

**Ortiz v Latta**

2020 NY Slip Op 35047(U)

November 27, 2020

Supreme Court, Orange County

Docket Number: Index No. EF000467-2019

Judge: Sandra B. Sciortino

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ORANGE

-----X  
**LYNDASUE ORTIZ,**

Plaintiff,

**DECISION AND ORDER**

**INDEX NO.: EF000467-2019**

**Motion Date: 10/30/2020**

Sequence Nos. 1 & 2

-against-

**ALLAN J. LATTA,**

Defendants.

-----X  
**SCIORTINO, J.**

The following papers numbered 1 to 25 were considered in connection with the application of plaintiff (Sequence #1) for summary judgment on the issue of liability only; and the cross-motion of defendant (Sequence #2) for summary judgment on the ground the plaintiff failed to establish a serious personal injury in accordance with the threshold predicates of Insurance Law §5102:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion (Seq. #1)/Affirmation (Dupee)/ Exhibits A - D	1 - 6
Notice of Cross-Motion (Seq. #2)/Affirmation (Santos)/ Exhibits 1 - 2	7 - 10
Affirmation in Opposition to Cross-Motion and in Reply (Dupee)/ Exhibits E - P	11 - 25

**Background and Procedural History**

This personal injury action arises out of a motor vehicle accident that took place on March 19, 2016 on Route 211 East, Town of Wallkill. Plaintiff commenced this action by filing a Summons and Complaint (Exhibit A) on or about June 20, 2016. Defendant served a Verified Answer with Affirmative Defenses on or about January 16, 2019. (Exhibit B) On or about May 30,

2019, plaintiff served a Verified Bill of Particulars. (Exhibit B to Cross-Motion) The Bill of Particulars alleged several injuries, including: broad based central herniated disc protrusion at L5-S1 which indents the ventral thecal sac; extruded disc at L5-S1; cervical radiculopathy; left sided foraminal impingement at C4-5; facet arthropathy at L5-S1 resultant bilateral neural foramen stenosis; L5-S1 disc herniation with findings worse since prior MRI; right paracentral disc extrusion with mild subligamentous cranial migration; moderate compression and posterior displacement of the right S1 nerve root sleeve; lumbar radiculopathy; and aggravation and exacerbation of a pre-existing asymptomatic degenerative disc disease in the lumbar spine.

The Examination Before Trial of plaintiff was held on November 7, 2019. (Exhibit C to moving papers) The Examination Before Trial of defendant was held on November 13, 2019. (Exhibit D to moving papers) Note of Issue has not been filed.

#### Plaintiff's Deposition Testimony

On March 19, 2016, plaintiff's vehicle was traveling in the left-hand lane on Route 211 heading east, traveling at approximately forty to forty-five miles per hour. Plaintiff's vehicle approached another vehicle from the rear, which had come to a stop to make a U-turn in the highway median separating the different directions of travel. Plaintiff testified that there was a sign indicating that no U-Turns were permitted. Plaintiff was approximately three car lengths behind the vehicle at the time and came to a stop without making contact with the vehicle. She did not come to an abrupt stop. There were vehicles traveling in all lanes at the time. Plaintiff was at a full stop for twenty to thirty seconds before the vehicle made the U-Turn and she was able to proceed. After the vehicle had made the turn, plaintiff was struck in the rear by a second vehicle, operated by defendant, which came into contact with the rear middle bumper of her vehicle. Plaintiff observed defendant's vehicle

approaching behind her before feeling the impact. Plaintiff was wearing a seatbelt and shoulder harness. Her head hit the headrest. Her airbags did not deploy. The parties got out of their vehicles, and defendant apologized for the incident. He noted that he had observed the third vehicle make an illegal U-Turn.

After the police arrived, the parties traveled by ambulance to Orange Regional Medical Center. Plaintiff's back and neck were x-rayed; she was given pain medication and was discharged the same day. She was referred to Dr. Yeon, an orthopedic surgeon, to follow up on her neck and lower back.

At some point after being discharged, plaintiff went to Urgent Care at Middletown Medical complaining of back pain. Plaintiff could not recall how long after discharge she sought treatment at Urgent Care. No diagnosis was made, but it was recommended that she follow up with Dr. Yeon.

Approximately two months later, the plaintiff sought treatment with Dr. Yeon. She received an MRI in July of 2016, at which point Dr. Yeon determined surgery was not necessary. Plaintiff was referred to Dr. Thrope, a pain management specialist, for treatment.

On May 18, 2016, plaintiff returned to Orange Regional Medical Center complaining of lower back pain. Plaintiff testified that she attended physical therapy without improvement, although she did not indicate for how long. She received the first of two spinal epidural injections during the summer of 2017; the second was in September of 2018. Plaintiff testified that she received approximately one additional MRI of her back and one of her neck.

Plaintiff sought a second opinion regarding possible surgery, although she was unable to provide the date, the name of the physician, or the physician's recommendation. Plaintiff testified that she had been in two prior accidents within the previous ten years, although she denied any prior

injuries to the parts of her body claimed to have been injured in the subject accident. After the accident, plaintiff took seven to ten days off of work. Approximately two months later, she voluntarily left her job. She testified that she was unable to perform the physical requirements of her job at Gander Mountain.

At the time of her deposition, plaintiff continued to complain of daily back pain radiating to her left leg and neck and restricted range of motion in her back. She testified that she can no longer perform certain physical activity, including going to the gym, and performing housework such as carrying laundry, doing dishes, or vacuuming.

#### Defendant's Deposition Testimony

On March 19, 2016, defendant was traveling with his daughter in the left lane of Route 211 East toward his home. Defendant described the traffic conditions as "busy." Defendant had been following plaintiff's vehicle for approximately five minutes. Defendant testified that he observed a third vehicle traveling in front of plaintiff's vehicle. Defendant testified that the lead vehicle stopped to make an illegal U-turn, causing plaintiff to stop short. Contrary to plaintiff's testimony, defendant testified plaintiff's vehicle initially came to a complete stop, but only for a period of "not even a second."

After the plaintiff's initial stop, defendant came to a stop behind her vehicle. The third vehicle having completed the illegal U-turn, plaintiff proceeded, then stopped again. Defendant estimated there was approximately five seconds between plaintiff's second stop and contact being made. Defendant also testified that he was "trying to avoid her, so I was trying to go into the intersection to avoid her and that's when I bumped her because she stopped short. Because I thought she was still going with the traffic." (Defendant's Deposition p. 12) The front right of defendant's bumper came

into contact with the back left of plaintiff's vehicle. Defendant described the impact between the vehicles as "very light." Defendant was unable to testify as to the length of time between when plaintiff started moving after the first stop and the time she brought her vehicle to a stop the second time. However, the defendant testified that "it happened very quickly."

### **Plaintiff's Motion for Partial Summary Judgment (Sequence #1)**

By Notice of Motion originally filed on March 19, 2020, and adjourned multiple times at the request of the parties, plaintiff moves for summary judgment on the issue of liability. Plaintiff asserts that she is entitled to summary judgment on liability, based on the rear-end collision, which establishes a *prima facie* case of negligence on the part of defendant.

Plaintiff argues that, based on the defendant's deposition testimony, plaintiff was stopped behind a vehicle making an illegal U-turn and was stopped for at least five seconds before being struck from behind by defendant's vehicle. Plaintiff argues the defendant's purported non-negligent explanation, that plaintiff came to a second sudden stop, is insufficient to raise a triable issue of fact. The Vehicle & Traffic Law requires a driver to maintain a safe distance between his vehicle and the vehicle in front of him. McKinney's Veh. & Traffic Law §1129.

### **Opposition**

In opposition to plaintiff's motion, defendant argues that there is a triable issue of fact as to whether plaintiff's actions caused or contributed to the motor vehicle collision. Defendant testified that plaintiff's vehicle stopped suddenly a second time after the initial stop. Therefore, defendant argues, a valid non-negligent explanation for the rear-end collision sufficient to deny a motion for summary judgment has been put forth.

### Plaintiff's Reply

In reply, plaintiff essentially argues that defendant has failed to raise a triable issue of fact precluding summary judgment on the issue of liability for violating Vehicle and Traffic Law Section 1129(a).

### Discussion (Sequence #1)

For the reasons which follow, plaintiff's motion is granted.

Summary judgment is a drastic remedy and is appropriate only when there is a clear demonstration of the absence of any triable issue of fact. (*Piccirillo v. Piccirillo*, 156 AD2d 748 [2d Dept 1989], citing *Andre v. Pomeroy*, 35 NY2d 361 [1974]) The function of the Court on such a motion is issue finding, and not issue determination. (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]) The Court is not to engage in the weighing of evidence; rather, the Court's function is to determine whether "by no rational process could the trier of facts find for the non-moving party." (*Jastrzebski v. N. Shore Sch. Dist.*, 232 AD2d 677, 678 [2d Dept 1996]) The Court is obliged to draw all reasonable inferences in favor of the non-moving party. (*Rizzo v. Lincoln Diner Corp.*, 215 AD2d 546 [2d Dept 1995])

A rear-end collision with a stopped or stopping vehicle establishes a *prima facie* case of negligence on the part of the driver of the moving vehicle, in the absence of any negligence on the part of the plaintiff. (*Velazquez v. Denton Limo, Inc.*, 7 AD3d 787 [2d Dept 2004]; *Trombetta v. Cathone*, 59 AD3d 526 [2d Dept 2009]) A driver of an automobile is charged with the duty to maintain a reasonably safe rate of speed and control over his vehicle and to exercise reasonable care to avoid a collision. A driver has a duty to see what should be seen. (*Filippazzo v. Santiago*, 277 AD2d 419 [2d Dept 2000]) Vehicle and Traffic Law Section 1129(a) provides, "The driver of

a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the conditions of the highway.

In the matter at bar, plaintiff established *prima facie* entitlement to summary judgment. The parties' deposition testimony establishes that plaintiff's vehicle was struck from behind by defendant's vehicle. Such testimony is sufficient to establish plaintiff's claim. Such a showing requires defendant to come forward with a non-negligent explanation for the accident. (*Velazquez, citing Shamah v. Richmond County Ambulance Serv.*, 279 AD2d 564 [2d Dept 2001]) If the operator of the trailing vehicle cannot come forward with evidence to rebut the inference of negligence, the operator of the lead vehicle is entitled to summary judgment on liability. (*Cortes v. Whelan*, 83 AD3d 763 [2d Dept 2011])

Here, defendant's argument that there was a second sudden stop by plaintiff's vehicle is insufficient to rebut the *prima facie* showing. (*Trombetta*, 59 AD3d at 527; *Lampkin v. Chan*, 68 AD3d 727 [2d Dept 2009]) Defendant testified that he had been traveling behind plaintiff for approximately five minutes. Plaintiff testified that she was approximately three car lengths behind a vehicle, which came to a stop to make an illegal U-turn. Plaintiff testified that she came to a single stop without making contact with the turning vehicle. After the lead vehicle had made the U-turn, plaintiff was struck in the rear by defendant's vehicle. Defendant testified that his vehicle came to a stop behind plaintiff's vehicle initially, then plaintiff's vehicle subsequently came to a second stop. Although there is a dispute over how long plaintiff's vehicle was stopped, defendant testified that plaintiff's vehicle was initially stopped for approximately five seconds. Defendant testified that he was "trying to avoid her, so I was trying to go into the intersection to avoid her

and that's when I bumped her because she stopped short. Because I thought she was still going with the traffic."

Defendant's opposition has failed to rebut the inference of negligence by providing a non-negligent explanation for the collision. (*Cortes*, 83 AD3d at 763)

### **Defendant's Cross-Motion for Summary Judgment (Sequence #2)**

By Notice of Cross-Motion filed on June 9, 2020, and adjourned multiple times at the request of the parties, defendant moves for summary judgment on the ground that the plaintiff failed to establish a serious personal injury in accordance with the threshold predicates of Insurance Law §5102.

In support of the cross-motion, defendant asserts that, while plaintiff claims to have suffered injuries allegedly causing radiating pain down her left extremity, this claim, without more, do not constitute "serious injuries" under the statute.

Plaintiff testified that she returned to work two days after the accident, used only seven to ten days of paid time off as a result of her injuries, then left voluntarily. However, no medical provider indicated to plaintiff that she should cease employment with Gander Mountain, or that she was not able to fulfill the obligations of her position. Plaintiff was unemployed for one year before obtaining a job at Quick Chek.

With respect to treatment, plaintiff has received two epidural shots; the second was approximately two and a half years after the incident. Plaintiff has not undergone surgery to address her alleged injuries nor has either of her medical providers opined that surgery was necessary. No medical providers have discussed with plaintiff whether her alleged injuries are permanent.

In support of his motion, defendant offers the independent medical examination report of certified orthopedic surgeon Robert Hendler, M.D., Dr. Hendler's report, dated February 5, 2020, is affirmed in compliance with Civil Practice Law & Rules §2106. Dr. Hendler states that he reviewed the Bill of Particulars; Response to Discovery Demands; the police accident report; Orange Regional Medical Center records including x-ray of lumbar spine, x-ray of cervical spine, two x-rays of right hand; Crystal Run health Care records of Dr. Yeon, including MRI of cervical spine, MRI of lumbar spine, left transforaminal epidural steroid injection under fluroscopic guidance, MRI of lumbar spine, MRI of lumbar spine, lumbar radiculopathy, caudal epidural steroid injection under fluroscopic guidance; Middletown Medical records; Unknown Facility records, check x-ray, ECG; and Crystal Run Health Care physical therapy records.

Dr. Hendler examined plaintiff on February 4, 2020. On that day, with respect to her cervical spine, plaintiff complained of intermittent aches and pain, with some radiation of pain into her left arm, down to the level of the elbow. She stated she experiences some numbness and paresthesias. With respect to her lower back, she complained of a constant ache and pain, with radiation of the pain to her left leg and down to the foot, with numbness and paresthesias.

Dr. Hendler conducted an examination. Neurologically, plaintiff was entirely within normal limits and non-focal. Motor systems were 5+/5+ in upper and lower extremities. Hand grip was within normal limits. There were no sensory deficits. Reflexes were equal and normal. Cerebellar functions were intact. Gait was normal.

Ranges of motion, measured by goniometer, were within normal limits<sup>1</sup> for cervical spine

---

<sup>1</sup>Using the standards of the American Medical Association Guidelines for the Evaluation of Permanent Impairment

flexion (0-60/0-60), extension (0-60/0-60), lateral rotation to left (0-80/0-80) and right (0-80/0-80). All joints of the upper extremities had full range of motion. She complained of tightness to the neck on lateral rotation to the left, and had mild subjective tenderness to palpation over the posterior paracervical, upper trapezius and interscapular regions. Dr. Hendler found no objective correlation between the plaintiff's subjective symptoms and the underlying accident.

Lumbar spine flexion was 0-80/0-25, extension was 0-25/0-25, with no complains of pain. These normal values represent full range of motion of the lumbar spine. No palpable spasm of the lumbar paravertebral musculature was found. No pain in either sciatic notch was evidenced on palpation.

X-rays were taken in Dr. Hendler's office on February 4, 2020. With respect to the cervical spine, findings showed the overall alignment of the spine is essentially within normal limits. There is normal cervical lordosis. There is no significant degenerative change, and no evidence of subluxations, fractures or dislocations. The disc spaces were well maintained.

With respect to the lumbosacral spine, findings showed the overall alignment of the spine to be within normal limits. No fractures or dislocations noted; normal lumbar lordosis was noted. No evidence of spondylolisthesis or degenerative change. The disc spaces are well maintained.

Dr. Hendler's examination of plaintiff and review of her medical records led him to the finding that, at the time of the accident, plaintiff sustained a cervical and lumbosacral sprain which have resolved. Present physical examinations of the cervical spine and lumbosacral spine are completely normal. There are no positive objective neurologic tests that would have any clinical correlation with a herniated disc in the neck or back, or a cervical or lumbar radiculopathy, including absent or asymmetric reflex, decreased sensation in a dermatomal type

pattern or other positive objective neurologic tests. There was no objective evidence of any significant structural, intracranial, myelopathic, radiculopathic or neuropathic dysfunction. He concluded that, with a reasonable degree of medical certainty, there is no present disability, and plaintiff will have no permanent findings in her neck or lower back that would be causally related to the accident of record. No further causally related orthopedic treatment, including surgery, is indicated.

### Argument

Defendants argue that plaintiffs have failed to establish a “serious injury” as that term is defined in Insurance Law §5102(d). That section provides, in relevant part, that:

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

Plaintiffs’ Bill of Particulars alleges injuries that resulted in (1) a significant limitation to body organ, member, function or system; (2) a permanent consequential limitation to a body organ, member or system; and (3) a medically-determined injury or impairment of a non-permanent nature that prevented plaintiff from performing substantially all of the material acts which constitute her usual and customary daily activities for not less than 90 of the 180 days immediately following the accident.

Defendant argues that plaintiff cannot proceed under the “permanent consequential

limitation” or “significant limitation” categories because the medical records show no permanent or serious injuries. With respect to the cervical spine, Hendler’s report is consistent with plaintiff’s deposition testimony in which she indicates she did not have any restrictions in range of motion of her neck. With respect to the lumbar spine, Dr. Hendler states that plaintiff’s injuries were not causally related to the alleged accident. Dr. Hendler opined that the moderate degenerative disc disease noted in plaintiff’s MRI of her lumbar spine from July 19, 2016, was a pre-existing condition. While plaintiff may have sustained a cervical and lumbrosacral sprain at the time of the accident, these sprains have since resolved and no further treatment is indicated.

Defendants further argue plaintiff cannot proceed under the “medically determined injury or impairment of a non-permanent nature” category that 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 (90) days during the one hundred and eighty (180) days immediately following the accident. Plaintiff’s own testimony regarding her ability to care for her two children and perform daily activities, as well as her return to work immediately after the incident, demonstrate the absence of a triable issue of fact as to this category.

Based on Dr. Hendler’s affirmed report, medical records and the plaintiff’s testimony, defendant asserts that plaintiffs do not have permanent injuries, all injuries have resolved, and the pain plaintiff alleges to continue to experience cannot constitute serious injuries.

#### **Plaintiff’s Opposition to Cross-Motion**

In opposition to defendant’s cross-motion, Plaintiffs assert that plaintiff sustained multiple injuries, including broad based central herniated disc protrusion at L5-S1 which indents the ventral thecal sac; extruded disc at L5-S1; cervical radiculopathy; lumbar radiculopathy; left sided foraminal

impingement at C4-5; facet arthropathy at L5-S1 resultant bilateral neural foramen stenosis; and L5-S1 disc herniations. These have resulted in a permanent consequential limitation of use, significant limitation of use, and a 90/180 injury.

Plaintiff offers the consulting physician narrative report of Board Certified Orthopedic Surgeon, Gabriel Dassa, D.O. Dr. Dassa's report, dated October 13, 2020, is affirmed in compliance with Civil Practice Law & Rules §2106. His report states that he reviewed the Bill of Particulars; MRI of the cervical spine dated July 10, 2016; MRI of the lumbar spine dated July 19, 2016, procedure note lumbar transforaminal steroid injections; MRI of the lumbar spine dated May 31, 2017; MRI of the lumbar spine dated August 10, 2018; cervical epidural steroid injection dated September 21, 2018; medical records from Crystal Run healthcare; medical records from orange Regional Medical Center; medical records from Crystal Run Healthcare as to Dr. Yeon; medical records from Access Physical Therapy and Wellness; medical records from Crystal Run Healthcare as to Dr. Thorp and Dr. Booker; medical records from Dr. Zheng.

Dr. Dassa conducted an examination of the plaintiff on October 13, 2020. On that day plaintiff complained of constant pain in her neck and lower back ranging from 4-5/10 to 8-9/10, with associated with numbness and tingling.

Neurologically, plaintiff was intact. With respect to the cervical spine, ranges of motion, measured by goniometer, showed cervical spine flexion (0-30/0-60), extension (0-20/0-75), lateral bending (0-25)/(0-45), rotation to left (0-20/0-80) and right (0-20/0-80). Palpation examination showed a myospasm from C1 through C7. With respect to the lumbosacral spine, palpation showed a severe muscle spasm from L1 through L5. Lumbar spine flexion was (0-45/0-90), extension (0-25/0-30), lateral bending (0-20)/(0-40), rotation to left (0-10/0-30) and right (0-10/0-30).

Dr. Dassa's examination of plaintiff and review of her medical records led him to the finding that plaintiff has suffered musculoligamentous injury to cervical and lumbar spine; traumatic disc displacement to the cervical and lumbosacral spine, and cervical and lumbar radiculopathy.

Physical examinations of the cervical spine and lumbosacral spine revealed restricted range of motion of the spine and back. The examination revealed findings of persistent cervical and lumbar nerve root compression as evidenced by positive straight leg raise test and positive Spurling test, as well as persistent soft tissue dysfunction. Dr. Dassa opined, "given the nature of the patient's injuries with continued subjective pain and abnormal physical findings that the patient's impairments remain to be a significant and have a significant permanent component. The patient needs to be seen by a spine surgeon for lumbar and cervical spine decompression surgery with fusion. The patient's symptoms and clinical findings are consistent with the diagnosis and were directly caused by the accident."

Dr. Dassa's report notes that the patient had a significant condition that precludes her from strenuous employment. Dr. Dassa concludes that, due to the strenuous nature of her previous occupation at Gander Mountain, she was not capable of performing her duties.

With respect to the "permanent consequential limitation" or "significant limitation" categories, plaintiff argues that there is a triable issues of fact as to whether she has suffered a limitation in the range of motion of her neck and back sufficient to constitute a serious injury. Plaintiff argues that the objective medical evidence demonstrates that plaintiff suffered multiple qualifying injuries as a result of the accident, leaving her with substantial limitations in ranges of motion in her neck and back. At the very least, plaintiff asserts, such evidence creates issues of fact precluding summary judgment.

With respect to the 90/180 category, plaintiff testified that she missed seven to ten days of

work during the initial sixty (60) days she returned to work following her accident. She subsequently left her job at Gander Mountain due to the strenuous duties required of her position. Plaintiff argues that in light of Dr. Dassa's opinion as to her physical impairments due to the herniated discs, affecting her ability to perform the physical tasks at her job, and plaintiff's testimony with respect to her inability to perform activities, an issue of fact exists as to whether she has sustained a "serious injury" under the 90/180 category.

Plaintiff has also asserted a claim for economic loss greater than the basic economic loss of \$50,000. As such, plaintiff argues she is not required to prove a "serious injury" for her economic loss claim, as the amount sought exceeds basic economic loss. Plaintiff was working at Gander Mountain making approximately \$62,000 per year. She ultimately took a job with Quick Chek, approximately one year later, for approximately \$25,000 per year. As a result, Ms. Ortiz has suffered a net loss of income of approximately \$35,000 per year. Based on the work expectancy tables contained in the 2018 edition of the new York pattern Jury Instruction, plaintiff has a work expectancy of approximately 21.1 years, for a total future lost earnings of \$739,238.00.

Reading the evidence in the light most favorable to plaintiff, as the Court must do on defendant's motion, there is documented evidence that could entitle a jury to conclude that plaintiff suffered significant serious injuries.

#### **Discussion (Sequence #2)**

For the reasons which follow, defendant's motion for summary judgment is denied in part, and granted in part.

Section 3212(b) of the Civil Practice Law & Rules states, in pertinent part, that a motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action

or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." Section 3212(b) further states that "the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." "Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a material and triable issue of fact." (*Anyanwu v Johnson*, 276 AD2d 572, 714 NYS2d 882 [2d Dept 2000]) Issue finding, not issue determination, is the key to summary judgment. (*Krupp v Aetna Casualty Co.*, 103 AD2d 252 [2d Dept 1984]) In deciding the motion, the court must view the evidence in the light most favorable to the non-moving party. (See, *Kutkiewicz v Horton*, 83 AD3d 904, 920 N.Y.S.2d 715 [2d Dept 2011])

Defendant moves for summary judgment claiming that plaintiff has failed to meet the threshold requirements of Insurance Law §5102 because plaintiff has not provided proof that they sustained a serious injury as a result of the accident. Defendants bear the initial burden of establishing a *prima facie* case that plaintiff did not sustain a serious injury. (*Toure v. Avis Rent-A-Car Sys.*, 98 NY 2d 345 [2002]) Once defendant has met this burden, plaintiff must then submit objective and admissible proof of the nature and degree of the alleged injury in order to meet the threshold of the statutory standard. (*Heege v. Falisi*, 2013 NY Slip Op. 31475[U] [Suffolk Co. 2013]) In light of defendant's showing, the burden shifted to plaintiff to demonstrate, by admissible evidence, that their injuries meet the threshold of Insurance Law §5012(d).

Permanent consequential limitation and significant limitation

It is well-established that a finding of permanent consequential limitation and significant limitation of use categories requires a comparative determination of the degree or qualitative nature

of the injury based on the normal function, purpose and use of the body part and must be supported by objective medical evidence. (*Toure*, 98 NY 2d at 350-351). The Court has examined the range of motion report of Dr. Hendler, which compares his findings, in each instance, to what is normal. (*Walker v. Public Adm'r of Suffolk County*, 60 AD3d 757 [2d Dept 2009]) Dr. Hendler's reports sufficiently establish that the actual ranges of motion fall within the normal range. By reliance on the affirmed report in which Dr. Hendler finds the injuries sustained in the accident to have been resolved, defendant initially met its *prima facie* burden of showing that the plaintiff did not sustain serious injuries with respect to the aforementioned categories within the meaning of Insurance Law §5102(d) as a result of the accident. (See, *Toure*, 98 N.Y.2d 345; *Gaddy v. Eycler*, 79 NY 2d 955 [1992])

The Second Department has made it clear that plaintiff may not rely on unsworn medical evidence to establish a serious injury. (*Grasso v. Angerami*, 79 NY 2d 813 [1991]; *Pagano v. Kingsbury*, 182 AD2d at 270; *Friedman v. U-Haul Truck Rental*, 216 AD2d 266 [2d Dept 1995]) (plaintiff may not rely on an unsworn report, and plaintiff's doctor may not rely on an unsworn MRI report, prepared by another doctor)

In opposition to defendant's application, plaintiff offers the records (but not reports) of Dr. Yeon; Access Physical Therapy and Wellness; Dr. Thorp; Dr. Booker; and Dr. Zheng. Section 4518 of the Civil Practice Law & Rules provides that a medical record is admissible provided that it bears a certification or authentication by the head of the hospital, laboratory, department or bureau of a municipal corporation or of the state, or by an employee designated for that purpose or by a qualified physician. None of the above records are certified. The Court thus finds these records may not be properly placed before the Court as a business record exception to the hearsay rule and, as such, they

have not been considered. (*Irizarry v. Lindor*, 110 AD3d 846 [2d Dept 2013])<sup>1</sup>

Plaintiff has, however, provided the affirmed report of Dr. Dass in which he raises a triable issue of fact regarding the permanency and significance of plaintiff's injuries in the loss of range of motion and detectable pain, tenderness and spasm. Contrary to Dr. Hendler's narrative report, Dr. Dassa's narrative report indicates musculoligamentous injury to cervical and lumbar spine; traumatic disc displacement to the cervical and lumbosacral spine, and cervical and lumbar radiculopathy. Plaintiff has met her burden to demonstrate that there is a triable issue of fact with respect to whether her injuries meet the threshold of Insurance Law § 5012(d). (*Toure v. Avis Rent-A-Car Sys.*, 98 NY 2d 345 [2002])

#### 90/180 claim

With respect to 90/180 claims, the Second Department has held that the report of an independent examination of plaintiff, conducted over a year after the accident, must relate its findings to the 90/180 claim. (*Volpetti v. Yoon Kap*, 28 AD3d 750 [2d Dept 2006]) A report which fails to do so falls short of satisfying the burden of proof necessary to establish the absence of a serious injury. (*Scinto v. Hoyte*, 57 AD3d 646 [2d Dep't 2008]) However, the Second Department has also held that a plaintiff's deposition testimony may be used as a basis of determining whether the alleged injuries prevented plaintiff from performing "substantially all" of the material acts constituting her customary daily activities during at least 90 out of the first 180 days following the accident. (*Sanchez v. Williamsburg Volunteer of Hatzolah, Inc.* 48 AD3d 664, 665 [2d Dept 2008]) In an effort to

---

<sup>1</sup>The Court recognizes that an exception may lie when the uncertified records have been relied upon by defendant's expert in his report. *See, Tomeo v. Beccia*, 127 AD3d 1071 (2<sup>nd</sup> Dep't 2015) In this matter, however, although Dr. Hendler asserts that he reviewed the records, nothing in his report suggests any reliance upon them.

reconcile this discrepancy, courts have held that, where a plaintiff presents evidence supporting a 90/180 claim, the defendant must come forth with a doctor's report ruling out the claim. (*Walcott v. Ocean Taxi Inc.*, NY Slip Op 50158[U] [Kings Co. 2009]) "However, where a plaintiff's testimony indicates that he or she was not incapacitated for the requisite period, than the defendants need not submit a medical opinion in order to meet their burden." (*id.*)

In the case at bar, defendant argues that plaintiff's deposition testimony demonstrates that her alleged injuries are insufficient to constitute a serious injury under the 90/180 category. Based on plaintiff's deposition testimony, defendant has demonstrated that the alleged injuries did not prevent her from performing "substantially all" of the material acts constituting their customary daily activities during at least 90 out of the first 180 days following the accident. (*Sanchez*, 48 AD3d at 665)

Plaintiff's deposition testimony and Dr. Dassa's report, dated four years after the underlying incident, indicate that, as a result of her neck and back pain, plaintiff was no longer able to perform the strenuous duties required of her position at Gander Mountain. However, plaintiff's opposition fails to demonstrate that her alleged injuries prevented her from performing "substantially all" of the material acts constituting her customary daily activities during at least 90 out of the first 180 days following the accident. The Court notes, again, that plaintiff has failed to include the certified reports of any treating physicians. Therefore, plaintiff has failed to raise a triable issue of fact with respect to the 90/180 claim.

#### Economic Loss claim

Pursuant to Insurance Law 5104(a), a plaintiff seeking to recover damages for economic loss arising from a motor vehicle accident must plead and prove economic loss greater than basic economic loss. (*Watford v. Boolukos*, 5 AD3d 475 [2d Dept 2004]). A claim for economic loss in

excess in excess of basic economic loss does not require a showing of serious injury. (*Wilson v. Colosimo*, 101 AD3d 1765, 1766 [4th Dept 2012])

Here, plaintiff moved for summary judgment on the issue of liability only. Defendant's Cross-Motion makes no reference to plaintiff's claim for economic loss. The only reference to this claim is contained in plaintiff's opposition to defendant's cross-motion. As such, this claim will not be addressed.

### Conclusion

On the basis of the foregoing, it is

ORDERED that defendant's motion for summary judgment is denied with respect to the claims for permanent consequential limitation of use of a body organ or member; and it is hereby


ORDERED that defendant's motion for summary judgment is denied with respect to the claims for significant limitation of use of a body function or

ORDERED that plaintiff's application for partial summary judgment on liability is granted.

The parties shall appear for a virtual conference on January 11, 2021 at 11:30 a.m. A Microsoft Teams link will be provided prior to the conference.

This decision shall constitute the order of the Court.

Dated: November 27, 2020  
Goshen, New York

ENTER :  
  
HON. SANDRA B. SCIORTINO, J.S.C.

To: *Counsel of Record via NYSCEF*