

Osegueda v Nicklas

2009 NY Slip Op 30948(U)

April 20, 2009

Supreme Court, Nassau County

Docket Number: 9191/07

Judge: William R. LaMarca

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SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU - PART 15**

**Present: HON. WILLIAM R. LaMARCA
Justice**

**MANUEL OSEGUEDA and SARAH L. MONGER,
Plaintiffs,**

**Motion Sequence #2, #3, #4, #5
Submitted February 3, 2009**

-against-

INDEX NO: 9191/07

**BRANDON HOWARD NICKLAS and WILLIAM
ROGERS NICKLAS,
Defendants.**

The following papers were read on these motions:

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Defendants, BRANDON HOWARD NICKLAS and WILLIAM ROGERS NICKLAS, each, move for an Order of this Court, awarding them summary judgment and dismissing the complaint on the grounds that neither plaintiff, MANUEL OSEGUEDA [Mot. Seq. #2], nor plaintiff SARAH L. MONGER [Mot. Seq. #3], has satisfied the "serious injury" threshold requirement of Insurance Law §5102(d). Simultaneously,

plaintiffs, MANUEL OSEGUEDA and SARAH L. MONGER, cross move for an Order of this Court: (1) [Mot. Seq. #4] pursuant to CPLR 3025(b) granting plaintiff, MANUEL OSEGUEDA, leave to serve an amended bill of particulars; (2) [Mot. Seq. #4] pursuant to CPLR 3212, granting plaintiff, MANUEL OSEGUEDA, summary judgment on the issue of liability; and (3) [Mot. Seq. #5] pursuant to CPLR 3212, granting plaintiff SARAH L. MONGER, summary judgment on the issue of liability; the motions are determined as herein set forth below.

This action arises out of a two car accident that occurred on April 11, 2007 at approximately 4:35 p.m., at the intersection of Route 107 and Boundary Avenue in Bethpage, New York. Plaintiff MANUEL OSEGUEDA (hereinafter referred to as "OSEGUEDA"), 20 years old at the time of the accident, was the driver of a 2001 Kia that he alleges was struck in the front by a vehicle owned and being operated by the defendants, BRANDON HOWARD NICKLAS and WILLIAM ROGERS NICKLAS. This impact occurred as plaintiff was traveling south on Route 107. Plaintiffs allege that defendants, who were traveling north on Route 107, made a left turn in front of their vehicle. Plaintiff, SARAH L. MONGER (hereinafter referred to as "MONGER"), 29 years old at the time of the accident, was a passenger in plaintiff OSEGUEDA's car.

Plaintiff, OSEGUEDA, claims that as a result of the subject accident, he sustained: lumbar sprain and strain; and, thoracic sprain and strain (*Motion*, Ex. C [Bill of Particulars] ¶3).

Plaintiff, MONGER, claims that as a result of the subject accident, she sustained: fracture of the coccyx; contusion of the right knee; sprain of the right knee; cervicalgia; and, lumbar sprain and strain (*Id*).

Upon the instant application, plaintiffs cross move [Mot. Seq. #4] for an Order, *inter alia*, granting them leave to serve a “supplemental” bill of particulars so as to add new injuries to OSEGUEDA’S claim. It is noted at the outset that a document, even though labeled or denominated by a plaintiff as a supplemental bill of particulars, is an amended bill of particulars where it seeks to add new injuries (*Danne v Otis Elevator Corp.*, 276 AD2d 581, 714 NYS2d 316 [2nd Dept. 2000]; *DeNicola v Mary Immaculate Hosp.*, 272 AD2d 505, 708 NYS2d 152 [2nd Dept. 2000]). Insofar as leave to amend a bill of particulars is freely given absent prejudice or surprise (*Singh v Rosenberg*, 32 AD3d 840, 842, 821 NYS2d 121 [2nd Dept. 2006]; *Joaquin v Munoz*, 21 AD3d 349, 798 NYS2d 913 [2nd Dept. 2005]). In this case, where there is no evidence that the amendment is sought on the eve of trial, and keeping in mind that the defendants were provided an opportunity to conduct a physical examination of the plaintiff, this Court herewith grants plaintiffs’ cross motion for leave to amend the bill of particulars to add new injuries (*Grande v Peteroy*, 39 AD3d 590, 833 NYS2d 615 [2nd Dept. 2007]). Defendants have failed to demonstrate any prejudice on their part such that the amendment of plaintiff’s bill of particulars would be precluded.

Thus, the “supplemental” bill of particulars is hereby deemed served upon the defendants. Accordingly, plaintiff, OSEGUEDA’s “new” injuries, as alleged in his “supplemental” bill of particulars - namely L5-S1 disc herniation; lumbar sprain and

strain; and thoracic sprain and strain - will be considered by this Court in determining defendants' "serious injury" motions.

It is noted at the outset that defendant is not required to disprove any category of serious injury which has not been pled by the plaintiff (*Melino v Lauster*, 82 NY2d 828, 625 NE2d 589, 605 NYS2d 4 [1993]). Both plaintiffs, OSEGUEDA and MONGER, contend that the injuries they sustained, as a result of the subject accident, fall within three of the nine categories of the "serious injury" statute:

"permanent consequential limitation of the use of a body organ or member;"

"significant limitation of use of a body function or system;" and

"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" (*Motion*, Ex. C [Bill of Particulars], ¶11).

Additionally, plaintiff, MONGER, contends that she fractured her coccyx (tail bone) as a result of this accident and thus she claims her injuries also satisfy a fourth category of the "serious injury" statute, namely:

"fracture" (*Id.*).

Plaintiffs do not claim that their injuries fall under any other category of Insurance Law 5102(d). Thus, any other category of serious injury, other than those alleged, will not be considered by this Court (*Melino v Lauster*, 195 AD2d 653, 656, 599 NYS2d 713 [3rd Dept. 1993] *affd* 82 NY2d 828, 625 NE2d 589, 605 NYS2d 4 [1993]). Whether plaintiffs can demonstrate the existence of a compensable serious injury depends upon the quality, quantity and credibility of admissible evidence (*Manrique v Warshaw*

Woolen Associates, Inc., 297 AD2d 519, 747 NYS2d 451 [1st Dept. 2002]). For the sake of clarity, this Court will address each plaintiff's injuries separately and in turn.

MANUEL OSEGUEDA [Mot. Seq. #2]

In support of their motion for summary judgment, defendants submit: the pleadings; plaintiff's verified and supplemental bill of particulars; plaintiff's deposition transcript; the sworn and affirmed report of Dr. S. Farkas, M.D., an orthopedist, who performed an independent orthopedic examination of the plaintiff on May 7, 2008; and, the sworn and affirmed report of Dr. Erik J. Entin, M.D., a neurologist, who performed an independent neurological examination of the plaintiff on April 8, 2008.

Based upon this evidence this Court finds that the defendants have established a *prima facie* case that plaintiff, OSEGUEDA, did not sustain a serious injury within the meaning of the Insurance Law §5102(d).

Specifically, Dr. Farkas, based upon his orthopedic examination of the plaintiff, approximately 13 months from the date of the accident, states, in pertinent part as follows:

PHYSICAL EXAMINATION:

The claimant was asked to inform me of as to any pain or tenderness during the examination.

Examination of the lumbar spine: Revealed no spasm or crepitus to palpation during static positioning or active range of motion. The claimant can forward flex to approximately 45 degrees (90 degrees or more of forward flexion normal). Lateral bending was 30 degrees (30 degrees lateral bending normal). Rotation to the left and right is to 45 degrees (normal 45 degrees). The claimant complains of pain over the lower back. This individual however sits and bends fully forward to remove his shoes with no indication of discomfort. The claimant can toe and heel walk without difficult. No limp was noted. Deep tendon reflexes were normal

at both the Achilles tendon and patellar tendon regions. Motor exam is 5+.
Straight leg raising was negative.

All measurements were performed using a goniometer.

DIAGNOSIS: The claimant presents with a diagnosis of:
1. Resolved lumbar sprain.

The diagnosis, as documented, is based upon the claimant's description of the accident and the physical examination, taking into account the subjective complaints and objective findings.

DISABILITY: I find no orthopedic disability based on the physical examination at this time. The claimant may perform his usual duties of his occupation and may carry out the daily activities of living, without restriction.

Similarly, Dr. Entin, based upon his neurological examination of the plaintiff, approximately one year from the date of the accident, states, in pertinent part as follows:

PHYSICAL EXAMINATION:

Examination of the dorsal area revealed no evidence of dorsal paraspinal muscle spasm, nor was there any lumbosacral paraspinal muscle spasm.

Double straight leg raising was negative to 90 degrees bilaterally while the claimant was sitting.

MOTOR EXAMINATION:

Gait was normal. There was no Romberg sign. Examination of strength was normal. Muscle tone was normal. There was no muscle atrophy. There were no abnormal involuntary movements....Deep tendon reflexes were symmetrical throughout. Plantar responses were flexor bilaterally. There were no Hoffman reflexes.

IMPRESSION:

Mr. OSEGUEDA demonstrates an entirely normal neurological examination, with no objective evidence of neurological deficit or disability referable to the accident of 4/11/07. He does have symptoms consistent with a left lateral femoral cutaneous nerve of the thigh neuropathy, but he has no symptoms referable to

an S1 radiculopathy; nor are there any objective physical findings consistent with this.

Based upon these records, this Court finds that defendants have sufficiently demonstrated that plaintiff did not suffer a limitation that was anything more than minor or mild and that he had no objective limitations or signs of an injury (*Gaddy v Eyler*, 79 NY2d 955, 591 NE2d 1176, 582 NYS2d 990 [1992]; *Licari v Elliot*, 57 NY2d 230, 441 NE2d 1088, 455 NYS2d 570 [1982]). Both experts provide a qualitative assessment of OSEGUEDA's condition; their evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organs, member, functions or systems (*Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 774 NE2d 1197, 746 NYS2d 865 [2002]).

Finally, defendants have also sufficiently demonstrated that plaintiff, OSEGUEDA did not sustain any injuries that prevented him from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident. At his sworn oral examination before trial, OSEGUEDA testified that he was never told by any health care provider to confine himself to his bed or home, and in fact, he never did confine himself. Further, OSEGUEDA testified that he was able to return to work and school within a couple of days after the accident. In light of these showings, defendants have demonstrated that plaintiff, OSEGUEDA, did not suffer a "medically determined injury or impairment of a non permanent injury" (Ins. Law 5102[d]) and that there was no curtailment of plaintiff's usual activities "to a great extent rather than some slight

curtailment" (*Licari v Elliot, supra* at 236; *Sands v Stark*, 299 AD2d 642, 749 NYS2d 334 [2nd Dept. 2002]).

Having established a *prima facie* showing that plaintiff OSEGUEDA did not sustain a "serious injury" within the meaning of the Insurance Law, the burden shifts to the plaintiffs to come forward with evidence to overcome defendants' submissions by demonstrating a triable issue of fact that a "serious injury" was sustained (*Pommels v Perez*, 4 NY3d 566, 830 NE2d 278, 797 NYS2d 380 [2005]; *Grossman v Wright*, 268 AD2d 79, 84, 707 NYS2d 233 [2nd Dept. 2000]).

In opposition, plaintiff, OSEGUEDA, submits, *inter alia*, the sworn affirmation of Charles Ruotolo, M.D., an orthopedic surgeon, with whom he treated during the first six months after the accident; plaintiff's time sheets from Cactus Salon & Day Spa, his place of employment for the months of March - June 2007; and, a radiological report dated April 30, 2007 by Adam Silvers, M.D.

As Dr. Silvers' radiological report is unaffirmed and unsworn, it is "without any probative value and cannot be used to defeat a motion for summary judgment" (*Holder v Brown*, 18 AD3d 815, 816, 796 NYS2d 641 [2nd Dept. 2005]; *Sammut v Davis*, 16 AD3d 658, 659, 792 NYS2d 192 [2nd Dept. 2005]). Similarly, as the records submitted from Cactus Salon & Day Spa are also neither affirmed nor sworn to, they are inadmissible and will not be considered by this Court on the same grounds (*Holder v Brown, supra*).

Plaintiffs' remaining proof, namely Dr. Charles Ruotolo's affirmation, also falls short of raising a triable issue of fact.

In his affirmation, Dr. Charles Ruotolo states that he examined plaintiff OSEGUEDA on April 26, 2007, May 7, 2007, June 4, 2007 and July 26, 2007. During those examinations of the plaintiff, he noted that there was tenderness on palpation over the lumbosacral spine and in the paravertebral musculature, there was hamstring tightness, there were positive leg raises and restricted range of motion. Dr. Ruotolo affirms that he reviewed the plaintiff's lumbar MRI films and that they did show a L5-S1 disc herniation with impingement upon the S1 nerve roots and thecal sac. Dr. Ruotolo's most recent examination of the plaintiff on June 13, 2008, revealed tenderness on palpation of the lumbosacral spine in the paravertebral musculature on the left side at L4,L5 and S1. There was also restricted range of motion and hamstring tightness.

While Dr. Ruotolo states in his affirmation that he first examined the plaintiff, on April 26, 2007, he does not indicate what objective tests he performed to determine that the plaintiff had a limitation in his lumbar range of motion (*Sainte-Aime v Ho*, 274 AD2d 569, 570, 712 NYS2d 133 [2nd Dept. 2000]). The only time Dr. Ruotolo provides a quantified range of motion limitation for the plaintiff is after his July 26, 2007 examination, which occurred 3 months and 15 days after the date of the accident and even then, the doctor does not specify how the range of motion exam was conducted (*Farozes v Kamran*, 22 AD3d 458, 802 N.Y.S.2d 706 [2nd Dept. 2005]). Furthermore, Dr. Ruotolo's affirmation presents an inexplicable gap in treatment from July 26, 2007 of almost one year through June 13, 2008 which is particularly significant in this case since plaintiff himself testified that he only received physical therapy on one occasion, never received any prescriptions for medication, or never sought any other medical treatment

as a result of the subject accident. This failure to explain a gap in treatment prevents plaintiff from establishing an issue of fact as to any serious injury sustained (*Farozes v Kamran, supra; Pommels v Perez, supra*).

Plaintiff has also failed to establish an issue of fact as to whether or not he was able to perform his usual and customary activities for 90 out of the first 180 days after the accident.

Accordingly, defendants' motion [Mot. Seq. #2] for summary judgment dismissal of plaintiff, OSEGUEDA's complaint on the grounds that he did not sustain a serious injury within the meaning of the Insurance Law is granted and his complaint is herewith dismissed.

Under these circumstances, plaintiff, OSEGUEDA's cross motion [Mot. Seq. #4] for summary judgment on the issue of liability is denied as moot.

SARAH L. MONGER [Mot. Seq. #3]

In support of their motion for summary judgment, defendants submit: the pleadings; plaintiff's verified bill of particulars; plaintiff's deposition transcript; the sworn and affirmed report of Dr. S. Farkas, M.D., an orthopedist, who performed an independent orthopedic examination of the plaintiff on May 7, 2008; the sworn and affirmed report of Dr. Erik J. Entin, M.D., a neurologist, who performed an independent neurological examination of the plaintiff on April 8, 2008; the sworn and affirmed radiographic study, dated April 16, 2007, of Dr. Stephen W. Lasting, M.D., Diplomate, American Board of Radiology; the unsworn, unaffirmed MRI study dated August 28,

2007 of Zwanger Pesiri Radiology; and an unsworn "report" dated July 26, 2007 of Maria Trotta, P.A.

It is noted at the outset that the unsworn and unaffirmed MRI reports from Zwanger Pesiri Radiology cannot be considered in support of defendants' motion for summary judgment. In support of a claim that the plaintiffs have not sustained a serious injury, defendants may rely either on the sworn statements of the defendants' examining physician or the unsworn reports of the plaintiff's examining physician (see *Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692 [2nd Dept. 1992]). In order to satisfy the statutory serious injury threshold, the legislature requires objective proof of a plaintiffs' injuries. The Court of Appeals in *Toure v Avis Rent A Car Systems*, 98 NY2d 345, stated that plaintiffs' proof of injury must be supported by objective medical evidence, such as sworn MRI and CT scan tests (*Toure v Avis Rent A Car Sys.*, 98 NY2d at 353, 774 NE2d 1197, 746 NYS2d 865 [2002]). However, the sworn MRI and CT scan tests and reports must also be paired with the doctor's observations during his physical examination of the plaintiff (see, *Toure v Avis Rent A Car Systems*, *supra*). Unsworn MRI reports can also constitute competent evidence but only if both sides rely on those reports (see, *Gonzalez v Vasquez*, 301 AD2d 438, 754 NYS2d 7 [1st Dept. 2003]). There is no indication on this record that plaintiff MONGER has also relied upon these MRI reports.

Similarly, the unsworn "report" by the physician's assistant Maria Trotta, is without any probative value in opposing the defendants' motion (*Grasso v Angerami*, 79 NY2d 813, 814-815, 588 NE2d 76, 580 NYS2d 178 [1991]; *Pagano v Kingsbury*, *supra*

at 270). Maria Trotta neither attempts to affirm the contents of her “report” concerning the plaintiff pursuant to CPLR 2106 nor does she offer her statements in the form of a sworn affidavit. Since Trotta is a physician’s assistant ¹, she can not avail herself of that statute to affirm the contents of her “report” (CPLR 2106; *Kunz v Gleeson*, 9 AD3d 480, 781 NYS2d 50 [2nd Dept. 2004]; *Santoro v Daniel*, 276 AD2d 478, 713 NYS2d 699 [2nd Dept. 2000]). Thus, Trotta’s “report” concerning the plaintiff, is without any probative value and will not be considered by this Court herein.

The sworn and affirmed radiographic study dated September 22, 2008 by Dr. Stephen Lastig is also inadmissible. There is no indication that Dr. Lastig performed the tests of plaintiff’s sacrum and coccyx on April 16, 2007 or that the tests and reports are accompanied by his observations during his physical examination of the plaintiff (*Toure v Avis Rent A Car Systems, Inc, supra*).

Based upon defendants’ remaining proof, however, this Court finds that while defendants have established a *prima facie* case that plaintiff, MONGER, did not sustain a serious injury under the “permanent consequential limitation of the use of a body organ or member,” “significant limitation of use of a body function or system” or the “90/180” category of Insurance Law 5102(d), they have failed to show that her fractured coccyx does not satisfy the “serious injury” requirement of Insurance Law 5102(d).

Dr. Farkas, based upon his orthopedic examination of the plaintiff, approximately 13 months from the date of the accident, states, in pertinent part as follows:

PHYSICAL EXAMINATION:

¹It is unclear from her “report” as to which physician she purportedly assists.

Examination of the lumbar spine: Revealed no spasm or crepitus to palpation during static positioning or active range of motion. The claimant can forward flex to approximately 95 degrees (90 degrees or more of forward flexion normal). Lateral bending was 30 degrees (30 degrees lateral bending normal). Rotation to the left and right is to 45 degrees and extension is to 20 degrees (normal 45/45/20). *The claimant complains of pain to the very slightest touch.* The claimant can toe and heel walk without difficult. No limp was noted. Deep tendon reflexes were normal at both the Achilles tendon and patellar tendon regions. Motor exam is 5+. Straight leg raising was negative. *This individual offers a complaint of pain as I palpate the region of the coccyx.*

Examination of the cervical spine: Examination revealed this individual to present with 70 degrees of rotation left and right (70 to 80 degrees rotation left and right is normal) and 50 degrees of flexion and extension (30 to 50 degrees of flexion and extension is normal). The claimant offers no complaint of pain. There was no spasm or crepitus to palpation during static positioning or active range of motion. Deep tendon reflexes are 2+ and motor examination is 5+. Tinel's sign was negative at the elbow and wrists bilaterally.

Right knee examination: Both knees were examined. *The claimant complains of numbness anterolaterally about the knee.* 16 inches of circumferential measurement is noted. There was no effusion nor bogginess noted. The claimant offered no complaint of pain as I palpated the knee. The knee is stable. A negative Apley's, McMurray's and Drawer's Signs were noted. Quad and patella tendons are intact. There is no retropatellar crepitus. Range of motion of the knee was from full extension to 135 degrees of flexion (normal range of motion 130 to 135 degrees flexion).

All measurements were performed using a goniometer.

DIAGNOSES: The claimant presents with diagnoses of:

1. Resolved lumbar sprain.
2. Resolved cervical sprain.
3. Clinically healed coccyx fracture.
4. Resolved sprain of the right knee.

The diagnosis, as documented, is based upon the claimant's description of the accident and the physical examination, taking into account the subjective complaints and objective findings.

DISABILITY: I find no orthopedic disability based on the physical examination at this time. The claimant may perform her usual duties of her occupation and may carry out the daily activities of living, without restriction.

Similarly, Dr. Entin, based upon his neurological examination of the plaintiff, approximately one year from the date of the accident, states, in pertinent part as follows:

PHYSICAL EXAMINATION:

Examination of the back revealed no dorsal or lumbosacral paraspinal muscle spasm. Double straight leg raising was negative to 90 degrees bilaterally while the claimant was sitting. *She complained of tenderness to palpation over the coccyx.*

MOTOR EXAMINATION:

Motor examination revealed normal strength, except for 4+/5 weakness of bilateral thumb abduction and apposition. Tinel's sign was positive at the left wrist for pain radiating up the left forearm. There was no Romberg sign. Examination of strength was normal. Muscle tone was normal. There was no muscle atrophy. There were no abnormal involuntary movements...Deep tendon reflexes were 1+ and symmetrical in the upper extremities and 2+ and symmetrical in the lower extremities. Plantar responses were flexor bilaterally. There were no Hoffman reflexes.

IMPRESSION:

Ms. MONGER has evidence of bilateral median neuropathies at the wrists, which are not secondary to the accident and which, indeed, antedate the accident. She has chronic daily headaches and it is unclear when these began. There is no specific mention of headaches on the orthopedic notes through August of 2007. These are not being treated, at any rate.

Ms. MONGER claims to have, historically, a fractured coccyx, but there are no objective neurological deficits and no neurologically based disability referable to the accident of 4/11/07.

Based upon this evidence this Court finds that the defendants have sufficiently demonstrated that plaintiff, MONGER, did not suffer a limitation that was anything more than minor or mild and that she had no objective limitations or signs of an injury (*Gaddy v Eyler, supra; Licari v Elliot, supra*).

Finally, defendants have also sufficiently demonstrated that plaintiff, MONGER did not sustain any injuries that prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident. At her sworn oral examination before trial, MONGER testified that she was not confined to her bed or home for 90 out of the first 180 days following the accident. She was only home bound for four days from the date of the accident until her April 16, 2007 visit with her chiropractor, Dr. Charles Ruotolo. She testified that she returned to work after four weeks at the same pay rate, working the same hours, and, at the same position as a hairdresser after the accident. In light of these showings, defendants have also demonstrated that plaintiff, MONGER did not suffer a "medically determined injury or impairment of a non permanent nature" (Ins. Law 5102[d]) which would have caused the alleged limitations on the plaintiff's daily activities.

Yet, while defendants have established that MONGER did not sustain a "serious injury" under the "permanent consequential limitation of use of a body organ or member," "significant limitation of use of a body function or system," or the "90/180" categories, their proof does not establish that plaintiff did not sustain a "serious injury" under the "fracture" category of the statute. Both Drs. Farkas and Entin's examination of the plaintiff confirms that plaintiff did fracture her coccyx as a result of this accident. However, Drs. Farkas and Entin both state that there are no resulting objective neurological deficits and no neurologically based disability referable to this accident. Dr. Farkas additionally notes that plaintiff's fractured coccyx has clinically healed. While

that may be so, the Insurance Law is very clear that a fracture is a fracture is a fracture (Insurance Law 5102[d]; *Olan v Allstate Ins. Co.*, 212 AD2d 362, 622 NYS2d 33 [1st Dept. 1995]; *Tagger v Olympic Van Line, Inc.*, 38 AD3d 646, 830 NYS2d 673 [2nd Dept. 2007]). There is nothing to indicate that the Legislature did not intend healed fractures to come within the definition of "fracture," so as not to constitute "serious injury" for the purposes of the Insurance Law. Thus, even a healed fracture is a fracture for the purposes of the "serious injury" statute (see N.Y. Civ. Pattern Jury Instructions 2:88 C).

Accordingly, while the burden shifts to the plaintiffs to come forward with evidence to overcome defendants' submissions by demonstrating a triable issue of fact that a "serious injury" was sustained under the "permanent consequential limitation of the use of a body organ or member," "significant limitation of use of a body function or system" or the "90/180" categories, defendants failure to make a *prima facie* showing that plaintiff did not sustain a fracture, requires a denial of the motion insofar as it pertains only to the fracture category, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 476 NE2d 642, 487 NYS2d 316 [1985]).

In opposition, plaintiff, MONGER, submits, *inter alia*, the sworn affirmation of Charles Ruotolo, M.D., an orthopedic surgeon who first examined the plaintiff on April 16, 2007; and, the sworn affirmation of Dr. J.Y. Marguiles, an orthopedist who performed an independent orthopedic examination of the plaintiff on January 7, 2008. Plaintiffs proof, however, falls short of raising a triable issue of fact.

Dr. Charles Ruotolo's affirmation states that he examined the plaintiff, MONGER on April 16, 2007, April 30, 2007, July 26, 2007, August 2, 2007, August 29, 2007 and then nine months later on May 30, 2008. During these examinations of the plaintiff, he noted that there was tenderness on palpation over her lumbosacral spine at L4, L5 and S1 and in the paravertebral musculature, there was tenderness along her sacrum and coccyx. The remaining part of Dr. Ruotolo's affirmation discusses the fracture of plaintiff's coccyx which he concedes that as of May 30, 2008, his most recent examination of the plaintiff, the coccygeal fracture had healed. He states:

8. On May 30, 2008, Ms. MONGER underwent additional x-rays of her coccyx at my office and under my supervision. These x-rays did show that the coccygeal fracture healed. However, the AP and lateral views of the x-rays revealed an anterior angulation of Ms. MONGER's distal coccyx.

Dr. Marguiles in his affirmation does not add anything more to Dr. Ruotolo's assessment. In fact, this Court is skeptical as to the veracity and accuracy of Dr. Marguiles's opinion that plaintiff sustained a fractured coccyx causally related to the motor vehicle accident of April 11, 2007 but which does not at any point acknowledge that such fracture has since healed.

Nevertheless, it is clear from plaintiff's proof that plaintiff, MONGER's injuries do not satisfy the threshold significant limitation of use of a body function or system or permanent consequential limitation of a body function or system categories of the statute. A claim raised under the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, can be made by an expert's designation of a numeric percentage of plaintiff's loss of range of motion, in order to prove the extent or degree of the physical

limitation (see *Toure v Avis Rent A Car Systems, Inc.*, *supra*). In addition, an expert's qualitative assessment of a plaintiff's condition is also probative, provided that: (1) the evaluation has an objective basis, and, (2) the evaluation compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system" (see *id*).

Dr. Ruotolo fails to provide either a quantitative or a qualitative assessment of plaintiff MONGER's condition of her lumbosacral spine at L4, L5 and S1 and in the paravertebral musculature.

Plaintiff has also failed to establish an issue of fact as to whether or not she was able to perform her usual and customary activities for 90 out of the first 180 days after the accident.

In sum, this Court finds that while plaintiff's proof is insufficient to defeat defendants' motion for summary judgment dismissal of plaintiffs' claim of serious injury under the "permanent consequential limitation of use of a body organ or member," "significant limitation of use of a body function or system," and "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" categories, defendants' motion for summary judgment dismissal of plaintiff's complaint is herewith denied insofar as plaintiff has demonstrated the existence of a triable issue of fact that a "serious injury" was sustained within the "fracture" category.

Plaintiff, MONGER's cross motion [Mot. Seq. #5] for summary judgment on the issue of liability is granted. In support of her motion, plaintiff submits that the sworn deposition testimony of BRANDON NICKLAS who testified that he was traveling northbound on Route 107 when he noticed an Italian deli on his left hand side. Defendant testified that he came to a light and it was his intention to make a left turn into a shopping center. He stated that the traffic light did not have a separate left hand turn signal, nor did the road he was traveling on have a separate left hand turning lane. The defendant testified that the cars traveling southbound had the right of way. He testified that he made a left turn and that his vehicle was in the southbound lanes when the impact occurred. Defendant testified that he never saw the other vehicle, traveling south, involved in the accident.

As a motor vehicle making a left turn, defendants were required to yield the right of way to a vehicle approaching from the opposite direction (Vehicle and Traffic Law 1141; *Spivak v Erickson*, 40 AD3d 962, 836 NYS2d 676 [2nd Dept. 2007]; *Aristizabal v Aristizabal*, 37 AD3d 503, 829 NYS2d 701 [2nd Dept. 2007]). Oncoming motorists are entitled to anticipate that left-turning motorists are going to obey traffic laws which require them to yield right of way, where the on-coming motorists have the right of way (*Moreback v Mesquita*, 17 AD3d 420, 793 NYS2d 148 [2nd Dept. 2005]).

Having made a *prima facie* showing of entitlement to judgment as a matter of law, the burden shifts to the defendants, as the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material

issues of fact requiring a trial (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 501 NE2d 572, 508 NYS2d 923 [1986]).

In opposition, defendants fail to come forward with any evidence sufficient to raise a triable issue of fact (*Almonte v Tobias*, 36 AD3d 636, 829 NYS2d 153 [2nd Dept. 2007]; *Berner v Koegel*, 31 AD3d 591, 819 NYS2d 89 [2nd Dept. 2006]). Defendants submit that “while plaintiffs’ counsel assumes that a VTL infraction exists, there is no showing that such an infraction was a proximate cause of the accident...A jury could clearly find that plaintiff...as the operator of the second vehicle in the collision was the sole proximate cause of the accident” (*Aff. in Opp.*, ¶7-8). However, it is well settled that mere conclusions and unsubstantiated allegations or assertions made by the party opposing the motion are insufficient (*Zuckerman v City of New York*, 49 NY2d 557, 562, 404 NE2d 718, 427 NYS2d 595 [1980]) to create material issues of fact requiring a trial to resolve (*Alvarez v Prospect Hosp.*, *supra*). Accordingly, plaintiff, MONGER’s cross motion [Mot. Seq. #5] for summary judgment on the issue of liability is granted. Accordingly, it is hereby

ORDERED, that the defendants’ motion for summary judgment dismissing plaintiff, OSEGUEDA’s complaint is granted; and it is further

ORDERED, that the defendants’ motion for summary judgment dismissing plaintiff, MONGER’s complaint is denied; and it is further

ORDERED, the caption shall henceforth read as follows:

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

SARAH L. MONGER,

Plaintiff,

-against-

INDEX NO: 9191/07

**BRANDON HOWARD NICKLAS and WILLIAM
ROGERS NICKLAS,**

Defendants.

All further requested relief not specifically granted is denied.

This shall constitute the decision and order of this Court.

Dated: April 20, 2009



WILLIAM R. LaMARCA, J.S.C.

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APR 24 2009
**NASSAU COUNTY
COUNTY CLERK'S OFFICE**