SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JAMES G. CLYNES** **PART** **22M**

Justice

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CHARLOTTE TERRY,

Plaintiff,

- v -

BECA NY INC., BILLY ROSADO

Defendant.

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INDEX NO. 150173/2020

MOTION DATE 10/11/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents and following oral argument, the motion of Beca NY Inc. and Billy Rosado (Defendants) seeking summary judgment in their favor and dismissal of Plaintiff's complaint on the basis that Plaintiff has failed to establish that she sustained a serious injury under Insurance Law 5102 (d) is DENIED except for the 90/180 claim.

Plaintiff seeks recovery for injuries allegedly sustained as a result of a March 13, 2017 accident between Plaintiff's vehicle and a vehicle owned by Beca NY Inc. and operated by Billy Rosado. Plaintiff alleges in her Bill of Particulars that she sustained injuries to her lumbar spine, cervical spine, and left hip and that these injuries meet the serious injury threshold under Insurance Law 5102 (d).

The 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 eliminate any material issues of fact from the case" (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). Once this showing has been made, the burden shifts to the non-moving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact

that require a trial for resolution (*Licari v Elliott*, 57 NY2d 230 [1982]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad* at 853 [1985]). 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 the plaintiff did not sustain a "serious injury" (*Toure v Avis Rent a Car Systems Inc,* 98 NY2d 345, 352 [2002]). In instances where a defendant asserts that the evidence reveals a preexisting injury or a degenerative condition, the plaintiff must present evidence to the contrary (*Brewster v FTM Servo, Corp.*, 44 AD3d 351 [1st Dept 2007]).

Defendants have established a prima facie showing of entitlement to summary judgment. Defendants rely on the affirmed reports of Dr. Richard D. Semble, orthopedic surgeon, and Dr. Melissa Sapan Cohn, radiologist.

Dr. Richard D. Semble examined Plaintiff on December 8, 2020 and reported that Plaintiff's "sprain/strain injuries sustained on March 13, 2017 have resolved. She is not disabled as it relates to the accident of record" (NYSCEF DOC NO 19). Dr. Semble measured Plaintiff's range of motion using a goniometer and reported the following: As to Plaintiff's cervical spine, flexion at 30 degrees (50 degrees normal), extension at 30 degrees (60 degrees normal), right lateral flexion at 30 degrees (45 degrees normal), left lateral flexion at 30 degrees (45 degrees normal), right rotation at 30 degrees (80 degrees normal), and left rotation at 40 degrees (80 degrees normal); lumbar spine 30 degrees (60 degrees normal), extension at 10 degrees (25 degrees normal), right lateral flexion at 20 degrees (25 degrees normal), and left lateral flexion at 20 degrees (25 degrees normal); right hip flexion at 120 degrees (100 degrees normal), extension at 30 degrees (30 degrees normal), abduction at 45 degrees (40 degrees normal), adduction at 35 degrees (20 degrees normal), external rotation at 50 degrees (50 degrees normal), and internal

rotation at 40 degrees (40 degrees normal); and left hip flexion at 120 degrees (100 degrees normal), extension at 30 degrees (30 degrees normal), abduction at 45 degrees (40 degrees normal), adduction at 35 degrees (20 degrees normal), external rotation at 50 degrees (50 degrees normal), and internal rotation at 40 degrees (40 degrees normal). Dr. Semble's examination revealed limitations as to Plaintiff's range of motion, Dr. Semble reported that Plaintiff has history of "underlying degenerative disease and fibromyalgia that contributes to the current symptoms and findings..." This conclusion simply adds a contributing factor to the Plaintiff's symptoms and fails to irrefutably establish that the limitation of Plaintiff's range of motion was not caused by the accident.

Dr. Melissa Sapan Cohn undertook an independent review of the MRIs of Plaintiff's lumbosacral spine on November 1, 2020. One MRI was taken on August 15, 2017 and the other was taken on January 25, 2019. Although she cannot determine the exact age, Dr. Cohn noted a disc herniation at the L5/S1 level but did not find any additional findings "such as bone contusion, marrow edema or ligamentous injury to confirm an acute injury to the spine" (NYSCEF DOC NO 20). Dr. Cohn also reported degenerative changes at that same level, consistent with arthritis of the spine. When comparing the two MRIs, Dr. Cohn found no progression and no new findings to indicate a traumatic injury.

Dr. Cohn also reviewed the MRI of Plaintiff's left hip, which was taken on March 19, 2019 and reported a normal left hip MRI with no evidence for pathology or acute traumatic related injury.

Finally, Dr. Cohn reviewed the MRI of Plaintiff's cervical spine, which was taken on January 25, 2019. Dr. Cohn found that there were "multilevel degenerative changes." Although she found a disc herniation at C3-4 level, she associated this with underlying degenerative changes

and desiccation of the disc, where the disc has dried out and lost its normal water content. Dr. Cohn explained her conclusion of degeneration and by noting that acute disc protrusions or herniations normally occur in well hydrated discs, further clarifying that the central, gelatinous portion of the disc, known as annulus pulposus, insinuates itself through a tear in the outer fibers of the disc to result in an acute disc herniation and it is unlikely to occur once this central portion has dried up. With regard to Plaintiff's cervical spine, Dr. Cohn determined that there were no findings to indicate an acute traumatic related injury.

Dr. Cohn also found a disc bulge in Plaintiff's cervical spine but also contributed it to degenerative disease and not trauma. A bulging or herniated disc may very well be a serious injury within the meaning of Insurance Law 5102(d) (*Arjona v Calcano*, 7 AD3d 279, 279 [1st Dept 2004]). However, in this case, Dr. Cohn thoroughly supported her findings by explaining her conclusion of degeneration.

In her examination before trial (EBT) testimony, Plaintiff testified that initially, she missed three days of work then took days or some hours off of work for doctor or physical therapy appointments. Plaintiff also testified that she commuted into New York City for work from her home in New Jersey primarily using public transportation – namely bus and subway – but was unable to commute by bus after the accident because she was unable to sit for extended periods of time, and unable to commute by subway because of the walk from the subway stop to her work and the number of stairs from the subway to the street. Plaintiff also testified, however, that she lives, and has lived since the accident, in an apartment building on the fourth floor, that the building does not have an elevator, and that she walks up the stairs and down the stairs to come and go from her apartment. Plaintiff's testimony makes a prima facie showing that Plaintiff was not prevented from performing substantially all of her daily activities for 90 out of the first 180 days after the

accident (*see DaCosta v Gibbs*, 139 AD3d 487, 488 [1st Dept 2016] where Plaintiff's testimony indicating that she missed less than 90 days of work in the 180 days immediately following the accident and otherwise worked "light duty" was fatal to her 90/180-day claim).

Taken together, Defendants' submission establishes that Plaintiff has not sustained a serious injury and thus the burden therefore shifted to Plaintiff to raise an issue of fact as to whether she sustained a serious injury as a result of the accident and whether she was prevented from performing substantially all of her daily activities for 90 out of the first 180 days after the accident (*Licari v Elliott*, 57 NY2d 230 [1982]).

In opposition, Plaintiff raises a triable issue of fact that she sustained a serious injury as a result of the subject accident. Plaintiff's treating chiropractor's range of motion findings both immediately after the accident, and for several months thereafter, conflict with those of Defendants' expert, who found no restriction in range of motion, and thus raise an issue of fact as to whether Plaintiff sustained a significant limitation in use or permanent consequential limitation of use of her lumbar spine. Plaintiff's MRIs also show bulging and herniated discs in the cervical and lumbar spine. Evidence of range of motion limitations, especially when coupled with positive MRI results, are sufficient to defeat summary judgment (*Wadford v Gruz*, 35 AD3d 258 [1st Dept 2006]; *Colon v Bernabe*, 65 AD3d 969 [1st Dept 2009]).

In reviewing the MRI of Plaintiff's lumbar spine taken on January 25, 2019, Dr. John M. Athas, neurologist, noted a small paracentral disc herniation at L5-S1 and a disc bulge at L4-L5. In reviewing the MRI of Plaintiff's cervical spine taken on January 25, 2019, Dr. Athas noted C3-C4 broad-based midline disc herniation resulting in mild spinal stenosis abutting the ventral cord and C6-C7 focal midline and left foraminal disc herniation resulting in mild effacement of the ventral thecal sac and mild left neural foraminal narrowing with no evidence of spinal stenosis.

Dr. Adeel Ahmad, one of Plaintiff's treating physicians, who had been treating in the practice since October of 2017, concluded, after reviewing the MRIs, prior notes and treating Plaintiff himself, that Plaintiff's injuries "to a reasonable degree of medical certainty, are related/exacerbated" by the subject accident. The affirmation of Plaintiff's treating doctor, attributing the injury to the accident as opposed to any other cause, suffices to raise a triable issue of fact (*see Lee Yuen v Arka Memory Cab Corp.*, 80 AD3d 481 [1st Dept 2011]. Although they did not expressly reject Defendants' expert's conclusion that the injuries were degenerative in origin, by attributing the injuries to a different, yet equally plausible cause, Plaintiff raised a triable issue of fact (*see Yuen*, 80 AD3d at 482). As these medical professionals made their notes and drew their conclusions during the course of Plaintiff's treatment, and thus prior to the subject motion, the Court could not expect Dr. Athas or Dr. Ahmad to specifically dispute Defendants' expert findings.

As noted by Defendants, the affirmation by Dr. Ahmad, does not comply with CPLR 2106 (a), as she is not a doctor licensed to practice medicine in New York. Pursuant to CPLR 2106, only select professionals, such as attorneys, physicians, osteopaths, or dentists, who are licensed by the State of New York are allowed to submit affirmations in lieu of affidavits. Although Plaintiff's treating doctor is a physician, she is unlicensed in New York, and should have submitted an affidavit. This technical error, however, will be excused provided that Plaintiff submits the physician's affidavit within ten days of receipt of a copy of this Decision and Order. The Court will consider Dr. Ahmad's affirmation at this time subject to the submission of a proper affidavit.

With regard to the final category claimed under Insurance Law 5102 (d), 90/180, a plaintiff must submit objective medical evidence to establish a claim, namely that s/he was prevented from performing substantially all usual and customary daily activities for not less than 90 days during the 180 days immediately following the subject accident (*Elias v Mahlah*, 58 AD3d 434 [1st Dept

2009]). Here, Plaintiff did not submit any objective medical evidence of a substantial physical limitation during the requisite time period and therefore failed to raise a sufficient issue of fact. Plaintiff's subjective complaints of pain and limitation, without more, do not rise to the level of a "serious injury" within this category of Insurance Law 5102 (d).

Accordingly, it is hereby

ORDERED that Defendants' summary judgment motion is DENIED as to Plaintiff's claim of serious injury under the significant disfigurement, permanent consequential limitation, and significant limitation of use categories of Insurance Law 5102 (d) unless Plaintiff fails to submit an affidavit by Dr. Adeel Ahmad within ten (10) days of this Decision and Order; and it is further

ORDERED that Defendants' summary judgment motion is GRANTED as to Plaintiff's claim of serious injury under the 90/180-day category of Insurance Law § 5102 (d); and it is further

ORDERED that within 30 days of entry, movant shall serve a copy of this Decision and Order upon Plaintiff with notice of entry.

This constitutes the Decision and Order of the Court.

01/09/2022
DATE

JAMES G. CLYNES, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE