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SHORT FORM ORDER

INDEX No. 08-9799
CAL. No. 09-02682-MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 4-27-10 (#003)
MOTION DATE 5-25-10 (#004)
ADJ. DATE 6-15-10
Mot. Seq. # 003 - MG; CASEDISP
004 - MD

VIVIAN LIGRNETTA, Plaintiff, - against - JUAN A. CAMPOS and BIENNE LUDNER, Defendants.	JAKUBOWSKI, ROBERTSON, MAFFEI, et al. Attorneys for Plaintiff 969 Jericho Turnpike St. James, New York 11780 MICHAEL G. NASHAK, ESQ. Attorney for Defendant Juan A. Campos 15 Metro Tech Center, 19th Floor Brooklyn, New York 11201-3818 CHEVEN, KEELY & HATZIS, ESQS. Attorneys for Defendant Bienne Ludner 40 Wall Street, 15th Floor New York, New York 10005

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendant Bienne Ludner, dated March 30, 2010, and supporting papers (including Memorandum of Law dated ____); (2) Notice of Motion by the defendant Juan A. Campos, dated April 12, 2010, supporting papers; (3) Affirmation in Opposition by the plaintiffs, dated June 8, 2010, and supporting papers; (4) Affirmation in Opposition by the defendant Juan Campos, dated April 12, 2010; (5) Reply Affirmation by the defendant Juan A. Campos, dated June 11, 2010, and supporting papers; (6) Reply Affirmation by the defendant Bienne Ludner, dated June 10, 2010; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion by defendant Bienne Ludner seeking summary judgment dismissing plaintiff's complaint and the motion by defendant Juan Campos seeking summary judgment dismissing plaintiff's complaint and all cross-claims against him hereby are consolidated for the purposes of this determination; and it is

ORDERED that the motion by defendant Bienne Ludner seeking summary judgment dismissing plaintiff's complaint is granted; and it is further

ORDERED that the motion by defendant Juan Campos seeking summary judgment dismissing plaintiff's complaint and all cross claims against him is denied, as moot.

Plaintiff Vivian Ligrnetta commenced this action against defendants Juan Campos and Bienne Ludner to recover damages for injuries she allegedly sustained as a result of a motor vehicle accident at the intersection of Suffolk Avenue and Pineville Road in the Town of Islip, New York on October 10, 2007. The accident allegedly occurred when the vehicle operated by defendant Ludner struck the vehicle operated by plaintiff after she failed to obey the stop sign controlling her direction of travel on Pineville Road. As a result of the collision between plaintiff's vehicle and defendant Ludner's vehicle, plaintiff's vehicle traveled into the oncoming eastbound traffic on Suffolk Avenue and was then struck by defendant Campos's vehicle. By her bill of particulars, plaintiff alleges that she sustained various personal injuries as a result of the subject accident, including a left rotator cuff tear; left shoulder sprain; lumbar, thoracic, and cervical radiculopathy; lumbar and cervical muscle spasm; cervical and lumbar myofascial derangement; and cervical brachial syndrome. Plaintiff alleges that she was unemployed and enrolled in school at Farmingdale Educational Opportunity Center at the time of the accident. Plaintiff further alleges that she was forced to drop out of school and had to undergo arthroscopic surgery on her left shoulder due to the injuries suffered in the accident.

Defendant Ludner now moves for summary judgment on the basis that plaintiff's injuries do not meet the "serious injury" threshold requirement of Insurance Law § 5102(d). Defendant Ludner also asserts that plaintiff's failure to yield the right way to his vehicle and defendant Campos's vehicle, in violation of Vehicle and Traffic Law § 1142(a), is the sole proximate cause of the subject accident. Defendant Ludner, in support of the motion, submits a copy of the pleadings, a copy of the parties' deposition transcripts, and a copy of the police accident report. Defendant Ludner also submits the sworn medical reports of Dr. Paul Miller, Dr. Iqbal Merchant, and Dr. Jessica Berkowitz, and plaintiff's medical records from Southside Hospital. At defendant Ludner's request, Dr. Miller performed an independent orthopedic examination of plaintiff on October 26, 2009, and Dr. Merchant performed an independent neurological examination of plaintiff on October 26, 2009. Also, at defendant Ludner's request, Dr. Berkowitz conducted an independent radiological review of the magnetic resonance image ("MRI") films of plaintiff's left shoulder and lumbar spine on September 16, 2009.

Defendant Campos moves for summary judgment on the basis that plaintiff's negligence is the sole proximate cause of the subject accident's occurrence. Defendant Campos asserts that the sudden and unexpected crossing over of plaintiff's vehicle into his lane of travel caused him to be faced with an emergency situation, and, as such, he cannot be held negligent for his inability to avoid the subject accident. Defendant Campos, in support of the motion, submits a copy of the pleadings, a copy of the parties' deposition transcripts, and a copy of the police motor vehicle accident report.

Plaintiff opposes the instant motions on the grounds that defendant Ludner failed to establish his prima facie burden demonstrating that the injuries she sustained as a result of the subject accident do not meet the "serious injury" threshold requirement of Insurance Law § 5102(d), and that defendants Ludner and Campos have failed to demonstrate that plaintiff's actions were the sole proximate cause of the subject accident. In the alternative, plaintiff asserts that the evidence submitted in opposition shows that she sustained injuries within the "limitation of use" categories and the "90/180" days category of "serious injury." Plaintiff, in opposition to the motions, submits her own affidavit, a copy of the parties' deposition transcripts, and copies of her medical records from Southside Hospital. Plaintiff also submits the sworn medical reports of Dr. Miguel Vargas, Dr. Harshad Bhatt, and Dr. Joseph Perez, the unsworn medical reports of Dr. James Himelfarb, and the unsworn operative report of Dr. Bhatt.

It has long been established that the "legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries (***Dufel v Green***, 84 NY2d 795, 622 NYS2d 900 [1995]; *see also* ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]). Therefore, the determination of whether or not a plaintiff has sustained a "serious injury" is to be made by the court in the first instance (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Porcano v Lehman***, 255 AD2d 430, 680 NYS2d 590 [1988]; ***Nolan v Ford***, 100 AD2d 579, 473 NYS2d 516 [1984], *aff'd* 64 NYS2d 681, 485 NYS2d 526 [1984]).

Insurance Law § 5102 (d) defines a "serious injury" as "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."

A defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred under the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a "serious injury" (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant's own witnesses, "those findings must be in admissible form, such as, affidavits and affirmations, and not unsworn reports" to demonstrate entitlement to judgment as a matter of law (***Pagano v Kingsbury***, 182 AD2d 268, 270, 587 NYS2d 692 [1992]). A defendant may also establish entitlement to summary judgment using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (*see* ***Fragale v Geiger***, 288 AD2d 431, 733 NYS2d 901 [2001]; ***Grossman v Wright***, 268 AD2d 79, 707 NYS2d 233 [2000]; ***Vignola v Varrichio***, 243 AD2d 464, 662 NYS2d 831 [1997]; ***Torres v Micheletti***, 208 AD2d 519,616 NYS2d 1006 [1994]). Once defendant has met this burden, plaintiff must then submit objective and admissible proof of the nature and degree of the alleged injury in order to meet the threshold of the statutory standard for "serious injury" under New York's No-Fault Insurance Law (*see* ***Dufel v Green***, *supra*; ***Tornabene v Pawlewski***, 305 AD2d 1025, 758 NYS2d 593 [2003]; ***Pagano v Kingsbury***,182 AD2d 268, 587 NYS2d 692 [1992]). However, if a defendant does not establish a prima facie case that the plaintiff's injuries do not meet the serious injury threshold, the court need not consider the sufficiency of the plaintiff's opposition papers (*see* ***Burns v Stranger***, 31 AD3d 360, 819 NYS2d 60 [2006]; ***Rich-Wing v Baboolal***, 18 AD3d 726, 795 NYS2d 706 [2005]; *see generally*, ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

Dr. Miller's report states, in relevant part, that an examination of plaintiff's cervical spine reveals that she exhibits flexion of 60 degrees (normal is 45 to 60 degrees), extension of 60 degrees (normal is 45 to 60 degrees), right and left lateral bending of 60 degrees (normal is 46 to 60 degrees), bilateral rotation of 90 degrees (normal is 70 to 90 degrees). The report states that there is no tenderness or muscle spasm upon palpation of the paracervical muscles or trapezii. Dr. Miller's report also states that an examination of the lumbar spine reveals that plaintiff exhibits forward flexion of 75 degrees (normal is 75 to 90 degrees), extension of 20 degrees (normal is 20 to 30 degrees), right and left lateral bending of 30 degrees

(normal is 30 to 45 degrees), and bilateral rotation of 20 degrees (normal is 20 to 30 degrees). The report states that there is no muscle spasm or tenderness upon palpation of the paralumbar muscles. Dr. Miller's report further states that an examination of plaintiff's left shoulder reveals that she exhibits forward flexion of 180 degrees (normal is 170 to 180 degrees), extension of 40 degrees (normal is 40 degrees), abduction of 180 degrees (normal is 170 to 180 degrees), adduction of 45 degrees (normal is 45 degrees), internal and external rotation of 90 degrees (normal is 90 degrees). The report states that there is no heat, swelling, effusion, crepitus, or erythema, and that there are three arthroscopic portals in plaintiff's left shoulder. Dr. Miller opines that the strains to plaintiff's cervical, thoracic, and lumbar regions have resolved. The report concludes that there is no causally related orthopedic disability and that plaintiff is capable of performing her daily living activities without restrictions.

Similarly, Dr. Merchant's report states, in pertinent part, that an examination of plaintiff's cervical spine reveals that she exhibits flexion of 50 degrees (normal is 50 degrees), extension of 60 degrees (normal is 60 degrees), bilateral rotation of 80 degrees (normal is 80 degrees), and right and left lateroflexion of 45 degrees (normal is 45 degrees). The report also states that an examination of plaintiff's lumbar spine reveals that she exhibits flexion of 90 degrees (normal is 90 degrees), extension of 30 degrees (normal is 30 degrees), and bilateral lateroflexion of 30 degrees (normal is 30 degrees). The report states that plaintiff's muscle tone in her upper and lower extremities is normal and that there is no atrophy or deformity present. It states that plaintiff has normal strength in her upper extremities and that she walks with a normal gait. Dr. Merchant opines that the cervical, thoracic, and lumbar strains that plaintiff sustained as a result of the subject accident have resolved. The report concludes that there is no evidence of a causally related neurological disability, and that plaintiff is capable of working and performing her usual daily living activities.

Based upon the foregoing and the submission of plaintiff's deposition testimony and medical records, defendant Ludner has established his prima facie entitlement to judgment as a matter of law that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102(d) as a result of the subject accident (*see* ***Gaddy v Eyler***, *supra*; ***Albano v Onolfo***, 36 AD3d 728, 830 NYS2d 205 [2007]; ***Giraldo v Mandanici***, 24 AD3d 419, 805 NYS2d 124 [2005]). Defendant Ludner's experts tested the ranges of motion in plaintiff's cervical and lumbar spines using a goniometer and set forth their specific measurements, as well as compared plaintiff's ranges of motion to the normal ranges (*see* ***Cantave v Gelle***, 60 AD3d 988, 877 NYS2d 129 [2009]; ***Staff v Yshua***, 59 AD3d 614, 874 NYS2d 180 [2009]). After reviewing the medical records and conducting their own independent examinations of plaintiff, Dr. Miller and Dr. Merchant were each unequivocal in stating that plaintiff has full range of motion in her cervical and lumbar regions, and in her left shoulder, and that she does not have any orthopedic or neurological disabilities and is capable of performing her normal daily living activities. Moreover, plaintiff's medical records submitted in support of defendant Ludner's motion state that plaintiff suffers from degenerative changes in her cervical, lumbar, and thoracic regions. Likewise, defendant's radiologist, Dr. Berkowitz, in her report, states that plaintiff suffers from degenerative disc disease in her lumbar spine, where she alleges her injuries were sustained (*see* ***Depena v Sylla***, 63 AD3d 504, 880 NYS2d 641 [2009], *lv denied* 13 NY3d 706, 887 NYS2d 4 [2009]; ***Jean v Kabaya***, 63 AD3d 509, 881 NYS2d 891 [2009]; ***Houston v Gajdos***, 11 AD3d 514, 728 NYS2d 839 [2004]). Dr. Berkowitz's report also states that there is no evidence of an acute traumatic injury to plaintiff's left shoulder, and that there is no causal relationship between plaintiff's alleged injuries and the subject accident. Therefore, the burden shifted to plaintiff to come forward with competent admissible medical evidence based on objective findings, sufficient

to raise a triable issue of fact that she sustained a "serious injury" (*see* ***Gaddy v Eyler***, *supra*; ***Luckey v Bauch***, 17 AD3d 411, 792 NYS2d 624 [2005];***McLoyrd v Pennypacker***, 178 AD2d 277, 577 NYS2d 272 [1991]).

A plaintiff claiming a significant limitation of use of a body function or system must substantiate his or her complaints with objective medical evidence showing the extent or degree of the limitation caused by the injury and its duration (*see* ***Ferraro v Ridge Car Serv.***, 49 AD3d 498, 854 NYS2d 408 [2008]; ***Mejia v DeRose***, 35 AD3d 407, 825 NYS2d 772 [2006]; ***Laruffa v Yui Ming Lau***, 32 AD3d 996, 821 NYS2d 642 [2006]; ***Kearse v New York City Tr. Auth.***, 16 AD3d 45, 789 NYS2d 281 [2005]; ***Beckett v Conte***, 176 AD2d 774, 575 NYS2d 102 [1991]). "Whether a limitation of use or function is 'significant' or 'consequential' (i.e. important . . .), relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part" (***Dufel v Green***, 84 NY2d 795, 798, 622 NYS2d 900 [1995]). A plaintiff claiming injury under either of the "limitation of use" categories also must present medical proof contemporaneous with the accident showing the initial restrictions in movement or an explanation for its omission (*see* ***Magid v Lincoln Servs. Corp.***, 60 AD3d 1008, 877 NYS2d 127 [2009]; ***Hackett v AAA Expedited Freight Sys.***, 54 AD3d 721, 865 NYS2d 101 [2008]; ***Ferraro v Ridge Car Serv.***, *supra*; ***Morales v Daves***, 43 AD3d 1118, 841 NYS2d 793 [2007]), as well as objective medical findings of restricted movement that are based on a recent examination of the plaintiff (*see* ***Nicholson v Allen***, 62 AD3d 766, 879 NYS2d 164 [2009]; ***Diaz v Lopresti***, 57 AD3d 832, 870 NYS2d 408 [2008]; ***Laruffa v Yui Ming Lau***, *supra*; ***John v Engel***, 2 AD3d 1027, 768 NYS2d 527 [2003]; ***Kauderer v Penta***, 261 AD2d 365, 689 NYS2d 190 [1999]). A sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part may also suffice (*see* ***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2000]; ***Dufel v Green***, *supra*). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]). Furthermore, a plaintiff alleging injury within the "limitation of use" categories who ceases treatment after the accident must provide a reasonable explanation for having done so (***Pommells v Perez***, 4 NY3d 566, 574, 797 NYS2d 380 [2005]; *see* ***Ferebee v Sheika***, 58 AD3d 675, 873 NYS2d 93 [2009]; ***Besso v DeMaggio***, 56 AD3d 596, 868 NYS2d 681 [2008]).

In opposition to defendant Ludner's prima facie showing, plaintiff has failed to raise a triable issue of fact as to whether she sustained a "serious injury" within the meaning of Insurance Law § 5102(d) (*see* ***Gaddy v Eyler***, *supra*; ***Licari v Elliott***, *supra*; ***Ali v Khan***, 50 AD3d 454, 857 NYS2d 71 [2008]). The Court notes that sprains and strains are not serious injuries within the meaning of Insurance Law § 5102(d) (*see* ***Rabolt v Park***, 50 AD3d 995, 858 NYS2d 995 [2008]; ***Washington v Cross***, 48 AD3d 457, 849 NYS2d 784 [2008]; ***Maenza v Letkajornsook***, 172 AD2d 500, 567 NYS2d 850 [1991]). Plaintiff has proffered insufficient medical evidence to demonstrate that she sustained an injury within the "limitation of use" categories (*see* ***Licari v Elliott***, *supra*; ***Ali v Khan***, 50 AD3d 454, 857 NYS2d 71 [2008]). The term "significant" limitation must be construed as more than a minor limitation of use (*see* ***Licari v Elliott***, *supra*; ***Leschen v Kollarits***, 144 AD2d 122, 534 NYS2d 233 [1988]; ***Gootz v Kelly***, 140 AD2d 874, 528 NYS2d 446 [1988]). While plaintiff has submitted the medical reports of Dr. Bhatt, Dr. Perez, and Dr. Vargas, demonstrating that she had significant range of motion limitations in her cervical and lumbar regions, and in her left shoulder contemporaneous with the subject accident, plaintiff failed to submit any medical evidence showing the existence of said limitations based upon a recent examination, so as to

establish the duration of plaintiff's alleged injuries (*see* ***Nesci v Romanelli***, 74 AD3d 765, 902 NYS2d 172 [2010]; ***Blasse v Laub***, 65 AD3d 509, 882 NYS2d 921 [2009]; ***Kin Chong Ku v Baldwin-Bell***, 61 AD3d 938, 880 NYS2d 76 [2009]; ***Diaz v Lopresti***, 57 AD3d 832, 870 NYS2d 408 [2008]). This requirement exists even when arthroscopic surgery had been performed on the shoulder (*see* ***Danvers v New York City Tr. Auth.***, 57 AD3d 252, 869 NYS2d 41 [2008]; ***O'Bradovich v Mrija***, 35 AD3d 274, 827 NYS2d 38 [2006]). Moreover, neither of plaintiff's experts indicated in their medical reports an awareness of plaintiff having been involved in a prior motor vehicle accident that resulted in an injury to her left shoulder in 1997, which required five months of physical therapy. This failure renders the conclusions found in plaintiff's experts' medical reports that the limitations in plaintiff's left shoulder were causally related to the subject accident speculative and without probative value (*see* ***Marrache v Akron Taxi Corp.***, 50 AD3d 973, 856 NYS2d 239 [2008]; ***Giraldo v Mandanici***, 24 AD3d 419, 805 NYS2d 124 [2005]; ***Ginty v MacNamara***, 300 AD2d 624, 751 NYS2d 790 [2002]; ***Matheis v Myers***, 199 AD2d 478, 606 NYS2d 34 [1993]).

Furthermore, plaintiff's experts did not address the findings of defendant Ludner's radiologist, who concluded that the changes seen in plaintiff's lumbar spine are degenerative in nature and have no causal relationship or association with the subject accident (*see* ***Mensah v Badu***, 68 AD3d 945, 892 NYS2d 428 [2009]). Where a defendant presents evidence of a pre-existing condition, it is incumbent upon the plaintiff to present proof to address the defendant's lack of causation (*see* ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]; ***Sky v Tabs***, 57 AD3d 235, 868 NYS2d 648 [2008]; ***Ciordia v Luchian***, 54 AD3d 708, 864 NYS2d 74 [2008]; ***Luciano v Luchsinger***, 46 AD3d 634, 847 NYS2d 622 [2007]; ***Carter v Full Serv., Inc.***, 29 AD3d 342, 815 NYS2d 41 [2006]; ***Flores v Leslie***, 27 AD3d 220, 810 NYS2d 464 [2006]; ***Giraldo v Mandanici***, 24 AD3d 419, 805 NYS2d 124 [2005]). Instead, plaintiff submitted the MRI reports of Dr. Himelfarb, dated December 19, 2007 and November 13, 2007, which state that plaintiff has a disc herniation at level L4-L5 and a disc herniation at level C6-C7. "The mere existence of a herniated or bulging disc, and even radiculopathy, is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the disc injury and its duration" (***Sharma v Diaz***, 48 AD3d 442, 443, 850 NYS2d 634 [2008]; *see* ***Mejia v De Rose***, 35 AD3d 407, 825 NYS2d 722 [2006]; ***Yakubov v CG Trans Corp.***, 30 AD3d 509, 817 NYS2d 353 [2006]; ***Cerisier v Thibiu***, 29 AD3d 507, 815 NYS2d 140 [2006]). Also, Dr. Himelfarb states in his MRI report, dated November 5, 2007, concerning plaintiff's left shoulder that "that there is some signal abnormality in the distal supraspinatus tendon consistent with a partial inter-substance tear and/or tendonitis without retraction." (*see* ***Knox v Lennihan***, 65 AD3d 615, 884 NYS2d 171 [2009]; ***Ferber v Madorran***, 60 AD3d 725, 875 NYS2d 518 [2009]; ***Collins v Stone***, 8 AD3d 321, 778 NYS2d 79 [2004]). However, Dr. Himelfarb does not express any opinion as to the cause of the herniated discs in plaintiff's lumbar and cervical spines, or the partial tear in plaintiff's left shoulder (*see* ***Knox v Lennihan***, 65 AD3d 615, 884 NYS2d 171 [2009]; ***Ferber v Madorran***, 60 AD3d 725, 875 NYS2d 518 [2009]; ***Collins v Stone***, 8 AD3d 321, 778 NYS2d 79 [2004]). Additionally, while a plaintiff may rely on unsworn reports of her own physicians once the defendant has introduced such reports into evidence, defendant Ludner did not introduce nor did he rely upon the unsworn medical report of Dr. Himelfarb in establishing his prima facie burden (*cf.* ***Desulme v Stanya***, 12 AD3d 557, 785 NYS2d 477 [2004]). Therefore, Dr. Himelfarb's reports are insufficient to raise a triable issue of fact and are without probative value because they are unaffirmed (*see* ***Grasso v Angerami***, 79 NY2d 813, 580 NYS2d 178 [1991]; ***Resek v Morreale***, 74 AD3d 1043, 903 NYS2d 120 [2010]; ***Lozusko v Miller***, 72 AD3d 908, 899 NYS2d 358 [2010]).

Finally, the fact that plaintiff is unable to perform a few enumerated tasks for a lengthy period without pain does not constitute a curtailment from performing substantially all of her usual activities to a great extent (*see* ***Licari v Elliott***, *supra*; ***Crane v Richard***, 180 AD2d 706, 579 NYS2d 736 [1992]). As a result, plaintiff failed to raise a triable issue as to whether she was substantially curtailed from all of her usual and customary activities for 90 of the first 180 days following the accident (*see* ***Rennell v Horan***, 225 AD2d 939, 639 NYS2d 171 [1996] ***Balshan v Bouck***, 206 AD2d 747, 614 NYS2d 487 [1994]; ***Kimball v Baker***, 174 AD2d 925, 571 NYS2d [1991]).

Accordingly, defendant Bienne Ludner's motion for summary judgment dismissing plaintiff's complaint is granted. Having determined that plaintiff's injuries do not meet the "serious injury" threshold, defendant Juan Campos's motion to dismiss plaintiff's complaint and all cross claims against him is denied, as moot (*see* CPLR 3212 [b]).

Dated: 10/26/10

Peter H. Mayer

PETER H. MAYER, J.S.C.