

**Moronta v Chen**

2011 NY Slip Op 33094(U)

November 21, 2011

Supreme Court, Nassau County

Docket Number: 22323/09

Judge: Denise L. Sher

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**SHORT FORM ORDER**

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER  
Acting Supreme Court Justice

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ISABEL MORONTA,  
  
Plaintiff,  
  
- against -  
  
DAVIS CHEN, MINI HASSEL and  
ALEXANDER DEMONSE,  
  
Defendants.

TRIAL/IAS PART 32  
NASSAU COUNTY  
  
Index No.: 22323/09  
Motion Seq. Nos.: 02, 03  
Motion Dates: 08/31/11  
08/31/11

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DAVIS CHEN and MINI HASSEL,  
  
Third-Party Plaintiffs,  
  
- against -  
  
ALEXANDER DEMONSE,  
  
Third-Party Defendant.

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**The following papers have been read on these motions:**

	Papers Numbered
<u>Notice of Motion (Seq. No. 02), Affirmation and Exhibits</u>	<u>1</u>
<u>Notice of Cross-Motion (Seq. No. 03), Affirmation and Exhibits</u>	<u>2</u>
<u>Affirmation in Opposition and Exhibits and Affidavit</u>	<u>3</u>
<u>Reply Affirmation (Seq. No. 02)</u>	<u>4</u>

Upon the foregoing papers, it is ordered that the motions are decided as follows:

Defendants/third-party plaintiffs Davis Chen ("Chen") and Mini Hassel ("Hassel") move (Seq. No. 02), pursuant to CPLR § 3212 and Article 51 of the Insurance Law of the State of

New York, for an order granting them summary judgment on the ground that plaintiff did not suffer a “serious injury” in the subject accident as defined by New York State Insurance Law § 5102(d) and dismissing the Verified Complaint and any and all cross-claims of defendant/third-party defendant Alexander Demonse (“Demonse”). Plaintiff opposes the motion.

Defendant/third-party defendant Demonse cross-moves (Seq. No. 03), pursuant to CPLR § 3212 and Article 51 of the Insurance Law of the State of New York, for an order granting him summary judgment on the ground that plaintiff did not suffer a “serious injury” in the subject accident as defined by New York State Insurance Law § 5102(d) and dismissing the Verified Complaint and any cross-claims asserted against him. Plaintiff opposes the cross-motion.

The above entitled action stems from personal injuries allegedly sustained by plaintiff as a result of an automobile accident with defendants which occurred on July 9, 2009, at approximately 12:00 p.m., at or near the intersection of West Sunrise Highway and North Bayview Avenue, Freeport, County of Nassau, State of New York. The accident involved three vehicles, a 2005 Nissan owned and operated by plaintiff, a 2006 BMW owned by defendant/third-party plaintiff Hassel and operated by defendant/third-party plaintiff Chen, defendant/third-party plaintiff Hassel’s employee, and a 2009 Ford U-Haul van operated by defendant/third-party defendant Demonse.

Plaintiff contends that defendants/third-party plaintiffs Chen and Hassel’s vehicle passed a red light, striking the vehicle driven by defendant/third-party defendant Demonse. Said collision caused defendant/third-party defendant Demonse’s vehicle to strike plaintiff’s vehicle which was stopped at a red traffic signal. The impact caused plaintiff’s vehicle to be propelled backwards and strike a non-party operated vehicle also stopped at a red traffic signal.

Defendants/third-party plaintiffs Chen and Hassel argue that plaintiff's injuries were due to the intentional and reckless conduct of defendant/third-party defendant Demonse and without any affirmative acts on their part contributing thereto.

As a result of the collision, plaintiff claims that she sustained the following injuries:

Right shoulder labreal tear and capsule laxity requiring plaintiff to undergo right shoulder arthroscopic surgery for debridement of the labrum and capsulorrhaphy of the anterior capsule;

Posterior disc herniation at L4/5 impinging upon the anterior aspect of the spinal canal centrally;

Posterior disc protrusion at T2/3;

Closed head injury, concussion, coma and headaches requiring two day hospital admission.

*See* Defendants/third-party plaintiffs Chen and Hassel's Affirmation in Support Exhibit C.

Plaintiff commenced the instant action by filing a Summons and Verified Complaint on or about December 15, 2008. *See* Defendants/third-party plaintiffs Chen and Hassel's Affirmation in Support Exhibit A. Defendants/third-party plaintiffs Chen and Hassel interposed a Verified Answer on or about January 15, 2010. *See* Defendants/third-party plaintiffs Chen and Hassel's Affirmation in Support Exhibit B. On or about May 18, 2010, defendants/third-party plaintiffs Chen and Hassel filed a Third Party Summons and Complaint against defendant/third-party defendant Demonse. *See* Defendants/third-party plaintiffs Chen and Hassel's Affirmation in Support Exhibit D. On or about July 29, 2010, defendant/third-party defendant Demonse served an Answer to the Third Party Complaint. *See* Defendants/third-party plaintiffs Chen and Hassel's Affirmation in Support Exhibit E. On November 18, 2010, plaintiff filed a Motion to

serve a Supplemental Complaint to add defendant/third-party defendant Demonse as a direct defendant. On January 3, 2011, this Court issued a Decision and Order granting the aforementioned motion. *See* Defendants/third-party plaintiffs Chen and Hassel's Affirmation in Support Exhibit G. On or about January 20, 2011, defendant/third-party defendant Demonse served a Supplemental Answer to the Amended Complaint. *See* Defendants/third-party plaintiffs Chen and Hassel's Affirmation in Support Exhibit I. On or about March 2, 2011, defendants/third-party plaintiffs Chen and Hassel served a Verified Answer to the Supplemental Complaint. *See id.*

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. *See* CPLR § 3212 (b); *Olan v. Farrell Lines Inc.*, 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary

judgment and necessitates a trial. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980), *supra*. When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957), *supra*. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. *See Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S. 2d 793 (1988). Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989).

Within the particular context of a threshold motion which seeks dismissal of a personal injury complaint, the movant bears a specific burden of establishing that the plaintiff did not sustain a "serious injury" as enumerated in Article 51 of the Insurance Law § 5102(d). *See Gaddy v. Eyer*, 79 N.Y.2d 955, 582 N.Y.S.2d 990 (1992). Upon such a showing, it becomes incumbent upon the non-moving party to come forth with sufficient evidence in admissible form to raise an issue of fact as to the existence of a "serious injury." *See Licari v. Elliott*, 57 N.Y.2d 230, 455 N.Y.S.2d 570 (1982).

In support of a claim that the plaintiff has not sustained a serious injury, the defendant may rely either on the sworn statements of the defendant's examining physicians or the unsworn reports of the plaintiff's examining physicians. *See Pagano v. Kingsbury*, 182 A.D.2d 268, 587 N.Y.S.2d 692 (2d Dept. 1992). However, unlike the movant's proof, unsworn reports of the plaintiff's examining doctors or chiropractors are not sufficient to defeat a motion for summary

judgment. *See Grasso v. Angerami*, 79 N.Y.2d 813, 580 N.Y.S.2d 178 (1991).

Essentially, in order to satisfy the statutory serious injury threshold, the legislature requires objective proof of a plaintiff's injury. The Court of Appeals in *Toure v. Avis Rent-a-Car Systems*, 98 N.Y.2d 345, 746 N.Y.S.2d 865 (2002) stated that a plaintiff's proof of injury must be supported by objective medical evidence, such as sworn MRI and CT scan tests. However, these sworn tests must be paired with the doctor's observations during the physical examination of the plaintiff. Unsworn MRI reports can also constitute competent evidence if both sides rely on those reports. *See Gonzalez v. Vasquez*, 301 A.D.2d 438, 754 N.Y.S.2d 7 (1<sup>st</sup> Dept. 2003).

Conversely, even where there is ample proof of a plaintiff's injury, certain factors may nonetheless override a plaintiff's objective medical proof of limitations and permit dismissal of a plaintiff's complaint. Specifically, additional contributing factors such as a gap in treatment, an intervening medical problem or a pre-existing condition would interrupt the chain of causation between the accident and the claimed injury. *See Pommells v. Perez*, 4 N.Y.3d 566, 797 N.Y.S.2d 380 (2005).

Whether plaintiff can demonstrate the existence of a compensable serious injury depends upon the quality, quantity and credibility of admissible evidence. *See Manrique v. Warshaw Woolen Associates, Inc.*, 297 A.D.2d 519, 747 N.Y.S.2d 451 (1<sup>st</sup> Dept. 2002).

Plaintiff claims that, as a consequence of the above described automobile accident with defendants, she has sustained serious injuries as defined in New York State Insurance Law § 5102(d) and which fall within the following statutory categories of injuries:

- 1) a permanent consequential limitation of use of a body organ or member; (Category 7)
- 2) a significant limitation of use of a body function or system; (Category 8)
- 3) 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.(Category 9).

See Defendants/third-party plaintiffs Chen and Hassel's Affirmation in Support Exhibit

C.

To meet the threshold regarding significant limitation of use of a body function or system or permanent consequential limitation of a body function or system, the law requires that the limitation be more than minor, mild or slight and that the claim be supported by medical proof based upon credible medical evidence of an objectively measured and quantified medical injury or condition. See *Gaddy v. Eyler*, 79 N.Y.2d 955, 582 N.Y.S.2d 990 (1992); *Licari v. Elliot*, 57 N.Y.2d 230, 455 N.Y.S.2d 570 (1982). A minor, mild or slight limitation will be deemed insignificant within the meaning of the statute. See *Licari v. Elliot*, *supra*. 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 a plaintiff's loss of motion in order to prove the extent or degree of the physical limitation. See *Toure v. Avis Rent-a-Car Systems*, *supra*. In addition, an expert's qualitative assessment of a plaintiff's condition is also probative, provided: (1) the evaluation has an objective basis and (2) the evaluation compares the plaintiff's limitation to the normal function, purpose and use of the affected body organ, member, function or system. See *id.*

Finally, to prevail under the "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” category, a plaintiff must demonstrate through competent, objective proof, a “medically determined injury or impairment of a non-permanent nature” (Insurance Law § 5102(d)) “which would have caused the alleged limitations on the plaintiff’s daily activities.” *See Monk v. Dupuis*, 287 A.D.2d 187, 734 N.Y.S.2d 684 (3d Dept. 2001). A curtailment of the plaintiff’s usual activities must be “to a great extent rather than some slight curtailment.” *See Licari v. Elliott, supra* at 236. Under this category specifically, a gap or cessation in treatment is irrelevant in determining whether the plaintiff qualifies. *See Gomez v. Ford Motor Credit Co.*, 10 Misc.3d 900, 810 N.Y.S.2d 838 (Sup. Ct., Bronx County, 2005).

With these guidelines in mind, the Court will now turn to the merits of defendants/third-party plaintiffs Chen and Hassel’s motion. In support of their motion, they submit the pleadings, plaintiff’s Verified Bill of Particulars and Supplemental Bill of Particulars, the transcript of plaintiff’s Examination Before Trial (“EBT”) testimony, the affirmed report of Daniel S. Rich, M.D., who performed an independent orthopedic examination of plaintiff on January 11, 2011 and the affirmed report of Lewis M. Rothman, M.D., who reviewed plaintiff’s brain MRI performed on July 31, 2009, plaintiff’s lumbar spine MRI performed on August 3, 2009, plaintiff’s cervical spine MRI performed on August 4, 2009 and plaintiff’s right shoulder MRI performed on August 3, 2009.

When moving for dismissal of a personal injury complaint, the movant bears a specific burden of establishing that the plaintiff did not sustain a serious injury. *See Gaddy v. Eyer*, 79 N.Y.2d 955, 582 N.Y.S.2d 990 (1992). Within the scope of the movant’s burden, defendant’s medical expert must specify the objective tests upon which the stated medical opinions are based, and when rendering an opinion with respect to the plaintiff’s range of motion, must compare any findings to those ranges of motion considered normal for the particular body part.

*See Gastaldi v. Chen*, 56 A.D.3d 420, 866 N.Y.S.2d 750 (2d Dept. 2008); *Malave v. Basikov*, 45 A.D.3d 539, 845 N.Y.S.2d 415 (2d Dept. 2007); *Nociforo v. Penna*, 42 A.D.3d 514, 840 N.Y.S.2d 396 (2d Dept. 2007); *Meiheng Qu v. Doshna*, 12 A.D.3d 578, 785 N.Y.S.2d 112 (2d Dept. 2004); *Browdame v. Candura*, 25 A.D.3d 747, 807 N.Y.S.2d 658 (2d Dept. 2006); *Mondi v. Keahan*, 32 A.D.3d 506, 820 N.Y.S.2d 625 (2d Dept. 2006).

Defendant is not required to disprove any category of serious injury which has not been properly pled by the plaintiff. *See Melino v. Lauster*, 82 N.Y.2d 828, 605 N.Y.S.2d 4 (1993). Moreover, even pled categories of serious injury may be disproved by means other than the submission of medical evidence by a defendant, including plaintiff's own testimony and his submitted exhibits. *See Michaelides v. Martone*, 186 A.D.2d 544, 588 N.Y.S.2d 366 (2d Dept. 1992); *Covington v. Cinnirella*, 146 A.D.2d 565, 536 N.Y.S.2d 514 (2d Dept. 1989).

Dr. Daniel S. Rich, a board certified orthopedist, reviewed plaintiff's medical records and conducted an examination of plaintiff on January 11, 2011. *See* Defendants/third-party plaintiffs Chen and Hassel's Affirmation in Support Exhibit H. At the examination, plaintiff complained of pain to her neck, entire back and right arm. In addition, plaintiff reported headaches associated with her pain. Dr. Rich examined plaintiff and performed quantified and comparative range of motion tests on plaintiff's cervical spine, shoulders and thoracic and lumbar spine. The results of the tests indicated deviations from normal. Dr. Rich noted that range of motion measurements are active and limited by the examinee unless specifically stated as a mechanical block. Dr. Rich also concluded that these values cannot be assumed to be objective limitations of motion. According to Dr. Rich, plaintiff's self-reported pain limited the observed range of motion of the back. Dr. Rich reported that causation was advised when interpreting his physical findings as they represent minimum values which may not accurately

reflect day to day function. Dr. Rich's diagnosis was "[l]abral tear and capsular laxity, right shoulder. Cervical strain/sprain. Cervical disk (*sic*) disease. Thoraco-lumbar strain/sprain. Lumbar disk (*sic*) disease." Dr. Rich commented that "[t]here is inadequate evidence to state with a reasonable degree of medical certainty that the labral tear and capsule laxity were caused by the accident of 7/9/2009. Labral pathology can be an atraumatic and degenerative condition. It can also be asymptomatic. The diagnosis of pathologic capsular laxity can also be problematic. Individuals vary in the degree of natural laxity of their joints. Although a joint may appear to be lax, for a particular patient it may not be symptomatic. The diagnosis is also undermined by the lack of response to the surgical intervention. Ms. Moronta reports that she is more symptomatic since the surgery despite the apparently uneventful recovery reported by Dr. Goodman. There is inadequate evidence to state with a medical degree of certainty that the posterior disc protrusion reported at C2-3 on the MRI of the cervical spine of 8/4/09 (as documented in the office records of Dr. Steven Goodman) was causally related to the accident of 7/9/2009. Similarly, there is inadequate evidence to state with a reasonable degree of medical certainty that the disc herniation at L4-5 reported in the MRI report of 8/3/09 was caused by the accident of 7/9/2009. Disc protrusions, herniations, etc. in the spine are common findings in middle-aged individuals even in the absence of significant trauma."

Dr. Lewis M. Rothman conducted an independent film review of plaintiff's brain MRI which was performed on July 31, 2009, plaintiff's lumbar spine MRI which was performed on August 3, 2009, plaintiff's cervical spine MRI which was performed on August 4, 2009 and plaintiff's right shoulder MRI which was performed on August 3, 2009. *See* Defendants/third-party plaintiffs Chen and Hassel's Affirmation in Support Exhibit H. With respect to the brain MRI, Dr. Rothman's findings were, "[t]here is no evidence of intracranial abnormality.

Specifically, there is no evidence of posttraumatic abnormality. Incidental inflammatory change is seen withing the paranasal sinuses as described above.” With respect to the lumbar spine MRI, Dr. Rothman’s findings were, “[t]here is evidence of chronic degenerative disc disease at the L4/5 level. This is manifest by disk (*sic*) desiccation and a small superimposed central disc herniation without evidence of nerve root compression.” With respect to the cervical spine MRI, Dr. Rothman’s findings were, “[s]traightening of the cervical lordosis, which may be positional. Mild diffuse chronic degenerative disc disease is characterized by diffuse disc desiccation. There is no evidence of cervical disc bulge or disc herniation. The thoracic spine is not adequately evaluated. There is no evidence of acute posttraumatic abnormality.” With respect to the right shoulder MRI, Dr. Rothman’s findings were, “[s]upraspinatus tendinosis. Mild chronic hypertrophic degenerative change involving the acromioclavicular joint. No evidence of rotator cuff tear other acute posttraumatic abnormality.”

Defendants/third-party plaintiffs Chen and Hassel add that plaintiff’s EBT testimony “evidences the weakness of the claims being prosecuted, as well as moving defendants’ entitlement to the relief requested herein.” *See* Defendants/third-party plaintiffs Chen and Hassel’s Affirmation in Support Exhibit F. Plaintiff testified that, as a result of the accident, she lost consciousness and an ambulance transported her from the scene of the accident to Meadowbrook Hospital where she was admitted and released the following day. Plaintiff testified that, as a result of the impact from the accident, she injured her neck, shoulder and back. Plaintiff added that she sought medical treatment four to five days later with general practitioner Dr. Chak whom sent plaintiff for “studies,” prescribed painkillers and recommended she attend physical therapy sessions. Plaintiff then attended physical therapy with Dr. Mendoza which included ice and acupuncture treatment for her head, right arm and back. Plaintiff also

treated with an orthopedist, Dr. Benatar, who gave her an injection to her right arm to help with the pain. When Dr. Benatar was on vacation, plaintiff treated with Dr. Goodman who recommended that plaintiff undergo right shoulder surgery, which plaintiff did in January 2010. Plaintiff testified that she stopped her physical therapy with Dr. Mendoza in March 2010 because her no-fault insurance was cut-off.

With respect to plaintiff's 90/180 claim, defendants/third-party plaintiffs Chen and Hassel also rely on plaintiff's EBT testimony. Plaintiff testified that, at the time of the accident, she was employed by South Nassau Community Hospital in the housekeeping department changing the sheets of the hospital beds. Plaintiff also cleaned two homes once per week. Plaintiff added that, following the accident, she was terminated from South Nassau Community Hospital because she was on a probationary period and missed work due to her injuries. However, she was re-hired by the hospital on September 17, 2009, two months following the accident. In order to be re-hired, plaintiff had to undergo a physical examination by the hospital to receive medical clearance. Plaintiff testified that, during said examination, she told the doctor at the hospital that she could not forcibly bend down or lift anything heavy. Although she complained of pain to her back, neck and arm, she received medical clearance from the hospital to return to work. Plaintiff further testified that she has not worked in any capacity following her shoulder surgery in January 2010. Plaintiff stated that she cannot raise her right arm up and down and, as a result of the accident, she can no longer blow dry her hair for a long period of time, nor change bed sheets.

Finally, defendants/third-party plaintiffs Chen and Hassel argue that plaintiff has an extensive gap in her medical treatment which is an independent basis that proves fatal to her claims. They submit that plaintiff testified at her EBT that she has not treated with any medical

doctor since March 2010.

In his cross-motion (Seq. No. 03), defendant/third-party defendant Demonse submits, “[i]n an effort to avoid duplication and in the spirit of judicial economy, the cross movant herein adapts the arguments set forth in the affirmation of attorney, James Burke [counsel for defendants/third-party plaintiffs Chen and Hassel] and incorporates herein the arguments set forth in Mr. Burke’s affirmation [in support of defendants/third-party plaintiffs Chen and Hassel’s motion (Seq. No. 02)] contained in paragraphs 15 through 56.”

As previously stated, the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century-Fox Film Corp., supra; Alvarez v. Prospect Hospital, supra; Zuckerman v. City of New York, supra; Bhatti v. Roche, supra.* To grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the Court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. Albany County, supra; Daliendo v. Johnson, supra.*

Based upon the evidence submitted in defendants/third-party plaintiffs Chen and Hassel’s motion, the Court finds that said defendants have not make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. Dr. Rich, the board certified orthopedist who conducted the independent examination of plaintiff on January 11, 2011 and whose report is replied upon by defendants/third-party plaintiffs Chen and Hassel in their instant summary judgment motion, found range of motion deficits in the comparative range of motion tests on plaintiff’s cervical

spine, shoulders, thoracic and lumbar spine - with the range of motion deficits of plaintiff's right shoulder being the most pronounced. Additionally, part of Dr. Rich's diagnosis of plaintiff was "[l]abral tear and capsular laxity, right shoulder." The Court is cognizant of the fact that Dr. Rich commented that "[t]here is inadequate evidence to state with a reasonable degree of medical certainty that the labral tear and capsule laxity were caused by the accident of 7/9/2009. Labral pathology can be an atraumatic and degenerative condition. It can also be asymptomatic. The diagnosis of pathologic capsular laxity can also be problematic. Individuals vary in the degree of natural laxity of their joints. Although a joint may appear to be lax, for a particular patient it may not be symptomatic" and "[t]here is inadequate evidence to state with a medical degree of certainty that the posterior disc protrusion reported at C2-3 on the MRI of the cervical spine of 8/4/09 (as documented in the office records of Dr. Steven Goodman) was causally related to the accident of 7/9/2009. Similarly, there is inadequate evidence to state with a reasonable degree of medical certainty that the disc herniation at L4-5 reported in the MRI report of 8/3/09 was caused by the accident of 7/9/2009." However, it is the Court's opinion that those comments, coupled with the results of Dr. Rich's comparative range of motion tests on plaintiff's cervical spine, shoulders, thoracic and lumbar spine, raise genuine issues of fact as to whether plaintiff's injuries were causally related to the July 9, 2009 accident. *See Powell v. Prego*, 59 A.D.3d 417, 872 N.Y.S.2d 207 (2d Dept. 2009); *Chun Ok Kim v. Orourke*, 70 A.D.3d 995, 893 N.Y.S.2d 892 (2d Dept. 2010); *Colon v. Cheun Sum Chu*, 61 A.D.3d 805, 878 N.Y.S.2d 127 (2d Dept. 2009); *Norme v. Ajons*, 57 A.D.3d 749, 870 N.Y.S.2d 91 (2d Dept. 2008).

With respect to defendants/third-party plaintiffs Chen and Hassel's argument that plaintiff had an extensive gap in her medical treatment which is an independent basis that

proves fatal to her claims, specifically that plaintiff testified at her EBT that she has not treated with any medical doctor since March 2010, while a cessation of treatment is not dispositive of a claim of “serious injury” under the No-Fault Law, a plaintiff who terminates therapeutic measures following an automobile accident, while claiming “serious injury,” must offer some reasonable explanation for having done so. *See Pommells v. Perez, supra*. Plaintiff testified at her EBT that she discontinued treatment because her No-Fault insurance payments stopped. *See Defendants/third-party plaintiffs Chen and Hassel’s Affirmation in Support Exhibit F*. Under those circumstances, plaintiff has satisfactorily explained the reason she discontinued her treatment. *See Black v. Robinson*, 305 A.D.2d 438, 759 N.Y.S.2d 741 (2d Dept. 2003); *Abdelaziz v. Fazel*, 78 A.D.3d 1086, 912 N.Y.S.2d 103 (2d Dept. 2010); *Tai Ho Kang v. Young Sun Cho*, 74 A.D.3d 1328, 904 N.Y.S.2d 743 (2d Dept. 2010).

Where, as here, defendants fail to demonstrate that they have met their *prima facie* burden, the Court will deny the motion for summary judgment regardless of the sufficiency of the opposition papers. *See Ayotte v. Gervasio*, 81 N.Y.2d 1062, 601 N.Y.S.2d 463 (1993); *David v. Bryon*, 56 A.D.3d 413, 867 N.Y.S.2d 136 (2d Dept. 2008); *Barrera v. MTA Long Island Bus*, 52 A.D.3d 446, 859 N.Y.S.2d 483 (2d Dept. 2008); *Breland v. Karnak Corp.*, 50 A.D.3d 613, 854 N.Y.S.2d 765 (2d Dept. 2008).

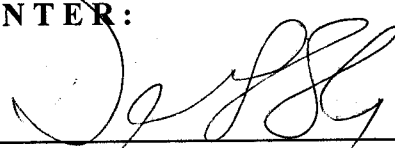
Accordingly, defendants/third-party plaintiffs Chen and Hassel’s motion (Seq. No. 02), pursuant to CPLR § 3212 and Article 51 of the Insurance Law of the State of New York, for an order granting them summary judgment on the ground that plaintiff did not suffer a “serious injury” in the subject accident as defined by New York State Insurance Law § 5102(d) and dismissing the Verified Complaint and any and all cross-claims of defendant/third-party defendant Demonse is hereby **DENIED**.

Additionally, defendant/third-party defendant Demonse's cross-motion (Seq. No. 03), pursuant to CPLR § 3212 and Article 51 of the Insurance Law of the State of New York, for an order granting him summary judgment on the ground that plaintiff did not suffer a "serious injury" in the subject accident as defined by New York State Insurance Law § 5102(d) and dismissing the Verified Complaint and any cross-claims asserted against him is also hereby **DENIED**.

All parties shall appear for Trial in Nassau County Supreme Court, Differentiated Case Management Part (DCM) at 100 Supreme Court Drive, Mineola, New York, on November 22, 2011, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

ENTER:



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DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York  
November 21, 2011

**ENTERED**  
NOV 23 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE