

**Nei v Diorio**

2008 NY Slip Op 30007(U)

January 2, 2008

Supreme Court, Suffolk County

Docket Number: 0013715/2006

Judge: Robert W. Doyle

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SUPREME COURT - STATE OF NEW YORK  
POST-NOTE MOTION PART - SUFFOLK COUNTY

**P R E S E N T :**

Hon. ROBERT W. DOYLE  
Justice of the Supreme Court

MOTION DATE 9-25-07 (001)  
MOTION DATE 10-24-07 (002)  
MOTION DATE 11-21-07 (003 & 004)  
ADJ. DATE 9-25-07 (001)  
ADJ. DATE 10-24-07 (002)  
ADJ DATE 12-5-07 (003 & 004)  
Mot. Seq. # 001 - MG  
Mot. Seq. # 002 - MD  
Mot. Seq. # 003 - MD  
Mot. Seq. # 004 - XMD

-----X  
MARIE NEI and ILIANA JUCELIN, :  
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 Plaintiffs, :  
 :  
 - against - :  
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 :  
 MARIA DIORIO, :  
 :  
 :  
 :  
 Defendant. :  
-----X

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Upon the following papers numbered 1 to 48 read on these motions for summary judgment and to vacate the Note of Issue; Notice of Motion/ Order to Show Cause and supporting papers 1-9; 10-15; 16-31; Notice of Cross Motion and supporting papers 32-40; Answering Affidavits and supporting papers 41-46; Replying Affidavits and supporting papers; Other 47-48; and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that the determinations on these motions, (001) by Marie Nei as plaintiff on the counterclaim, (002) by defendant Maria Diorio, (003) by defendant Maria Diorio, and cross motion (004) by Marie Nei as plaintiff on the counterclaim, are hereby consolidated; and it is further

**ORDERED** that this motion (001) by plaintiff on the counterclaim, Marie Nei, pursuant to CPLR 3212 for an order granting summary judgment on the issue of liability, is granted, and the

counterclaim asserted by defendant Marie Diorio is hereby dismissed as a matter of law. Movant is directed to serve and file a copy of this order with Notice of Entry upon all parties and the Clerk of the Supreme Court within thirty days of the date of this order. The clerk is directed to set this matter down for a trial on damages; and it is further

**ORDERED** that motion (002) by defendant, Marie Diorio, pursuant to 22 NYCRR §202.17 and §202.21 for an order vacating the note of issue and striking this matter from the trial calendar in that plaintiff Iliana Jucelin has not appeared for her independent orthopedic and neurological examinations, has been rendered academic in that these examinations were conducted on May 21, 2007 and May 23, 2007, and submitted to this Court by defendant Diorio in motion (003), and is accordingly denied as moot; and it is further

**ORDERED** that motion (003) by defendant, Maria Diorio, pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that plaintiffs, Marie Nei and Iliana Jucelin, have not sustained serious injury within the meaning of Insurance Law §5102(d), is denied; and it is further

**ORDERED** that motion (004) by plaintiff on the counterclaim, Marie Nei, pursuant to CPLR 3212 for summary judgment on the basis that plaintiff, Iliana Jucelin, has not sustained serious injury within the meaning of Insurance Law §5102(d), is denied.

This is an action to recover damages for personal injuries allegedly sustained by plaintiffs, Marie Farmingdale, County of Suffolk, State of New York, when their vehicle was struck in the rear by the vehicle operated by defendant Maria Diorio. Plaintiff, Iliana Jucelin, was a passenger in the vehicle operated by plaintiff Marie Nei. The complaint alleges defendant was negligent in causing the accident. Defendant has asserted a counterclaim against plaintiffs Marie Nei and Iliana Jucelin seeking contribution or indemnification for any negligence by plaintiffs.

In the verified bill of particulars, plaintiff, Marie Nei, has claimed injuries consisting of disc bulges at L2-3, L3-4, L4-5 with secondary mild epidural compression predominantly at the L4-5 level; disc bulges at C3-4, C4-5, C5-6, and C6-7; neck pain; low back pain; headaches; muscle spasms; and loss of range of motion.

In the verified bill of particulars, plaintiff, Iliana Jucelin, has claimed injuries consisting of epidural compression secondary to disc protrusions at C4-5 and C5-6 and disc bulges at C3-4 and C6-7; disc bulges at L2-3, L3-4, L4-5, and L5-S1 with secondary epidural compression, most pronounced at the L5-S1 level towards the right side, mild to moderate encroachment of exit foramina at L3-4, L4-5 and L5-S1; left shoulder joint pain; neck stiffness and pain with numbness and tingling in the left extremity; and lower back pain radiating down to hips, buttocks and thighs; loss of range of motion.

Both plaintiffs allege in their bills of particulars that they sustained serious injury within the meaning of Insurance Law § 5102(d) as they have each sustained a permanent consequential limitation of use of a body member; a significant limitation of use of a body function or system and a medically determined injury which prevented each of them from performing substantially all of the material acts which constituted their usual and customary activities for not less than ninety of the one hundred eighty

days after the accident.

In motion (001), plaintiff on the counterclaim, Marie Nei, seeks summary judgment on the basis that she bears no liability for the happening of the accident. In motion (002), defendant Marie Diorio seeks to vacate the Note of Issue asserting plaintiff, Iliana Jucelin, has failed to submit to the independent neurological and orthopedic examinations provided for in the Preliminary Conference Order. In motion (003), Maria Diorio seeks summary judgment on the issue that plaintiffs have not sustained serious injury within the meaning of Insurance Law §5102(d). In motion (004), Marie Nei, as plaintiff on the counterclaim, asserts Iliana Jucelin has not sustained a serious injury within the meaning of Insurance Law §5102(d).

Turning to motion (002), defendant Maria Diorio asserts that plaintiff Iliana Jucelin has not submitted to independent neurological and orthopedic examinations, and therefore the action is not ready for trial. In support of this motion, defendant Diorio has submitted an attorney's affirmation copies of the pleadings, and a copy of a Preliminary Conference Order. However, in reviewing all the motions submitted, it is noted in motion (003) that Marie Diorio seeks summary judgment, in part, on the issue of whether Iliana Jucelin sustained a serious injury, and in support of that motion, submitted copies of the reports of Dr. Goodman and Dr. Chacko concerning their independent orthopedic and neurological examinations conducted of Iliana Jucelin on May 21, 2007 by Dr. Goodman and May 23, 2007 by Dr. Chacko, nearly four months prior to defendant making this motion. Therefore, defendant's motion (002) has been rendered academic in that the independent neurological and orthopedic

Accordingly, motion (002) is denied as moot.

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. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center*, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499, 538 NYS2d 843 [2<sup>nd</sup> Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2<sup>nd</sup> Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]).

In support of motion (001), Marie Nei has submitted a copy of the summons and complaint; the verified answer with a counterclaim against Marie Nei and Iliana Jucelin; verified reply to the counterclaim; and copies of the transcripts of the examinations before trial of Iliana Jucelin, Marie Nei and Maria M. Diorio.

In support of motion (003), defendant Maria Diorio has submitted an attorney's affirmation; copies of the summons and complaint, defendant's verified answer and counterclaim, and plaintiffs' verified bill of particulars; report of the independent orthopedic evaluation of Marie Nei by Dr. Richard S. Goodman dated May 21, 2007; report of the independent neurological evaluation of Marie Nei by Mathew M. Chacko, M.D., D.P.N. dated May 23, 2007; report of the independent orthopedic evaluation of Iliana Jucelin by Dr. Richard S. Goodman, dated May 21, 2007; report of the independent neurological examination of Iliana Jucelin by Dr. Mathew M. Chacko, M.D., D.P.N. dated May 23, 2007; report of the radiological review by Dr. Richard Heiden, dated October 28, 2006, for lumbar and cervical spine MRI examinations of Marie Nei, performed December 13, 2002 and February 18, 2003; report of the radiological review, dated December 8, 2006, by Dr. Richard Heiden of lumbar and cervical spine MRI examinations of Marie Nei performed December 28, 2004 and December 18, 2004; report of the radiological review, dated March 16, 2007, by Dr. Richard Heiden of lumbar and cervical spine MRI examinations of Marie Nei performed December 18, 2004 and December 28, 2004, and February 18, 2003 and December 13, 2002; report of the radiological review by Dr. Heiden, dated March 16, 2007, of lumbar and cervical spine MRI examinations of Iliana Jucelin, performed December 18, 2004 and December 28, 2004; copies of the transcripts of the examinations before trial of Marie Nei and Iliana Jucelin; and uncertified claim search inquiry printouts.

In support of motion (004), Marie Nei has submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, defendant's answer with counterclaim, various Demands, and plaintiffs' verified bill of particulars; report of the independent orthopedic examination of Iliana Jucelin by Dr. Goodman dated May 21, 2007; report of the independent orthopedic examination of Iliana Jucelin by Dr. Joseph Stubel dated March 5, 2007; report of the independent neurological examination of Iliana Jucelin by Naunihal Singh, M.D. dated March 20, 2007; report of the radiological review of lumbar and cervical spine MRI examinations of Iliana Jucelin, dated March 5, 2007; report of the radiological review by Dr. Heiden, dated March 16, 2007, of lumbar and cervical spine MRI examinations of Iliana Jucelin performed December 18, 2004 and December 28, 2004; and a copy of the transcript of the examination before trial of Iliana Jucelin.

Plaintiffs Marie Nei and Iliana Jucelin have opposed these motions for summary judgment on the issue of serious injury by submitting the affidavit of Iliana Jucelin; a copy of a New York Motor Vehicle No-Fault Insurance Law Denial of Claim Form; the affidavit of Dr. Dominic Fitzsimons dated November 8, 2007 on behalf of Iliana Jucelin; the affidavit of Marie Nei; the affidavit of Dr. Dominic Fitzsimons dated November 8, 2007 on behalf of Marie Nei; and a Memorandum of Law.

#### LIABILITY

At her examination before trial, plaintiff Iliana Jucelin testified she was a passenger in the vehicle operated by Marie Nei when it was involved in an accident at the intersection of Conklin

Avenue with Route 110, in Farmingdale. She stated it was a nice day and the weather was dry. She testified they were traveling north on Conklin Street, and when they reached the intersection with Route 110, there were no traffic control devices at the intersection. She thought the vehicle she was in was stopped for about four or five seconds when the impact occurred to the back of her car.

Marie Nei testified that immediately before the accident she was traveling on Conklin Street and was intending to make a right turn at the yield sign at the intersection with 110 to travel north on 110. At the yield sign, she stated, she stopped for a second, and made a decision to go when the lady in back of her bumped into the back of her car. Her car was still stopped at the time of the impact. No part of her vehicle had entered onto 110 when the impact occurred. As a result of the impact to the rear of her car, she stated her trunk opened and would not close

Maria Diorio testified she was operating her motor vehicle heading west on Conklin and was going to merge onto Route 110 to travel north when the accident occurred in the yield lane going onto Route 110. She did not recall seeing the other vehicle involved in the accident before the accident occurred because, she testified, she never saw the vehicle in front of her at all. She was traveling about thirty miles an hour when the impact occurred to her front bumper and the middle to the left driver's side of the rear of plaintiff's vehicle. She testified that after the impact occurred, she got out of her car "because obviously, I felt I hit something."

Here, the adduced evidence establishes that the vehicle operated by Marie Nei was stopped in the yield lane heading to enter north onto Route 110 when it was struck in the rear by the vehicle operated by Maria Diorio who testified she never saw plaintiff's vehicle before hitting it in the rear. Marie Nei has therefore demonstrated entitlement to summary judgment as a matter of law on the issue of liability.

It is well settled that when a driver of a motor vehicle approaches another automobile from the rear, he or she is bound to maintain a safe rate of speed and has the duty to keep control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle (*Chepel v Meyers*, 306 AD2d 235, 762 NYS2d 95 [2<sup>nd</sup> Dept 2003]; *Power v Hupart*, 260 AD2d 458, 688 NYS2d 194 [2<sup>nd</sup> Dept 1999]; see also, Vehicle and Traffic Law § 1129[a]). Moreover, a rear-end collision with a stopped or stopping vehicle creates a prima facie case of liability regarding the operator of the moving vehicle and imposes a duty of explanation on the operator of the moving vehicle to excuse the collision by providing a non-negligent explanation, such as a mechanical failure, a sudden stop of the vehicle ahead, and unavoidable skidding on a wet pavement or some other reasonable excuse (see, *Rainford v Han*, 18 AD3d 638, 795 NYS2d 645 [2<sup>nd</sup> Dept 2005]; *Thoman v Rivera*, 16 AD3d 667, 792 NYS2d 558 [2<sup>nd</sup> Dept 2005]; *Power v Hupart*, *supra*). Marie Diorio was under a duty to maintain a safe distance between her vehicle and plaintiff's vehicle (See, Vehicle and Traffic Law §1129(a)) and the failure to do so, in the absence of an adequate, nonnegligent explanation, constitutes negligence as a matter of law (*Silberman v. Surrey Cadillac Limousine Service, Inc.*, 100 AD2d 833, 486 NYS2d 357 [2<sup>nd</sup> Dept 1985]; *DiLeo v Greenstein*, 281 AD2d 586, 722 NYS2d 259 [2<sup>nd</sup> Dept 2001])). Moreover, drivers have a duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident (*Fillippazzo v Santiago*, 277 AD2d 419, 716 NYS2d 710 [2<sup>nd</sup> Dept 2000]). What was there to be seen by Marie Diorio was Marie Nei's vehicle, which Ms. Diorio stated she never saw prior to the accident.

It is determined that no factual issues have been raised to defeat Marie Nei's motion for summary judgment on liability. Maria Diorio has not come forward with a non-negligent explanation to excuse the collision which occurred when her vehicle ran into the rear of the vehicle operated by Marie Nei. She therefore has not raised a factual issue concerning liability as to either Marie Nei or Iliana Jucelin.

Accordingly, motion (001) by Marie Nei, plaintiff on the counterclaim, for summary judgment on liability is granted and the counterclaim asserted against her is hereby dismissed.

#### SERIOUS INJURY

Pursuant to Insurance Law § 5102(d), "[s]erious injury" 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 medical 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."

The term "significant," as it appears in the statute, has been defined as "something more than a mere inconvenience, and something which has been curtailed from performing his usual activities to a great extent rather than some slight curtailment (*Licari v Elliot*, 57 NY2d 230, 455 NYS2d 570).

On a motion for summary judgment to dismiss a complaint for failure to set forth a prima facie case of serious injury as defined by Insurance Law § 5102(d), the initial burden is on the defendant to "present evidence in competent form, showing that plaintiff has no cause of action" (*Rodriquez v Goldstein*, 182 AD2d 396, 582 NYS2d 395, 396 [1<sup>st</sup> Dept 1992]). Once defendant has met the burden, the plaintiff must then, by competent proof, establish a *prima facie* case that such serious injury exists (*DeAngelo v Fidel Corp. Services, Inc.*, 171 AD2d 588, 567 NYS2d 454, 455 [1<sup>st</sup> Dept 1991]). Such proof, in order to be in competent or admissible form, shall consist of affidavits or affirmations (*Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692 [2<sup>nd</sup> Dept 1992]). The proof must be viewed in a light most favorable to the non-moving party, here the plaintiff (*Cammarere v Villanova*, 166 AD2d 760, 562 NYS2d 808, 810 [3<sup>rd</sup> Dept 1990]).

#### SERIOUS INJURY: MARIE NEI

The report of Dr. Richard Heiden, dated October 28, 2006, concerns a review of the lumbar MRI study performed on Marie Nei on December 13, 2002, and the cervical spine MRI performed February 18, 2003. Dr. Heiden sets forth that it was a normal MRI of the lumbar spine, with no hemorrhage, bone bruise or compressions, and no edematous changes to the discs, supporting ligaments or surrounding soft tissue. He further sets forth that the original radiologist has mentioned dehydration at the L3-4 and L4-5 levels and early degenerative changes, and if present, dehydration is a degenerative process and would have no association or causal relationship to the accident. He, however, does not state that he

reviewed the films as showing dehydration, and merely states "if present." As to the cervical spine MRI of February 18, 2003, Dr. Heiden sets forth his impression is dehydration throughout the cervical spine, no hemorrhage, bone bruise or compressions and no edematous changes to the discs, supporting ligaments, or surrounding soft tissues. He further states that the original radiologist has mentioned dehydration at the C2-3, C3-4 and C4-5 levels and early degenerative changes which demonstrates the presence of degenerative changes. He indicated both of these studies predated the within accident.

In his report of December 8, 2006, Dr. Heiden states he reviewed the cervical MRI examination performed on December 18, 2004, and the lumbar spine MRI examination performed December 28, 2004. His impression of the cervical spine MRI was dehydration throughout the cervical spine, bulging at C3-4 and C4-5; no hemorrhage, bone bruise or compressions and no edematous changes to the discs, supporting ligaments or surrounding soft tissues are noted. He states the dehydration remained stable since the previous MRI study, however there was an interval development of bulging at the C3-4 and C4-5 levels consistent with age and the evolution of degenerative disease. Concerning the lumbar spine MRI, he opines that when compared to the prior study, there is no interval change in the lumbar spine and it remains normal with no post-traumatic changes attributable to the within accident.

Dr. Goodman conducted an independent orthopedic examination on Marie Nei on May 21, 2007 and set forth in his report the records, reports and documents reviewed by him. His examination of Marie Nei's lumbar spine revealed flexion 50 degrees (normal 90 degrees); extension 15 degrees (normal 30 degrees); right and left lateral flexion both 5 degrees (normal 30 degrees); right rotation 15 degrees (normal 30 degrees); left rotation 10 degrees (normal 60 degrees); right rotation 15 degrees (normal 60 degrees); left rotation 10 degrees (normal 60 degrees); right rotation 15 degrees (normal 60 degrees); left rotation 10 degrees (normal 60 degrees).

Dr Goodman further sets forth in his report that Marie Nei had injuries in 1997 requiring manipulations (chiropractic), and then had a second motor vehicle accident in 2002 followed by this third event in 2004. He states there is no documentation by x-rays, MRI's or other, of any significant change in the physical findings or images following the accident of 2004. However, in his report he indicated he reviewed the MRI report by Dr. Maltin, dated February 18, 2003, pre-dating the within accident, and set forth that the MRI of plaintiff's cervical spine demonstrated mild degenerative changes. Dr. Goodman then states he reviewed the report of Dr. Basra, dated December 20, 2004, describing the MRI of Marie Nei's cervical spine with "probable muscle spasm and mild multilevel disc bulges throughout the cervical spine." Dr. Goodman also stated he read the three page report of Dr. Heiden dated October 28, 2006 which demonstrated "Dehydration throughout the cervical spine and bulging at C3-4 and C4-5. No hemorrhage, bone bruise or compressions and no edematous changes to the discs, supporting ligaments, or surrounding soft tissues are noted." He also reviewed the report of Dr. Ha, dated December 13, 2002, pre-dating the within accident, wherein he stated the MRI of the lumbar spine demonstrates early degenerative changes of the intervertebral disc, L3-4 and L4-5, with mild disc bulge with encroachment of the interior aspect of the neural foramina without distortion or displacement of the exiting L3 or L4 nerve roots. He then reviewed the report of Dr. Basra, dated December 29, 2004, describing the MRI of Marie Nei's lumbar spine which demonstrated "evidence of disc bulge at L2-3, L3-4, and L4-5 levels with secondary epidural compression as described above."

Dr. Chacko conducted an independent neurological examination of Marie Nei on May 23, 2007, at which time she complained of lower back pain and occasional pain in the right side of the neck. He states his examination reveals active cervical range of motion testing with flexion 50 degrees (normal 50 degrees); extension 60 degrees (normal 60 degrees); lateral rotations 80 degrees (normal 80 degrees); lateral flexions 30 degrees on the right and 45 degrees on the left (normal 45 on visual examination). He found the cranial nerve examination II through XII including fundus examination is unremarkable; motor examination shows normal tone and strength in both upper and lower extremities in proximal and distal muscle groups; deep tendon reflexes 2+ and symmetrical; plantar reflexes downgoing; and sensory examination normal to touch and pinprick sensation bilaterally, however, he does not set forth the normals for comparison. He set forth that visual examination of the active lumbar range of motion testing of the lumbar spine revealed flexion 60 degrees (normal 60 degrees); lateral flexions 25 degrees (normal 25); and extension 25 degrees (normal 25 degrees). He further set forth that her gait was normal with no signs of cerebellar dysfunction; straight leg raising was 70 to 80 degrees in the left side with 80 to 90 degrees in the right side (normal 90 degrees).

Dr. Chacko states Marie Nei is not disabled and is working as a nurse's aid and is capable of performing normal activities of daily living. He sets forth that the MRI's of her cervical and lumbar spines did not reveal any disc herniations, but disc bulges were mentioned in the cervical and lumbar spines, however, there was no nerve root impingement or cord compression reported. He further states there is no objective clinical evidence of any neurological sequelae attributable to the accident of December 4, 2004 noted.

Ms. Nei testified on April 27, 2007 that following the accident, she had pain in her neck, back and shoulders. She went to New Island Hospital after the accident, was treated and released. About four or five days later, she followed up with a chiropractor with whom she treated four to five days a week for two and a half months, until her insurance was stopped, but then started treatment again about two months later. At the time of the accident she was employed at Huntington Hills Nursing Home and stayed home from work for about two weeks following the accident. She stated she still experiences back pain and really feels it when she finishes work. She stated she has to work, and although she has pain, she does things slowly and deals with it.

Based upon the foregoing, it is determined by this Court that no party has demonstrated prima facie entitlement to summary judgment on the issue that Marie Nei did not suffer a serious injury within the meaning of Insurance Law §5102(d).

Dr. Heiden states he reviewed the cervical MRI examination performed on December 18, 2004, and compared it to the cervical MRI performed before the accident, and found there was an interval development of bulging at the C3-4 and C4-5 levels. However, he further stated this was consistent with age and the evolution of degenerative disease and states there were no post-traumatic changes attributable to the within accident. However, his opinion was conclusory as he did not base this on the time frame for degenerative changes and gave no satisfactory or supported explanation for the basis of this opinion.

Dr. Chacko, upon neurological examination of Ms. Nei, stated there are no findings consistent with radiculopathy such as muscle weakness, reflex asymmetry or sensory changes noted and that she

only complains of lower back and occasional pain in the right side of her neck. He stated she exhibited limitation of range of motion of the cervical spine on right lateral flexion, but this is a voluntary motion and fully under control of the person being examined and hence is not an objective finding. It is determined by this court that Dr. Chacko has set forth findings of limitation of range of motion and has raised a credibility issue (*see, Washington v Delossantos*, 44 AD3d 748, 843 NYS2d 186 [2d Dept 2007]) by suggesting that the voluntary motion which demonstrated limitation of the cervical spine on right lateral flexion was under the control of the person being examined. This creates a factual issue as well as an issue of credibility. Issues of credibility are for jury determination (*see, Lalla v Connolly*, 17 AD3d 322, 791 NYS2d 845 [2d Dept 2005]), thus precluding summary judgment.

Dr. Goodman, upon examination of Ms. Nei's cervical and lumbar spine, quantified his range of motion findings which demonstrated deficits as set forth above. He states there are no consistent objective findings, Marie Nei's restricted range of motion of the neck and back is not consistent with the other findings, and she is therefore not considered to have a handicap, disability or impairment. However, Dr. Goodman does not support this conclusory statement with an explanation. Additionally, he sets forth in his report that Marie Nei has a full, pain free normal range of motion of the cervical spine, but also states that she has limited right rotation to 75 degrees compared to the normal and yet his findings indicate it was 45 degrees. He further states that there was limited left rotation of the cervical spine to 80 degrees compared to the normal 90 degrees. These inconsistencies in quantifying limitations in range of motion and stating there are no consistent objective findings raise factual issues which preclude summary judgment. He also notes the changes in the MRI's pre and post accident, including compression. A disc bulge may constitute a serious injury within the meaning of Insurance Law §5102 (*Hussein, et al. v Harry Littman, et al.*, 287 AD2d 543, 731 NYS 2d 477 [2<sup>nd</sup> Dept 2001]). Dr. Goodman has quantified restrictions in Ms. Nei's cervical range of motion. Thus a factual issue exists as to whether Ms. Nei has suffered a serious injury.

Defendants have submitted admissible evidence to demonstrate findings of bulging discs in plaintiff Marie Neis cervical and lumbar spines and objective findings of limitation of range of motion which may constitute evidence of serious injury, thus raising triable issues of fact which preclude summary judgment.

Accordingly, that part of motion (003) by defendant Maria Diorio for summary judgment on the issue that Marie Nei did not sustain a serious injury within the meaning of Insurance Law §5102(d) is denied.

#### SERIOUS INJURY: ILIANA JUCELIN

Dr. Heiden performed a review on March 16, 2007 of the cervical spine MRI performed on Iliana Jucelin on December 18, 2004 and states the discs reveal dehydration throughout the cervical spine with anterior protrusion of the disc material at the C4-5 and C5-6 levels. There are disc bulges indenting the thecal sac at the C3-4, C4-5, C5-6, and C6-7 levels. He states these findings are all manifestations of degenerative spondyloarthropathy, a process reflecting wear and tear, which requires years to develop and affects most people as they age and is in no way causally related to the within accident. Concerning his review of the MRI of Ms. Jucelin's lumbar spine on December 28, 2004, he

states there is disc dehydration at the L2-3, L3-4, L4-5, and L5-S1 levels with anterior protrusion from L2-3 through L5-S1. He states these findings are all manifestations of degenerative spondyloarthropathy, a process reflecting wear and tear, which requires years to develop and affects most people as they age and is in no way causally related to the within accident.

Dr. Goodman conducted an independent orthopedic examination of Iliana Jucelin on May 21, 2007 and set forth the reports, documents and records he reviewed, including reports of cervical and lumbar MRI's. Dr. Goodman, upon examination, found that Ms. Jucelin walked with a normal gait, could toe-walk and heel walk normally. He stated she had full normal range of motion of the cervical spine with flexion 30/30 degrees, limited cervical extension to 20/30 degrees, limited right rotation to 75/90 degrees but full 90 degrees left rotation. He set forth that she had limited cervical lateral flexion to 20/30 degrees to the right and 25/30 degrees to the left. Examination of the lumbosacral spine reveal motion was restricted flexion to 80/90 degrees, extension 5/30 degrees, right and left rotation 75/90 degrees, and right and left lateral flexion 25/30 degrees. He set forth that the biceps, triceps, forearm and ankle reflexes were symmetrical and absent, but did not set forth whether or not this was a normal or abnormal finding. He stated knee reflexes were symmetrical and 2+, but did not indicate if this was a normal or abnormal finding. He found should abduction was 45 degrees to the right and left or symmetrical, but he did not quantify the normal. Shoulder flexion was 65 degrees on the right and left or symmetrical on both compared to the normal of 180. His diagnosis is that of status-post motor vehicle accident with cervical and lumbar sprains. He further states she has no disability, there are no consistent objective findings, and treatment has been excessive, but does not set forth the basis for this

Defendant Diorio also submitted the report concerning the independent neurological examination of Ms. Jucelin on May 23, 2007, by Dr. Chacko. He states she is in housekeeping and is working and complains of pain in the right shoulder. Examination of her cervical spine revealed range of motion findings of flexion 50 degrees (normal 50 degrees), extension 60 degrees (normal 60 degrees), lateral rotations 80 degrees (normal 80 degrees), lateral flexions 45 degrees (normal 45 degrees). He stated cranial nerve examination II through XII including fundus examination was unremarkable; motor examinations showed normal tone and strength in both upper and lower extremities in proximal and distal muscle groups; and no atrophy or fasciculations were noted. He stated she complained of pain in her right shoulder when testing the strength in the right upper extremity. Abduction of the shoulders was normal at 150 degrees bilaterally. He stated deep tendon reflexes were 2+ and symmetrical and plantar responses are downgoing, but did not indicate if this was a normal or abnormal finding. Sensory examination was normal to touch and pinprick. Straight leg raising was negative bilaterally, but he did not indicate what his findings were. He further stated active range of motion testing of the lumbar spine on visual examination showed flexion 60 degrees (normal 60 degrees), lateral flexions 25 degrees (normal 25 degrees), extension 25 degrees (normal 25 degrees). Dr. Chacko did not set forth his findings as to rotation. Although he reviewed the MRI reports of plaintiff's cervical and lumbar spine, he does not comment on the same or dispute the claims of multiple cervical and lumbar disc bulges and encroachment as set forth in the bill of the particulars. His diagnosis was that of lumbar strain resolved and right shoulder strain. He set forth there was no objective evidence of any neurological disability at this time. Comments regarding her right shoulder complaints were deferred to the appropriate specialist.

Marie Nei, as plaintiff on the counterclaim, has submitted the report of Dr. Joseph Stubel, dated March 5, 2007, concerning an independent orthopedic examination of Ms. Jucelin on that date. Here, Dr. Stubel did not provide the results of extension in his range of motion testing of Ms. Jucelin's cervical spine, although he quantified the range of motion for flexion, rotation and lateral flexion and stated they were normal. He set forth that biceps, triceps and brachioradialis reflexes were bilaterally symmetrical and 2+, and Tinel's sign was negative at both carpal tunnels and both cubital tunnels, however, he did not indicate whether or not these were normal findings. He quantified the range of motion measurements of Ms. Jucelin's lumbar spine and set forth they were normal. Examination of the right shoulder revealed forward flexion was to 150 degrees (150 degrees normal), internal rotation to 80 degrees (normal 80 degrees), abduction was 150 degrees (normal 150) and extension was to 30 degrees (normal 30 degrees). He did not review the MRI films and made no comment concerning the claimed multi-level disc bulges and protrusions. He stated it was his opinion that the accident of December 4, 2004 has a causal relationship to the symptoms described. His diagnosis was that of sprains to the neck, back and right shoulder. He stated he found no objective signs of disability and no need for further physical therapy or orthopedic treatment.

Marie Nei also submitted the report of independent neurological examination dated March 20, 2007, performed by Dr. Singh, however, the date of that examination has not been set forth. Dr. Singh examined Ms. Jucelin's cervical and lumbar spine and quantified normal findings as to flexion, extension, right and left lateral flexion and right and left lateral rotation. His examination of Ms. Jucelin's shoulders, however, revealed flexion was 120 degrees (180 degrees normal), extension 20 degrees bilaterally (180 degrees normal), adduction 30 degrees bilaterally (30 degrees normal), internal rotation 40 degrees bilaterally (40 degrees normal) and external rotation 90 degrees bilaterally (90 degrees normal), thus evincing abnormal findings in the both shoulders upon extension and abduction. His diagnosis was that of lumbar sprain-resolved, and shoulder sprain-resolved. He opines that the injuries sustained on December 4, 2004 are causally related to the accident. He found no neurological disability based on his examination and stated Ms. Jucelin is not disabled from working or from activities of daily living.

Ms. Jucelin testified on April 27, 2007, that after the accident she was seen in an emergency room, treated and released, then spent the next three days in bed due to the injuries. She thereafter followed with a chiropractor for pain in her lower back, neck and right shoulder five days a week for two and one half months, and then continued two times a week after her insurance stopped paying. She testified that after the accident she was unable to return to her job for two and one half months doing housekeeping at the Hilton Hotel. She stated she still experiences heavy pain in her right shoulder and still experiences pain in her back, lower back and neck every two or three days. Now she experiences difficulty lifting. She used to fix six or seven beds at her job but can only do two or three instead. Since the accident, at work she does some laundry, stays in the office, picks up phone calls, and brings things to people. She still cleans rooms at night, but when she cannot do the whole job, someone else helps her.

Based upon the foregoing, it is determined by this Court that neither defendant, Maria Diorio, nor plaintiff on the counterclaim, Marie Nei, have demonstrated prima facie entitlement to summary judgment on the issue that Iliana Jucelin did not sustain a serious injury within the meaning of Insurance

Law §5102(d).

Dr. Heiden, in his radiology review on March 16, 2007 diagnosed anterior protrusion of the disc material at the C4-5 and C5-6 levels and disc bulges indenting the thecal sac at the C3-4, C4-5, C5-6, and C6-7 levels. Concerning his review of the MRI of Ms. Jucelin's lumbar spine on December 28, 2004, he states there is disc dehydration at the L2-3, L3-4, L4-5, and L5-S1 levels with anterior protrusion from L2-3 through L5-S1. Dr. Heiden has failed to address the causation, except in a conclusory statement that her condition is a process reflecting wear and tear which requires years to develop and affects most people as they age and is in no way causally related to the within accident.

Dr. Goodman found that Ms. Jucelin had full normal range of motion of the cervical spine but then quantified limited cervical extension to 20/30 degrees and limited right rotation to 75/90 degrees, and limited cervical lateral flexion to 20/30 degrees to the right and 25/30 degrees to the left. Examination of the lumbosacral spine revealed motion was restricted in flexion 80/90 degrees, extension 5/30 degrees, right and left rotation 75/90 degrees, and right and left lateral flexion 25/30 degrees. He set forth shoulder abduction was 45 degrees to the right and left or symmetrical and shoulder flexion was 65 degrees on the right and left or symmetrical on both compared to the normal of 180. Dr. Goodman has quantified limitations of range of motion in Ms. Jucelin's cervical and lumbar spines and has made reference to protrusions or disc bulges, but does not further comment on the same, thus raising factual issues as a disc bulge may constitute a serious injury within the meaning of Insurance Law §5102 (*Hussein, et al. v Harry Littman, et al.*, 287 AD2d 543, 731 NYS 2d 477 [2<sup>nd</sup> Dept 2001]). He

range of motion of the cervical and lumbar spine is purely subjective and that there were no objective findings. Issues of credibility are for jury determination (*see, Lalla v Connolly*, 17 AD3d 322, 791 NYS2d 845 [2d Dept 2005]).

Dr. Chacko conducted an independent neurological examination of Ms. Jucelin on May 23, 2007. Upon examination of her cervical spine he quantified no limitations in her cervical range of motions. He stated she complained of pain in her right shoulder when testing the strength in the right upper extremity, and upon examination, only quantified his findings as to abduction and did not quantify the range of motion for the remainder of shoulder ranges of motion. He stated deep tendon reflexes were 2+ and symmetrical and plantar responses are downgoing, but did not indicate if this was a normal or abnormal finding. He stated straight leg raising was negative bilaterally, but he did not quantify his findings. He further stated active range of motion testing was performed on the lumbar spine by visual examination, but did not quantify his findings as to lumbar rotation. Although he reviewed the MRI reports of plaintiff's cervical and lumbar spine, he does not comment on the same or dispute the claims of multiple cervical and lumbar disc bulges and encroachment as set forth in the bill of the particulars. His diagnosis was that of lumbar strain resolved and right shoulder strain, and he forth there was no objective evidence of any neurological disability at this time and does not comment on his findings of range of motion limitations as set forth above. Comments regarding her right shoulder complaints were deferred to the appropriate specialist. Therefore, there are factual issues concerning his findings of limitations in range of motion or failing to quantify or test certain ranges of motion as set forth above.

Dr. Joseph Stubel's report of the independent orthopedic examination of Ms. Jucelin did not provide the results of extension in his range of motion testing of Ms. Jucelin's cervical spine, although

he quantified the range of motion for flexion, rotation and lateral flexion and stated they were normal. He set forth that biceps, triceps and brachioradialis reflexes were bilaterally symmetrical and 2+, and Tinel's sign was negative at both carpal tunnels and both cubital tunnels, however, he did not indicate whether or not these were normal findings. He did not review the MRI films and made no comment concerning the bulging or protruding discs.

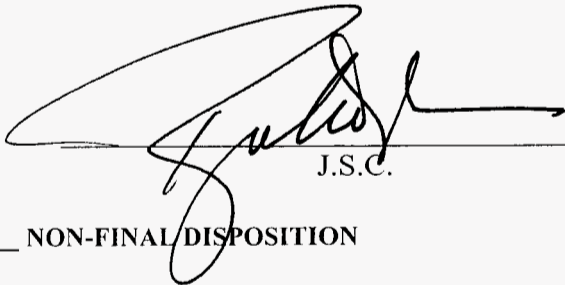
Dr. Singh did not set forth the date of his examination of Ms. Jucelin in his report. Dr. Singh examined Ms. Jucelin's shoulders and found flexion was 120 degrees (180 degrees normal), extension 20 degrees on the right side and 45 degrees on the left side (50 degrees normal), abduction 120 degrees bilaterally (180 degrees normal), thus evincing abnormal findings in the both shoulders upon extension and abduction. He does not address these limitations

Accordingly, motions (003) and (004) for summary judgment on the issue that plaintiff Iliana Jucelin did not sustain serious injury within the meaning of Insurance Law §5102(d) are denied.

Here, the parties failed to satisfy the burden of establishing, prima facie, that plaintiffs did not sustain a "serious injury" within the meaning of Insurance Law 5102 (d) (see, *Agathe v Tun Chen Wang*, 33 AD3d 737, 822 822 NYS2d 766 [2 Dept 2006]; see also, *Walters v Papanastassiou*, 31 AD3d 439, 819 NYS2d 48 [2d Dept 2006]). The moving parties' examining physicians either failed to provide specific range of motion measurements for plaintiff, as set forth above, or failed to compare those findings with normal ranges of motion (see, *Hypolite v International Logistics Management, Inc.*, 43 AD3d 461, 842 *Browdame v Candura*, 25 AD3d 747, 807 NYS2d 658 [2<sup>nd</sup> Dept 2006]). By failing to compare the results that were reported to the normal range, or by failing to quantify their range of motion findings in degrees, the reports of the examining physicians leave it to this Court to speculate as to whether the ranges of motion reported are normal or abnormal (see, *Rodriguez v Schickler*, 229 AD2d 326, 645 NYS2d 31 [1st Dept 1996], *lv denied* 89 NY2d 810, 656 NYS2d 738 [1997]). In that the reports of the independent examining physicians do not exclude the possibility that plaintiff suffered a serious injury in the accident, the moving parties are not entitled to summary judgment (see, *Peschanker v Loporto*, 252 AD2d 485, 675 NYS2d 363 [2d Dept 1998]).

Since defendants failed to establish their entitlement to judgment as a matter of law, it is not necessary to consider whether plaintiffs' papers in opposition to defendants' motions were sufficient to raise a triable issue of fact (see, *Agathe v Tun Chen Wang, supra; Walters v Papanastassiou, supra*).

Dated:           JAN 02 2008          

  
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J.S.C.

           FINAL DISPOSITION      X   NON-FINAL DISPOSITION