

Amaya v Estrada

2011 NY Slip Op 30074(U)

January 5, 2011

Supreme Court, Suffolk County

Docket Number: 07-16008

Judge: John J.J. Jones, Jr.

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOHN J.J. JONES, JR.
Justice of the Supreme Court

MOTION DATE 12-2-09 (#003 & 004)
MOTION DATE 2-10-10 (#005)
ADJ. DATE 3-24-10
Mot. Seq. # 003 - MotD
004 - XMD
005 - XMD

JOSE ARGUETA AMAYA and REYNA
MARIBEL RODRIGUEZ,
Plaintiff,
- against -
FRANCISCO ESTRADA and FRANCISCO
ESTRADA,
Defendants.

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Upon the following papers numbered 1 to 51 read on this motion and cross motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 16; Notice of Cross Motion and supporting papers 17 - 19; 20 - 43; Answering Affidavits and supporting papers; Replying Affidavits and supporting papers 45 - 51; Other plaintiff's memorandum of law - 44; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by defendants Francisco Estrada and Francisco Pena seeking summary judgment dismissing plaintiffs' complaint is decided as follows; and it is

ORDERED that this cross motion by plaintiff Jose Amaya seeking summary judgment dismissing the cross claim against him is denied, as moot; and it is further

ORDERED that this cross motion by plaintiffs Jose Amaya and Reyna Rodriguez striking the answer of defendants Francisco Estrada and Francisco Pena is denied.

This is an action to recover damages that were allegedly sustained by plaintiffs Jose Amaya and Reyna Rodriguez as a result of a motor vehicle accident that occurred on January 13, 2007. The accident

allegedly occurred when the vehicle operated by defendant Francisco Estrada and owned by defendant Francisco Pena struck the front of the vehicle operated by plaintiff Jose Amaya while it was stopped on the westbound side of Vanderbilt Avenue in Suffolk County, New York. Plaintiff Reyna Rodriguez was the front seat passenger in the vehicle operated by plaintiff Amaya at the time of the accident.

By his bill of particulars, plaintiff Amaya alleges that he sustained various personal injuries as a result of the subject accident, including a cerebral concussion; right and left wrist carpal tunnel syndrome; and permanent scarring of the right shoulder. Plaintiff Amaya alleges that as a result of the injuries that he sustained in the subject accident he had to undergo arthroscopic surgery on his right shoulder. Plaintiff Amaya also alleges that he missed approximately two weeks from his employment at Almichite Cleaning Services and an additional six weeks from work after his arthroscopic surgery. Plaintiff Rodriguez, by her bill of particulars, alleges that she sustained various personal injuries as a result of the subject accident, including, herniated discs at levels C3 through C7 and L5-S1; disc bulges at levels C4-C5 and L4-L5; thoracic spine sprain/strain; cervical, lumbar and thoracic radiculopathy; and emotional trauma. Plaintiff Rodriguez also alleges that she missed approximately one month from her employment at Almichite Cleaning Services.

Defendants now move for summary judgment on the basis that plaintiffs have not sustained a “serious injury” within the meaning of Insurance Law § 5102(d). Defendants also assert that plaintiffs are unable to explain their significant gap in treatment. In support of the motion, defendants submit a copy of the pleadings, copies of plaintiffs’ deposition transcripts, and the sworn medical reports of Dr. Isaac Cohen and Dr. Audrey Eisenstadt. Dr. Cohen conducted an independent orthopedic examination of plaintiffs at defendants’ request on June 18, 2009. Dr. Eisenstadt performed an independent radiological review of the magnetic resonance image (“MRI”) films of plaintiff Amaya’s lumbar and cervical spines, and right shoulder at defendants’ request on December 5, 2009. Dr. Eisenstadt performed an independent radiological review of the MRI films of plaintiff Rodriguez’s lumbar spine at defendants’ request on December 5, 2009. Plaintiff Amaya also cross-moves to dismiss the counterclaim of plaintiff Rodriguez on the basis that plaintiff Rodriguez has not sustained a “serious injury” as required by Insurance Law § 5102(d).

Plaintiffs oppose the instant motion on the ground that defendants have failed to meet their prima facie burden that plaintiffs did not sustain a “serious injury” as a result of the subject accident. Alternatively, plaintiffs assert that the proof submitted in opposition demonstrates that there are material issues of fact whether they sustained a “serious injury” under Insurance Law § 5102(d). In opposition to the motion, plaintiffs submit the affidavits of Dr. Frantz Jazmin and Todd Goldman, plaintiff Amaya’s affidavit, and the medical reports of Dr. Alan Greenfield and Dr. Alan Rothpearl. Plaintiffs also submit the police motor vehicle accident report and their deposition testimony.

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

NYS2d 681, 485 NYS2d 526 [1984]).

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

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

Moreover, a plaintiff claiming a significant limitation of use of a body function or system must substantiate his or her complaints with objective medical evidence showing the extent or degree of the limitation caused by the injury and its duration (see *Ferraro v Ridge Car Serv.*, 49 AD3d 498, 854 NYS2d 408 [2008]; *Mejia v DeRose*, 35 AD3d 407, 825 NYS2d 772 [2006]; *Laruffa v Yui Ming Lau*, 32 AD3d 996, 821 NYS2d 642 [2006]; *Kearse v New York City Tr. Auth.*, 16 AD3d 45, 789 NYS2d 281 [2005]; *Beckett v Conte*, 176 AD2d 774, 575 NYS2d 102 [1991]). “Whether a limitation of use or function is ‘significant’ or ‘consequential’ (i.e. important . . .), relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part” (*Dufel v Green*, 84 NY2d 795, 798, 622 NYS2d 900 [1995]). A plaintiff claiming injury under either of the “limitation of use” categories also must present medical proof contemporaneous with the accident showing the initial restrictions in movement or an explanation for its omission (see *Magid v Lincoln Servs. Corp.*, 60 AD3d 1008, 877 NYS2d 127 [2009]; *Hackett v*

AAA Expedited Freight Sys., 54 AD3d 721, 865 NYS2d 101 [2008]; *Ferraro v Ridge Car Serv.*, *supra*; *Morales v Daves*, 43 AD3d 1118, 841 NYS2d 793 [2007]), as well as objective medical findings of restricted movement that are based on a recent examination of the plaintiff (*see Nicholson v Allen*, 62 AD3d 766, 879 NYS2d 164 [2009]; *Diaz v Lopresti*, 57 AD3d 832, 870 NYS2d 408 [2008]; *Laruffa v Yui Ming Lau*, *supra*; *John v Engel*, 2 AD3d 1027, 768 NYS2d 527 [2003]; *Kauderer v Penta*, 261 AD2d 365, 689 NYS2d 190 [1999]). A sufficient description of the “qualitative nature” of plaintiff’s limitations, with an objective basis, correlating plaintiff’s limitations to the normal function, purpose and use of the body part may also suffice (*see Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865 [2000]; *Dufel v Green*, *supra*). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*see Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]). Further, a plaintiff alleging injury within the “limitation of use” categories who ceases treatment after the accident must provide a reasonable explanation for having done so (*Pommells v Perez*, 4 NY3d 566, 574, 797 NYS2d 380 [2005]; *see Ferebee v Sheika*, 58 AD3d 675, 873 NYS2d 93 [2009]; *Besso v DeMaggio*, 56 AD3d 596, 868 NYS2d 681 [2008]).

Furthermore, to qualify as a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts that constituted his or her usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment objective medical evidence must be presented of plaintiff’s curtailment, and it must be demonstrated that plaintiff’s activities were significantly curtailed (*see Licari v Elliot*, 57 NY2d 230, 455 NYS2d 570 [1982]; *Nesci v Romanelli*, 74 AD3d 765, 902 NY2d 172 [2010]; *Amato v Fast Repair, Inc.*, 42 AD3d 477, 840 NYS2d 394 [2007]). Additionally, a plaintiff must demonstrate through the use of competent medical evidence that his or her inability to perform such activities was medically indicated and causally related to the subject accident (*see Penalosa v Chavez*, 48 AD3d 654, 852 NYS2d 315 [2008]; *Hamilton v Rouse*, 46 AD3d 514, 846 NYS2d 650; *Roman v Fast Lane Car Serv., Inc.*, 46 AD3d 535, 846 NYS2d 613 [2007]; *Sainte-Aime v Ho*, 274 AD2d 569, 712 NYS2d 133 [2000]).

Based upon the adduced evidence, defendants failed to satisfy their prima facie burden that plaintiff Amaya did not sustain a “serious injury” within the meaning of Insurance Law § 5102(d) as a result of the subject accident (*see Toure v Avis Rent A Car Sys.*, *supra*; *Licari v Elliott*, *supra*; *Galofaro v Wylie*, __ AD3d __, 2010 NY Slip Op 7891 [2d Dept 2010]; *Guzman v Joseph*, 50 AD3d 741, 855 NYS2d 638 [2008]; *Lopez v Geraldino*, 35 AD3d 398, 825 NYS2d 143 [2006]). Where, as here, a plaintiff is claiming that he or she has sustained an injury within the 90/180 days category, it is incumbent upon the examining medical expert to relate his findings to this category of serious injury for the period of time immediately following the subject accident (*see Takaroff v A.M. USA, Inc.*, 63 AD3d 1142, 882 NYS2d 264 [2009]; *Scinto v Hoyte*, 57 AD3d 646, 870 NYS2d 61 [2008]; *Colacino v Andrews*, 50 AD3d 615, 854 NYS2d 771 [2008]; *Daddio v Shapiro*, 44 AD3d 699, 844 NYS2d 76 [2007]). In the instant matter, defendants rely on the affirmed medical report of Dr. Cohen, an orthopedist, who examined plaintiff more than two years after the subject accident occurred. Although he concludes that plaintiff has full range of motion in his spine and that the sprains that he sustained as a result of the accident have resolved, Dr. Cohen failed to relate any of his findings to the category of serious injury for the period immediately following the accident (*see Ballard v Cunneen*, 76 AD3d 1037, 908 NYS2d 443 [2010]; *Torres v Performance Auto. Group, Inc.*, 36 AD3d 894, 894, 829 NYS2d 181 [2007];

Nakanishi v Sadaqat, 35 AD3d 416, 826 NYS2d 373 [2006]; *Faun Thai v Butt*, 34 AD3d 447, 824 NYS2d 131 [2006]). Additionally, Dr. Cohen's report only addressed plaintiff Amaya's condition at the time of the subject examination and inexplicably failed to address plaintiff Amaya's condition immediately following the accident (see *Burford v Fabrizio*, 8 AD3d 784, [2005]; *Lowell v Peters*, 3 AD3d 778, 770 NYS2d 796 [2004]; *Tornatore v Haggerty*, 307 AD2d 522, 763 NYS2d 344 [2003]). Similarly, the affirmed report of Dr. Eisenstadt fails to address this category of serious injury, despite concluding that plaintiff Amaya suffers from degenerative changes in his right shoulder and that the changes seen in his shoulder joint are not causally related to trauma or the subject accident (see *Ali v Rivera*, 52 AD3d 445, 859 NYS2d 713 [2008]; *Museau v New York City Tr. Auth.*, 34 AD3d 772, 823 NYS2d 908 [2006]; *Talabi v Diallo*, 32 AD3d 1014, 820 NYS2d 904 [2006]; *Volpetti v Yoon Kap*, 28 AD3d 750, 814 NYS2d 236 [2006]). Dr. Cohen and Dr. Eisenstadt failed to offer an opinion as to whether plaintiff Amaya suffered an injury that limited his usual daily activities for 90 of the 180 days immediately after the accident (see *Lopez v Geraldino*, 35 AD3d 398, 825 NYS2d 143 [2006]; *Nakanishi v Sadaqat*, 35 AD3d 416, 826 NYS2d 373 [2006]; *Faun Thai v Butt*, 34 AD3d 447, 824 NYS2d 131, 2006).

Further, while a defendant is permitted to use a plaintiff's deposition testimony to establish that he or she did not sustain a nonpermanent injury that prevented him or her from performing substantially all of his or her material daily activities for at least 90 of the 180 days immediately following the accident (see e.g. *Neuburger v Sidoruk*, 60 AD3d 650, 875 NYS2d 144 [2009]; *Shaw v Jalloh*, 57 AD3d 647, 869 NYS2d 189 [2008]; *Sanchez v Williamsburg Volunteer of Hatzolah*, 48 AD3d 664, 852 NYS2d 287 [2008]), defendants' reliance on plaintiff Amaya's testimony in the instant matter is insufficient to meet their burden on the motion (see *Neuburger v Sidoruk*, 60 AD3d 650, 875 NYS2d 144 [2009]; *Tinsley v Bah*, 50 AD3d 1019, 857 NYS2d 180 [2008]; *Torres v Performance Auto. Group, Inc.*, *supra*; cf. *Geliga v Karibian*, 56 AD3d 518, 867 NYS2d 519 [2008]). Plaintiff Amaya testified at his deposition that he missed approximately two weeks from work following the accident and that his work schedule was drastically reduced when he returned to his job. He testified that prior to the accident he worked approximately 50 to 60 hours per week, but only was able to work approximately 25 to 35 hours per week after the accident due to the injury to his right shoulder. He testified that he had surgery on his right shoulder on April 26, 2007, because physical therapy no longer alleviated the pain that he was experiencing, and that following the surgery he missed an additional six weeks from his employment. He testified that following the accident he was placed on modified duty as he was unable to perform any cleaning duties, and that he did not resume his regular duties until December 2007. Having determined that defendants failed to establish their initial burden, it is unnecessary for the court to consider whether plaintiff Amaya's opposition papers were sufficient to raise a triable issue of fact (see *Bright v Moussa*, 72 AD3d 859, 898 NYS2d 865 [2010]; *Alma v Samedy*, 24 AD3d 398, 805 NYS2d 417 [2005]; *Sayers v Hot*, 23 AD3d 453, 805 NYS2d 571 [2005]; *Bebry v Farkas-Galindez*, 276 AD2d 656, 714 NYS2d 734 [2000]).

However, defendants established their prima facie entitlement to judgment as a matter of law that plaintiff Rodriguez did not sustain a "serious injury" as required by Insurance Law § 5104(d) as a result of the subject accident (see *Toure v Avis Rent a Car Sys.*, 98 NY2d 345, 746 NYS2d 865 [2002]; *Gaddy v Eyley*, 79 NY2d 955, 582 NYS2d 990 [1992]; *Hasner v Budnik*, 35 AD3d 366, 826 NYS2d 387 [2006]). Dr. Cohen in his medical report states that upon an examination of plaintiff Rodriguez's

cervical spine she exhibits “flexion and extension of 60 degrees (normal 45-70 degrees), lateral bending to the left and right is possible to 45 degrees (normal up to 46 + -6.5), and right and left rotational motion is possible to 80 degrees (normal up to 78 + -15).” It states that there is no evidence of muscle spasm upon palpation of plaintiff Rodriguez’s cervical paravertebral muscles. Dr. Cohen’s report states that an examination of plaintiff Rodriguez’s lumbar spine reveals that she has “flexion to 90 degrees (normal up to 66 + -15), hyperextension is possible to 30 degrees (normal up to 33 + -5.5), right and left lateral bending to 25 degrees (normal up to 29 + -6.6), left and right rotational motion is possible to 30 degrees (normal up to 30). The report states that her muscle strength bilaterally is 5/5, that she is able to stand on her toes and heels without difficulty, and that she walks with a normal heel-toe gait. It states that the straight leg raising test was negative, bilaterally. Dr. Cohen’s report states that an examination of plaintiff Rodriguez’s right knee shows that she has flexion to 140 degrees (normal is 130-150 degrees). It states that there is no medial or lateral instability in the knee, and that there is no evidence of tenderness, erythema, or effusion. Dr. Cohen opines that plaintiff Rodriguez’s sustained soft tissue injuries as a result of the subject accident, which have all resolved. The report concludes that plaintiff Rodriguez does not have any evidence of sequelae related to the subject accident, and that she is capable of performing her normal daily living activities without restrictions.

Likewise, Dr. Eisenstadt, in her medical report, states that a review of the MRI of plaintiff Rodriguez’s lumbar spine shows that there is desiccation of disc material at the L4-L5 and L5-S1 intervertebral disc levels. Dr. Eisenstadt explains that this type of “drying out of disc material is a degenerative process, greater than three months in origin, which predates the incident of January 13, 2007.” The report states that disc bulges are seen at both levels, L4-L5 and L5-S1, and that the bulging is not part of a traumatic process. Instead, Dr. Eisenstadt states, it is part of a degenerative condition related to ligamentous laxity.

Here, the Court notes that sprains and strains are not serious injuries within the meaning of Insurance Law § 5102(d) (see *Rabolt v Park*, 50 AD3d 995, 858 NYS2d 995 [2008]; *Washington v Cross*, 48 AD3d 457, 849 NYS2d 784 [2008]; *Maenza v Letkajornsook*, 172 AD2d 500, 567 NYS2d 850 [1991]). Although Dr. Cohen found that plaintiff Rodriguez had full range of motion in her cervical and lumbar spine, Dr. Cohen’s failure to provide the normal degrees of movement in the spine leaves the court to speculate as to whether plaintiff Rodriguez’s ranges of motion findings were normal, or that any limitations were mild, minor, or slight so as to be considered insignificant within the meaning of the No-Fault statute (see *McLaughlin v Rizzo*, 38 AD3d 856, 832 NYS2d 666 [2007]; *Powell v Alade*, 31 AD3d 523, 818 NYS2d 600 [2006]; *Aronov v Leybovich*, 3 AD3d 511, 770 NYS2d 741 [2004]). However, Dr. Eisenstadt’s report shows that plaintiff Rodriguez had a pre-existing degenerative condition in her lumbar spine at levels L4-L5 and L5-S1, where she alleges her injuries were sustained (see *Valentin v Pomilla*, 59 AD3d 184, 873 NYS2d 537 [2009]; *Colon v Tavares*, 60 AD3d 419, 873 NYS2d 637 [2009]).

In opposition, plaintiff Rodriguez failed to raise a triable issue of fact as to whether she sustained a “serious injury” within the meaning of Insurance Law § 5102(d) (see *Gaddy v Eyler*, *supra*; *Licari v Elliott*, *supra*; *Ali v Khan*, 50 AD3d 454, 857 NYS2d 71 [2008]; *Luckey v Bauch*, 17 AD3d 411, 792 NYS2d 624 [2005]; *McLoyrd v Pennypacker*, 178 AD2d 277, 577 NYS2d 272 [1991]). Plaintiff Rodriguez has proffered insufficient medical evidence to demonstrate that she sustained an injury within

the “limitation of use” categories (see *Licari v Elliott, supra*; *Ali v Khan*, 50 AD3d 454, 857 NYS2d 71 [2008]), or within the “90/180” category (see *Jack v Acapulco Car Serv., Inc.*, 63 AD3d 1526, 897 NYS2d 648 [2010]; *Bleszcz v Hiscock*, 69 AD3d 639, 894 NYS2d 481 [2010]; *Nguyen v Abdel-Hamed*, 61 AD3d 429, 877 NYS2d 26 [2009]; *Kuchero v Tabachnikov*, 54 AD3d 729, 864 NYS2d 459 [2008]; *Sainte-Aime v Ho*, 274 AD2d 569, 712 NYS2d 133 [2000]). The term “significant” limitation must be construed as more than a minor limitation of use (see *Licari v Elliott, supra*; *Leschen v Kollarits*, 144 AD2d 122, 534 NYS2d 233 [1988]; *Gootz v Kelly*, 140 AD2d 874, 528 NYS2d 446 [1988]). Significantly, no proof has been offered by plaintiff Rodriguez to establish that her alleged ailment goes beyond temporary discomfort or is not relieved by an aspirin. While the medical reports of both Dr. Jazmin and Dr. Goldman, who examined plaintiff Rodriguez on January 22, 2010 and February 1, 2010, respectively, note significant limitations in plaintiff Rodriguez’s cervical and lumbar regions, neither doctor proffered objective medical evidence showing significant limitations of motion in plaintiff Rodriguez’s cervical or lumbar region contemporaneous with the subject accident (see *Stevens v Sampson*, 72 AD3d 793, 898 NYS2d 657 [2010]; *Keith v Duval*, 71 AD3d 1093, 898 NYS2d 184 [2010]; *Rivera v Bushwick Ridgewood Prop. Inc.*, 63 AD3d 712, 880 NYS2d 149 [2009]).

Also, the MRI reports simply establish that as of February 15, 2007 plaintiff Rodriguez showed evidence of herniated and bulging discs in the cervical and lumbar regions of her spine. “The mere existence of a herniated or bulging disc, and even radiculopathy, is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the disc injury and its duration” (*Sharma v Diaz*, 48 AD3d 442, 443, 850 NYS2d 634 [2008]; see *Mejia v De Rose*, 35 AD3d 407, 825 NYS2d 722 [2006]; *Yakubov v CG Trans Corp.*, 30 AD3d 509, 817 NYS2d 353 [2006]; *Cerisier v Thibiu*, 29 AD3d 507, 815 NYS2d 140 [2006]). Moreover, Dr. Rothpearl’s MRI reports regarding plaintiff Rodriguez’s spine state that there are decreased signal changes in both her cervical and lumbar spines, which indicate “discogenic changes possibly related to poor hydration within the nucleus pulposus of the disc.”

In addition, neither plaintiff Rodriguez nor any of her experts explained the extensive gap between the time plaintiff Rodriguez stopped treatment and her most recent examinations on January 22, 2010 and February 1, 2010 (see *Pommells v Perez, supra*; *Garcia v Lopez, supra*; *Berkas v McMillian*, 40 AD3d 563, 835 NYS2d 388 [2007]). Plaintiff Rodriguez testified at her deposition that she stopped receiving treatment once her No-Fault benefits were terminated. However, plaintiff Rodriguez did not present any evidence to substantiate the claim that her No-Fault benefits were terminated, and that, despite being employed, she was unable to afford to pay for additional medical care (see *Mohamed v Siffrain*, 19 AD3d 561, 797 NYS2d 532 [2005]; *Neugebauer v Gill*, 19 AD3d 567, 797 NYS2d 541 [2005]; *Villalta v Schechter*, 273 AD2d 299, 710 NYS2d 87 [2000]). Further, plaintiff Rodriguez failed to submit competent medical evidence to demonstrate that the injuries she sustained prevented her from performing substantially all of her usual or customary activities for not less than 90 days of the first 180 days following the subject accident (see *Rabolt v Park, supra*; *Roman v Fast Lane Car Serv., Inc.*, 46 AD3d 535, 846 NYS2d 613 [2007]; *Nociforo v Penna*, 42 AD3d 514, 840 NYS2d 396 [2007]; *Felix v New York City Tr. Auth.*, 32 AD3d 527, 819 NYS2d 835 [2006]; *Sainte-Aime v Ho, supra*). Accordingly, defendants’ motion for summary judgment is denied as to plaintiff Amaya, but granted as to plaintiff Rodriguez. Plaintiff Amaya’s cross motion for summary judgment dismissing plaintiff Rodriguez’s complaint for failure to sustain a serious injury under Insurance Law § 5102 (d), therefore, is

denied as moot.

Lastly, plaintiffs' cross-move for an order striking defendants' answer for failure to appear for depositions. Plaintiffs allege that despite repeated requests, defendants have not been produced for examinations before trial. Plaintiffs argue that defendants' failure to appear for depositions on January 26, 2010 was in violation of a self-executing order issued by this Court on December 11, 2009 and, therefore, defendants' answer should be stricken, all allegations deemed true, and the matter scheduled for a hearing on the assessment of damages. Plaintiffs, in support of the motion, submit a copy of this Court's December 11, 2009 order. Defendants oppose the instant motion on the ground that plaintiffs failed to establish that defendants' failure to appear for examinations before trial was willful and contumacious. Defendants, in opposition to the motion, submit a copy of the September 9, 2009 stipulation entered into between plaintiffs' and defendants' counsel withdrawing plaintiffs' prior motion to strike defendants' answer, a copy of the February 5, 2010 correspondence to this Court from defendants' counsel, and a copy of the February 19, 2010 correspondence to this Court from plaintiffs' counsel. Defendants also submit a copy of the September 10, 2009 correspondence between plaintiffs' and defendants' counsel.

The Uniform Rules for Trial Courts (22 NYCRR) §202.7 (c) provides that a motion relating to disclosure must be supported by an affirmation that counsel "has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion." In addition, the affirmation of good-faith effort "shall indicate the time, place, and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held" (Uniform Rules for Trial Courts [22 NYCRR] §202.7 [c]).

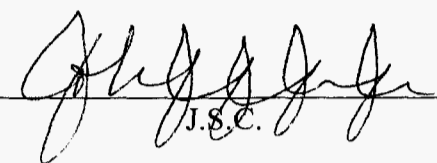
Furthermore, all parties and their counsel have an obligation to make good faith efforts to fulfill their discovery and disclosure obligations and to resolve all discovery and disclosure disputes, before seeking judicial intervention (*see* CPLR 3101 [a]). Dilatory tactics, evasive conduct and a pattern of non-compliance with discovery and disclosure obligations may give rise to an inference of willful and contumacious conduct, and may result in severe adverse consequences and sanctions (*see Andrea v Arnone*, 5 NY3d 514, 806 NYS2d 453 [2005]; CPLR 3126 [3]; *Schwartz v Suebsanguan*, 15 AD3d 565, 791 NYS2d 569 [2005]). Also, it is well settled that the nature and degree of the penalty imposed pursuant to CPLR 3126 is a matter within the discretion of the trial court (*see Kryhanoykaya v City of New York*, 31 AD3d 717, 818 NYS2d 469 [2006]; *Herrera v City of New York*, 238 AD2d 475, 656 NYS2d 647 [1997]). Although courts favor the resolution of the merits of an action whenever possible (*see 1523 Real Estate v East Atl. Props.*, 41 AD3d 567, 839 NYS2d 111 [2007]; *Pascarelli v City of New York*, 16 AD3d 472, 791 NYS2d 617 [2005]; *Espinal v City of New York*, 264 AD2d 806, 695 NYS2d 610 [1999]), a court may strike the pleadings or any parts thereof as a sanction against a party who "refuses to obey an order for disclosure or willfully fails to disclose information that the court finds should have been disclosed upon notice" (*Devito v J&J Towing, Inc.*, 17 AD3d 624, 624, 794 NYS2d 74 [2005]; *see Mendez v City of New York*, 7 AD3d 766, 778 NYS2d 501 [2004]; *Alto v Gilman Mgt. Corp.*, 7 AD3d 650, 658 NYS2d 435 [1997]). However, the drastic remedy of striking a pleading for failure to disclose should not be granted unless it is clearly shown that the party's failure to comply was "willful contumacious, or in bad faith" (*see Devito v J&J Towing, Inc., supra*; *Moreno v Westchester Paving & Sealing Corp.*, 7 AD3d 495, 776 NYS2d 83 [2004]; *Pryzant v City of New York*, 300 AD2d

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383, 750 NYS2d 779 [2002]).

Plaintiffs' cross motion for the imposition of sanctions under CPLR 3126 is denied, as plaintiffs' counsel failed to submit an affirmation of good faith demonstrating that he conferred with defense counsel in an attempt to settle the disclosure issues raised in the motion (*see* 22 NYCRR 202.7 [a]; CPLR 3101 [a]; *Blauman-Spindler v Blauman*, 68 AD3d 1105, 892 NYS2d 143 [2009]; *Cestaro v Chin*, 20 AD3d 500, 799 NYS2d 143 [2005]; *Diel v Rosenfeld*, 12 AD3d 558, 784 NYS2d 379 [2004]). Further, while the Court does not condone defendants' failure to appear for an examination before trial, plaintiffs failed to demonstrate that defendants engaged in willful, contumacious behavior, or otherwise acted in bad faith (*see* *Greene v Mullens*, 70 AD3d 996, 893 NYS2d 895 [2010]; *Jenkins v Proto Prop. Servs., LLC.*, 54 AD3d 726, 864 NYS2d 79 [2008]; *Harris v City of New York*, 211 AD2d 663, 622 NYS2d 289 [1995]).

Dated: 5 Jan, 2011



J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION