Castillo v Reado
2023 NY Slip Op 35284(U)
May 3, 2023
Supreme Court, Nassau County
Docket Number: Index No. 601237/2020
Judge: Sarika Kapoor
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SUPREME COURT: STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT: HON. SARIKA KAPOOR
ACTING JUSTICE OF THE SUPREME COURT

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MARISOL RAMOS DE CASTILLO,

TRIAL/IAS PART 33
Index No.: 601237/2020

Plaintiff,

FINAL
DECISION AND ORDER

- against -

Motion Seq. No.: 003
Motion Submission Date:
03/14/2023

CHARITY READO,

Defendant.

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NYSCEF Docs. 54-64, 73-91 and 103-113 were read and considered in deciding this motion.

This Court begins by noting that in an Interim Decision and Order dated November 14, 2022 (entered November 22, 2022) [NYSCEF Doc. 89], this Court (Mahon, J.), "*sua sponte* adjourned [the instant motion] for further submission by the plaintiff as to the location of the motor vehicle accident in issue." This Decision and Order is the final determination on the application advanced by the defendant, Charity Reado ("Reado"), for an Order, *inter alia*, awarding her summary judgment dismissal of the plaintiff's complaint on the grounds that the injuries sustained by the plaintiff, Marisol Ramos De Castillo ("Castillo"), do not satisfy the "serious injury" threshold requirement of Insurance Law § 5102(d). The motion is **GRANTED**.

This action arises out of an intersection motor vehicle accident which took place on November 5, 2019 at approximately 8:00 a.m. Plaintiff testified that she was operating her vehicle with her daughter – nonparty herein – as a passenger and that as a result of the subject collision, they were transported by ambulance to Winthrop Hospital. Plaintiff presented to the Hospital with complaints to her neck, back and left knee. Plaintiff testified that she left the hospital the same day and returned home via Uber and laid down. She claims that she first sought medical treatment in relation to the alleged accident on November 12, 2019 for her lower and middle back. She testified to seeing her treating physician, namely Dr. Mendoza, three (3) times per week for therapy, acupuncture and chiropractic adjustments. Plaintiff asserted that she was never given any prescription medication for pain and did not see any other providers in relation to this accident besides Dr. Mendoza.

Plaintiff, who was 32-years old at the time of the subject accident, claims that, as a result of this accident, she was confined to her bed for two (2) weeks following the accident and to her home for approximately one (1) month. As to activities, plaintiff testified that she is unable to walk with her daughter to the park and is unable to complete "some" work responsibilities, such as heavy lifting, without some difficulty. She has no other limitations.

Plaintiff also testified that following the accident, she traveled to El Salvador and stayed for approximately two (2) months. She did not request any special accommodations during the flight.

"Serious injury" is defined by § 5102(d) of the New York Insurance Law as follows:

> 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 persons' usual and customary daily activities for not less than ninety days during one hundred and eighty days immediately following the occurrence of the injury or impairment. (Ins. Law § 5102(d)).

The law provides that "[b]y establishing that any one of several injuries sustained in an accident is a serious injury within the meaning of Insurance Law § 5102(d), a plaintiff is entitled to seek recovery for all injuries incurred as a result of the accident" (*Nussbaum v. Chase*, 166 AD3d 638, 639 [2nd Dept. 2018]; *Bonner v. Hill*, 302 AD2d 544, 545 [2nd Dept. 2003]; see Insurance Law § 5104[a]; *Rizzo v. DeSimone*, 6 AD3d 600, 601 [2nd Dept. 2004]; *Bebry v. Farkas-Galindez*, 276 AD2d 656 [2nd Dept. 2000]).

In her Verified Bill of Particulars, plaintiff claims that, as a result of this accident, she sustained, *inter alia*, the following:

> ***
> LUMBAR & THORACIC SPINE:
> - Bulging of the 14/L5 disc with focal acute central and right sided herniation of the nucleus pulposus, with impingement of nerve roots centrally and on the right hip with moderate central stenosis;
> - bulging of annulus fibrosis of the L3/L4 and L5/S1 discs;
> - Bulge seen at T9/T10;
> - Lumbar radiculopathy;
> - Lumbar myofascitis;
> - Lumbar vertebral derangement;
> - Lumbar muscle spasms;
> - Traumatic thoracic pain syndrome of the lumbar spine;
> - Lumbar sprain/strain;
>
> LEFT KNEE:

- Insertional tendinosis of the quadriceps tendon with heterogeneous intrasubstance signal abnormality approached the distal insertion.
- Grade II Signal within the body of the medial and lateral meniscus;
- Lateral patellar tilt, subluxation and patellofemoral chondromalacia with thinning of the articular cartilage peripherally over the lateral patellar facet;
- Synovitis;
- Chondromalacia;
- Trace fluid with the knee joint;
- Joint effusion;
- narrowing of the medial and lateral joint compartments was noted;
- Left knee sprain/strain;

CERVICAL SPINE:
- C3/C4 disc bulge;
- C4/C5 disc bulge;
- C5/C6 disc bulge;
- Cervical radiculopathy;
- Cervicalgia;
- Cervical radiculitis;
- Cervical myofascitis;
- Cervical muscle spasms;
- Traumatic thoracic pain syndrome of the cervical spine;
- Cervical sprain/strain;

***

Notably, in her bill of particulars, plaintiff claims that her injuries fall within the following four categories of Insurance Law §5102[b]; to wit,

(a) a permanent loss of use of a body organ, member, function or system;

(b) permanent consequential limitation of use of a body organ or member;

(c) significant limitation of use of a body function or system; and,

(d) a medically determined injury or impairment of a no-permanent nature which prevents the plaintiff from performing substantially all of the material acts which constitute such persons usual and customary daily activities, for not less than 90 during the 180 days immediately following the occurrence of the injury or impairment.

(Bill of Particulars, ¶8).

In the end, however, whether the plaintiff can demonstrate the existence of a compensable serious injury depends upon the quality, quantity and credibility of the admissible evidence (*Manrique v. Warshaw Woolen Assoc.*, 297 AD2d 519 [1st Dept. 2002]).

Here, it is noted at the outset that insofar as the plaintiff neither claims, let alone presents any evidence, that she has sustained a "total loss of use" of a body organ, member, function or

system, it is plain that her injuries do not satisfy the "permanent loss of use" category of Insurance Law §5102(d) (*Oberly v. Bangs Ambulance*, 96 NY2d 295 [2001]).

Equally meritless are the plaintiff's claims that her injuries satisfy the 90/180 category of Insurance Law § 5102(d).

As noted above, plaintiff asserts in her sworn examination before trial and bills of particular, that she was only confined to her bed for two weeks and to her home for one month following the accident. Additionally, there is no evidence on this record, including the plaintiff's own testimony, wherein she has asserted, let alone demonstrated, that she was curtailed in her usual activities "to a great extent rather than some slight curtailment" (*Licari v. Elliott*, 57 NY2d 230, 236 [1982]; *Frier v. Teague*, 288 AD2d 177 [2nd Dept. 2001]). According to her own sworn testimony, other than being unable to walk with her daughter to the park, doing heavy lifting and completing some work responsibilities without some difficulty, she has no other limitations.

In any event, to the extent that the plaintiff claims any limitations of her daily activities, she fails to attest that such limitations were "medically determined." In light of these facts, this Court determines that the plaintiff has effectively abandoned her 90/180 claim for purposes of defendants' initial burden of proof on a threshold motion (*Joseph v. Forman*, 16 Misc.3d 743 [Sup. Ct. Nassau 2007]).

Thus, this Court will restrict its analysis to the remaining two categories of Insurance Law 5102(d); to wit, permanent consequential limitation of use of a body organ or member; and, significant limitation of use of a body function or system.

Under the no-fault statute, to meet the threshold "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, the law requires that the body organ or member or a body function or system not operate at all or operate only in some limited way.

While it is not necessary for the plaintiff to establish "a total loss of the use" in the "permanent consequential limitation of use" and "significant limitation of use" categories, the limitations of use must nevertheless be consequential and significant, respectively, i.e., important or meaningful. The essential difference between the "significant limitation" category and the "permanent consequential" category is that "significant limitation of use" does not require that the limitation be total or permanent (*Lopez v Senatore*, 65 NY2d 1017 [1985]; *Estrella v GEICO Ins. Co.*, 102 AD3d 730 [2nd Dept. 2013]; *Velez v Svehla*, 229 AD2d 528 [2nd Dept. 1996]). In either case, however, the law requires that the plaintiff's limitations be more than minor, mild, or slight and that the claim be supported by medical proof based upon credible medical evidence of an objectively measured and quantified medical injury or condition (*Licari v. Elliot*, *supra* at 236; *Gaddy v. Eyler*, 79 NY2d 955 [1992]).

That is, in order to constitute quantified proof of a medical injury or condition and in order to prove the extent or degree of the physical limitation, an expert's designation of a numeric percentage of plaintiff's loss of range of motion is acceptable (*Toure v. Avis Rent A Car Sys.*, 98 NY2d 345 [2002]). Notably, an expert's qualitative assessment of a plaintiff's condition is also

probative, provided that: (1) the evaluation has an objective basis, and, (2) the evaluation compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system (*Id*). Ultimately, however, a minor, mild or slight limitation, whether quantified or qualitatively established, is deemed "insignificant" within the meaning of the statute (*Licari v. Elliot*, *supra*; *Grossman v. Wright*, 268 AD2d 79, 83 [2nd Dept. 2000]).

Essentially, in order to satisfy the statutory serious injury threshold, the legislature requires objective proof of a plaintiff's injury. However, even where there is ample objective proof of plaintiff's injury, the Court of Appeals held in *Pommells v. Perez*, 4 NY3d 566 (2005), that certain factors may override a plaintiff's objective medical proof of limitations and nonetheless permit dismissal of plaintiff's complaint. Specifically, in *Pommells v. Perez*, the Court of Appeals has held that additional contributing factors, such as a gap in treatment, an intervening medical problem, or a preexisting condition, would interrupt the chain of causation between the accident and the claimed injury (*Id*). Thus, to establish a claim for "serious injury" plaintiff must not only offer contemporaneous findings with the accident, but recent findings (based upon medical examinations) as well (*Perl v. Meher*, 18 NY3d 208 [2011]).

However, in 2011, the Court of Appeals clarified in *Perl v. Meher*, *supra*, that while the law requires both quantitative proof of a "serious injury" as well as "contemporaneous" evidence of a "serious injury", a quantitative assessment of a plaintiff's injuries does not have to be made during an initial examination and may instead be conducted much later, in connection with litigation (*Perl v. Meher*, *supra*). Thus, when relying on the quantitative prong of *Toure v Avis Rent A Car Systems, Inc.*, *supra*, to establish a permanent consequential limitation of use and/or significant limitation of use based on a limitation of movement, a plaintiff is not required to submit quantitative range of motion findings "contemporaneous" to the accident (*Perl v Meher*, *supra*). Rather, the plaintiff may submit qualitative medical evidence establishing plaintiff's symptoms shortly after the accident, and quantitative measurements of range of motion taken later in preparation for litigation (*Id*). The qualitative evidence generated shortly after the accident serves to establish that the accident was a proximate cause of plaintiff's injuries, while the quantitative evidence generated in preparation for litigation serves to demonstrate the severity of plaintiff's injuries (*Id*).

Ultimately, in support of a claim that the plaintiff has not sustained a serious injury, a defendant may rely either on the sworn statements of the defendant's examining physician or the unsworn reports of the plaintiff's examining physician (CPLR 2106; *Pagano v. Kingsbury*, 182 AD2d 268 [2nd Dept. 1992]). It is only when the defendant's motion is sufficient to raise the issue of whether a "serious injury" has been sustained that the burden shifts, making it incumbent upon the plaintiff to produce *prima facie* evidence in admissible form to support the claim for serious injury (*Pommells v. Perez*, *supra*; see also, *Grossman v. Wright*, *supra* at 84). However, unlike the movant's proof, unsworn reports of plaintiff's examining doctor or chiropractor are not sufficient to defeat a motion for summary judgment (*Grasso v. Angerami*, 79 NY2d 813 [1991]). Otherwise, a medical affirmation or affidavit which is based on a physician's personal examination and observations of plaintiff, is an acceptable method to provide a doctor's opinion regarding the existence and extent of a plaintiff's serious injury (*see Reid v. Wu*, 2003 WL 21087012 [Sup. Ct. Bronx 2003], *citing O'Sullivan v. Atrium Bus Co.*, 246 AD2d 418 [1st Dept. 1998]).

Here, in support of their motion, the defendants submit, *inter alia*, the following: the sworn report of Dorothy Scarpinato, M.D. FAAOS, who performed an independent orthopedic examination of the plaintiff on December 2, 2021; and, an unsworn letter dated July 6, 2020 from NYU Langone Health/NYU Winthrop Hospital addressed to defendant's attorney articulating, in sum and substance, "We have performed a complete and thorough search of all our files based on the information provided to us for identification and have not been able to locate any records for the above named patient."

This Court begins with noting that the letter from Winthrop Hospital to the defendant's attorney corroborates the plaintiff's testimony that despite being brought to the emergency room by ambulance to NYU Winthrop Hospital, plaintiff never sought treatment for her injuries; only her daughter received treatment that day.

Moreover, the balance of the defendant's submissions, namely the sworn independent report of Dr. Scarpinato, establishes her *prima facie* entitlement to judgment as a matter of law.

Specifically, Dr. Scarpinato, attests in her sworn report that based upon her examination of the plaintiff on December 2, 2021, including performing quantified range of motion testing on her cervical spine, thoracic spine, lumbar spine and left knee, with a goniometer/inclinometer, compared her findings to normal range of motion values and, notably, concluded the following:

> ***
> **Examination of the cervical spine**: Examination of the cervical spine reveals a range of motion of flexion to 50 degrees (50 degrees normal), extension to 60 degrees (60 degrees normal), side bending to 45 degrees (45 degrees normal) and rotation to 80 degrees (80 degrees normal). There is a subjective complaint of midline tenderness noted.
> Reflexes are present, equal and symmetrical in the upper extremities. Muscle strength is good with no noted atrophy. No sensorial deficits noted. Handgrip, pinch and grasp were normal.
>
> **Examination of the thoracic spine**: Examination of the thoracic spine reveals maintenance of the normal lordotic curvature. Range of motion of flexion was to 45 degrees (45 degrees normal), extension to 0 degrees (0 degrees normal), right and left lateral bending to 45 degrees (45 degrees normal), right and left rotation to 30 degrees (30 degrees normal). There is a subjective complaint of midline tenderness but no muscle spasms or trigger points elicited upon palpation.
>
> **Examination of the lumbar spine**: Examination of the lumbar spine reveals maintenance of the normal lordotic curvature. Range of motion of flexion was to 60 degrees (60 degrees normal), extension to 25 degrees (25 degrees normal), right and left lateral bending to 25 degrees (25 degrees normal). Straight leg raise testing is negative, performed to 90 degrees bilaterally in the supine position. There is no tenderness, muscle spasms or trigger points elicited upon palpation.
> Reflexes were present, equal and symmetrical in the lower extremities. Muscle strength was good with no noted atrophy. Sensation was intact. No neurotrophic changes noted.

Measurement of the quadriceps and calf muscles is equal and symmetrical with no noted atrophy. The claimant can stand on toes and heels and can squat without difficulty.

Examination of the left knee: Examination of the left knee reveals range of motion of flexion to 150 degrees (150 degrees normal). Extension is full. There is no medial or lateral instability noted. There is a subjective complaint of anterior tenderness but no swelling. Anterior Drawer and posterior Drawer tests are negative. Effusion is negative. Quad strength is intact and there is no instability.

In the end, Dr. Scarpinato, explains her noted impressions as follows:

***
IMPRESSION:
***
My examination of the neck, back and left knee was normal revealing subjective complaints of neck, back and left knee tenderness and no positive objective findings. My diagnosis is resolved cervical spine strain, resolved lumbar spine strain, resolved thoracic spine strain and resolved left knee sprain. If the history provided is accurate and based on the medical records provided and my examination performed today, there is a causal relationship between the claimant's initial complaints and the accident of record. The claimant is currently working as a housekeeper. There is no orthopedic disability or permanency noted upon today's examination. Her prognosis and current clinical assessment is good.
***

Thus, based upon this medical submission, and when read in conjunction with the balance of defendant's other submissions, this Court finds that the defendant has demonstrated that the plaintiff's injuries do not satisfy any of the categories of the "serious injury" statute. Accordingly, the burden shifts to the plaintiff to come forward with evidence to overcome the defendant's submissions, in admissible form, to support her claim for "serious injury" (*Licari v. Elliot*, *supra*).

In opposition, counsel for the plaintiff submits, *inter alia*, the following:

1. the unsworn MRI reports of plaintiff's cervical spine, lumbar spine, and thoracic spine each dated February 8, 2020 submitted under the cover of the affidavit of Kerry Ann "Johnson", the medical records clerk at "CitiMed Diagnostics" who avers, on April 29, 2022, that "the copies annexed hereto are exact photocopies of the original medical records on file at CitiMed Diagnostics that I have in my custody and control" and that the medical records are made and kept "in the regular course of business of the hospital and it is the regular course of the business of the hospital to make such medical records at or about the time of the vents described in the medical records."

2. the unsworn MRI reports of plaintiff's left knee dated 01/07/2020 submitted under the cover of the affidavit of "Catalina Pam", the medical record/front desk clerk at "Stand-Up MRI Carle Place", dated May 23, 2022, who avers, that "the copies annexed hereto are exact photocopies of the original medical records on file at Stand-Up MRI that I

have in my custody and control" and that the medical records are made and kept "in the regular course of business of the hospital and it is the regular course of the business of the hospital to make such medical records at or about the time of the vents described in the medical records."

3. The narrative report of Dr. Didier Demesmin, MD, dated May 31, 2022 (Doc. 81), who avers therein that he initially evaluated the plaintiff on February 6, 2020 and then next examined her on May 5, 2022.

4. The sworn affirmation of Dr. Didier Demesmin dated July 6, 2022 (Doc. 82) who avers therein that he first saw the plaintiff on February 6, 2020 and then again on May 5, 2022.

5. The narrative report of Dr. Randall V. Erhlich, M.D., Board Certified Orthopedic Surgeon, dated May 9, 2022, who avers therein that he evaluated the plaintiff on May 5, 2020, albeit remotely due to the COVID-19 lockdowns in place (Doc 83).

6. The sworn affirmation of Dr. Randall Erhlich dated July 6, 2022 who avers therein that following his initial evaluation of the plaintiff on May 5, 2020, he next examined her on May 9, 2022 (Doc. 84).

The law is clear. To defeat a motion for a summary judgment, the plaintiff must meet the statutory threshold requirement of establishing a "serious injury" by competent, admissible medical evidence, and, as in this case, the statements and reports by the plaintiff's examining and treating physicians that are unsworn or which are not affirmed to be true under penalty of perjury do not meet that test (*Magid v. Lincoln Servs. Corp.*, 60 AD3d 1008 [2nd Dept. 2009]; *Goldin v. Lee*, 275 AD2d 341 [2nd Dept. 2000]). Indeed, unsworn reports and records – medical and otherwise – are not admissible in opposition to a motion for summary judgment based on the plaintiff's failure to establish a serious injury within the meaning of the statute (*Bonsu v. Metropolitan Suburban Bus Auth.*, 202 AD2d 538 [2nd Dept. 1994]).

This Court begins with noting that plaintiff's reliance upon the unsworn MRI reports of her cervical spine, lumbar spine, thoracic spine and left knee do not constitute competent admissible medical evidence. It is plain from a simple reading of the reports of Dr. Stephen Toder, M.D., Board Certified Diagnostic Radiologist, and Dr. Ronald Wagner, M.D., Diplomate of the American Board of Radiology, that both doctors merely "reviewed" plaintiff's "MRIs."

In order to constitute competent medical evidence, a radiologist is required to have the MRI taken under his or her supervision and he or she also has to be the physician to read the MRI (*Fiorillo v. Arriaza*, 24 Misc.3d 1215(A) [Sup. Ct. Nassau 2007]; *Sayas v. Merrick Transportation*, 23 AD3d 367 [2nd Dept. 2005]). Under these circumstances, while the radiologist need not pair the findings of the MRI films with a physical examination, he or she, as the radiologist performing the MRI, must nevertheless also report an opinion as to the causality of the findings (*Collins v. Stone*, 8 AD3d 321 [2nd Dept. 2004]; *Betheil-Spitz v. Linares*, 276 AD2d 732 [2nd Dept. 2000]). Here, neither Dr. Toder nor Dr. Wagner offers any such findings.

Moreover, while MRI reports are also admissible if another radiologist, i.e., not the radiologist who performs the MRI scan, avers that he or she personally reviewed either the actual MRI films or the sworn MRI reports of the prescribing radiologist, rather than just the unsworn MRI reports of another physician (*Dioguardi v. Weiner*, 288 AD2d 253 [2nd Dept. 2001]; *Beyel v. Console*, 25 AD3d 636 [2nd Dept. 2006]; *Porto v. Blum*, 39 AD3d 614 [2nd Dept. 2007]), here, there is no indication that either physician has done so. In any event, even assuming that said physician had reviewed either the actual MRI films or the sworn MRI reports of the prescribing radiologist, it is plain that said physician did not pair up his findings with a recent physical examination as would be necessary to constitute competent admissible evidence (*Silkowski v. Alvarez*, 19 AD3d 476 [2nd Dept. 2005]).

To the extent that plaintiff attempts to submit said MRI reports into evidence with the submission of the affidavits of Kerry Ann Johnson and Catalina Pam, respectively, who identify themselves as the clerks of their respective medical facilities, said offer of proof is also unavailing. Neither "custodian" of the records represents that she has any personal knowledge of the facts stated in the underlying reports (*Washington v. Mendoza*, 57 AD3d 972 [2nd Dept. 2008]). Finally, said reports are also precluded from being considered by this Court on the grounds that they are business records under CPLR 4518. Medical reports including interpretations of examinations and testing, as opposed to day to day business entries of a treating physician, cannot be properly considered by this Court as business records (*Komar v. Showers*, 227 AD2d 135 [1st Dept. 1996] *citing Rodriguez v. Zampella*, 42 AD2d 805 [3rd Dept. 1973]).

Accordingly the unsworn MRI reports will not be considered by this Court herein.

The balance of plaintiff's submissions, while competent admissible evidence, nonetheless fail to establish an issue of fact as to whether the plaintiff sustained a serious injury within the meaning of "permanent consequential limitation of use" and/or "significant limitation of use" categories of the Insurance Law.

Initially, this Court notes that, both, Drs. Demesmin and Erhlich state in their respective sworn reports and affirmations that they first examined the plaintiff on February 6, 2020 and May 5, 2020, respectively – i.e., three and six months, respectively, after the date of plaintiff's accident. As stated above, medical evidence of an injury is required to establish a serious injury (*Toure v. Avis Rent A Car Systems, Inc., supra*). Generally, the medical proof required should be contemporaneous with the accident, showing qualitative evidence of what restrictions, if any, plaintiff was afflicted with (*Nemchyonok v. Ying*, 2 AD3d 421 [2nd Dept. 2003]); *Pajda v. Pedone*, 303 AD2d 729 [2nd Dept. 2003]). In fact, a failure to submit medical evidence contemporaneous with the injury, as in this case, requires summary judgment in defendant's favor (*Nemchyonok v. Ying, supra*).

Moreover, both physicians – Drs. Demesmin and Erhlich – aver that there was a gap in their respective "treatments" of 27 months and 24 months, respectively. While this Court is not convinced that either physician "treated" the plaintiff for her alleged injuries as a result of this accident, even assuming that they had treated the plaintiff, neither physician explains their gap in treatment of over two years. As stated above, the Court of Appeals in *Pommels v. Perez* has held that while "the law surely does not require a record for needless treatment in order to survive

summary judgment, where there has been a gap in treatment or cessation of treatment, a plaintiff must offer some reasonable explanation for the gap in treatment or cessation of treatment" (*Perl v. Meher*, *supra*). Moreover, courts that have applied *Pommels*, *supra*, have consistently held that to be reasonable, the explanation for the gap in treatment must be concrete and substantiated by the record. The plaintiff has failed to offer any proof in this regard.

This Court is fully aware of the COVID-19 lockdowns and restrictions that were in place during the time of plaintiff's "gap" in treatment. Nonetheless this court cannot overlook the fact that the physicians had the ability to engage in telemedicine or other remote visits that could have arguably supported plaintiff's claim for treatment for her purported serious injuries.

Under such circumstances, the gap in treatment present with respect to the plaintiff is fatal to her claim, as this gap – inadequately explained – renders any conclusion as to causation entirely speculative (*Pommels v. Perez*, *supra*; *see also*, *Phillips v. Zilinsky*, 39 AD3d 728 [2nd Dept. 2007]).

Therefore, in light of plaintiff's failure to present any competent or admissible evidence, supporting a claim for serious injury, defendant's motion for summary judgment dismissal of plaintiff's complaint is granted.

Under these circumstances, that part of defendant's application for summary judgment on the grounds that no liability exists with regard to the defendant, is denied as moot (*Licari v. Elliott*, 57 NY2d 230 [1982]; *Cf. Zecca v Riccardelli*, 293 AD2d 31 [2nd Dept. 2002]).

The complaint is dismissed in its entirety.

This shall constitute the decision and order of this Court.

Settle judgment on notice.

Dated: Mineola, New York
May 3, 2023

ENTER:

HON. SARIKA KAPOOR, A.J.S.C.