prejudiced by this Court's consideration of the motion, as Plaintiff was served with the motion papers prior to the expiration of the time limit.

Summary Judgment

This action arises from a motor vehicle accident which occurred on March 2, 2017 on Dutch Broadway at or near the intersection with Fletcher Avenue, County of Nassau and State of New York. Plaintiff alleges that she sustained serious injuries to her left shoulder, neck and back.

"[T]he proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *see Schmitt v Medford Kidney Center,* 121 AD3d 1088 [2d

Dept 2014]; *Zapata v Buitriago*, 107 AD3d 977 [2d Dept 2013]). Once a prima facie demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of a material issue of fact which requires a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). The burden is on the party moving for summary judgment to demonstrate the absence of a material issue of fact. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Gilbert Frank Corp. v. Federal Ins. Co.*, 70 NY2d 966 [1988]; *Winegrad v. New York Med. Ctr.*, 64 NY2d 851 [1985]).

Serious Injury

Defendants assert that the Plaintiff did not incur a "serious injury" as defined in NY Insurance Law §5102 (d) as follows:

> "'Serious injury' means 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."

Plaintiff claims the following injuries in her Bill of Particulars:

CERVICAL AND LUMBAR SPINE
- DISC HERNIATION AT THE C3-4
- DISC HERNIATION AT THE C4-5
- DISC HERNIATION AT THE C5-6
- DISC HERNIATION AT THE C6-7
- CERVICAL RADICULOPATHY
- LUMBAR RADICULOPAHTY
- CERVICAL SPINE SPRAIN/STRAIN
- LUMBAR SPINE SPRAIN/STRAIN
- RESTRICTED RANGE OF MOTION

LEFT SHOULDER
- CONTUSION
- SPRAIN/STRAIN
- RESTRICTED RANGE OF MOTION

EMOTIONAL UPSET AND SHOCK
• HEADACHES
• INSOMNIA
• ANXIETY
• FEAR

Defendants present the consultation report of Robert F. Traflet, M.D. (hereinafter referred to as "Dr. Traflet"), a radiologist, dated December 28, 2019. Dr. Traflet reviewed the MRI images of Plaintiff's left shoulder, lumbar and cervical spine.

Left Shoulder

Dr. Traflet opined that the AC joint has mild degenerative hypertrophy at its margins and degenerative heterogenity at the AC ligament and adjacent bone margins. Dr. Traflet further opined that there was mild myxoid degeneration in the labrum cartilage and a normal sublabral recess is seen. Furthermore, there was mild degenerative thinning of the articular hyaline cartilage at the humeral head. According to Dr. Traflet, the findings are not causally related to the subject accident.

Lumbar Spine

Dr Traflet found mild chronic degenerative annular bulging at LF-S1. According to Dr. Traflet, the MRI of Plaintiff's lumbar spine was unremarkable overall. Dr. Traflet opined that the findings are not causally related to the subject accident.

Cervical Spine

Dr. Traflet opined that there are chronic degenerative changes in the cervical spine. According to Dr. Traflet at C3-4 and C4-5 there are chronic annular bulges which are apart of the overall chronic degenerative process. Dr. Traflet observed old disc herniations at C5-6 and C6-7 which had a typical chronic degenerative appearance. According to Dr. Traflet the findings, are often seen in individual patients without any history of trauma.

"In order to prove the extent or degree of physical limitation, an expert's designation of a numeric percentage of a plaintiff's loss of range of motion can be used to substantiate a claim of serious injury. An expert's qualitative assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system." (*Ahmed D. Toure v Avis Rent A Car Systems, Inc. et al.,* 98 NY2d 345 [2002]).

Here, Defendants present this Court with a qualitative assessment of Plaintiff's condition, objectively based upon Plaintiff's MRI images. The Defendants assert Plaintiff suffers from a preexisting chronic degenerative condition. Defendants also submit the MRI report of Plaintiff's radiologist Dr. Steve Sharon, M.D. ("Dr. Sharon") in support of their motion. Dr. Sharon found multilevel disc dessication with multiple disc protrusions in Plaintiff's cervical spine. Dr. Sharon did not find a rotator cuff tear, labral tear, bicep tear or acute osseous injury in Plaintiff's left shoulder. Finally, Dr. Sharon did not find posterior disc herniation, central stenosis, or exiting nerve root impingement of Plaintiff's lumbar spine. Thus, Defendants argue Plaintiff's own doctor acknowledges that Plaintiff possessed degenerative changes.

Within the Bill of Particulars Plaintiff states "if the defendants claim that any injury sustained by the plaintiff were caused by the pre-existing conditions, the plaintiff alleges that any so claimed preexisting conditions were latent, inactive and dormant and were exacerbated and activated by the acts and omissions of the defendants..."

Defendants have failed to address Plaintiff's claims of exacerbation. Defendant's argue Plaintiff was involved in a prior accident in Florida in 2005. However, the injuries associated with the 2005 accident, if any, remain unknown to this Court. Defendants include the testimony of Plaintiff where she testified as follows:

Q: Did you ever sustain any other type of prior accident, whether motor vehicle, slip and fall where you injured your body?
MR. GIANNOPOULOS: Note my objection, you can answer.
A: No.
(Page 132 lines 7-12)

Defendant's pointed to testimony where Plaintiff claims she bruised her pelvis on January 2, 2017. Plaintiff testified the pain did not last. Defendants remaining contentions are unpersuasive.

Defendants have failed to meet their burden. In *Michael Burzynski v United States of America* (2016 WL 6298513*7 [WDNY, October 25, 2016]) the court found the record was silent as to any prior injuries to plaintiff's back. The court states "even if Plaintiff had some amount of pre-existing degenerative disc disease that alone is not sufficient to show that there is no causal link between the collision and an exacerbation of Plaintiff's condition. The court points to *Nasrallah Nasrallah et al. v Oliveiri Helio De et al.* (1998 WL 152568 *8 [SDNY, April 2, 1998]) where the court found the existence of "degenerative disc disease does not prevent an accident from causing serious injury by aggravating the condition". (See generally *Jimmy Washington v Asdotel Enterprises, Inc. et al.*, 66 AD3d 880 [2d Dept 2009]).

Notwithstanding, even if Defendants carried their burden Plaintiff provided sufficient evidence to, at the very least, raise a triable issue of fact. Plaintiff presented the affirmation of Plaintiff's treating physician Dr. Charles Nguyen, D.C. ("Dr. Nguyen") who examined Plaintiff on April 13, 2017 and recorded a series of decreases in the ranges of motion of Plaintiff's cervical and lumbar spine. Dr. Nguyen used the normal ranges published by the American Medical Association. Dr. Nguyen attributed Plaintiff's injuries to the subject accident. The records provided by Dr. Nguyen were objective and contemporaneous with the accident (*see Joseph Perl v Mehmood Mehr,* 18 NY3d 208, 218 [2011]).

In *Linton v Nawaz* (62 AD3d 434 [1st Dept 2009]) defendant submitted the affirmations of two doctors in support of their motion for summary judgement seeking to dismiss plaintiff's claim that he suffered a serious injury. Defendant submitted an orthopedist and radiologist report. The court found the orthopedist report was insufficient to shift the burden to plaintiff as the examining doctor failed to cite what objective tests he used to examine plaintiff (*id* at 439). The court found that the radiologist shifted the burden as to injuries concerning plaintiff's cervical spine and right knee

because the radiologist reviewed the MRI's of plaintiff and found that the abnormalities were degenerative in nature and prexisted the accident (*id* at 439). However, the court found that Plaintiff successfully raised a triable issue of fact by submitting the affirmation of his treating physician which concluded plaintiff's symptoms were causally related to the subject accident (*id*). The defendant argued the report was speculative and conclusory. The court rejected the argument reasoning, that the report "was based on a full physical examination of plaintiff made within days of the onset of plaintiff's complaints of pain and other symptoms, which plaintiff told him ensued after he was involved in a traumatic accident. Clearly, this was sufficient to raise a triable issue as to whose medical opinion was worthy of greater weight" (*id*). The court found that plaintiff's doctor's affirmation is entitled to considerable weight, it provided a different but equally plausible explanation for plaintiff's symptoms and it "is the only competent evidence before us of plaintiff's injuries that is based on an actual physical examination" (*id* at 440).

In *Carmelo Noble v. Calvin Ackerman* (252 A.D.2d 392 [1st Dept 1998]) plaintiff alleged he sustained serious injuries after an accident with defendant pursuant to Insurance Law §5102 (d), and defendant's motion for summary judgment was denied by the lower court. On appeal, defendant moved once again for summary judgment on the issue of whether plaintiff sustained a serious injury (*id*). Both sides presented medical expert opinions. Plaintiff's expert found correlation between the alleged injuries and the accident (*id* at 393). Defendant's experts attributed plaintiff's injuries to, among other things, the normal aging process (*id* at 394). The court held "[w]here conflicting medical evidence is offered on the issue of whether the plaintiff's injuries are permanent or significant, and varying inferences may be drawn therefrom, the question is one for the jury" (*id* at 395). Therefore it is,

ORDERED, that the motion is denied.

This constitutes the decision and Order of the Court.

Dated: August 20, 2021

Hon. Chereé A. Buggs, J.S.C.