SCAN

CASE DISP

SUPREME COURT - STATE OF NEW YORK

Present:

HON. DANIEL PALMIERI
Acting Justice Supreme Court

MAUREEN APA,

Plaintiff,

-against-

TWIN COUNTY RECYCLING CORP. and CHARLES SANGIOVANNI,

Defendants.

TRIAL PART: 35

NASSAU COUNTY

INDEX NO: 00-14744

MOTION DATE: 10-4-02

MOTION SEQ. NOS: 001 & 002

The following papers having been read on this motion:

Notice of Motion, dated 8-22-02	**1**
Notice of Cross-Motion and Affirmation in Opposition, dated 10-25-02	**2**
Reply Affirmation, dated 12-04-02	**3**

Plaintiff's un-opposed Cross-Motion as to liability only is granted and defendants' motion for summary judgment pursuant to CPLR § 3212 dismissing the complaint based on the failure of the plaintiff to have sustained a "serious injury" under Insurance Law § 5102 is granted and the complaint is dismissed.

This action arose as a result of a two car motor vehicle accident which occurred on November 19, 1999, at the entrance ramp of the Southern State parkway in Nassau County, New York. Plaintiff alleges the defendant struck the rear of plaintiff's vehicle as they were entering the parkway. Plaintiff had started to enter the parkway, stopped and defendant failed to observe that she had stopped and struck the rear of her vehicle. A rear-end collision with another vehicle establishes a prima facie case of negligence and imposes a duty on the operator of the following vehicle to explain how the accident occurred. Here, defendant has

failed to come forward with any evidence to inculpate negligence on the part of plaintiff and she is entitled to judgment as a matter of law. *Benvarko v. Avis Rent a Car System*, 162 AD2d 572 (1990); *Abramowicz v. Roberto*, 220 AD2d 374 (1995); *Leal v. Wolff*, 224 AD2d 392 (1996). If the operator of the moving vehicle cannot come forward with any evidence to rebut the inference of negligence, the operator of the stationary vehicle may properly be awarded summary judgment on the issue of liability. *Leonard v. City of New York*, 273 AD2d 205 (2nd Dept. 2000), citations omitted. The uncontroverted facts clearly establish that the negligence of defendant was the sole and only cause of the accident and the plaintiff's cross motion as to liability only is granted.

Defendant alleges that plaintiff has failed to establish a "serious injury" as defined by the Insurance Law § 5102(d) and as such has no cause of action under the New York Insurance Law Section § 5104(a). As a result, they argue this action must be dismissed.

On a motion for summary judgment the movant must establish his or her cause of action or defense sufficient to warrant a court directing judgment in its favor as a matter of law. *Junco v. Ranzi,* 288 ADd2d 440 (2nd Dept., 2001); *Frank Corp. v. Federal Ins. Co.*, 70 NY2d 966 (1988); *Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986), *Rebecchi v. Whitmore*, 172 AD2d 600, (2nd Dept. 1991). "The party opposing the motion, on the other hand, must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact" (*Frank Corp. v. Federal Ins. Co., supra*, at 967, *GTF Mktg. v. Colonial Aluminum Sales*, 66 NY2d 965 (1985), *Rebecchi v. Whitmore, supra* at 601. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (*see, Frank Corp. v. Federal*

Ins. Co., supra).

Further to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court deciding this type of motion is not to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist [see, *Barr v. County of Albany*, 50 NY2d 247 (1980); *Daliendo v. Johnson*, 147 AD2d 312, 317 (2nd Dept. 1989)].

In addressing the serious injury issue as defined by the New York State Insurance Law §5102(d), the Court first looks at the plaintiff's pleadings. Plaintiff, Maureen Apa, alleges in her Bill of Particulars to have sustained left knee internal derangement, lumbosacral strain, probable medial meniscal tear, cervical radiculitis, T12-L1 disc herniation, disc bulges at L2-3, L3-4 L4-5, L5-S1, all of which plaintiff contends satisfies the serious injury requirement of the Insurance Law. Since a disc herniation or bulge and limited range of motion may constitute evidence of serious injury, a defendant must demonstrate that it is not causally related to the accident, *Caulfield v. Metten*, 275 AD2d 758 (2nd Dept. 2000). Conversely the existence of a herniated disc or bulge does not in and of itself constitute a serious injury. To raise a triable issue of fact as to whether a herniated disc or bulge constitutes a serious injury, a plaintiff is required to provide objective evidence of the qualitative nature of the plaintiff's limitations based upon the normal function, purpose and use of the injured body parts. *Toure v. Avis Rent A Car Systems, Inc.*, 98 NY2d 345 (2002).

"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. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." *Junco v. Ranzi, supra; Winegrad v. New York Univ. Med. Center,* 64 NY2d 851, 853 (1985).

> "Serious injury" as defined by §5102(d) of the New York State Insurance Law "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."

Defendant argues that plaintiff did not sustain a "serious injury" as defined by any section of the statute. Defendant's application is supported by an affirmations of Dr. Frank Hudak, an Orthopedic Surgeon, dated June 10, 2002, Dr. Stephen Newman, a Neurologist, dated July 22, 2002 and Dr. Jeffery Lang, a Radiologist, dated August 22, 2002. On behalf of the defendants, Dr. Hudak, examined the plaintiff and the medical records available for his review. Upon examination, Dr. Hudak found the plaintiff to have pre-existing degenerative disc disease in the area of the lumbosacral spine that predates the accident that forms the basis of this claim, and to have sustained resolved soft tissue injuries to her neck and lower back. He found no evidence of objective left knee pathology and concluded the plaintiff had sustained cervical and lumbar sprain with no objective physical findings which could be causally related to the accident. Dr. Newman, upon examination found all range of motion tests to be within normal limits and found no abnormalities of her neurologic examination or to have sustained any neurologic injury or disability as a result of the reported accident. Dr. Lang's radiological review of the lumbar MRI film dated June 12, 2000, reports

degenerative changes and states the findings are not post traumatic.

Defendant has also submitted an unaffirmed left knee MRI report of plaintiff's physician, dated May 19, 2000, and an unaffirmed MRI report of the lumbar spine, dated June 16, 2000. A moving defendant may rely on the unsworn reports of plaintiff's medical providers in support of a summary judgment motion. *Torres v. Michelli*, 208 AD2d 519 (2nd dept. 1994). The MRI of the knee reveals no tear of the meniscus. The lumbar MRI reports disc desiccation and degenerative changes with mild to moderate spinal stenosis.

In opposition, the only competent medical evidence the plaintiff relies upon is a sworn affidavit from Dr. Ali Guy, a physician she only saw for the first time on October 4 2002, in response to this motion. Consequently, there is no medical history or course of treatment provided, causally relating the lumbar herniation and sprains to the accident which forms the basis of this claim nor is there any objective medical evidence of the extent or degree of the alleged limitation resulting from the injuries to her neck, back, left knee, right thumb. *Davis v Brightside Fire Protection* , 275 AD2d 298 (2 nd Dept. 2000)., *Pierre v. Nanton,* 279 AD2d *621 (*2nd Dept. 2001*)*. The medical evidence proffered in this case fails to support the plaintiff's burden, the mere parroting of language tailored to meet statutory requirements is insufficient. *Grossman v. Wright, supra.* The court did not consider the unsworn medical reports and other unsworn records offered by the plaintiff since such material does not constitute competent evidence. *Slavin v. Associates Leasing, Inc., 273 AD2d 372 (2nd Dept. 2000).* As these reports do not constitute competent evidence they may not be considered by the court. *Grasso v. Angerami, 79NY2d 813 (199*], Sandt v. New York Racing *Ass'n, Inc., 289 AD2d 218 (2nd Dept. 2001), Golden v. Lee,* 275 AD2d 341 (2nd Dept. 2000).

In a motion for summary judgment seeking to dismiss, the defendant is required to establish a prima facie case that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d). Gaddy v. Eyler, 79 NY2d 955 (1992). Upon such a showing, it becomes incumbent on the plaintiff to come forward with sufficient evidence in admissible form to demonstrate the existence of a question of fact on the issue. *Gaddy*, supra. The Court must than decide whether plaintiff established a prima facie case of sustaining a serious injury. *Licari v. Elliott,* 57 NY2d 230 (1983).

Plaintiff has proffered no medical testimony to support a finding that she suffered a permanent loss of use of a body part or function because there is no testimony by her expert to find the total loss of use necessary to come within this category of serious injury. *Oberly v. Bangs Ambulance*, 96 NY2d 295 (2001), *Mikl v. Shufelt,* 285 AD2d 949 (3rd Dept. 2001).

A plaintiff's self-serving claim of inability to perform her daily activities without medical evidence to connect the inability to perform one's activities to the injury is insufficient. *Jackson v. New York City Transit Authority,* 273 AD2d 200 (2nd Dept. 2000), *Turchuk v. Town of Wallkill*, 255 AD2d 575 (2nd Dept. 1998) *cf. Hines v. Capital District Transportation Authority,* 280 AD2d 768 (3rd Dept. 2001). Plaintiff's claim lacks any medical evidence to support a claim of a medically determined injury of a non-permanent nature which prevented her from performing substantially all of the material acts which constitute her usual and customary daily activities for 90 of the first 180 days following the accident within the meaning of Insurance Law 5102(d). *Toure v. Avis Rent A Car Systems, Inc.,* supra, *Jackson v. New York City Transit Authority,* 273 AD2d 200 (2nd Dept. 2000), *Turchuk v. Town of Wallkill*, 255 AD2d 575 (2nd Dept. 1998), *cf. Hines v. Capital District Transportation Authority,* 280 AD2d 768 (3rd Dept. 2001). In addition to showing a nexus

between the injury and the duration of the disability, there must be proof of the full extent of the person's usual activities and a curtailment to a great extent of the ability to perform them. *Horowitz v. Clearwater,* 176 AD2d 1084 (3rd Dept.1991). The lack of medical evidence proffered in this case fails to support the plaintiff's burden. *Toure v. Avis Rent A Car Systems, Inc. , supra, Grossman v. Wright*, supra.

In the instant case, the affirmations submitted by the defendants in support of the motion for summary judgment were affirmed under the penalty of perjury (see, CPLR 2106) and made out a prima facie case that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d), *cf. Junco v. Ranzi, supra; Monette v. Keller,* 281AD2d 523 (2nd Dept. 2001), *Dugan v. Sprung,* 280 AD2d 736 (3rd Dept. 2001), *Napoli v. Cunningham, 273 AD2d (2nd Dept., 2000), Delinda v. Coronamos Cab Corp,* 244 AD2d 397 (2nd Dept. 1997). The movant's submission in support of the motion establishes a prima facie case that the injured plaintiff has not sustained a "serious injury" within the meaning of Insurance Law § 5102(d), *cf. Gamberg v. Romeo, 736 NYS2d 64 (2nd Dept., 2001); Napoli v. Cunningham*, supra, thus shifting the burden to the plaintiff to rebut the movant's case by submitting proof in evidentiary form showing the existence of triable issues of fact. *Zuckerman v. City of New York*, 49 NY2d 557 (1980); *Friends of Animals v. Associated Fur Manufacturers, Inc.*, 46 NY2d 1065 (1979). *Delinda v. Coronamos Cab Corp,* 244 AD2d 397 (2nd Dept. 1997).

Plaintiff has failed to provide the necessary proof of any serious injury. *Grossman v. Wright, supra.* Having addressed plaintiff's claimed injury, it was incumbent upon the plaintiff to come forward with competent object medical proof of serious injury within the meaning of the no-fault statute to raise an issue of fact. *Grossman v. Wright*, supra. The affidavit of plaintiff's attorney, who has no personal knowledge of plaintiff's medical injuries

is without evidentiary value. *Carpluck v. Friedman,* 269 AD2d 349 (2nd Dept. 2000). Additionally, no adequate explanation is given for the gaps and lack of treatment and this motion. Any significant lapse of time between the cessation of the plaintiff's medical treatments after the accident and the physical examination conducted by his or her own expert must be adequately explained. *Grossman v. Wright*, supra at 237. Plaintiff has failed to meet her burden, the motion is granted and the complaint is dismissed.

This constitutes the Decision and Order of this Court.

ENTER

DATED: DECEMBER 19, 2002

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Acting J.S.C.

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