NEW YORK SUPREME COURT----------COUNTY OF BRONX

PART IA - 5

STEPHANIE RIVERA,

Plaintiff,

-against-

YUMARIBIS HERNANDEZ, MARJOS AUTO CORP., JUAN FERNANDEZ and CAR RENTALS LLC,

Defendants.

INDEX NUMBER: **305066/2011**

Present:
HON. **ALISON Y. TUITT**
Justice

The following papers numbered 1-3,

Read on this Defendants' Motion for Summary Judgment

On Calendar of **7/21/14**

Notice of Motion-Exhibits and Affirmation 1

Affirmation in Opposition 2

Reply Affirmation 3

Upon the foregoing papers, defendants Marjos Auto Corp. and Yumaribis Hernandez's motion for summary judgment is denied in part and granted in part for the reasons set forth herein.

The within action arises from a motor vehicle accident on July 4, 2010 as a result of which plaintiff claim to have sustained serious injuries. Defendants move for summary judgment on the grounds that plaintiff fails to prove a serious injury as required by §5102(d) of the Insurance Law.

The Court's function on this motion for summary judgment is issue finding rather than issue determination. Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1978). The movant must come forward with evidentiary proof

in admissible form sufficient to direct judgment in its favor as a matter of law. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. Stone v. Goodson, 8 N.Y.2d 8, (1960); Sillman v. Twentieth Century Fox Film Corp., *supra*.

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986). Thus, the moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Once that initial burden has been satisfied, the "burden of production" (not the burden of persuasion) shifts to the opponent, who must now go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact. The burden of persuasion, however, always remains where it began, i.e., with the proponent of the issue. Thus, if evidence is equally balanced, the movant has failed to meet its burden. 300 East 34th Street Co. v. Habeeb, 683 N.Y.S.2d 175 (1st Dept. 1997).

In the present action, the burden rests on defendant to establish, by the submission of evidentiary proof in admissible form, that plaintiff has not suffered a serious injury. Lowe v. Bennett, 511 N.Y.S.2d 603 (1st Dept. 1986), *aff'd*, 69 N.Y.2d 701 (1986). When a defendant's motion is sufficient to raise the issue of whether a "serious injury" has been sustained, the burden shifts and it is then incumbent upon the plaintiff to produce prima facie evidence in admissible form to support the claim of serious injury. Licari v Elliot, 57 N.Y.2d 230 (1982); Lopez v. Senatore, 65 N.Y.2d 1017 (1985). When a claim is raised under the "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," in order to prove the extent or degree of physical limitation, an expert's designation of a numeric percentage of a plaintiff's loss of range of motion is acceptable. Toure v. Avis Rent A Car Systems, Inc., 98 N.Y.2d 345 (2002). 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. Toure, supra. [1]

In the instant action, defendants move for summary judgment arguing that plaintiff has not suffered a serious injury pursuant to §5102 of the Insurance Law. Plaintiff alleges to have sustained, in relevant part, injuries to her neck and back as follows: midline herniations at C5-C6 and C6-C7; central posterior herniation at C6-C7; posterior disc herniations at L4-L5 and L5-S1; and disc bulge at L3-L4.

In support of their motion, defendants submit the affirmed reports of Michael Setton, D.O., a Board Certified Radiologist, who performed a review of plaintiff's MRI films; the affirmation of Dr. Lisa Nason, a Board Certified Orthopedist, who performed a medical examination on plaintiff on December 3, 2012; and the affirmation of Dr. Jean-Robert Desrouleaux, a Board Certified Neurologist, who performed a physical examination on plaintiff on September 24, 2012. Through these submissions, defendants have met their burden by producing competent medical evidence showing that plaintiff has not sustained a serious injury.

The burden now shifts to the plaintiff to show the existence of a question of fact that would preclude judgment as a matter of law. Plaintiff meets her burden. At the time of the accident, plaintiff was 23 years old and in good health. She had never injured her neck or back prior to the accident. Immediately following the accident, plaintiff was taken by ambulance to St. Barnabas Hospital where she was treated in the Emergency Room. Plaintiff complained of pain in her head, neck, back and knees. She was treated and released. Shortly thereafter, plaintiff sought treatment at Avicenna Medical Arts. She was treated by Dr. Veder who performed physical examinations and various medical tests. Dr. Veder recommended physical therapy which plaintiff underwent three to four times a week for approximately four to five months. It is Dr. Veder's medical opinion to a reasonable degree of medical certainty that plaintiff's injuries to her cervical and lumbar spines are causally related to her accident on July 4, 2010. Directly following the accident, Dr. Veder conducted range of motion testing of plaintiff's cervical and lumbar spine, and found significant restrictions. The positive findings on the plaintiff's MRI films of her cervical and lumbar spine of herniations are accompanied by objective evidence in admissible form as to the extent of the limitation resulting from the herniations. Onishi v.

[1]The Toure decision appears to indicate that claims of neck or back injury resulting from bulging or herniated discs may be considered either under the category of a "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system," as well as the 90/180 day category (Toure v. Avis Rent A Car Systems, Inc., 98 N.Y.2d 345, 352, 774 N.E.2d 1197, 746 N.Y.S.2d 865 [2002].)

N&B Taxi, Inc., 858 N.Y.S2d 171 (1st Dept. 2008). Thus, plaintiff has produced objective, contemporaneous and qualitative medical evidence regarding her injuries. See, Blackman v. Dinstuhi, 810 N.Y.S.2d 79 (1st Dept. 2006); Jimenez v. Rojas, 810 N.Y.S.2d (1st Dept. 2006). Plaintiff shows contemporaneous objective proof of the limitations sustained as a result of the injury such as an expert's designation of a numeric percentage of loss of range of motion or the extent or degree of physical limitation. See, Lazarus v. Perez, 901 N.Y.S.2d 39 (1st Dept. 2010) citing Franchini v. Palmieri, 1 N.Y.3d 536 (2003). Plaintiff also sets forth that she stopped treatment when her No-Fault benefits were cut off and she could not afford to pay for treatment as she was unemployed. The evidence that plaintiff ceased treatment when her No-Fault benefits terminated constitutes at least "the bare minimum required to raise an issue regarding 'some reasonable explanation' for the cessation of physical therapy". Ramkumar v. Grand Style Transp. Enters. Inc., 22 N.Y.3d 905 (2013). Plaintiff here makes a showing that she did not have the resources to continue therapy. Windham v. New York City Transit Authority, 983 N.Y.S.2d 4 (1st Dept.,2014); Merrick v. Lopez-Garcia, 954 N.Y.S.2d 25 (1st Dept. 2012).

At her most recent examination on July 14, 2014 performed by Dr. Nicky Bhatia, a neurologist, plaintiff continued to exhibit significant restrictions in her range of motion in her cervical and lumbar spine. Dr. Bhatia states that based on the proximity of the symptoms to the car accident and further based on the mechanism of injury and site and nature of pathology involved, he believes to a reasonable degree of medical certainty that plaintiff's conditions and associated impairment are causally related to the accident. Dr. Bhatia states that plaintiff has been symptomatic since the date of the accident and has received adequate physical therapy and medical treatment. Dr. Bhatia believes that plaintiff has reached the maximal medical improvement and prognosis is poor for further recovery. He opines with a reasonable degree of medical certainty that plaintiff's condition is permanent and she has a permanent partial disability.

Plaintiff's submissions adequately rebuts Dr. Setton's positive findings within the cervical spine to degeneration and to the lumbar spine as physiologic. Dr. Bhatia personally reviewed plaintiff's MRI films and states that he disagrees with Dr. Setton's findings. Dr. Bhatia opines to a reasonable degree of medical certainty that these films show posterior disc herniations at L4-L5 and L5-S1 and bulging disc at L3-L4 in the lumbar spine as well as disc herniations at C5-C6 and C6-C7 in the cervical spine with no signs of degeneration or physiologic causation. It is his opinion that plaintiff's herniated and bulging discs are causally related to the accident and not due to degeneration or a preexisting condition. Spencer v. Golden Eagle, Inc., 920 N.Y.S.2d

24 (1st Dept. 2011)(Plaintiff's expert must address causation where defendants expert indicates that plaintiff's injury was caused by pre-existing condition); Valentin v. Pomilla, 873 N.Y.S.2d 537 (1st Dept. 2009)(plaintiff failed to raise an inference that his injury was caused by the accident by not refuting defendants' evidence of a preexisting degenerative condition of the spine).

However, plaintiff did not sustain a medically determined injury of a nonpermanent nature that prevented her from performing substantially all of her customary and daily activities for 90 of the 180 days immediately following the accident. In her bill of particulars, plaintiff alleges that she was confined to bed for only one week, and confined to home only one month following the accident. This is insufficient for a finding that plaintiff makes out a claim pursuant to the 90/180 category.

This constitutes the decision and order of this Court.

Dated: 5/13/15

Hon. Alison Y. Tuitt