SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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JOVANNA A. JONES,

Plaintiff,

- v -

KAFIL LECRAFT, MTA BUS COMPANY, ANDRE D. REID

Defendant.

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INDEX NO. 450380/2019

MOTION DATE 01/16/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 62, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 102, 103, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120

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

Upon the foregoing documents and following oral argument the motion by Defendant Andre R. Reid and cross-motion by Defendants Kafil LeCraft and MTA Bus Company for summary judgment on the grounds that Plaintiff's alleged injuries fail to satisfy the serious injury threshold requirement of Insurance Law 5102 (d) are denied for the reasons that follow:

Plaintiff seeks recovery for injuries sustained as a result of a November 14, 2017 accident between a bus owned by Defendant MTA Bus Company and operated by Defendant Kafil Lecraft, within which Plaintiff was a passenger, and a vehicle owned and operated by Defendant Andre D. Reid. In her Bill of Particulars, Plaintiff alleges injuries to her lumbar spine, for which she underwent surgery on July 7, 2017 and August 4, 2017, and cervical spine, for which she underwent surgery on June 23, 2017, thoracic spine, for which she underwent surgery on June 30, 2017, which fall under the serious injury categories of Insurance Law 5102 (d).

In addition to submitting his motion, Defendant Reid adopted and incorporated the legal arguments and medical evidence contained in the cross-motion of co-Defendants LeCraft and MTA Bus.

The burden rests upon the movant to establish that the plaintiff has not sustained a serious injury (*Lowe v Bennett*, 122 AD2d 728 [1st Dept 1986]). When the movant has made such a showing, the burden shifts to the plaintiff to produce prima facie evidence to support the claim of serious injury (*see Lopez v Senatore*, 65 NY2d 1017 [1985]).

Here, Defendant Reid has established that Plaintiff did not sustain a serious injury under Insurance Law 5102 (d). Defendant's submission relies on the affirmed report of Dr. Jay E. Eneman, orthopedic surgeon, who performed an independent medical examination (IME) of Plaintiff on August 26, 2019. Dr. Eneman measured Plaintiff's range of motion with a goniometer pursuant to AMA Guidelines and concluded that the status post cervical spine sprain/strain, thoracic spine sprain/strain, lumbar spine sprain/strain, and right shoulder sprain/strain were all resolved. Dr. Eneman recorded full range of motion and negative objective tests as to Plaintiff's cervical spine, thoracic spine, lumbar spine, and right shoulder. Dr. Eneman determined that there is no evidence of an orthopedic disability, and that Plaintiff is able to perform the duties of her occupation as a bookkeeper without restrictions or limitations as well as all activities of daily living.

Defendant Reid has met his initial burden of establishing that Plaintiff did not sustain serious injuries as a result of the accident under Insurance Law 5102 (d) (*Perez v Rodriguez*, 25 AD3d 506 [1st Dept 2006]).

In support of their cross-motion, Defendants LeCraft and MTA Bus relied on the affirmed report of Dr. Jay E. Eneman, discussed above, as well as on Plaintiff's unsworn medical records (*Newton v Drayton*, 305 AD2d 303 [1st Dept 2003] where the defendants permissibly relied on the unsworn reports of the plaintiff's doctors to satisfy their initial burden that the plaintiff did not sustain a serious injury within the meaning of Insurance Law 5102 [d]). The treatment records indicate that Plaintiff's range of motion progressively increased to full range of motion in all subject areas and negative objective tests in 2010. Defendants contend that the objective medical evidence establishes that Plaintiff has not sustained a serious injury as a result of the subject accident.

Defendants have also met their burden as to the 90/180 category of Insurance Law 5102 (d). Defendants submit Plaintiff's deposition transcript, in which she testified that as a result of the subject accident, she canceled her one-week vacation and instead stayed home for the week, using her pre-scheduled time off and vacation days. She further testified that when she returned to work, she was on light duty and earned the same salary. Defendants have met their initial burden of establishing that Plaintiff did not sustain serious injuries as a result of the accident under Insurance Law 5102 (d) (*Perez v Rodriguez*, 25 AD3d 506 [1st Dept 2006]).

In opposition to Defendant Reid's motion and Defendants LeCraft and MTA Bus' cross-motion, Plaintiff relies on the affirmed medical records from Gordon C. Davis Medical P.C., the affirmed, but not notarized, report of GC Chiropractic P.C., the affirmed MRI reports from New Millennium Medical Imaging, the affirmed medical records from Millennium Ambulatory Surgical Center, the affirmed report from Vincentiu Popa MD LLC Interventional Pain Management, the affirmed final narrative report of Dr. Mark Gladstein, the affirmation of Dr. Gladstein, and Plaintiff's affidavit.

As an initial matter, although the medical records from Gordon C. Davis Medical P.C. and the report from Vincentiu Popa MD LLC Interventional Pain Management were submitted in proper form, they were both substantively deficient in that they fail to specify range of motion measurements or objective tests used to determine that the subject accident caused Plaintiff's injuries (*Perl v Meher*, 18 NY3d 208 [2011]). Both reports indicate decreased range of motion without noting how the doctors measured Plaintiff's range of motion and, with regard to Dr. Popa's report, without providing a baseline norm to compare the ranges, eroding the reliability of the assessments, "leaving the court to speculate" as to their ultimate meaning (*Bray v Rosas*, 29 AD3d 422 [1st Dept 2006]). With regard to the report of GC Chiropractic P.C., pursuant to CPLR 2106, chiropractors are not afforded the privilege of making an affirmation without appearing before notary or other official authorized to administer oaths or affirmations (*Burgess v Avignon Taxi, LLC*, 211 AD3d 522 [1st Dept 2022] where the First Department ruled that the motion court

correctly disregarded it because it failed to comply with the rule that "reports of chiropractors must be subscribed before a notary or other authorized official").

The MRI reports fail to raise a triable issue of fact. While the MRI report of Plaintiff's cervical spine found reversal of normal curvature of the cervical spine compatible with a spasm and both MRI reports noted posterior bulges, neither addressed causation (*Paduani v Rodriguez*, 101 AD3d 470 [1st Dept 2012]).

Dr. Gladstein's final narrative report was submitted in proper form and raises a triable issue of fact. Plaintiff began treating with Dr. Gladstein in December of 2016. Dr. Gladstein personally reviewed the MRI films of Plaintiff's cervical spine, which revealed reversal of the normal curvature compatible with spasm and posterior disc bulges at the C4-C7 levels and lumbar spine, which revealed disc bulge at the L3-4 level impinging upon the thecal sac. Dr. Gladstein also measured Plaintiff's range of motion with a goniometer and found decreased range of motion as to Plaintiff's cervical spine and lumbar spine. As to causation, Dr. Gladstein found within a reasonable degree of medical certainty, that the subject accident was the cause of Plaintiff's injuries and that she is in need of further treatment. Dr. Gladstein concluded that Plaintiff is permanently partially disabled and that her condition interferes with her quality of life and activities of daily living.

The Court also notes that Defendants did not provide evidence that Plaintiff's injuries can be traced to Plaintiff's prior accident, and therefore Plaintiff's doctors were not specifically charged with addressing that contention. Nevertheless, Dr. Gladstein did note in his report that Plaintiff did not express similar symptomology before the date of the subject accident.

Regarding Defendants LeCraft and MTA Bus' argument that there has been a gap in treatment, Plaintiff asserts that she stopped treating because her no-fault benefits terminated and that she continues to perform exercises and stretches at home. This constitutes a sufficient explanation for Plaintiff's gap in treatment (*Nwanji v City of NY*, 190 AD3d 650 [1st Dept 2021]).

Plaintiff has raised triable issues of fact as to whether the injuries to her cervical spine and lumbar spine meet the threshold for serious injury under Insurance Law 5102 (d) (*Williams v Perez*,

92 AD3d 528, 529 [1st Dept 2012]; *Perl v Meher*, 18 NY3d 208 [2011]; *Elias v Mahlah*, 58 AD3d 434 [1st Dept 2009]).

However, with respect to the 90/180 days category of serious injury, Plaintiff supplies the Court with no competent medical evidence demonstrating that Plaintiff was unable to perform substantially all of her normal activities for at least 90 of the first 180 days as a result of the accident (*Elias v Mahlah*, 58 AD3d 434, 435 [1st Dept 2009]). Further, Plaintiff's testimony that she only took the pre-scheduled one week off from work and was on light duty thereafter fails to raise an issue of fact in opposition to Defendants' prima facie showing (*Anderson v Pena*, 122 AD3d 484 [1st Dept 2014]). 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

ORDERED that the motion by Defendant Andre R. Reid and cross-motion by Defendants Kafil LeCraft and MTA Bus Company for summary judgment based upon the grounds that Plaintiff's alleged injuries fail to satisfy the serious injury threshold under Insurance Law 5102 (d) are denied, except as to the 90/180 days category; and it is further

ORDERED that any requested relief not specifically addressed herein has nonetheless been considered; and it is further

ORDERED that within 30 days of entry, Plaintiff shall serve a copy of this Decision and Order with Notice of Entry upon all Defendants.

This constitutes the Decision and Order of the Court.

4/13/2022
DATE

James G. Clynes
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