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SHORT FORM ORDER

INDEX NO. 07-8751
CAL. NO. 08-01681-MV

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

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 10-10-08 (001)
MOTION DATE 12-23-08 (002 & 003)
ADJ. DATE 2-18-09
Mot. Seq. # 001 - MG
002 - MD
003 - XMD

KATRINA RIVERA and FRANCESCO SORCE, Plaintiffs, - against - JOSEPH M. ODERMATT, Defendant.	SETH M. GOLDSTEIN, ESQ. Attorney for Plaintiff Katrina Rivera 125-10 Queens Boulevard, Suite 5 Kew Gardens, New York 11415 SOBEL & SEIDELL, LLP Attorneys for Plaintiff Francesco Sorce 811 West Jericho Turnpike, Suite 105W Smithtown, New York 11787 SOBEL & SEIDELL, P.C. Attorneys for Defendant 464 New York Avenue, Suite 100 Huntington, New York 11743

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the plaintiff Sorce and defendant Odermatt, dated September 15, 2008 and November 26 2008, and supporting papers; (2) Notice of Cross Motion by the plaintiff Sorce, dated December 5, 2008, and supporting papers; (3) Affirmation in Opposition by the plaintiff Rivera and defendant Odermatt dated January 7, 2009 and November 5, 2008, and supporting papers; (4) Reply Affirmation by the defendant Odermatt and plaintiff Sorce, dated February 11, 2009 and January 19, 2009, and supporting papers; and now

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

ORDERED that this motion (#001) by plaintiff Francesco Sorce seeking summary judgment in his favor and as against defendant Joseph Odermatt on the issue of liability, and that this motion (#002) by defendant Joseph Odermatt seeking summary judgment dismissing plaintiff's complaint, and that this cross motion (#003) by plaintiff Francesco Sorce seeking summary judgment dismissing plaintiff's complaint is hereby consolidated for purposes of this determination and it is further;

ORDERED that this motion by plaintiff Francesco Sorce seeking summary judgment in his favor and as against defendant Joseph Odermatt on the issue of liability, and setting this action down for an immediate assessment of damages is granted, and it is further;

ORDERED that this motion by defendant Joseph Odermatt seeking summary judgment dismissing plaintiffs' complaint is denied, and it is further;

ORDERED that this cross motion by plaintiff Francesco Sorce seeking summary judgment dismissing plaintiff's complaint is denied, as plaintiff Katrina Rivera has not asserted any claims against him

This is an action to recover damages for injuries allegedly sustained by plaintiffs Katrina Rivera and Francesco Sorce as a result of a motor vehicle accident that occurred at the intersection of DeKalb Avenue and North Fifth Street in the Village of Lindenhurst, New York on December 17, 2005. By her bill of particulars, plaintiff Katrina Rivera alleges that she sustained various personal injuries as a result of the subject accident, including disc herniations at L4 through S1 and C4 through C7, cervical and lumbar myofascial derangement, lumbar radiculopathy, contusion of the left elbow and cervical and lumbar sprains.

Plaintiff Sorce now moves for summary judgment on the basis that defendant Odermatt's failure to obey Vehicle and Traffic Law §1142 and yield the right-of-way to his vehicle is the sole proximate cause of the subject accident. Plaintiff Sorce, in support of the motion, submits a copy of the pleadings, a copy of the police accident report, and copies of the parties' deposition transcripts. Defendant Odermatt opposes the instant motion on the ground that there are triable issues of fact regarding liability for the happening of the subject accident. Defendant Odermatt and Plaintiff Sorce also move for summary judgment on the basis that plaintiff does not meet the "serious injury" threshold requirement of Insurance Law §5102 (d). Defendant Odermatt and plaintiff Sorce, both, in support of their motions, rely upon a copy of plaintiff's deposition transcript, and the sworn medical reports of Dr. Irving Etkind, Dr. Edward Weiland, and Dr. Steven Mendelsohn. Dr. Etkind, an orthopedist, conducted an independent physical examination of plaintiff Rivera at defendant's request on June 26, 2008. Dr. Weiland, a neurologist, conducted an independent physical examination of plaintiff Rivera at defendant's request on June 23, 2008. Dr. Mendelsohn performed an independent radiological review of the magnetic resonance imaging ("MRI") films of plaintiff Rivera's cervical and lumbar spines.

Plaintiff Rivera opposes the instant motions on the ground that defendant Odermatt and plaintiff Sorce have failed to meet their prima facie burden to show that she did not sustain a "serious injury" as required by Insurance Law §5102 (d) in the subject accident. Plaintiff Rivera, in opposition to the motions, submits a copy of the pleadings, her affidavit, copies of plaintiff's treatment records, and the sworn medical reports of Dr. Michael Pappas, her treating physician and Dr. Richard Rizzuti, a radiologist. Dr. Rizzuti performed an independent radiological review of the MRI films of plaintiff's cervical and lumbar spines.

It is well established that in order to obtain summary judgment, the moving party must demonstrate his or her cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his or her favor, and he or she must tender evidentiary proof in admissible form to eliminate all material issues of fact from the case (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985] ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Moreover, where a party has

demonstrated his or her entitlement to judgment as a matter of law, the party opposing the motion must establish by admissible evidence the existence of a factual issue requiring a trial of the action, however, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see* ***Zuckerman v City of New York***, *supra*; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2004]).

Vehicle and Traffic Law §1142 (a) states, in pertinent part, that the driver of a motor vehicle approaching a stop sign shall stop, and after having stopped, shall yield the right-of-way to any vehicle that has entered the intersection or is approaching so closely as to constitute an immediate hazard during the time such driver is moving across or within the intersection (*see also* ***Guadagno v Norward***, 43 AD3d 1432, 842 NYS2d 844 [2007]; ***Galvin v Zacholl***, 302 AD2d 965, 755 NYS2d 175 [2003], *lv denied* 100 NY2d 512, 767 NYS2d 393 [2003]; ***Kelsey v Degan***, 266 AD2d 843, 697 NYS2d 426 [1999]; ***Namisnak v Martin***, 244 AD2d 258, 664 NYS2d 435 [1997]).

Defendant Joseph Odermatt testified at his deposition that he was traveling south on North Fifth Street when he approached the stop sign controlling North Fifth Street and DeKalb Avenue. Defendant Odermatt testified that he came to a full stop at the stop sign, and looked both left and right. He testified that he was able to see approximately 150 to 200 feet to his right, down DeKalb Avenue, and that he did not observe any vehicles approaching on DeKalb Avenue. He testified that when he looked to his left, his view was blocked by a tree, so he "inched" past the tree to see if any cars were coming. Defendant Odermatt testified that he when looked to his right for a second time the collision occurred. Defendant Odermatt testified that his foot was on the brakes at the time of impact, and that he was traveling approximately 5 to 10 miles per hour. He testified that he did not hear the sound of a horn blowing or any screeching brakes prior to the accident. He further testified that plaintiff Sorce's vehicle approached him from his right.

Plaintiff Francesco Sorce testified at his deposition that he was the operator of the vehicle and that his daughter-in-law, plaintiff Rivera, and a neighbor's child were passengers in his vehicle at the time of the accident's occurrence. Plaintiff Sorce testified that there was a stop sign controlling the direction of traffic on North Fifth Street and that there was no stop sign or traffic light controlling the direction of traffic on DeKalb Avenue. He testified that he was traveling eastbound on DeKalb Avenue and that he first observed defendant's vehicle when it was approximately 20 feet from the stop sign on the southbound side of North Fifth Avenue. He testified that defendant Odermatt did not stop at the stop sign, nor did defendant Odermatt slow down for the stop sign. Plaintiff Sorce testified that his vehicle was in the middle of the intersection when the collision occurred and that he tried to avoid the collision by honking his horn and veering to the right. Plaintiff Sorce testified that there were two impacts to his vehicle. He further testified that his vehicle was struck in the middle to rear of the driver's side of the vehicle, and that the collision caused the right side of his vehicle to strike the telephone pole located on the southeast corner of DeKalb Avenue.

Plaintiff Katrina Rivera testified at her deposition that she was the front-seat passenger in her father-in-law's vehicle and that they were traveling at about 20 miles per hour when the accident occurred. Plaintiff Rivera testified that when she first observed defendant Odermatt's vehicle it was approaching the stop sign on North Fifth Street. She testified that defendant Odermatt's vehicle was

approximately 10 feet from the stop sign. She testified that plaintiff Sorce's vehicle was about halfway into the intersection when she first observed defendant Odermatt's vehicle. Plaintiff Rivera testified that plaintiff Sorce tried to avoid the collision by turning his steering wheel to the right. Plaintiff Rivera testified that after the vehicle collided with defendant Odermatt's vehicle that it struck a pole located on the right corner of DeKalb Avenue. She further testified that the vehicle she was a passenger in was struck in the middle and the back and that both of the front airbags in the vehicle deployed.

Based upon the foregoing, plaintiff Sorce has established that the sole proximate cause of the subject accident was defendant Odermatt's failure to yield the right-of-way to his vehicle, which had already entered the intersection, in violation of Vehicle and Traffic Law §1142 (a) (*see* ***Kelsey v Degan***, *supra*; ***Matt v Tricil (NY), Inc.***, 260 AD2d 811, 687 NYS2d 828 [1999]). Plaintiff Sorce, as the driver with the right-of-way, was entitled to anticipate that defendant Odermatt would obey the traffic laws that required him to yield the right-of-way to the vehicle that was already in the intersection or approaching so closely that it constituted an immediate danger (*see* VTL §1142 (a); *see also* ***Dinham v Wagneri***, 48 AD3d 349, 851 NYS2d 535 [2008]; ***Namisnak v Martin***, *supra*; ***Hazelton v Brown***, 248 AD2d 871, 669 NYS2d 769 [1998]). Plaintiff Sorce also did not have a duty to watch for and avoid a driver that might fail to stop at a stop sign (*see* ***Aeillo v City of New York***, 32 AD3d 361, 820 NYS2d 579 [2006]; ***Jordan v City of New York***, 12 AD3d 326, 784 NYS2d 861 [2004]; ***Murchison v Incognoli***, 5 AD3d 271, 773 NYS2d 299 [2004]). In opposition, defendant Odermatt's submission of an affirmation from his attorney, who has no personal knowledge of the subject accident, is insufficient to raise a triable issue of fact regarding plaintiff Sorce's comparative negligence (*see* ***Jenkins v Alexander***, 9 AD3d 286, 780 NYS2d 133 [2004]; ***Perez v Brux Cab Corp.***, 251 AD2d 157, 674 NYS2d 343 [1998]; ***Anastasio v Scheer***, 239 AD2d 823, 658 NYS2d 467 [1997]). In addition, the record does not disclose any condition that would have required plaintiff Sorce to reduce his speed as he approached the intersection (*see* ***Anastasio v Scheer***, *supra*; ***Bagnato v Romano***, 179 AD2d 713, 578 NYS2d 613 [1992], *lv denied* 81 NY2d 701, 594 NYS2d 715 [1992]) or evidence that plaintiff Sorce had the opportunity to avoid the collision (*see* ***Hazelton v Brown***, *supra*; ***Hornacek v Hallenbeck***, 185 AD2d 561, 586 NYS2d 426 [1992]). Accordingly, plaintiff Sorce's motion for summary judgment on the issue of liability is granted.

With respect to defendant Odermatt's motion for summary judgment and plaintiff Sorce's cross motion for summary judgment on the basis that plaintiff Rivera did not sustain a "serious injury" under Insurance Law § 5102 (d), a defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred under the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a "serious injury" (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant's own witnesses, "those findings must be in admissible form, such as, affidavits and affirmations, and not unsworn reports" to demonstrate entitlement to judgment as a matter of law (***Pagano v Kingsbury***, 182 AD2d 268, 270, 587 NYS2d 692 [1992]). A defendant may also establish entitlement to summary judgment using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (*see* ***Fragale v Geiger***, 288 AD2d 431, 733 NYS2d 901 [2001]; ***Grossman v Wright***, 268 AD2d 79, 707 NYS2d 233 [2000]; ***Vignola v Varrichio***, 243 AD2d 464, 662 NYS2d 831 [1997]; ***Torres v Micheletti***, 208 AD2d 519,616 NYS2d 1006 [1994]). Once defendant has met this burden,

plaintiff must then submit objective and admissible proof of the nature and degree of the alleged injury in order to meet the threshold of the statutory standard for "serious injury" under New York's No-Fault Insurance Law (*see* ***Dufel v Green***, 84 NY2d 795, 622 NYS2d 900 [1995]; ***Tornabene v Pawlewski***, 305 AD2d 1025, 758 NYS2d 593 [2003]; ***Pagano v Kingsbury***,182 AD2d 268, 587 NYS2d 692 [1992]). However, if a defendant does not establish a prima facie case that the plaintiff's injuries do not meet the serious injury threshold, the court need not consider the sufficiency of the plaintiff's opposition papers (*see* ***Burns v Stranger***, 31 AD3d 360, 819 NYS2d 60 [2006]; ***Rich-Wing v Baboolal***, 18 AD3d 726, 795 NYS2d 706 [2005]; *see generally*, ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

Furthermore, to recover under the "permanent loss of use" category, a plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance***, 96 NY2d 295, 299, 727 NYS2d 378 [2001]). A plaintiff claiming injury within the "limitation of use" categories must substantiate his or her complaints of pain with objective medical evidence showing the extent or degree of the limitation of movement caused by the injury and its duration (*see* ***Laruffa v Yui Ming Lau***, 32 AD3d 996, 821 NYS2d 642 [2006]; ***Cerisier v Thibiu***, 29 AD3d 507, 815 NYS2d 140 [2006]; ***Meyers v Bobower Yeshiva Bnei Zion***, 20 AD3d 456, 797 NYS2d 773 [2005]). He or she must present medical proof contemporaneous with the accident showing the initial restrictions in movement or an explanation for its omission (*see* ***Bell v Rameau***, 29 AD3d 839, 814 NYS2d 534 [2006]; ***Suk Ching Yeung v Rojas***, 18 AD3d 863, 796 NYS2d 661 [2005]; ***Ifrach v Neiman***, 306 AD2d 380, 760 NYS2d 866 [2003]), as well as objective medical findings of restricted movement that are based on a recent examination (*see* ***Laruffa v Yui Ming Lau***, *supra*; ***Murray v Hartford***, 23 AD3d 629, 804 NYS2d 416 [2005], *lv denied* 6 NY3d 713, 816 NYS2d 748 [2006]; ***Batista v Olivo***, 17 AD3d 494, 795 NYS2d 54 [2005]; ***Kauderer v Penta***, 261 AD2d 365, 689 NYS2d 190 [1999]). "Whether a limitation of use or function is 'significant' or 'consequential' * * * relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part" (*see* ***Dufel v Green***, *supra*; *see* ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*see* ***Licari v Elliott***, *supra*). While the law does not require a plaintiff to produce a record of needless treatments in order to survive summary judgment, a plaintiff who ceases all therapeutic treatment following an accident, while claiming a "serious injury," must provide a reasonable explanation for such cessation (*see* ***Pommells v Perez***, *supra*; ***Knuchero v Tabachnikov***, 54 AD3d 729, 864 NYS2d 459 [2008]; ***Cornelius v Cintas Corp.***, 50 AD3d 1085, 857 NYS2d 637 [2008]).

Moreover, the purpose of New York State's No-Fault Insurance Law is to "assure prompt and full compensation for economic loss by curtailing costly and time-consuming court trial[s]" (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]), and requiring every case, even those with minor injuries, to be decided by a jury would defeat the statute's effectiveness (*see* ***Licari v Elliott***, *supra*). Therefore, the No-Fault Insurance law precludes the right of recovery for any "non-economic loss, except in the case of serious injury, or for basic economic loss" (*see* Insurance Law § 5104 [a]; ***Martin v Schwartz***, 308 AD2d 318, 766 NYS2d 13 [2003]). Any injury not falling within the definition of "serious injury" is classified as an insignificant injury, and a trial is not allowed under the No-Fault statute (*see* ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Martin v Schwartz***, *supra*).

Insurance Law § 5102 (d) defines a "serious injury" as "a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment."

The affirmed medical report of defendant Odermatt's examining orthopedist, Dr. Irving Etkind, states that plaintiff Rivera's flexion and extension in her cervical spine are 45 degrees and that 45 to 60 degrees is normal. Dr. Etkind's report states that plaintiff Rivera's right lateral and left lateral bending are 45 degrees and that 45 to 60 degrees is normal. It also states that plaintiff Rivera's right and left rotation are 70 degrees and that 70 to 90 degrees is normal. Dr. Etkind's report further states that plaintiff's flexion in her lumbar spine is 75 degrees and that 75 to 90 degrees is normal. It states that plaintiff Rivera's extension is 20 degrees and that 20 to 30 degrees is normal. Dr. Etkind's report states that plaintiff Rivera's right lateral and left lateral bending are 30 degrees and that 30 to 45 degrees is normal. It also states that plaintiff Rivera's right and left rotation is 20 degrees and that 20 to 30 degrees is normal. Dr. Etkind's report states that plaintiff Rivera's range of motion in her right and left elbow are normal and that there is no swelling, effusion, erythema or crepitus noted. It then states that plaintiff Rivera's range of motion in her right and left knee is normal, with flexion to 130 degrees and that 130 to 140 degrees is normal and that extension is 0 degrees and that 0 degrees is normal. The report also states that plaintiff Rivera is capable of working full-time without limitations, that she is able to perform all of her daily living activities without restrictions, and that there is no evidence of disability or permanency.

Likewise, the affirmed report of defendant Odermatt's examining neurologist, Dr. Weiland, states plaintiff Rivera has full range of motion of the neck, shoulders and knees. Dr. Weiland's report states that normal neck motion is "flexion 40 to 45 degrees, extension 40 to 45 degrees, rotation 70 degrees and lateral flexion 40 degrees." It also states that normal shoulder motion is "anterior flexion 170 degrees, abduction 180 degrees, adduction 45 degrees, internal and external rotation is 45 degrees, and posterior extension 45 degrees." Dr. Weiland's report states that normal knee range of motion is "0 to 150 degrees, external rotation 10 degrees." The report also states that plaintiff Rivera has full range of motion of the lumbar spine. It states that normal lumbar spine motion is "flexion 90 degrees, extension 30 degrees, rotation and lateral flexion is 30 degrees." Dr. Weiland's report further states that plaintiff Rivera made subjective complaints of pain upon light palpation of her lower back region, but that there were no signs of tissue inflammation or soft tissue swelling. It also states that plaintiff Rivera's motor strength was 5/5 and that her sensation was intact. Dr. Weiland's report states that plaintiff Rivera's gait is normal and that her coordination skills were also normal. The report concludes that plaintiff Rivera is able to perform all of her daily living activities, is able to continue being gainfully employed without restrictions and that she is not in need of any further neurologic treatment.

In addition, the affirmed report prepared by defendant Odermatt's radiologist, Dr. Mendelsohn, after his radiological review of plaintiff Rivera's lumbar spines states that he finds no evidence of

herniations at L4-5 or L5-S1. It also states that the lumbar discs maintain normal height, hydration, and that there is no evidence of diffuse bulging or focal disc herniation. The report states that the spinal canal is of normal caliber with no evidence of stenosis and that the lumbar lordotic curve is well maintained. It further states that there are no compression deformities and that the paravertebral soft tissue structures appear normal. Similarly, Dr. Mendelsohn's radiological review of plaintiff Rivera's cervical spine states that her spinal canal is of normal caliber, that there are no compression deformities and that the paravertebral soft tissue structures appear normal. The report also states that there is evidence of "mild desiccation with minimal circumferential degenerative bulging" at levels C4-5, C5-6, and C6-7. It states that the changes are representative of the normal aging process and are not causally related to a traumatic event. The report further states since the "patient's head is lifted off the MRI table by a pillow, it produced a straightening of the cervical lordotic curve."

Here, defendant Odermatt has failed to meet his prima facie burden to establish that plaintiff Rivera did not sustain a serious injury as a result of the subject motor vehicle accident (*see* ***Pommells v Perez***, *supra*; ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, *supra*; ***Licari v Elliott***, *supra*; ***Milhauser v Wood***, 107 AD2d 1019, 486 NYS2d 525 [1985], *appeal dismissed* 65 NY2d637 [1985]). While Dr. Weiland in his medical report set forth what is consider to be normal ranges of motion findings, he inexplicably failed to set forth any quantified ranges of motion testing results for plaintiff Rivera's cervical and lumbar spines and nowhere in the report were his findings for plaintiff Rivera compared against what is normal range of motion results (*see* ***Banguela v Babbo***, 51 AD3d 833, 858 NYS2d 353 [2008]; ***Page v Belmonte***, 45 AD3d 825, 846 NYS2d 351 [2007]; ***Spektor v Dichy***, 34 AD3d 557, 824 NYS2d 403 [2006]). Thus, Dr. Weiland's report was without probative value (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Shtesl v Kokoros***, 56 AD3d 544, 867 NYS2d 492 [2008]; ***Melino v Lauster***, 195 AD2d 653, 599 NYS2d 713 [1993]). Furthermore, the reports prepared by defendant Odermatt's experts, Dr. Weiland and Dr. Etkind, each cite different and contradictory numbers for what is considered normal ranges of motion findings for the cervical and lumbar spines of a person of plaintiff Rivera's age, height and weight. Indeed, their ranges of motion measurements of plaintiff Rivera differed from each other by as much as between 10 degrees to 25 degrees. "Where conflicting medical evidence is offered on the issue of whether a plaintiff's injuries are permanent or significant, and varying inferences may be drawn, the question is one for the jury" (*see* ***Noble v Ackerman***, 252 AD2d 392, 395, 675 NYS2d 86 [1998]; ***Reynolds v Burghezi***, 227 AD2d 941, 643 NYS2d 248 [1996]). Therefore, these discrepancies between defendant Odermatt's experts create an issue of fact for the jury to determine (*see* ***Martinez v Pioneer Transp. Corp.***, 48 AD3d 306, 851 NYS2d 306 [2008]; ***Martin v Schwartz***, 308 AD2d 318, 766 NYS2d 13 [2003]; ***Velasquez v Quijada***, 269 AD2d 592, 703 NYS2d 518 [2000]; ***Jackson v United Parcel Serv.***, 204 AD2d 605, 612 NYS2d 186 (1996]). As a consequence, defendant Odermatt's proof has failed to objectively demonstrate that plaintiff Rivera did not sustain a serious injury as a result of the subject accident (*see* ***Aronov v Leybovich***, 3 AD3d 511, 770 NYS2d [2004]; ***Baudillo v Pam Car & Truck Rental, Inc.***, 23 AD3d 803 NYS2d 922 [2005]; ***Minlionica v Shahabi***, 296 AD2d 569, 745 NYS2d 715 [2002]). Under these circumstances, it is not necessary for this Court to consider whether plaintiff Rivera's papers in opposition were sufficient to raise a triable issue of fact (*see* ***Coscia v 938 Trading Corp.***, 283 AD2d 538, 725 NYS2d 349 [2001]; ***Chaplin v Taylor***, 273 AD2d 188, ***Mariaca-Olmos v Mizrhy***, 226 AD2d 437, 640 NYS2d 604 [1994]). Accordingly, defendant Odermatt's motion for summary judgment is denied.

Finally, regarding plaintiff Sorce's cross motion for summary judgment dismissing plaintiff Rivera's complaint for failure to sustain a serious injury under Insurance Law § 5102 (d), the Court finds that no claims have been asserted against plaintiff Sorce by plaintiff Rivera in her complaint, and therefore the granting of summary judgment on behalf of plaintiff Sorce would be inappropriate. Accordingly, plaintiff Sorce's cross motion for summary judgment is denied.

Dated: 6/2/09

PETER H. MAYER, J.S.C.