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| <b>Altadonna v Numanov</b>   |
| 2015 NY Slip Op 32776(U)   |
| January 4, 2015  |
| Supreme Court, Kings County  |
| Docket Number: 22672/12  |
| Judge: Debra Silber  |
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: PART 9**

**BEVERLI ALTADONNA, SAMANTHA CANORA,  
and ADRIAN HEISMAN,**

**Plaintiffs,**

**-against-**

**DZHAMSHED NUMANOV, CHEIKH T. NIASS and  
ILANA TAXI CORP.,**

**Defendants.**

**DECISION/ORDER**

**Index No. 22672/12**

**Submitted: 9/10/15**

**Mot. Seq. # 2**

**HON. DEBRA SILBER, J.S.C.:**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendants' motion for summary judgment dismissing the complaint.

| Papers  | Numbered     |
|---|--------------|
| Notice of Motion, Affirmation, Memo and Exhibits Annexed..... | <u>1-15</u>  |
| Affirmations in Opposition and Exhibits Annexed.....          | <u>16-40</u> |
| Affirmation in Reply .....                                    | <u>41</u>    |

Upon the foregoing cited papers, the decision/order on this motion is as follows:

Defendants Ilana Taxi Corp. and Cheikh Niass move for summary judgment dismissing the plaintiffs' action on the ground that none of the plaintiffs has sustained a "serious injury" as defined by § 5102(d) of the NYS Insurance Law. Plaintiffs oppose the motion. For the reasons set forth herein, the defendants' motion is granted in part and denied in part.<sup>1</sup>

<sup>1</sup>A default judgment against defendant Dzhamshed Numanov was granted on October 20, 2013.

Plaintiffs claim they sustained personal injuries as a result of an automobile accident on September 18, 2011, on 14<sup>th</sup> Street near Irving Place in New York County, when the SUV owned by Ilana Taxi and operated by defendant Niass was struck by a pedicab driven by defendant Numanov; plaintiffs were passengers in the pedicab. Following the collision, the plaintiffs fell out of the pedicab, which landed on top of them. The plaintiffs were transferred by ambulance to Bellevue Medical Center and subsequently sought medical treatment. At the time of the accident, all three plaintiffs were 23 years old.

Plaintiff Beverli Altadonna claims (Bill of Particulars) she has sustained numerous injuries, including cervical and lumbar disc bulges, cervical, lumbar and thoracic radiculitis, a lumbar disc herniation, cervical, lumbar and thoracic spine sprains/strains, left shoulder sprains/strains, right and left-hand sprains/strains and right and left leg sprains/strains.

Plaintiff Samantha Canora claims (Bill of Particulars) she has sustained numerous injuries, including a subligamentous herniated cervical disc, cervical, thoracic and lumbar disc bulges, cervical, thoracic and lumbar sprains/strains, cervical and lumbar radiculopathy, right and left shoulder sprains/strains, right arm and wrist sprains/strains, right hip and leg sprains/strains and right knee and foot sprains/strains.

Plaintiff Adrian Heisman claims (Bill of Particulars) she has sustained numerous injuries, including cervical disc bulges, cervical, lumbar and thoracic sprains/strains, jaw sprains/strains, right and left shoulder sprains/strains and right and left leg sprains/strains.

Defendants contend the complaint must be dismissed because plaintiffs have not sustained a "serious injury" within the meaning of Insurance Law § 5102(d).

Where a motion for summary judgment is predicated on a determination of "serious injury," the moving party has the initial burden of submitting sufficient evidentiary proof in admissible form to warrant a finding that the plaintiff has not sustained a "serious injury." *Lowe v Bennett*, 122 AD2d 728 [1<sup>st</sup> Dept], *affirmed* 69 NY2d 701 [1986].

**Beverli Altadonna**

Defendants' evidence, consisting of the pleadings and plaintiff's Bill of Particulars, three doctors' affirmations and portions of plaintiff's deposition testimony, supports the conclusion that plaintiff did not sustain "a medically determined injury or impairment which prevented her from performing substantially all of the material acts which constituted her customary daily activities for not less than 90 days during the 180 days immediately following the accident."

In her Bill of Particulars, dated June 17, 2013, plaintiff claims that she was confined to her bed for two months following the accident and was confined to her home for six months. However, at her EBT, she stated she was confined to her home for only two months. She also stated that because of the accident, she graduated with a degree in psychology instead of education, which has no bearing on the issues before the court.

Defendants' evidence also supports the conclusion that plaintiff did not sustain a "serious injury" in the categories of "a permanent loss of use of a body organ, member, function or system," "a permanent consequential limitation of use of a body organ or member" and "a significant limitation of use of a body function or system." See, Insurance Law § 5102(d).

The affirmation of Dr. C.M. Sharma, a neurologist and physiatrist, states that she

examined the plaintiff on March 25, 2014, for an Independent Medical Exam report. Dr. Sharma states that plaintiff complained of pain in the left wrist, head, neck, left leg, shoulders, left knee and upper, lower and middle back. Plaintiff also complained of bruises on her arms and legs and a bump on the back of her head. She reported numbness in her leg "on and off."

Range of motion testing of plaintiff's cervical spine revealed flexion 40 degrees (45-60 normal), extension 20 degrees (45-60 normal), bilateral lateral flexion 10 degrees (30-60 normal), bilateral rotation 30 degrees (45-60 normal).

Range of motion testing of plaintiff's thoraco-lumbar spine revealed flexion 45 degrees (90 normal), extension 10 degrees (30 normal), bilateral lateral flexion 10 degrees (30 normal), bilateral rotation 10 degrees (30 normal).

Dr. Sharma states that the range of motion of the plaintiff's cervical spine and lumbar spine during spontaneous activities was in the normal range. She referred to her findings as "voluntary guarding with subjective loss of motion" and claims "passive unguarded motion of the spine is normal."

Straight leg raising in the supine posture was 60 degrees on both sides, which is within the range of normal. Straight leg raising in the seated posture was 90 degrees on both sides, which is within the range of normal.

Dr. Sharma's diagnosis is "cervical and thoraco-lumbar sprains resolved," "headaches, normal examination," "post concussion syndrome, normal examination," "retrograde amnesia as per Bill of Particulars with no current complaints," and "normal neurological examination." She opines that there are no causally related neurological problems. There is no neurological disability. There are no neurological restrictions to plaintiff's usual work and daily activities. Plaintiff has no neurological problems as a

result of the accident.

The affirmation of Dr. Thomas P. Nipper, an orthopedist, dated March 28, 2014, states that he examined plaintiff on that date for an IME report. Plaintiff complained of headaches, radiating neck pain with numbness, pain in her mid-back, lower back, both shoulders, wrists, hips, knees and in her left ankle.

Dr. Nipper reports a completely normal exam with no deficits in plaintiffs' ranges of motion. His diagnosis is "cervical, thoracic and lumbar spine sprain, resolved," "left shoulder sprain, resolved," "bilateral hands sprain, resolved" and "bilateral knees/legs sprain, resolved." Dr. Nipper opines that there is no objective evidence of any accident-related orthopedic disability or permanency, and that plaintiff is able to perform all activities of daily living as well as the duties of her occupation without restrictions or limitations.

The affirmation of Dr. Richard DeBenedetto, a psychologist, states he examined plaintiff on June 17, 2014. He outlines his interview with the plaintiff and the tests he conducted and reports that he found no causally-related neurocognitive deficits or psychological symptoms present, and that plaintiff may work and perform all activities of daily living without restriction.

The plaintiff then has the burden of overcoming the motion. *Grossman v Wright* 288 AD2d 79 [2<sup>nd</sup> Dept 2000].

In her opposition, plaintiff does not overcome the motion as regards the category of injury defined as "a medically determined injury or impairment which prevented her from performing substantially all of the material acts which constituted her customary daily activities for not less than 90 days during the 180 days immediately following the accident." *Abrahamson v Premier Car Rental of Smithtown*, 261 AD2d 562 [2<sup>nd</sup> Dept

1999]; *Kaplan v Gak*, 259 AD2d 763 [2<sup>nd</sup> Dept 1999]. While plaintiff testified at her EBT that she missed three months from work as a result of the accident, the affirmation of her treating doctor, Joseph Gregorace, indicates that he told her to refrain from working on October 7, 2011 and October 19, 2011, but he did not continue this instruction on November 9, 2011 or thereafter.

For plaintiff to establish this prong of the statute, her doctor would have had to inform her that she could not return to work or do her other regular activities for at least 90 days. This is the prerequisite for a medically determined injury. See *Sainte v Ho*, 274 AD2d 569 [2<sup>nd</sup> Dept 2000]; *Welcome v Diab*, 273 AD2d 377 [2<sup>nd</sup> Dept 2000]. As such, plaintiff cannot claim a medically determined injury or impairment which prevented her from performing substantially all of the material acts which constituted her customary daily activities for not less than 90 days during the 180 days immediately following the accident. *Abrahamson v Premier Car Rental of Smithtown*, 261 AD2d 562 [2<sup>nd</sup> Dept 1999]; *Kaplan v Gak*, 259 AD2d 763 [2<sup>nd</sup> Dept 1999].

However, the court finds that plaintiff has overcome the motion and raised a triable issue of fact as to whether she sustained a "permanent consequential limitation of use of a body organ or member" or "a significant limitation of use of a body function or system."

The affirmation of Dr. Joseph Gregorace, an osteopath, states plaintiff has been his patient since October 7, 2011. She first visited his office due to persistent neck pain with numbness, tingling and pins and needles traveling down her left arm into her left hand, mid back pain, lower back pain, as well as pain, numbness and tingling down both legs and bilateral shoulder pain.

Upon initial examination, Dr. Gregorace noted plaintiff had cervical spine

tenderness throughout her cervical spine with spasms, as well as tenderness throughout the thoracic spine, tenderness throughout the mid to lower lumbar spine with spasms, and left shoulder tenderness posterolaterally.

Range of motion testing of the plaintiff's cervical spine revealed left rotation 60 degrees (80 normal) and right rotation 60 degrees (80 normal). Range of motion testing of the plaintiff's lumbar spine revealed flexion 60 degrees (90 normal). Range of motion testing of the plaintiff's left shoulder revealed extension 46 degrees (60 normal), internal rotation 65 degrees (80 normal) and external rotation 70 degrees (90 normal).

Hawkin's test, Yocum's test, Apprehension tests were all positive. Straight leg raise test was positive on the left at 60 degrees and positive on the right at 65 degrees.

Dr. Gregorace's initial clinical impression was "cervical spine sprain/strain with spasms," "bilateral cervical radiculitis," "thoracolumbar sprain/strain with lumbar spine spasms," "bilateral lumbosacral radiculitis" and left shoulder strain. Plaintiff was advised to refrain from returning to work and school pending re-evaluation and was started on physical therapy. She was prescribed painkillers and tests were ordered.

Following plaintiff's initial visit she was evaluated again by Dr. Gregorace on October 19, 2011, at which time she presented with her left shoulder in an arm sling. Range of motion test results were similar, and in some tests, worse. MRIs were ordered and she was told to continue her medications and physical therapy and to continue to refrain from returning to work or school.

Plaintiff's range of motion testing continued to be abnormal on November 9, 2011. Upper and lower EMG/NCS tests were performed. Upper EMG/NCS testing revealed bilateral C6 radiculopathy. Lower EMG/NCS testing revealed bilateral S1 radiculopathy. Plaintiff was referred to a pain management specialist and prescribed

additional medication. Her therapy was modified.

At her November 30, 2011 visit, plaintiff was suffering persistent neck and lower back pain and pain to her arms and legs. She had recently had an epidural steroid injection. Physical therapy was continued, as well as a pain management follow up appointment.

On January 20, 2012, plaintiff continued to have complaints of neck pain, lower back pain and pain radiating down both arms and into her left leg. She had another steroid injection and another one was scheduled. Plaintiff stated she was unable to fill her prescription for Lyrica for financial reasons. Her range of motion testing continued to be abnormal. Plaintiff was given samples of Naprelan 500 mg and advised to continue physical therapy. She was recommended to continue with pain management.

On March 2, 2012, plaintiff continued to complain of neck and lower back pain, as well as pain in both arms. She had been administered another two steroid injections. Her examination continued to be abnormal. She went for a second pain management consultation.

Dr. Gregorace evaluated plaintiff again three years later, on April 8, 2015, to respond to the instant motion. She complained of lower back pain and neck stiffness.

During examination of the plaintiff's cervical spine, there was tenderness throughout the mid to lower cervical spine with spasm across the upper trapezius muscles. Range of motion testing of the lumbar spine revealed extension 15 degrees (30 normal). Dr. Gregorace recommended a home exercise program and that plaintiff consider alternative therapy, such as acupuncture. He also discussed the possibility of trigger point injections.

Dr. Gregorace opines, with a reasonable degree of medical certainty, that as a

result of the accident, plaintiff suffered a lumbar disc herniation at L5/S1 which abuts the proximal left S1 root; cervical disc bulges at C3/C4, C4/C5, C5/C6 and C6/C7; lumbar disc bulges at L1/L2 and L4/L5; cervical and thoracolumbar sprain/strain with spasm; left shoulder sprain/strain; left biceps tenosynovitis; bilateral C6 radiculopathies; and bilateral S1 lumbar radiculopathies. He also notes other findings from the records of other practitioners, including cervical, thoracic and lumbar strain; bilateral S1 lumbar radiculopathies; a left shoulder injury, possibly a contusion or strain; left wrist sprain/strain; myofascial pain syndrome; elements of post-concussive syndrome with mild cognitive dysfunction; exacerbation of migraine headache phenomena; cervical disc bulges; cervical facet arthropathy and myofascial pain syndrome.

Dr. Gregorace opines, with a reasonable degree of medical certainty, that as a result of the accident, plaintiff sustained significant injuries to her cervical, thoracic and lumbar spine, as well as to her left shoulder and left wrist. He states that his diagnosis is clinically correlated with plaintiff's symptomology, exam findings and clinical limitations. Despite her intensive physical therapy, no full recovery is noted and plaintiff continues to demonstrate signs and symptoms of severe residual inflammatory pathology to the muscular and supportive structures of the cervical, thoracic and lumbar spine and left shoulder. Dr. Gregorace opines, with a reasonable degree of medical certainty, that these changes are permanent and that plaintiff may be prone to future exacerbation and may require surgical intervention. He describes plaintiff's injuries as a partial disability and as permanent and states that plaintiff is unable to perform her usual household, recreational and social activities and duties without pain and restriction. He says her prognosis for a full recovery is extremely poor and concludes the accident is the direct cause of her injuries and condition.

Dr. Gregorace appends several of plaintiff's medical records from other providers. Some of them are not in admissible form and were not considered by the court.

The affidavit of Dr. Douglas Drobbin, a chiropractor, was considered by the court, even though he states at the beginning that he "affirm[s]" to the contents of the report, as the report was properly sworn to before a notary.

Dr. Drobbin states that plaintiff has been his patient since September 19, 2011. At that visit plaintiff complained of neck pain radiating into her left arm and left wrist, decreased cervical spine range of motion, tingling of the left arm, left hand and fingers, headaches, nausea, and dizziness, lower back pain and mid-back pain.

Range of motion testing of the plaintiff's cervical spine revealed flexion 10 degrees (50 normal), extension 0 degrees (70 normal), left lateral flexion 10 degrees (45 normal), right lateral flexion 15 degrees (45 normal), left rotation 10 degrees (85 normal) and right rotation 30 degrees (85 normal).

Range of motion testing of the plaintiff's lumbar spine revealed flexion 40 degrees (90 normal), extension 10 degrees (30 normal), left rotation 10 degrees (30 normal), right rotation 10 degrees (30 normal), left lateral flexion 15 degrees (35 normal), right lateral flexion 20 degrees (35 normal).

Left and right shoulder depressor tests, Soto-Hall test, left and right cervical compression test, cervical distraction test, left Braggard's test, left and right Bechterew test, left and right Kemp's sign, left and right Gaenslen's test, and pinwheel exam were all positive.

Plaintiff returned to Dr. Drobbin's office on November 24, 2014 and reported continuing complaints of bilateral cervical spine pain, left arm pain to the wrist and

tingling to the left fingers, as well as constant headaches, dizziness, nausea, mid back pain and lower back pain. All cervical and lumbar ranges of motion were decreased. Plaintiff was positive for Soto-Hall test, cervical compression, bilateral straight leg raise and bilateral Braggard's test.

Dr. Drobbin evaluated plaintiff again on April 7, 2015, in response to the instant motion. Plaintiff complained of neck pain radiating into the left arm to the wrist, left arm tingling to the left hand and fingers, headaches, nausea and dizziness, decreased cervical spine range of motion, mid-back pain and lower back pain.

Range of motion testing of the plaintiff's cervical spine revealed flexion 20 degrees (50 normal), left rotation 60 degrees (85 normal), right rotation 50 degrees (85 normal).

Range of motion testing of the plaintiff's lumbar spine revealed extension 20 degrees (30 normal), right rotation 20 degrees (30 normal) and left lateral flexion 25 degrees (35 normal).

The court notes that, in his affidavit, Dr. Drobbin reaches his conclusions with what he calls "a reasonable degree of medical certainty" which a chiropractor is not permitted to do. The court also notes that the records Dr. Drobbin annexed from other medical practitioners were not considered as they are not in admissible form.

Plaintiff also annexes other unaffirmed and uncertified medical records, which were not considered by the court as they are inadmissible hearsay. *Shmerkovich v Sitar Corp.*, 61 AD3d 843 [2<sup>nd</sup> Dept 2007]; *Randio v Thomas* 270 AD2d 767 [3<sup>rd</sup> Dept 2000].

The court finds that the evidence submitted by the plaintiff raises a triable issue of fact (see CPLR 3212[b]) which overcomes the motion. *Toure v Avis Rent A Car Sys.*,

98 NY2d 345 [2002]; *Gaddy v Eyley*, 79 NY2d 955 [1992]; *Yunatanov v Stein*, 2010 NY Slip Op 249 [2<sup>nd</sup> Dept]; *Yun v Barber*, 63 AD3d 1140 [2<sup>nd</sup> Dept 2009]; *Gavria v Alvarado*, 65 AD3d 567 [2<sup>nd</sup> Dept 2009].

Plaintiff has presented ample evidence of specific and documented restrictions in her range of motion both from recent examinations by Dr. Gregorace and Dr. Drobbin and from tests performed by Dr. Gregorace and Dr. Drobbin which were contemporaneous with the subject accident. *Morris v Edmond*, 48 AD3d 432, 433; *McIntosh v O'Brien*, 2010 NY Slip Op 115 [2<sup>nd</sup> Dept]; *Yunatanov v Stein*, 2010 NY Slip Op 249 [2<sup>nd</sup> Dept].

Where a plaintiff's doctor asserts a permanent injury, and sets forth the findings upon which he expresses his opinion that the injury is causally related to the accident, such evidence is sufficient for denial of a summary judgment motion which seeks to dismiss the complaint. *Lopez v Senatore*, 65 NY2d 1017 [1985].

The evaluation of competing evidence (the battle of the experts) falls within the province of the trier of fact at trial, and it is not appropriate for the court to dismiss the complaint on a motion for summary judgment. See, *Dietrich v Puff Cab Corp.* 63 AD3d 778 (2d Dept 2009); *Duffel v Green*, 84 NY2d 795 [1995]; *Lopez v Senatore*, 65 NY2d 1017 [1985]; *Mercafe Clearing, Inc. v Chemical Bank*, 216 AD2d 231 [1<sup>st</sup> Dept 1995]; *Kaiser v Edwards*, 98 AD2d 825 [3<sup>rd</sup> Dept 1983]; *Slack v Crossetta*, 75 AD2d 809 [2<sup>nd</sup> Dept 1980].

It must be noted that if a plaintiff overcomes the motion with regard to one injury, the court is not permitted to dismiss the plaintiff's claims with regard to other injuries. "Since the Supreme Court properly determined that there were triable issues of fact as to whether each of the plaintiffs sustained a serious injury to the cervical and lumbar

regions of his or her spine, the plaintiffs are entitled to seek recovery for all injuries allegedly incurred as a result of the accident." *Sin v Singh*, 74 AD3d 1320 [2<sup>nd</sup> Dept 2010].

**Samantha Canora**

Defendants' evidence, consisting of the pleadings and plaintiff's Bill of Particulars and two doctors' affirmations, does not make out a prima facie case that plaintiff did not sustain a medically determined injury or impairment which prevented her from performing substantially all of the material acts which constituted her customary daily activities for not less than 90 days during the 180 days immediately following the accident. Defendants in fact make no argument with regard to this prong of the statute as to Ms. Canora, except for a boilerplate assertion that she did not suffer such an injury. They do not state the basis for this assertion.

However, defendants' evidence does supports the conclusion that plaintiff did not sustain a "serious injury" in the categories of "a permanent loss of use of a body organ, member, function or system," "a permanent consequential limitation of use of a body organ or member" and "a significant limitation of use of a body function or system." See, Insurance Law § 5102(d).

The affirmation of Dr. C.M. Sharma, a neurologist and physiatrist, states that she examined plaintiff on March 25, 2014, for an Independent Medical Exam. Dr. Sharma states that plaintiff complained of pain in the neck, lower back and right knee, with pressure in the shoulders and spasms in the neck.

Range of motion testing of plaintiff's cervical spine revealed flexion 40 degrees (45-60 normal), extension 20 degrees (45-60 normal), bilateral lateral flexion 10 degrees (30-60 normal), bilateral rotation 30 degrees (45-60 normal).

Range of motion testing of plaintiff's thoraco-lumbar spine revealed flexion 30 degrees (90 normal), extension 10 degrees (30 normal), bilateral lateral flexion 10 degrees (30 normal), bilateral rotation 10 degrees (30 normal).

Dr. Sharma states that the range of motion of the plaintiff's cervical spine and lumbar spine during spontaneous activities is in the normal range. She referred to this as "voluntary guarding with subjective loss of motion" and said "passive unguarded motion of the spine was normal."

Straight leg raising in the supine posture was 60 degrees on both sides, which is within the range of normal. Straight leg raising in the seated posture was 90 degrees on both sides, which is within the range of normal.

Dr. Sharma's diagnosis is "cervical and thoraco-lumbar sprains resolved," "headaches, normal examination," "post concussion syndrome, normal examination", and "normal neurological examination." She opines that there are no causally-related neurological problems. There is no neurological disability. There are no neurological restrictions with regard to plaintiff's usual work and daily activities. There is no neurological problem of a causally related nature.

The affirmation of Dr. Thomas P. Nipper, an orthopedist, dated March 28, 2014, states that he saw plaintiff on that date for an IME. She complained of headaches, neck pain, pain in her mid- back, lower back, right shoulder, right wrist, right hip, and right knee.

Dr. Nipper reports a completely normal exam with no deficits in plaintiff's ranges of motion. His diagnosis is "cervical, thoracic and lumbar spine sprain, resolved," "normal left shoulder examination," "right shoulder sprain, resolved," "right elbow/arm sprain, resolved," "right wrist/hand sprain, resolved," "right hip/leg sprain, resolved," and

"right knee/leg sprain, resolved," "normal right foot examination," "normal ribs examination." Dr. Nipper opines that there is no objective evidence of any accident-related orthopedic disability or permanency, and that plaintiff is able to perform all activities of daily living as well as the duties of her occupation without restrictions or limitations.

The plaintiff then has the burden of overcoming the motion. *Grossman v Wright* 288 AD2d 79 [2<sup>nd</sup> Dept 2000].

The court finds that plaintiff has overcome the motion and raised a triable issue of fact as to whether she has sustained a permanent consequential limitation of use of a body organ or member or a significant limitation of use of a body function or system.

The affirmation of Dr. Joseph Gregorace, an osteopath, states plaintiff has been his patient since October 5, 2011. She first visited his office due to persistent neck pain, right shoulder pain, right wrist pain, lower back pain, right knee pain and right foot pain.

Upon examination, Dr. Gregorace states that, during palpation, he observed cervical spine tenderness throughout the plaintiff's mid to low cervical spine with cervical spine spasms, mid thoracic spine tenderness and tenderness throughout the mid to lower lumbar spine with spasms, tenderness anteriorly to the right shoulder, as well as tenderness of the right wrist, along the medial joint line of the right knee, along the MCL with valgus strain via palpation as well as tenderness along the right foot along the first MTP joint.

Range of motion testing of the plaintiff's cervical spine revealed left rotation 50 degrees (80 normal) and right rotation 54 degrees (80 normal). Range of motion testing of the plaintiff's lumbar spine revealed flexion 55 degrees (90 normal). Range of motion testing of the plaintiff's right shoulder revealed internal rotation 40 degrees (80 normal)

and external rotation 56 degrees (90 normal).

Hawkin's test, Yocum's test and supraspinatus test were all positive as regards the plaintiff's right shoulder; patella grind test was positive in the right knee; straight leg test was positive at 50 degrees.

Dr. Gregorace's initial clinical impression was "cervical spine sprain/strain with spasms," "bilateral cervical radiculitis," "lumbar sprain/strain with spasms," "right lumbosacral radiculitis," "right shoulder rotator cuff tear," "right knee contusion/sprain" and "right foot contusion/sprain" A regime of physical therapy was put in place. Plaintiff was advised to refrain from returning to work.

Following plaintiff's initial visit she was evaluated again by Dr. Gregorace on October 19, 2011. Range of motion test results were similar. Plaintiff was advised to continue her medications and physical therapy and to continue to refrain from returning to work. Additional tests were ordered.

Plaintiff's examination and range of motion testing was still abnormal on November 9, 2011. Upper and lower EMG/NCS tests were performed. Upper EMG/NCS testing revealed bilateral C6 radiculopathies. Plaintiff was referred to a pain management specialist and prescribed additional medication. Therapy was modified. Plaintiff was recommended to refrain from working,

At her November 30, 2011 visit, plaintiff was suffering ongoing neck pain, pain in both arms and lower back pain. She had recently had a steroid injection and another was scheduled. Examination and range of motion testing continued to be abnormal. Physical therapy was continued, and new medication was prescribed, as well as a pain management follow up.

On January 20, 2012, plaintiff continued to have complaints of ongoing neck

pan, as well as pain in both shoulders and down the right arm and lower back pain. She had another steroid injection and another one was scheduled. Examination and range of motion testing continued to be abnormal. Plaintiff was advised to continue physical therapy. She was recommended to continue with pain management. She was also advised to continue to refrain from working.

On February 17, 2012, plaintiff continued to complain of ongoing neck pain, mid back pain and lower back pain, as well as pain in both arms. She had another steroid injection. Her examination and range of motion testing continued to be abnormal. She was advised to continue physical therapy. She was advised to continue to refrain from working. She was advised to follow up with pain management.

Dr. Gregorace evaluated plaintiff again on March 14, 2012. Plaintiff continued to complain of ongoing neck pain, mid back pain and lower back pain. She complained of tingling and pain down her right arm. She had another steroid injection. Her examination and range of motion testing continued to be abnormal. She was advised to continue physical therapy and medication. She was advised to follow up with pain management.

Dr. Gregorace evaluated plaintiff again on April 25, 2012. Her back pain had worsened. She had spasms along her cervical and mid to lower lumbar spine. Her examination and range of motion testing continued to be abnormal. She was advised to continue physical therapy, and was prescribed new medication.

Dr. Gregorace evaluated plaintiff again on May 23, 2012. Plaintiff stated that physical therapy treatment had been helpful, but her neck and back pain was amplified with inclement weather. Her examination and range of motion testing continued to be abnormal. At that time, Dr. Gregorace determined that plaintiff had plateaued. She was

told to continue with home exercise. She was referred for acupuncture.

Dr. Gregorace examined plaintiff again on January 16, 2015, to respond to the instant motion. She complained of persistent neck pain with spasms and stiffness with pain traveling down both arms and stiffness as well as lower back pain. During his examination, Dr. Gregorace found spasms throughout the plaintiff's mid to lower cervical spine and throughout the mid to lower lumbar spine.

Range of motion testing of the plaintiff's cervical spine revealed extension 40 degrees (60 normal) and right rotation 56 degrees (80 normal). Range of motion testing of the plaintiff's lumbar spine revealed flexion 60 degrees (90 normal), extension 20 degrees (30 normal), right side bending 10 degrees (25 normal), left side bending 14 degrees (25 normal). Plaintiff was referred to a pain management doctor and prescribed a home exercise program and told to consider alternative therapy, such as acupuncture.

On January 19, 2015, plaintiff returned to Dr. Gregorace's office for a pain management consultation with Dr. Visram. Plaintiff complained of persistent neck pain with pain radiating into both shoulders and both arms. Range of motion testing of the plaintiff's cervical spine revealed flexion 42 (60 normal). There was noted tightness of the bilateral mid trapezius. Spurling test was positive on the right. Dr. Visram recommended cervical epidural steroid injections.

Dr. Gregorace opines, with a reasonable degree of medical certainty, that as a result of the accident, plaintiff suffered lumbar disc bulges at T12/L1, L1/L2, L2/L3, L4/L5 and L5/S1; a cervical disc herniation at C5/C6 with cord compression; cervical disc bulges at C4/C5 and C6/C7 with ventral cord abutment; a thoracic disc bulge at T11/T12; bilateral C6 radiculopathies; lumbosacral radiculitis; cervical and lumbar

sprain/strain with spasms; thoracic spine sprain/strain/myofascitis; right shoulder strain with rotator cuff tendinitis; right knee contusion/chondromalacia patella; right wrist contusion/sprain; right foot contusion/sprain. He also noted other findings as per other practitioners, including cervicalgia, herniated nucleus pulposus and cervical radiculopathy; myofascial pain syndrome; right shoulder injury/strain; right foot sprain/contusion; cervical herniated nucleus pulposus with radiculitis; lumbar sprain with bulging disc; cervicalgia/cervical disc disease; lumbago/lumbar disc disease; rib pain; post traumatic cervicogenic headaches and elements of cervical and lumbar radiculopathy.

Dr. Gregorace opines, with a reasonable degree of medical certainty, that as a result of the accident, plaintiff has sustained significant injuries to her cervical, thoracic and lumbar spine, as well as to her right shoulder, right knee, right wrist and right foot. He states that his diagnosis is clinically correlated with plaintiff's symptomology, exam findings and clinical limitations. He opines that plaintiff has not fully recovered and that her injuries are permanent and that plaintiff may be prone to future exacerbations. He describes plaintiff's injuries as partially disabling and permanent and states that plaintiff is unable to perform her usual household, recreational and social activities and duties without pain and restriction. He describes her prognosis for full recovery extremely poor and states that the accident was the direct cause of her injuries and condition.

Dr. Gregorace also appends several of plaintiff's other medical reports. Some, from other providers, are not in admissible form and were not considered by the court.

The affidavit of Dr. Douglas Drobbin, a chiropractor, was considered by the court, even though he states at the beginning that he "affirm[s]" to the contents of the report, as the report was properly sworn to before a notary.

Dr. Drobbin states that plaintiff has been his patient since September 19, 2011. At that initial visit, plaintiff complained of abrasions on her right arm and hip, neck pain radiating into the right arm, right shoulder pain, right wrist pain, right arm tingling sensation and weakness, mid back pain, lower back pain radiating into the right thigh, right foot pain and right TMJ pain.

Range of motion testing of the plaintiff's cervical spine revealed flexion 15 degrees (50 normal), extension 20 degrees (70 normal), left lateral flexion 10 degrees (45 normal), right lateral flexion 15 degrees (45 normal), left rotation 20 degrees (85 normal), right rotation 25 degrees (85 normal).

Range of motion testing of the plaintiff's lumbar spine revealed flexion 10 degrees (90 normal), extension 0 degrees (30 normal), left rotation 10 degrees (30 normal), right rotation 5 degrees (30 normal), left lateral flexion 10 degrees (35 normal), right lateral flexion 10 degrees (35 normal).

Plaintiff's Soto-Hall test, left and right cervical compression test, cervical distraction test, left and right Braggard's test, left and right Bechterew test, left and right Kemp's sign, left and right Gaenslen's test and pinwheel exam were all positive.

Plaintiff returned to Dr. Drobbin's office on November 24, 2014 with continuing complaints of left neck pain, left arm pain, pain in the right neck to right shoulder, right wrist pain, right arm tingling, right arm weakness and lower back pain radiating into the right thigh and knee. All cervical and lumbar ranges of motion were decreased. Plaintiff was still positive for Soto-Hall test, cervical compression, bilateral Bechterew, Kemp's and Gaenslen.

Dr. Drobbin evaluated plaintiff again on March 16, 2015, to respond to the instant motion. Plaintiff complained of neck and left arm pain, pain in the right shoulder, right

wrist pain, right arm tingling, right arm weakness, and lower back pain traveling into her thighs.

Range of motion testing of the plaintiff's cervical spine revealed flexion 30 degrees (50 normal), extension 45 (70 normal), left rotation 70 degrees (85 normal) and right rotation 50 degrees (85 normal).

Range of motion testing of the plaintiff's lumbar spine revealed flexion 40 degrees (90 normal), extension 10 degrees (30 normal), left rotation 15 degrees (30 normal), right rotation 20 degrees (30 normal), left lateral flexion 25 degrees (35 normal) and right lateral flexion 20 degrees (35 normal).

The court notes that, in his affidavit, Dr. Drobbin states that he reached his conclusion with what he calls "a reasonable degree of medical certainty" which a chiropractor is not permitted to do. The court also notes that the plaintiff's medical records which Dr. Drobbin annexed from other practitioners were not considered as they are not in admissible form.

Plaintiff also annexes other unaffirmed and uncertified medical records, which were not considered by the court as they were not submitted in admissible form.

The court finds that the evidence submitted by the plaintiff raises a triable issue of fact (*see* CPLR 3212[b]) which overcomes the motion as to whether she sustained a serious injury. *Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyler*, 79 NY2d 955 [1992]; *Yunatanov v Stein*, 2010 NY Slip Op 249 [2<sup>nd</sup> Dept]; *Yun v Barber*, 63 AD3d 1140 [2<sup>nd</sup> Dept 2009]; *Gavria v Alvarado*, 65 AD3d 567 [2<sup>nd</sup> Dept 2009].

Plaintiff has presented ample evidence of specific and documented restrictions in her range of motion both from recent examinations by Dr. Gregorace and Dr. Drobbin and from tests performed by Dr. Gregorace and Dr. Drobbin which were

contemporaneous with the subject accident. *Morris v Edmond*, 48 AD3d 432, 433; *McIntosh v O'Brien*, 2010 NY Slip Op 115 [2<sup>nd</sup> Dept]; *Yunatanov v Stein*, 2010 NY Slip Op 249 [2<sup>nd</sup> Dept].

Where a plaintiff's doctor asserts a permanent injury, and sets forth the findings upon which he expresses his opinion that the injury is causally related to the accident, such evidence is sufficient for denial of a summary judgment motion which seeks to dismiss the complaint. *Lopez v Senatore*, 65 NY2d 1017 [1985].

The evaluation of competing evidence (the battle of the experts) falls within the province of the trier of fact at trial, and it is not appropriate for the court to dismiss the complaint on a motion for summary judgment. See, *Dietrich v Puff Cab Corp.* 63 AD3d 778 (2d Dept 2009); *Duffel v Green*, 84 NY2d 795 [1995]; *Lopez v Senatore*, 65 NY2d 1017 [1985]; *Mercafe Clearing, Inc. v Chemical Bank*, 216 AD2d 231 [1<sup>st</sup> Dept 1995]; *Kaiser v Edwards*, 98 AD2d 825 [3<sup>rd</sup> Dept 1983]; *Slack v Crossetta*, 75 AD2d 809 [2<sup>nd</sup> Dept 1980].

It must be noted that if a plaintiff overcomes the motion with regard to one injury, the court is not permitted to dismiss the plaintiff's claims with regard to other injuries. "Since the Supreme Court properly determined that there were triable issues of fact as to whether each of the plaintiffs sustained a serious injury to the cervical and lumbar regions of his or her spine, the plaintiffs are entitled to seek recovery for all injuries allegedly incurred as a result of the accident." *Sin v Singh*, 74 AD3d 1320 [2<sup>nd</sup> Dept 2010].

**Adrian Heisman**

Defendants' evidence, consisting of the pleadings and plaintiff's Bill of Particulars, three doctors' affirmations and portions of plaintiff's deposition testimony,

supports the conclusion that plaintiff did not sustain a "medically determined injury or impairment which prevented her from performing substantially all of the material acts which constituted her customary daily activities for not less than 90 days during the 180 days immediately following the accident."

In her Bill of Particulars, dated June 17, 2013, plaintiff claims that she was confined to her bed for one and a half weeks following the accident and to her home for one month. At her EBT, Ms. Heisman stated she missed one month from work.

Defendants' evidence also supports the conclusion that plaintiff did not sustain a "serious injury" in the categories of "a permanent loss of use of a body organ, member, function or system," "a permanent consequential limitation of use of a body organ or member" and "a significant limitation of use of a body function or system." See, Insurance Law § 5102(d).

The affirmation of Dr. C.M. Sharma, a neurologist and physiatrist, states that she examined plaintiff on March 25, 2014, for an Independent Medical Exam. Dr. Sharma states that plaintiff told her she was involved in a prior accident in 2009 with reported injury to the jaw, but fully recovered. Plaintiff complained of pain in her neck and lower back and stiffness in her jaw. She stated that she has returned to almost all of her daily routines, except for gym exercises and strenuous activities.

Dr. Sharma reports that range of motion testing of plaintiff's cervical spine and lumbar spine were all in the range of normal, as was straight leg raising.

Dr. Sharma's diagnosis is "cervical and thoraco-lumbar sprains resolved," "headaches, normal examination," "post concussion syndrome, normal examination," "seizures, as per Bill of Particular, not reported" and "normal neurological examination." She opines that there are no causally related neurological problems. There is no

neurological disability. There are no neurological restrictions to plaintiff's usual work and daily activities. There is no neurological problem of a causally related nature.

The affirmation of Dr. Thomas P. Nipper, an orthopedist, dated March 28, 2014, states that he saw plaintiff on that date for an IME. She reported headaches, pain in her neck, lower back and right jaw.

Dr. Nipper reports a completely normal exam with no deficits in plaintiff's ranges of motion. His diagnosis is "cervical, thoracolumbar spine sprain, resolved," "bilateral shoulder sprains, resolved," "bilateral leg sprains, resolved." Dr. Nipper opines that there is no objective evidence of any accident related orthopedic disability or permanency, and that plaintiff is able to perform all activities of daily living as well as the duties of her occupation without restrictions or limitations.

The affirmation of Dr. Nelson Perez, a dentist, states he examined plaintiff on April 16, 2014 for an IME. He states that plaintiff did not report any dental or jaw complaints at the time.

Dr. Perez states that craniomandibular manipulation revealed no discomfort. Clinical examination revealed no abnormal joint sounds and all ranges of motion were within normal limits. Cervical range of motion measurements indicated pain on extension. All other testing was within normal limits.

Dr. Perez's diagnosis was "bilateral jaw sprain, as per BOP, with no complaints" and "normal dental/TMJ examination." He opines that there was no trauma to the TMJ or dental issues which were caused by the reported incident. There is no causally related dental/TMJ disability or permanency related to the accident. No dental/TMJ treatment is needed. Plaintiff has the ability to work and perform her activities of daily living without restriction.

Defendants also point out plaintiff's EBT testimony that she had a prior motor vehicle accident in 2009 in which she claimed injuries to her neck and jaw and treated for a month due to the injuries sustained in the prior accident.

The plaintiff then has the burden of overcoming the motion. *Grossman v Wright* 288 AD2d 79 [2<sup>nd</sup> Dept 2000].

In opposition to the motion, plaintiff does not overcome the motion as regards the category of "a medically determined injury or impairment which prevented her from performing substantially all of the material acts which constituted her customary daily activities for not less than 90 days during the 180 days immediately following the accident." *Abrahamson v Premier Car Rental of Smithtown*, 261 AD2d 562 [2<sup>nd</sup> Dept 1999]; *Kaplan v Gak*, 259 AD2d 763 [2<sup>nd</sup> Dept 1999].

For plaintiff to overcome the motion on this prong of the statute, her doctor would have had to inform her that she could not return to work or do her other regular activities. This is the prerequisite for a medically determined injury. See *Sainte v Ho*, 274 AD2d 569 [2<sup>nd</sup> Dept 2000]; *Welcome v Diab*, 273 AD2d 377 [2<sup>nd</sup> Dept 2000]. As such, plaintiff cannot claim a medically determined injury or impairment which prevented her from performing substantially all of the material acts which constituted her customary daily activities for not less than 90 days during the 180 days immediately following the accident. *Abrahamson v Premier Car Rental of Smithtown*, 261 AD2d 562 [2<sup>nd</sup> Dept 1999]; *Kaplan v Gak*, 259 AD2d 763 [2<sup>nd</sup> Dept 1999].

However, the court finds that plaintiff has overcome the motion and raised a triable issue of fact as to whether she has sustained "a permanent consequential limitation of use of a body organ or member" or "a significant limitation of use of a body function or system."

The affirmation of Dr. Joseph Gregorace, an osteopath, states that plaintiff has been his patient since October 21, 2011. She first visited his office due to neck pain, pain in both shoulders, mid back pain and lower back pain.

Upon initial examination, Dr. Gregorace noted that palpation of the cervical and lumbar spine revealed tenderness and spasms of plaintiff's cervical spine and lumbar spine; palpation of the thoracic spine was tender as well.

Dr. Gregorace's initial clinical impression was "cervical spine sprain/strain with cervical radiculitis," and "thoracolumbar sprain/strain." She was started on physical therapy and prescribed a painkiller.

Following her initial visit, Dr. Gregorace reports multiple evaluations at his office. On November 4, 2011, after an exam similar to the initial examination, plaintiff was referred for MRIs. Results of an exam on November 16, 2011 were similar and plaintiff was advised to continue physical therapy and medication.

On December 14, 2011, plaintiff complained of neck and lower lumbar spine pain. Cervical and lumbar spine examination revealed spasms along the lower cervical spine, including upper trapezius muscles with spasms along the mid to lower lumbar spine.

Range of motion testing of the plaintiff's cervical spine revealed extension 50 degrees (60 normal), right rotation 20 degrees (80 normal), left rotation 60 degrees (80 normal). Range of motion testing of the plaintiff's lumbar spine revealed flexion 65 degrees (90 normal) and left side bending 23 degrees (25 normal). Plaintiff was told to continue physical therapy and medication.

At a visit on January 4, 2012, plaintiff was similarly symptomatic and was advised to continue physical therapy, although her medication was changed. On

January 20, 2012, plaintiff complained of upper mid back pain and stated that this pain had been worsening. Medication and physical therapy were continued and new MRIs were ordered.

On February 17, 2012, Dr. Gregorace states that plaintiff reported lower neck pain, mid back pain and improved lower back pain. Cervical and lumbar spine examination revealed tenderness along the mid to lower cervical spine with spasms. There was tenderness throughout the mid thoracic and lower lumbar spine.

Range of motion testing of the plaintiff's cervical spine revealed extension 52 degrees (60 normal), right rotation 60 degrees (80 normal), left rotation 70 degrees (80 normal). Range of motion testing of the plaintiff's lumbar spine revealed flexion 80 degrees (90 normal). Plaintiff was told to continue physical therapy and medication.

On March 30, 2012, Dr. Gregorace states plaintiff reported her neck pain was feeling better with therapy. Cervical spine examination revealed cervical spine tenderness including tenderness of the upper trapezius muscles.

Range of motion testing of the plaintiff's cervical spine revealed extension 55 degrees (60 normal), right rotation 75 degrees (80 normal).

Dr. Gregorace states that, at this time, plaintiff had plateaued with her conservative physical therapy treatments.

Dr. Gregorace evaluated plaintiff again on March 11, 2015 to respond to the instant motion. He hadn't seen her in three years. She complained of lower neck and lower lumbar spine pain. Examination of the plaintiff's cervical spine revealed lower cervical spine tenderness with tenderness across the upper trapezius muscles. They discussed alternative treatment plans, including injections, massage therapy and acupuncture.

Dr. Gregorace states that, it is his belief, with a reasonable degree of medical certainty, that as a result of the accident, plaintiff sustained significant injuries to her cervical, thoracic and lumbar spine, resulting in a cervical disc bulge at C6/C7. She also suffered consistent limitations in her cervical and lumbar ranges of motion. He states that the trauma resulted in posttraumatic sprain/strain syndromes with myofascial derangements, secondary to her ligaments and muscles being overstretched and various soft tissues becoming inflamed. He states that the changes noted are permanent and that physical stress may trigger recurrent episodes of neck pain and back pain. He opines that plaintiff's disability is partial, her injuries are permanent and have resulted in chronic pain with progressive remission and exacerbation during her use of the neck and back. He describes her prognosis for full and complete recovery extremely poor and describes the accident as the direct competent producing cause of the plaintiff's injuries. He states that plaintiff is unable to perform her usual household, recreational and social activities and duties without experiencing some pain and restriction.

Dr. Gregorace also appends MRI reports from other providers, which are not in admissible form and were not considered by the court.

The affidavit of Dr. Douglas Drobbin, a chiropractor, was considered by the court, even though he states at the beginning that he "affirm[s]" to the contents of the report, as the report was properly sworn to before a notary.

Dr. Drobbin states that plaintiff has been his patient since September 19, 2011. At that initial visit, plaintiff complained of neck pain radiating into her right wrist, right jaw clicking and an inability to open her jaw all the way, headache, lower back pain and mid-back pain.

Range of motion testing of the plaintiff's cervical spine revealed flexion 20 degrees (50 normal), left lateral 30 degrees (45 normal), right lateral 20 degrees (45 normal), left rotation 40 degrees (85 normal) and right rotation 55 degrees (85 normal).

Range of motion testing of the plaintiff's lumbar spine revealed flexion 40 degrees (90 normal), extension 10 degrees (30 normal), left rotation 10 degrees (30 normal), right rotation 15 degrees (30 normal), left lateral flexion 5 degrees (35 normal), right lateral flexion 15 degrees (35 normal).

Straight leg raise, Braggard's test, left and right Bechterew test, left and right Kemp's sign, and left and right Gaenslen's tests were all positive.

Plaintiff returned to Dr. Drobbin's office on November 24, 2014 with continued complaints of neck pain, right jaw clicking, and lower back pain. All cervical and lumbar ranges of motion remained decreased. Plaintiff was positive for Soto-Hall test, cervical compression test, Braggard's test and Gaenslen's test.

Dr. Drobbin evaluated plaintiff again on April 7, 2015, to respond to the instant motion. Plaintiff complained of neck pain, right jaw "cracking" and "clicking" with an inability to open her jaw all the way, headaches, mid-back pain and lower back pain.

Range of motion testing of the plaintiff's cervical spine revealed left lateral flexion 30 degrees (45 normal), right lateral flexion 35 degrees (45 normal), left rotation 50 degrees (85 normal), right rotation 60 degrees (85 normal).

Range of motion testing of the plaintiff's lumbar spine revealed extension 20 degrees (30 normal) and left rotation 20 degrees (30 normal).

The court notes that, in his affidavit, Dr. Drobbin reaches his conclusions with what he calls "a reasonable degree of medical certainty" which a chiropractor is not permitted to do. The court also notes that the plaintiff's medical records which Dr.

Drobbin annexed from other practitioners were not considered as they are not in admissible form.

Plaintiff also annexes other unaffirmed and uncertified medical records, which were not considered by the court as they are not in admissible form

The court finds that the evidence submitted by the plaintiff has raised a triable issue of fact (*see* CPLR 3212[b]) which overcomes the motion as to whether plaintiff has sustained a serious injury. *Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyer*, 79 NY2d 955 [1992]; *Yunatanov v Stein*, 2010 NY Slip Op 249 [2<sup>nd</sup> Dept]; *Yun v Barber*, 63 AD3d 1140 [2<sup>nd</sup> Dept 2009]; *Gavria v Alvarado*, 65 AD3d 567 [2<sup>nd</sup> Dept 2009].

Plaintiff has presented ample evidence of specific and documented restrictions in her range of motion both from a recent examination by Dr. Gregorace and Dr. Drobbin and from tests performed by Dr. Gregorace and Dr. Drobbin which were contemporaneous with the subject accident. *Morris v Edmond*, 48 AD3d 432, 433; *McIntosh v O'Brien*, 2010 NY Slip Op 115 [2<sup>nd</sup> Dept]; *Yunatanov v Stein*, 2010 NY Slip Op 249 [2<sup>nd</sup> Dept].

Where a plaintiff's doctor asserts a permanent injury, and sets forth the findings upon which he expresses his opinion that the injury is causally related to the accident, such evidence is sufficient for denial of a summary judgment motion which seeks to dismiss the complaint. *Loper v Senatore*, 65 NY2d 1017 [1985].

The evaluation of competing evidence (the battle of the experts) falls within the province of the trier of fact at trial, and it is not appropriate for the court to dismiss the complaint on a motion for summary judgment. *See, Dietrich v Puff Cab Corp.* 63 AD3d 778 (2d Dept 2009); *Duffel v Green*, 84 NY2d 795 [1995]; *Lopez v Sanatore*, 65 NY2d

1017 [1985]; *Mercafe Clearing, Inc. v Chemical Bank*, 216 AD2d 231 [1<sup>st</sup> Dept 1995]; *Kaiser v Edwards*, 98 AD2d 825 [3<sup>rd</sup> Dept 1983]; *Slack v Crossetta*, 75 AD2d 809 [2<sup>nd</sup> Dept 1980].

It must be noted that if a plaintiff overcomes the motion with regard to one injury, the court is not permitted to dismiss the plaintiff's claims with regard to other injuries. "Since the Supreme Court properly determined that there were triable issues of fact as to whether each of the plaintiffs sustained a serious injury to the cervical and lumbar regions of his or her spine, the plaintiffs are entitled to seek recovery for all injuries allegedly incurred as a result of the accident." *Sin v Singh*, 74 AD3d 1320 [2<sup>nd</sup> Dept 2010].

#### Conclusion

The motion to dismiss plaintiffs' complaint for failure to meet the serious injury threshold in Insurance Law § 5102(d) is denied in its entirety as to plaintiff Samantha Canora, and is denied as regards the other two plaintiffs except that their claims that they sustained "a medically determined injury or impairment which prevented her from performing substantially all of the material acts which constituted her customary daily activities for not less than 90 days during the 180 days immediately following the accident," are dismissed, for the reasons set forth herein.

The foregoing constitutes the decision and order of the court.

Dated: Brooklyn, New York  
January 4, 2015



Hon. Debra Silber, J.S.C.

Hon. Debra Silber  
Justice Supreme Court