

Vera v O'Connor

2018 NY Slip Op 34307(U)

June 13, 2018

Supreme Court, Nassau County

Docket Number: Index No. 605876/16

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

<hr/>		TRIAL/IAS PART 32
JENNIFER VERA and CESAR VERA,		NASSAU COUNTY
	Plaintiffs,	Index No.: 605876/16
		Motion Seq. No.: 01
	- against -	Motion Date: 01/11/18
		XXX
EAMON O'CONNOR,		
	Defendant.	

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation and Exhibits	1
Affirmation in Opposition and Exhibits	2
Reply Affirmation	3

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

Defendant moves, pursuant to CPLR § 3212 and Article 51 of the Insurance Law of the State of New York, for an order granting summary judgment dismissing plaintiffs' Verified Complaint on the ground that plaintiff Jennifer Vera did not suffer a "serious injury" in the subject accident as defined by New York State Insurance Law § 5102(d). Plaintiffs oppose the motion.

The above entitled action stems from personal injuries allegedly sustained by plaintiff Jennifer Vera as a result of an automobile accident that occurred on September 13, 2015, at approximately 6:30 p.m., on Nassau Boulevard, at or near its intersection with 8th Street, Garden

City South, County of Nassau, State of New York. The subject accident involved two (2) vehicles - a 2015 Toyota Sienna, owned and operated by plaintiff Jennifer Vera, and a 2005 Honda, owned and operated by defendant. *See* Defendant's Affirmation in Support Exhibit C.

Plaintiffs commenced the action with the filing of a Summons and Verified Complaint on or about August 2, 2016. *See* Defendant's Affirmation in Support Exhibit C. Issue was joined on or about September 6, 2016. *See* Defendant's Affirmation in Support Exhibit D.

As a result of the accident, plaintiff Jennifer Vera claims that she sustained the following injuries and/or aggravation of pre-existing conditions:

- puncture wound to right breast;
- hematoma within right breast;
- cellulitis in right breast;
- lump in right breast;
- fever;
- numbness in arms;
- numbness in legs;
- loss of strength in arms and legs;
- necessity to take antibiotics;
- acute and chronic lumbo sacral and cervical sprain and strain;
- herniated discs;
- severe cervical and lumbar trauma with soft tissue injury;
- disc bulging;
- acute intermittent radiculopathy;

lower extremity multiple nerve root abnormalities;

osteoarthritis;

severe low back pain;

low back syndrome;

necessity to undergo future operative procedures on the spine;

restriction of neck and back flexation;

necessity to undergo numerous medical testing procedures;

necessity to undergo a prolonged course of physical therapy;

the permanent inability of the plaintiff to work at her normal employment without pain;

inability to participate in all activities and functions that were available to plaintiff prior to the date of the accident without pain;

loss of strength, range of motion, muscle wasting and numbness in the lower extremities;

loss of sensation in the lower extremities;

severe emotional distress and anxiety;

depression;

constant pain requiring pain medication;

necessity for intermittent bed rest;

the plaintiff will experience intermittent episodes of exacerbation to the area of her neck and back;

tenderness over the sacroiliac area;

spasms in the neck and lumbar region;

general weakness;

loss of strength and stamina;

inability to sit, stand for any length of time;

inability to ambulate free of pain;

inability or diminished ability to participate in athletic, recreational and/or social activities without pain;

difficultly sleeping;

loss of confidence and self esteem;

inability to perform household and family duties to the extent previously accustomed without pain;

post traumatic sciatica. *See* Defendant's Affirmation in Support Exhibit E ¶ 5.

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, 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, 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. Eycler*, 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 (1st 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).

Plaintiff Jennifer Vera claims that, as a consequence of the above described automobile accident with defendant, 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* Defendant'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, supra; Licari v. Elliot, supra.* 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 defendant's motion. In support of his motion, defendant submits the pleadings, plaintiffs' Verified Bill of Particulars, plaintiffs' Supplemental Verified Bill of Particulars, plaintiff Jennifer Vera's Emergency Room records from Winthrop University Hospital, the transcript of plaintiff Jennifer Vera's Examination Before Trial ("EBT") testimony, the reports of plaintiff Jennifer Vera's primary care physician, Gina Bolnet-Quettant, M.D., the report of plaintiff Jennifer Vera's gynecologist, Marni Sanders, M.D., the report of plaintiff Jennifer Vera's right breast ultrasound and the affirmed report of David L. Kaufman, M.D., who performed an independent breast examination of plaintiff on August 15, 2017.

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. Eyler, supra*. 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).

Counsel for defendant submits, in pertinent part, that, "[p]laintiff's Emergency Room records from Winthrop University Hospital show that the plaintiff made no complaints regarding her right breast; no hematoma, puncture wound or other signs of injury to her breast were noted; no limitations were noted in her neck or back; she was diagnosed with nothing more than

musculoskeletal pain and a strain/sprain of her back and no injury to her neck; and the attending physician concluded that the plaintiff did not sustain any serious injury in the Accident. Specifically, following the Accident, plaintiff went to the Emergency Room of Winthrop Hospital complaining (*sic*) neck and back pain with no complaints of pain or bruising of her breast.... The attending physician, Dr. Barry Rosenthal, examined the plaintiff and reported that she was no (*sic*) bleeding; no bruising or lacerations were noted upon inspection of her skin; no bruising or visible puncture wound (*sic*) were noted in breasts, her back was within normal limits; she had not tenderness or limitations in her neck; there was no edema, swelling or limitations in her upper extremities (shoulders, elbows, wrists) or lower extremities (hips, knees, ankles); and her neurological responses were normal with no motor or sensory deficits or radicular complaints;... Plaintiff was sent for x-rays of her cervical spine, which showed ‘no acute traumatic changes.... Based on the negative x-ray results and his clinical findings, Dr. Rosenthal diagnosed the plaintiff with ‘musculoskeletal pain’ and ‘sprain/strain back’ with no injury of any kind to her right breast or cervical spine.... Dr. Rosenthal further concluded upon discharging the plaintiff that ‘Your exam today does not show any sign of serious injury from your car accident.’... As for any disability, Dr. Rosenthal prepared a ‘School Release Form’ stating that Jennifer Vera was seen at Winthrop Hospital on 09/13/15, and that ‘she may return to school on 09/16/2015’ with no restrictions specified.” *See* Defendant’s Affirmation in Support Exhibit G.

Counsel for defendant further asserts that, “[p]laintiff’s sworn deposition testimony shows that the only injury for which she sought treatment was an alleged injury to her right breast; that the only doctors she saw for her right breast injury was her primary care physician, who diagnosed her with cellulitis and prescribed antibiotics, and a radiologist who diagnosed her with bruising of her right breast based on ultrasound testing; and that bruising and infection

resolved in a couple of weeks with no residual scarring. Specifically, plaintiff testified that she suffered a puncture wound to her right breast in the Accident.... It should be noted that plaintiff's Emergency Room records reflect that plaintiff made no complaints of any wound or laceration to her right breast; nor did her physical examination reveal any signs of bruising or injury to her right breast.... Plaintiff testified that a few days after her Emergency Room visit, she went to her primary care physician, Dr. Boinet (*sic*), complaining about her right breast being swollen, red and painful.... Plaintiff testified that Dr. Boinet (*sic*) told her that she had cellulitis, an infection for which she was prescribed antibiotics.... Plaintiff testified that Dr. Boinet (*sic*) also sent her for an ultrasound of her right breast.... Plaintiff testified that the radiologist told her that the breast ultrasound showed a hematoma, which she stated was 'basically a bruise'; and that Dr. Boinet (*sic*) confirmed these results and told her to return in six months for a follow-up visit." See Defendant's Affirmation in Support Exhibit H.

Counsel for defendant also submits that, "on September 15, 2015, two days after the Accident, plaintiff went to see her primary care physician, Dr. Gina Boinet (*sic*), with complaints of a painful mass on her right breast, and no other injury to any other body part.... Dr. Boinet (*sic*) performed a complete physical examination of the plaintiff, and reported no positive findings to any body part other than her breast, which was tender and inflamed.... Dr. Boinet (*sic*) diagnosed the plaintiff with cellulitis in the right breast, an infection for which she prescribed Bactrim and warm compresses.... Dr. Boinet (*sic*) did not diagnose plaintiff with any injury to any other body part, and did not prescribe treatment apart from the antibiotics and warm compresses for her right breast.... Plaintiff's deposition testimony reflects that she did not return for the follow-up sonogram or follow-up visit to Dr. Boinet (*sic*) because she was busy with school.... Plaintiff further admitted that the puncture wound and bruising resolved in a 'couple of weeks'; that she had no scarring of her right breast; the antibiotics resolved the cellulitis, and she had no further

treatment for her right breast injury.... Plaintiff's medical records confirm that the bruising and infection of her right breast did resolve, and that her breast examination was entirely normal at her annual check-up. Specifically, on September 21, 2016, plaintiff went to see her gynecologist, Dr. Marni Sanders, for her annual gynecological visit. At that visit, Dr. Sanders performed a breast examination and reported that the right breast was normal.... Plaintiff's medical records from her primary care physician demonstrate that she has no residuals regarding her right breast from the Accident. Specifically, plaintiff went to see her primary care physician, Dr. Gina Boinet (*sic*), on March 17, 2017, for her annual physical. On that occasion, Dr. Boinet (*sic*) reported that plaintiff had no deformities or palpable masses in her right breast, and no bruising was noted.... Plaintiff's records from her follow-up ultrasound of her right breast confirm that the small hematoma found on the 09/17/15 sonogram and associated bruising had resolved. Specifically, Dr. Diedre Coll performed an ultrasound of plaintiff's right breast on April 20, 2017 and compared the films to the ultrasound performed on September 17, 2015. Dr. Coll concluded that the hematoma and bruising of the right breast found on the September 17, 2015 ultrasound had resolved, and that the April 20, 2017 ultrasound of plaintiff's right breast was entirely normal.... [B]y her own admission, plaintiff did not seek or receive treatment for any alleged injuries to her cervical spine or lumbar spine from the Accident; never made any complaints of injury to these body parts; and was never diagnosed with a herniated disc or osteoarthritis, two injuries claimed in plaintiff's bill of particulars." *See* Defendant's Affirmation in Support Exhibits H-L.

David I. Kaufman, M.D. ("Dr. Kaufman"), a board certified breast surgeon, reviewed plaintiff's medical records and conducted a physical examination of her on August 15, 2017. *See* Defendant's Affirmation in Support Exhibit M. Dr. Kaufman states that, "[o]n physical examination in the presence of a chaperone, the left breast was normal. The right breast in question was without mass, no sign of infection. There were no regionally enlarged lymph nodes.

The area of injury which she pointed to was normal. The remainder of the complete clinical breast examination was normal.” *See id.* Dr. Kaufman’s impression and diagnosis was “1. Blunt trauma right breast by history. 2. Penetrating trauma right breast/healed. 3. Contusion right breast/resolved. 4. Hematoma right breast/resolved. 5. Mastalgia right breast.” *Id.*

Based upon this evidence, the Court finds that defendant has established a *prima facie* case that plaintiff Jennifer Vera did not sustain serious injuries within the meaning of New York State Insurance Law § 5102(d).

The burden now shifts to plaintiffs to come forward with evidence to overcome defendant’s submissions by demonstrating the existence of a triable issue of fact that serious injuries were sustained. *See Pommells v. Perez, supra; Grossman v. Wright, 268 A.D.2d 79, 707 N.Y.S.2d 233 (2d Dept. 2000).*

To support their burden, plaintiffs submit the pleadings, plaintiffs’ Verified Bill of Particulars, plaintiffs’ Supplemental Verified Bill of Particulars, plaintiff Jennifer Vera’s Emergency Room records from Winthrop University Hospital, the transcript of plaintiff Jennifer Vera’s EBT testimony, the transcript of plaintiff Cesar Vera’s EBT testimony, the certified reports of plaintiff Jennifer Vera’s primary care physician, Gina Bolnet-Quettant, M.D., and the affirmed report of David L. Kaufman, M.D., who performed the independent breast examination of plaintiff Jennifer Vera on August 15, 2017.

In opposition to the motion, counsel for plaintiffs submits, in pertinent part, that, “[a]s a result of her injuries, Ms. VERA has had difficulty lifting her daughter and groceries, and she cannot apply pressure to the area without it feeling tender and painful.... Her relationship with her husband, Plaintiff, CESAR VERA, has also been affected since their intimate relations have been restricted due to the pain Ms. VERA experiences when pressure is applied to her right breast.... In fact, after the accident, there were period of months where Plaintiff JENNIFER VERA and

CESAR VERA were not intimate due to the plain (*sic*) Ms. VERA was experiencing.... Defendant's own independent medical examination on August 15, 2017 confirms Ms. VERA's injuries. Dr. Kaufman reported that Ms. VERA suffers from mastalgia of the right breast as a result fo the automobile accident of September 13, 2015.... Ms. VERA's medical treatment as a result of the injuries she sustained in this accident has been protracted and consistent. Therefore, as a result of the motor vehicle accident of September 13, 2015, the Plaintiff, Ms. VERA, sustained serious and permanent injuries to her right breast and has met the requirements under the law." *See* Plaintiffs' Affirmation in Opposition Exhibits 6-9.

As stated above, medical evidence of an injury is required to establish a "serious injury." *See Toure v. Avis Rent-a-Car Systems, Inc., supra*. Generally, the medical proof required should be contemporaneous with the accident, showing qualitative evidence of what restrictions, if any, with which plaintiff was afflicted. *See Perl v. Meher*, 18 N.Y.3d 208, 936 N.Y.S.2d 655 (2011); *Lewars v. Transit Facility Mgt. Corp.*, 84 A.D.3d 1176, 923 N.Y.S.2d 701 (2d Dept. 2011).

The Court of Appeals, in *Perl v. Meher, supra*, reconciled the need to require both quantitative proof of a "serious injury" and "contemporaneous" evidence of a "serious injury." *See id.* The *Perl* decision did not eliminate the need to set forth any objective findings contemporaneous with the subject accident, only their need to be expressed quantitatively, as such findings are critical to the issue of causation.

In addition to providing medical proof contemporaneous with the subject accident, the plaintiff must also provide competent medical evidence containing verified objective findings based upon a recent examination wherein the expert must provide an opinion as to the significance of the injury. *See Kauderer v. Penta*, 261 A.D.2d 365, 689 N.Y.S.2d 190 (2d Dept. 1999); *Constantinou v. Surinder*, 8 A.D.3d 323, 777 N.Y.S.2d 708 (2d Dept. 2004); *Brown v. Tairi Hacking Corp.*, 23 A.D.3d 325, 804 N.Y.S.2d 756 (2d Dept. 2005); *Elgendy v. Nieradko*,

307 A.D.2d 251, 762 N.Y.S.2d 275 (2d Dept. 2003); *Castaldo v. Migliore*, 291 A.D.2d 526, 737 N.Y.S.2d 862 (2d Dept. 2002).

Plaintiffs have offered no medical proof of any treatment that plaintiff Jennifer Vera received beyond the first four (4) days of the subject accident. Therefore, there has been no evidence of any ongoing treatment by plaintiff Jennifer Vera for any injuries that she allegedly sustained. As indicated, plaintiffs failed to submit any information with respect to any recent medical examinations of plaintiff Jennifer Vera. Instead, plaintiffs relied on defendant's expert report which clearly did not find any serious injury to have been sustained by plaintiff Jennifer Vera.

Plaintiff Jennifer Vera's subjective complaints of pain, without more, are insufficient to satisfy the burden of establishing a serious injury. *See Marshall v. Albano*, 182 A.D.2d 614, 582 N.Y.S.2d 220 (2d Dept. 1992)

Additionally, plaintiffs have not sustained their burden under the 90/180 day category (Category 9) which requires a plaintiff to submit objective evidence of a "medically determined injury or enforcement of a non-permanent nature which prevents the injured person from performing substantially all of the natural acts which constitute such person's usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury." *See Insurance Law* § 5102(d).

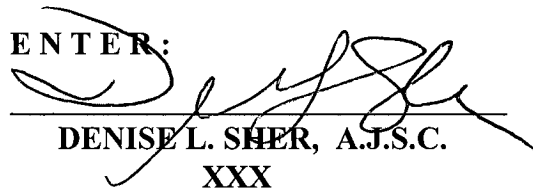
"When construing the statutory definition of a 90/180 day claim, the words 'substantially all' should be construed to mean that the person has been prevented from performing his usual activities to a great extent, rather than some slight curtailment." *See Thompson v. Abbasi*, 15 A.D.3d 95, 788 N.Y.S.2d 48 (1st Dept. 2005); *Gaddy v. Eycler, supra*.

Plaintiff Jennifer Vera's EBT testimony does not establish that she was unable to perform substantially all of the material acts that constitute her customary and daily activities for no less

than ninety (90) out of the first one hundred eighty (180) days following the subject accident.

Accordingly, based upon the above, defendant's motion, pursuant to CPLR § 3212 and Article 51 of the Insurance Law of the State of New York, for an order granting summary judgment dismissing plaintiffs' Verified Complaint on the ground that plaintiff Jennifer Vera did not suffer a "serious injury" in the subject accident as defined by New York State Insurance Law § 5102(d), is hereby **GRANTED**.

This constitutes the Decision and Order of this Court.

ENTER:

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

Dated: Mineola, New York
June 13, 2018

ENTERED

JUN 18 2018

NASSAU COUNTY
COUNTY CLERK'S OFFICE