SHORT FORM ORDER

INDEX No. 05-23393
CAL. No. 07-02063-MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 24 - SUFFOLK COUNTY

P R E S E N T :

Hon. PETER FOX COHALAN
Justice of the Supreme Court

MOTION DATE 12-20-07
ADJ. DATE 2-26-08
MNEMONIC: # 005 - MD
MNEMONIC: # 006 - XMD

GRACIELA AVILES CERNA,

Plaintiff,

- against -

THE TOWN OF SMITHTOWN, ANDREW BROFMAN, SYLVIA P. RWEYEMANU, ANGELA P. RWEYEMANU, DONNA M. SANTORA, MARGERY A. CSAKANY and DANNY TOM,

Defendants.

GARY E. ROSENBERG, P.C.
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Forest Hills, New York 11375

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Attorneys for Plaintiffs Santora & Keller
146 North Ocean Avenue, P.O. Box 918
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DONNA SANTORA and SAMANTHA KELLAR, an infant over the age of 14 years by her mother and natural guardian, DONNA SANTORA,

Plaintiffs,

- against -

ANDREW BROFMAN, THE TOWN OF SMITHTOWN and DANNY TOM,

Defendants.

DEVITT SPELLMAN BARRETT, LLP
Attorneys for Defendants Town of Smithtown and Andrew Brofman
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Upon the following papers numbered 1 to 47 read on this motion and cross-motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 20; Notice of Cross-Motion and supporting papers 21 - 33; Answering Affidavits and supporting papers 36-47; Replying Affidavits and supporting papers 34-35; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (005) by the defendants Town of Smithtown (hereinafter "Town") and Anthony Brofman (hereinafter "Brofman") pursuant to CPLR 3212 and Insurance Law §§ 5102 and 5104 for an order granting summary judgment on the basis that the plaintiffs Graciela Aviles Cerna (hereinafter "Cerna"), Donna Santora (hereinafter "Santora"and Samantha Kellar (hereinafter "Kellar") have failed to meet the serious injury threshold limits, is denied; and it is further

ORDERED that this cross-motion (006) by Cerna pursuant to CPLR 3212 striking the Third Affirmative Defense of the Town and Brofman raised pursuant to Insurance Law Article 51 and § 5102 asserting that the plaintiffs' alleged injuries fail to meet the threshold limits, is denied.

The main action seeks to recover damages for personal injuries allegedly sustained by Cerna when she was operating the first vehicle involved in a five-vehicle, chain reaction motor vehicle accident on May 10, 2005, on State Route 25 approximately 200 feet west of County Road 97, County of Suffolk, State of New York. Brofman was operating a vehicle owned by the Town. It was the fifth vehicle in line and caused the first impact.

A third-party action was brought by Santora and Kellar for personal injuries claimed to have been sustained in the same accident, a derivative claim by Santora related to the injuries claimed by the infant Kellar and a cause of action for property damage on behalf of Santora.

Summary judgment on liability was granted against the only remaining defendants the Town and Brofman by this Court in an order, dated June 22, 2007. Summary judgment dismissing the complaint on the issue of liability was previously granted in favor of the defendants Santora, Sylvia P Rweyemanu, Angela P. Rweyemanu, Margery Csakany, and Danny Tom by order of this Court, dated December 20, 2006.

The plaintiff Cerna claims in her bill of particulars that she, as a result of the within accident, sustained central herniation deforming the dural sac at C4-5 and C5-6; degenerative disc disease at L3-4, L4-5, and L5-S1; chronic right L5-S1 nerve root radiculopathy with denervation; multilevel osteoarthropathy; sensory hypoesthesia at the C6-C7-C8-T1 and L4-L5-S1 levels; decreased lordosis of the cervical spine; scoliosis of the lumbar and thoracic spine; decreased range of motion of the cervical and lumbar spine; tenderness of the cervical and lumbar spine regions; muscle spasm of the cervical and lumbar spine. The plaintiff Cerna further claims she has sustained a permanent injury and significant limitation which prevented her from performing substantially all of the material acts which were usual and customary for a period in excess of ninety days during the first one hundred eighty days following the accident.

The plaintiff Santora claims in her bill of particulars that, as a result of the within accident, she sustained disc herniations at C4-C5 and C5-C6; cervical sprain/strain; multiple cervical subluxations; cervical facet syndrome; significant limitations in lifting, particularly with the left arm; disc herniations at L4-L5; lumbar sprain/strain causing radiating numbness; lumbar facet syndrome; significantly delayed distal onset latency at left median motor nerve; decreased velocities at both median, right ulnar and right radial motor nerves; significantly decreased velocities at left median, both radial and right ulnar sensory nerves; muscle spasms; headaches; and pain in her upper arms and pins and needles in her arms and hands.

The plaintiff Kellar claims in her bill of particulars that she has suffered from cervical strain/sprain; C6 subluxation; lumbar strain/sprain; lumbar facet syndrome; muscle spasms; decreased velocities at median, radial and ulnar sensory nerves bilaterally; and frontal headaches.

The defendants now seek summary judgment on the basis that the plaintiffs' claimed injuries fail to meet the threshold imposed by Insurance Law §5102.

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 [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 [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]).

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 minor limitation of use," and the term "substantially all" has been construed to mean "that the person 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), it is for the Court to determine in the first instance whether a prima facie showing of "serious injury" has been established (*see*, ***Tipping-Cestari v Kilhenny***, 174 AD2d 663, 571 NYS2d 525 [2d Dept 1991]). The initial burden is on the defendant to "present evidence in competent form, showing that the plaintiff has no cause of action" (***Rodriquez v Goldstein,*** 182 AD2d 396, 582 NYS2d 395, 396 [1992]). Once the 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 [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 [1992]). The proof must be viewed in a light most favorable to the non-moving party, in this case the plaintiff (***Cammarere v Villanova,*** 166 AD2d 760, 562 NYS2d 808, 810 [1990]).

In order to recover under the "permanent loss of use" category, the plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance Inc.***, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, either a specific percentage of the loss of range of motion must be ascribed or there must be a sufficient description of the "qualitative nature" of the plaintiff's limitations, with an objective basis, correlating the plaintiff's limitations to the normal function, purpose and use of the body part (***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott*** (supra).

GRACIELA AVILES CERNA

This plaintiff testified at her examination before trial that prior to this accident she did not experience neck or back pain, but did have chiropractic treatment for migraine headaches. As a result of the accident, she began to experience neck and back pains and began treatment with a chiropractor about three times a week for massage, heat, electrical stimulation and adjustments. After an uncertain period of time, the frequency of the visits decreased, but she was still seeing the chiropractor for treatment to date. She testified she still has pain in her lower back on the right side if she sits too long and that pain travels to her right foot. She experiences this all the time. The amount of pain she gets in her back increases the amount of pain she gets in her neck. She gets a burning feeling and numbness and it goes to her right shoulder and travels. She now experiences headaches on a regular basis. She testified she has difficulty doing household chores, vacuuming, outdoor activities around the property such as gardening or shoveling snow. She recently joined a Yoga class but could not do the exercise for the lower back, so she had to stop. She is unable to lift anything heavy as she is afraid she cannot get back up again.

The defendants have submitted the sworn report of orthopedist Michael J. Katz, M.D., dated August 14, 2007, in which he states, inter alia, that he examined Cerna on consultation. She was seen at Stony Brook Hospital after the accident and received outpatient chiropractic care three to five times a week from the date of the accident on March 10, 2005 until the date of his examination, but that care is less frequent. He further states that she denies any prior injury. He examined the plaintiff's cervical and lumbar spine ranges of motion, quantified his findings and compared them to the normal ranges of motion with no deficits noted. However, he states that motor strength is present in the C5-T1 enervated segments, but does not opine whether the motor strength is normal or impaired. With regard to sensation and reflex testing relative to both the cervical and lumbar spine, his findings were 2+ and symmetrical bilaterally, but he does not indicate whether this is a normal finding. His review of the plaintiff's MRI indicates pre-existing multi-level degenerative disc disease, but he does not indicate whether this is the MRI of the lumbar or cervical spine, does not define degenerative disc disease, or opine how long it has been present or rule out that it was caused by the accident. He does not comment on the injuries listed in the plaintiff's bill of particulars and does not opine whether the claimed injuries are causally related to the accident. His diagnosis is cervical strain now resolved and thoracolumbosacral strain resolved with no findings of disability.

The report of neurologist Mark Zuckerman, M.D. (hereinafter "Zuckerman"), dated April 23, 2007, reveals he performed an independent neurological examination of Cerna. He indicates that the cervical spine MRI report of May 4, 2005 reveals small central disc herniations at C4-C5 and C5-C6 with no evidence of root compression or high grade stenosis; that the lumbar spine MRI of May 4, 2005 reveals findings of disc degenerative disease at L3-4, L4-5, and L5-S1, with no focal herniation or canal stenosis, mild multi-level osteoarthropathy. He indicates that the nerve conduction EMG study, dated December 2, 2005, of the upper extremities shows no evidence of bilateral cervical radiculopathy, and of the

lower extremities shows chronic right L5-S1 nerve root irritation/radiculopathy with evidence of mild denervation. Upon examination of the plaintiff's lumbar spine, Zuckerman quantified the range of motion compared to the normal ranges of motion and set forth no deficits, however, lumbar extension was not quantified or compared with the normal ranges of motion. Examination of the cervical spine revealed flexion was 40 to 45 degrees (45 degrees normal). His impression was that of cervical sprain, resolved; lumbar sprain, resolved; no clear objective evidence of a lumbosacral radiculopathy; subjective minimal sensory disturbance on the right arm and leg in a non-dermatomal pattern. Zuckerman does not opine as to causation concerning the injuries claimed in the plaintiff's bill of particulars.

Zuckerman raises factual issues concerning his finding of 40 to 45 degrees relative to cervical spine flexion, and ambiguity in his statement that there is "no clear objective evidence of a lumbosacral radiculopathy." This leaves the Court to speculate at to whether there was a deficit in cervical spine flexion and whether there was evidence of lumbosacral radiculopathy. He raises credibility issues concerning his statement that there was "subjective minimal sensory disturbance on the right arm and leg in a non-dermatomal pattern." It is determined by this Court that Zuckerman has therefore raised a credibility issue (*see*, ***Washington v Delossantos***, 44 AD3d 748, 843 NYS2d 186 [2d Dept 2007]) by indicating there was subjective sensory disturbance, suggesting that the same 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]).

As the defendants' examining physicians have raised factual issues concerning what degenerative disc disease is and how long it has been present; whether the plaintiff's claimed injuries were proximately caused by the within accident; ambiguity concerning the finding of 40 to 45 degrees relative to cervical spine flexion, and credibility issues concerning the finding of subjective sensory disturbance as set forth above, the defendants' motion for summary judgment is precluded on the issue of serious injury.

Accordingly, motion (005) by the defendants for dismissal of the complaint on the serious injury threshold as to Cerna is denied.

DONNA SANTORA

Santora testified at her examination before trial that she had been employed by Amerada Hess Corporation, working approximately fourteen hours a day, five days a week, running the store, doing the books and lifting about 150 to 200 cases of beer and soda a day. As a result of the injuries claimed in this accident, she testified she lost seven months from work and went out on Social Security disability. Thereafter, she returned to work with the her employer as a manager in a kiosk taking money for fuel and purchases. She now relies on the other employees to do the lifting, and she testified she cannot sit or stand too long. As a result of the accident, she stated she felt pain right away in her lower back and neck, and she felt a crack in her neck, lower back and two shoulders. She now takes anti-inflammatory medication

for the pain. She stated she never sustained injury to her neck or back prior to the accident. After the accident she started seeing a chiropractor for burning pain in her neck and back which pain was going down both legs, and she was getting numbness in her feet. She also experienced "really bad burning shooting pain to her finger tips" in her left arm. She also received physical therapy and had surgery on her elbow. Since the accident, she has changed jobs and has had surgery on her left elbow and she cannot play softball or bowl anymore or go to the gym, and she can no longer vacuum and do other housework.

Santora was examined by Michael Katz, M.D. on May 8, 2007. His examination of her cervical and lumbar spine revealed no deficits upon a showing of the quantified ranges of motion compared to the normal ranges. With regard to the cervical spine, he stated that motor strength was present in the C5-T1 enervated segments, but he did not set forth the tests he employed or whether his findings were normal. Although he stated that the straight leg raising test was normal, he did not quantify his findings or compare them to normal ranges. He did not opine on the findings in the MRI reports and films although he stated that the lumbar spine MRI film of May 26, 2005 indicated straightening and left sided protrusion at L-4, and he did not comment on proximate cause relative to any of her claimed injuries. He further opined that Santora's radicular complaints had resolved, but he didn't not state what those radicular complaints were, where they were located, if they were still related to her back pain and didn't comment on her need for anti-inflammatories. This opinion that Santora's radicular pain had resolved raises factual issue with the report of neurologist Zuckerman and Santora's testimony.

Zuckerman performed an independent neurological examination of the plaintiff on June 19, 2007. His history reveals she has mild cervical discomfort "all the time," if she sits for a long time her back "starts to burn" in the mid lumbar area, and when she is sitting her left leg "starts to go dead." Zuckerman sets forth that he reviewed the MRI films of the plaintiff's cervical and lumbar spine and found the films to be of poor, inferior quality for adequate diagnostics. He does state that pursuant to the reports there is straightening of the (cervical) curvature and lateral angulation of the spine to the right posterior herniations at C4-5 and C5-6, and there is straightening of the curvature (lumbar) with posterior midline to left disc herniation at L4-L5 impinging the thecal sac. Upon examination, Zuckerman stated spinal examination (lumbar) revealed forward of 30 degrees out of ninety degrees; lateral flexion 20 degrees out of 30 to the left and right; extension of 20 degrees out of an expected 20. (Dr. Katz sets forth that normal lumbar extension is 30 degrees.) He states there is no lumbar tenderness or spasm elicit able. Cervical range of motion was 50 degrees out of 80 to the left and right, but when repeated incred to 60 degrees out of 80; left and right lateral flexion 30 degrees out of 40; flexion 40 degrees out of 45 and extension 40 degrees out of an expected 40, although he does not set forth that the expected 40 degrees was normal. There was no observed weakness on testing of the of the deltoid, biceps, triceps, wrist extension and flexion, interossei or thumb abductors, and in the lower extremities, hip flexion, extension, dorsi flexion and plantar flexion, inversion and eversion are intact. However, Zuckerman did not state what tests he performed nor quantify his findings. He states she declines to walk on her heels and toes, claiming her "feet hurt." Zuckerman also stated that Santora did not appear to provide

full effort on range of motion testing; that initially she gave incomplete effort on upper and lower extremity testing but eventually provided better effort.

Based upon the foregoing, Zuckerman has raised factual issues to preclude summary judgment as he set forth quantified deficits in range of motion as set forth above, and failed to list some of the tests he performed or to quantify the findings, leaving this Court to speculate on the same. He has also raised factual issues and credibility issues precluding summary judgment by stating that Santora did not appear to provide full effort on range of motion testing, and that initially she gave incomplete effort on upper and lower extremity testing but then provided better effort (*see*, ***Washington v Delossantos***, supra; ***Lalla v Connolly***, supra).

SAMANTHA KELLAR

Kellar testified at her examination before trial that she was a senior in high school and was involved as a passenger in the accident on March 10, 2005, She testified that although her seat belt was on, she came out of the upper portion of the seat belt and her face and shoulder hit the dashboard of the vehicle when she was thrown. She sustained a cut on her cheek, felt dizzy, her head was killing her and she became nauseous. Also her spine (whole back), neck and hips hurt. Her hips felt numb and they were clicking. She experiences numbness of her legs down to her feet and sometimes to her hands. In June 2005 following the accident, she began to experience anxiety and seizures and testified her head had never hurt her so severely before. After the accident she received treatment from three doctors. She visited with one named Dessing about three or four days a week for about six months for chiropractic treatment. Since the accident, she has pain in her neck all the time, her legs and hips hurt, her hips click when she walks, her back hurts and the pain in her head never stops. Before the accident she used to dance but can no longer dance hip hop or ballet. She also used to go running all the time and does not do it anymore. Also she used to lift dumbbells but it is to painful for her to do it now.

Keller was examined by Michael J. Katz, M.D. on May 8, 2007 for an orthopedic evaluation wherein he quantified the range of motion findings and compared them to the normal range of motion relative to the examination of her cervical and lumbar spine. However, he set forth the normal ranges of motion for cervical flexion is 50 degrees, extension 60 degrees; right and left lateral flexion 45 degrees; right and left rotation 80 degrees; lumbar forward flexion 90 degrees; extension 30 degrees; and lateral and side bending 30 degrees. Zuckerman performed an independent neurological examination on June 19, 2007 and examined her cervical and lumbar ranges of motion, quantified the findings and compared them to normal. However, he set forth the normal ranges of motion as follows: cervical left and right rotation 80 degrees; flexion 45 degrees; extension 40 degrees. The normal lumbar ranges of motion were set forth by him as being 90 degrees flexion; lateral flexion 30 degrees. Based upon the forgoing, Michael J. Katz, M.D. and Zuckerman have set forth different normal ranges of motion for cervical extension, thus raising factual issues.

Although Michael J. Katz, M.D. found ranges of motion to be normal in the cervical and lumbar spine, Zuckerman set forth that Kellar could extend at least 30 degrees, but he did not set forth the normal ranges. On cervical flexion, he stated she extended 20 degrees out of an expected 40 degrees. Zuckerman also found that the neurological examination was normal except for diffuse diminished vibration throughout both upper and lower extremities. Accordingly, factual issues have been raised concerning what the normal cervical range of motion is, and objective findings of limitation of range of motion as to cervical flexion, and the significance of diffuse diminished vibration throughout the upper and lower extremities, C6 subluxation, and the diagnostic testing which studies revealed decreased velocities at median, radial and ulnar sensory nerves bilaterally. Neither Michael J. Katz, M.D. nor Zuckerman opine as to whether the claimed injuries were proximately caused by the accident of March 10, 2005. These aforementioned factual issues preclude summary judgment.

Here, the defendants failed to satisfy their burden of establishing, prima facie, that the plaintiffs did not sustain a "serious injury" within the meaning of Insurance Law 5102 (d) (*see*, ***Agathe v Tun Chen Wang***, ___NYS2d ___, 2006 WL 2965205, 2006 NY Slip Op 07434 [NYAD 2 Dept Oct 17, 2006]; *see also*, ***Walters v Papanastassiou***, 31 AD3d 439, 819 NYS2d 48 [2d Dept 2006]) as the defendants' examining physicians either fail to provide specific range of motion measurements for the plaintiffs or fail to compare those findings with normal ranges of motion (*see,* **Hypolite v International Logistics Management, Inc.,** 43 AD3d 461, 842 NYS2d 453 [2nd Dept 2007]; ***Somers v Macpherson,*** 40 AD3d 742, 836 NYS2d 620 [2nd Dept 2007]; ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2nd 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 defendants' 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 defendants' examining physicians do not exclude the possibility that the plaintiffs all suffered a serious injury in the accident, the defendants are not entitled to summary judgment (*see*, ***Peschanker v Loporto***, 252 AD2d 485, 675 NYS2d 363 [2d Dept 1998]). In that the defendants examining physicians have also raised credibility issues as set forth above, summary judgment is also precluded on those issues.

Disc herniation and limited range of motion based on objective findings may constitute evidence of serious injury (***Jankowsky v Smith,*** 294 AD2d 540; 742 NYS2d 876[2nd Dept 2002]). 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 [2nd Dept 2001]). The defendants have submitted admissible evidence to demonstrate findings of herniated discs in Cerna's and Santora's lumbar spine and subluxation in Kellar's spine which may constitute evidence of serious injury based upon objective findings. Therefore the defendants have raised triable issues of fact in their moving papers, which factual issues preclude summary judgment.

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

Accordingly, motion (005) for summary judgment dismissing the complaints as asserted by Cerna, Santora and Keller as the plaintiffs did not sustain serious injury within the definition of Insurance Law §5102(d) is denied.

The plaintiff Cerna cross-moves for summary judgment for dismissal of the defendants' affirmative defense that the plaintiff has failed to sustain serious injury as defined by Insurance §5102(d). It has already been determined in motion (005) that there are factual and credibility issues existing which preclude summary judgment to the defendants. Although the defendants have failed to oppose this cross-motion, it is determined that the plaintiff's admissible evidence raises factual issues which preclude summary judgment as a matter of law on the issue of serious injury. While the plaintiff's supporting medical reports opine that the plaintiff's injuries are proximately caused by the accident, such opinion is found to be conclusory in that no medical basis has been set forth in support of such opinion and while Kevin McPartland, D.C., (hereinafter "McPartland"), sets forth that the claimed injuries were proximately caused by the accident as the plaintiff had no symptoms or complaints of pain prior to her accident of March 10, 2005, there has been no opinion setting forth objective findings on the MRI studies or other medical proof which supports that the degenerative disease at L3-4, L4-5 and L5-S1 did not pre-exist the accident. Clearly, a chiropractor's affidavit which is premised on little more than the plaintiff's subjective complaints is insufficient to establish a prima facie case of serious injury. McPartland's mere unsupported conclusions that such findings of degenerative disease are insignificant are not sufficient to grant summary judgment as a matter of law. Conclusory allegations without more are insufficient as a matter of law to establish a prima facie case of serious injury. (*See,* ***Weingrad v New York Univ. Med. Center,*** supra). Thus, this Court finds there are factual issues, including, whether the plaintiff's degenerative spinal disease is causally related to the within accident which precludes summary judgment striking the defendants' third affirmative defense.

Accordingly, cross-motion (006) for summary judgment striking the defendants' third affirmative defense asserted pursuant to Insurance Law §5102(d) is denied.

Dated: April 24, 2008

J.S.C.

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**