SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. KENNETH A. DAVIS,

Justice

TRIAL/IAS, PART 10
NASSAU COUNTY

VICTORIA PUCCIO,

Plaintiff(s),

SUBMISSION DATE: 12/09/02
INDEX No.: 4628/01

-against-

TRACEY ANN MOODIE, AISHA BROWN and DESIREE DORAN,

MOTION SEQUENCE #3, 4

Defendant(s).

The following papers read on this motion:

Notice of Motion/ Order to Show Cause.....	X
Answering Papers.....	X
Reply.....	X
Briefs: Plaintiff's/Petitioner's.....	
Defendant's/Respondent's.....	

Upon the foregoing papers, defendants', TRACEY ANN MOODIE, AISHA BROWN and DESIREE DORAN's, motion and cross motion for an order, pursuant to CPLR §3212, dismissing the complaint and directing summary judgment in favor of the defendants are granted.

The instant matter involves an automobile accident that occurred on October 22, 1998, in which plaintiff was injured. Said accident occurred on Jerusalem Avenue and First Street in Uniondale, New York. The other vehicles involved in the accident were driven by Tracy Ann Moodie and Desiree Doran. Plaintiff alleges that she sustained the following injuries: posterior disc bulges at C5-C6 and C6-C7 with impingement on the spinal canal, C4-C5 malalignment, radiculapathy in the upper extremities, headaches, posterior disc herniations at T7-T8 and T8-T9 with impingement on the anterior aspect of the spinal cord, disc bulges at L4-L5 with impingement on the spinal canal and neural foramina bilaterally, posterior disc herniation at L5-S1 with impingement on the spinal canal and neural formina and L5-S1 retrolisthesis. Plaintiff alleges to have been confined to bed for five days and out of work for nine days. The instant action was commenced by the filing of a Summons and Complaint on March 21, 2001. Issue was joined on or about June 6, 2001 by the service of an answer.

Plaintiff has claimed that she sustained a serious physical injury that is permanent in nature as a result of the accident. The court finds otherwise. Plaintiff's injuries fail to meet the serious injury requirement of Insurance Law §5102. Insurance Law §5102 (d) states:

> 'Serious injury' means a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member, a significant limitation of use of 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.

Defendant has the initial burden of proving a serious injury was not incurred by the plaintiff. Gaddy v. Eyler, 79 N.Y.2d 955, 956-957, 591 N.E.2d 1176, 582 N.Y.S.2d 990 (1992). Defendant has submitted an affirmation from Dr. Erik Entin, M.D. stating that after reviewing the plaintiff's records and performing objective testing that the plaintiff "sustained a dorsal sprain secondary to the motor vehicle accident on October 22, 1998. This appears to have been resolved. She has no neurologically based disability referable to the accident of October 22, 1998. She has an entirely normal "neurological examination." Additionally, defendants have submitted reports from plaintiff's treating physicians which state that the plaintiff does not have a permanent injury. See, Tankerslay v. Szesnat, 235 A.D.2d 1010. Defendant's report of Dr. Jeffrey Meyer was not reviewed by the court as it is not in admissible form. Grasso, *infra*. Once defendant has established that the injury falls outside of Insurance Law §5102, plaintiff has the burden of proving a triable issue of fact. The statute specifies the types of injuries or the impairment that are defined as a serious injury. In the instant matter, in order to meet this burden, plaintiff must establish that there is a significant limitation of use of the body function or system. "The law requires the limitation of use to be more than minor, mild or slight." Lanuto v. Constantine, 192 A.D.2d 989, *lv denied* 82 N.Y.2d 654. The court finds that the injuries complained of by plaintiff do not constitute a significant limitation of use and

therefore fall outside the realm of Insurance Law §5102. Plaintiff submitted letters from her radiologist and a treating chiropractor, Dr. Tepper. These letters do not constitute affidavits as they are not in admissible form and will not be considered in the determination of the instant motion. See, Grasso v. Angerami, 79 N.Y.2d 813; Thousand v. Hedberg, 249 A.D.2d 941; Gill v. O.N.S. Trucking, 239 A.D.2d 463. Plaintiff has submitted an affidavit from Andrew Marcus, D.C., a chiropractor that plaintiff was treated by in March of 2002 following the retirement of Dr. Tepper. See, Rut v. Greforis, 204 A.D.2d 721. Dr. Marcus states that he reviewed prior reports and diagnostic tests as well as Dr. Tepper's records in October of 2002. Dr. Marcus states that he performed several tests and he further states "it is my opinion based upon a reasonable degree of medical certainty that the conditions as noted in the MRIs were caused by her car accident of October 22, 1998 and that her injuries have resulted in restrictions in her use of her cervical spine and as a result restricts her daily activity due to concommitent pain in the areas injured and that she has sustained a limitation in the cervical spine which will be recurring and permanent in nature." Dr. Marcus in his affidavit failed to describe the tests used, thereby rendering his affidavit insufficient. Hernan v. Church, 276 A.D.2d 471. Furthermore, plaintiff's statements that she could not perform certain activities do not raise a triable issue of fact. Id.

In the instant matter, plaintiff has not submitted any proof to substantiate that the claimed injuries fall within the statute. See, Toure v. Avis Rent A Car, 98 NY2d 345; Robinson v. Grecian Trans. Inc., 278 A.D.2d 90. The court finds that the plaintiff has failed to demonstrate that a triable issue of fact exists. One of the goals of the no-fault system is to keep minor personal injury cases arising out of automobile accidents out of the courts. Licari v. Elliot, 57 N.Y.2d 230, 441 N.E.2d 1088, 445 N.Y.S.2d 570 (1982).

Accordingly, it is hereby ordered that all of the defendants are granted summary judgment and the plaintiff's complaint is dismissed.

This decision constitutes the order of the court.

Dated: FEB 03 2003

ENTERED

HON. KENNETH A. DAVIS J.S.C.

FEB 06 2003

NASSAU COUNTY
COUNTY CLERK'S OFFICE