| **Levine v New Jersey Transit Corp.** |
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| 2010 NY Slip Op 33989(U) |
| January 5, 2010 |
| Supreme Court, New York County |
| Docket Number: 116585/06 |
| Judge: Carol R. Edmead |
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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SUZANNE LEVINE,

Plaintiff,

Index # 116585/06

-against-

NEW JERSEY TRANSIT CORP., and "John Doe," intended to be the operator of a New Jersey Transit Corporation Bus,

Defendants,

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NEW JERSEY TRANSIT,

Third-Party Plaintiff,

-against-

CARLTON ANDERSON,

Third-Party Defendant.

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FILED
JAN 11 2010
COUNTY CLERK'S OFFICE
NEW YORK

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION[1]

In this personal injury action, plaintiff Suzanne Levine ("plaintiff") seeks to recover damages against defendants New Jersey Transit Corp. ("NJT") and "John Doe," intended to be the operator of a New Jersey Transit Corporation Bus (collectively, "defendants") for negligence. In turn, defendants seek indemnification and/or contribution from third-party defendant Carlton Anderson ("Mr. Anderson").

Defendants now move for an order, pursuant to CPLR §3212, granting them summary judgment, on the ground that plaintiff failed to sustain a "serious injury" as required by New

[1] Motion sequence 006 is brought by NJT and John Doe. Motion sequence 007, which is brought by third-party defendant Carlton Anderson, adopts and incorporates the facts, legal arguments, and exhibits set forth in defendants' moving papers, for the purpose of judicial economy. Motion sequences 006 and 007 are consolidated for joint decision.

York State Insurance Law ("Insurance Law") §§5102 and 5104.

*Background*[2]

On December 5, 2004, plaintiff, a passenger on a NJT bus (the "bus"), suffered injuries after the bus was struck by a vehicle driven by Mr. Anderson.

In support of dismissal, defendants contend that plaintiff testified at an examination before trial ("EBT") that she was holding the bus's handrails with both hands at the time of the accident. After impact, she fell forward "about ten inches from the ground," without making contact with the floor or exterior of the bus. Plaintiff never let go of the handrail (see the "Levine EBT," pp. 30-33).[3] Plaintiff further testified that no ambulance or medical personnel were present or called to the scene, and plaintiff neither requested medical attention, nor informed the driver that she was injured (Levine EBT at 45-46). Plaintiff continued to her destination, walking about a block and a half and then boarding another bus to go to the Town Hall in Weehawken, New Jersey, where she was scheduled serve as the conductor for a choir at a tree-lighting ceremony. Plaintiff was at Town Hall with the choir for about one hour. She stood while conducting the choir for a 10-minute performance. Then, she returned home the same way she came to New Jersey, *via* a NJT bus (Levine EBT, pp. 46-48). Plaintiff further testified that she has been treated by a chiropractor her "entire life" (*id.* at 52-53). Defendants further contend that plaintiff did not lose any time from work.[4]

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[2]Information is taken from plaintiff's Complaint, defendants' Third-Party Complaint, and defendants' motion.

[3]The Court notes that plaintiff testified that during her fall, she came in contact with a passenger (Levine EBT, p. 30).

[4]Defendants refer to an Exhibit I that is not included with their moving papers.

Defendants argue that, as plaintiff did not sustain a serious injury as defined by Insurance Law §5102(d), she cannot recover in this action, pursuant to Insurance Law §5104.

First, defendants argue that based on an independent medical examination ("IME") of plaintiff performed by Dr. Michael J. Katz ("Dr. Katz") on September 24, 2008 (the "Katz IME"), plaintiff did not suffer a "permanent loss of use of a body organ, member, function or system," or "permanent consequential limitation of use of a body organ or member," as defined by Insurance Law §5102(d). Dr. Katz's diagnosis states that there is no need for plaintiff to seek continued treatment and that plaintiff has no objective orthopedic disability at this time.

Second, defendants argue that plaintiff did not suffer a "significant limitation of use of a body function or system," as defined by Insurance Law §5102(d). Defendants contend that a "significant limitation" involves more than merely minor pain or limitation of motion. As plaintiff did not lose any time from work and continues to work, her alleged injury "clearly does not qualify" as a significant limitation, defendants argue.

Third, defendants argue that plaintiff did not suffer a "medically determined injury or impairment of a non-permanent nature" that prevented her from performing her usual daily activities for 90 days out of the 180 days immediately following the subject accident, pursuant to Insurance Law §5102(d). Defendants contend that for one to claim that she has suffered such an injury, the claim must rest on a medically determined injury that prevented the claimant from performing substantially all of her normal daily activities. Further, proof in the form of objective medical evidence is required; self-serving comments are insufficient. Here, plaintiff was not confined to her bed or her home as a result of this accident; and she did not lose time from work. Therefore, she has not met the 90-day requirement of Insurance Law §5102(d), defendants

contend.

In conclusion, defendants argue that plaintiff's inability to demonstrate a "serious injury" warrants an order dismissing her complaint with prejudice.

In opposition, plaintiff cites the affirmation of her long-time treating physician, Lillie Rosenthal ("Dr. Rosenthal"), dated September 4, 2004 (*see* the "Rosenthal Affm."), and an IME from physician Edward M. Decter ("Dr. Decter"), who examined her on April 12, 2005 at the request of defendants (*see* the "Decter IME"). Plaintiff argues that these documents demonstrate that she sustained a serious injury to her left knee within the meaning of Insurance Law §5102(d), in that she has sustained (1) a permanent consequential limitation of use of a body member, and (2) a significant limitation of use of a body function or system. Plaintiff further argues that as Dr. Rosenthal's and Dr. Decter's findings and diagnoses conflict with those of Dr. Katz, issues of material fact exist defeating defendants' motion.

Plaintiff contends that Dr. Rosenthal reports significant and permanent restrictions of plaintiff's left knee as a result of the accident. Although plaintiff's injuries to her cervical spine, lumbar spine, and right knee resolved within one year of the accident, complaints about her left knee persist to the present. Plaintiff argues that it is significant that Dr. Decter, defendant's examining physician, confirms the diagnosis of Dr. Rosenthal, and the fact that the accident was the cause of plaintiff's condition.

In reply, defendants first argue that a majority if not all of plaintiff's proof is inadmissible. Defendants contend that the Rosenthal Affm. is inadmissible because Dr. Rosenthal relied on unsworn MRI reports, and plaintiff failed to annex a properly sworn affidavit or affirmation from the treating doctor or radiologist who performed the MRI. Dr. Rosenthal

refers to MRIs conducted on plaintiff's left knee on September 27, 2005 and January 12, 2006. However, as Dr. Rosenthal did not conduct the MRIs herself and no affirmation or affidavit from the radiologist is provided, the results of the MRIs are hearsay, defendants argue.

Defendants further argue that Dr. Rosenthal's affirmation is suspect because it contains contradictory statements. For example, Dr. Rosenthal alleges that she stopped treating plaintiff in December 2005 (Rosenthal Affm., pp. 3-4); however, later she states that she continued to treat plaintiff once a month until January of 2006, and thereafter four to five times per year. Dr. Rosenthal also fails to mention that plaintiff testified that she was seeing chiropractors for general upkeep prior to this accident and continually since this accident. "Yet there is no explanation by Dr. Lillie Rosenthal regarding that treatment [by the chiropractors] and how it affects plaintiffs alleged permanency of injury," defendants argue. Further, Dr. Rosenthal alleges "blanket assertions and speculation of injury" without showing any current objective medical testing to support her diagnosis, defendants contend. The alleged findings are from unsworn medical records and MRIs, which are inadmissible.

Defendants further argue that the Rosenthal Affm. should be disregarded because Dr. Rosenthal refers only to "stale medical documents, which are inadmissible." Defendants contend that where there is a significant gap or lag between a plaintiff's last medical treatment and his subsequent visit to the physician, the affirmation will still be insufficient to demonstrate a "serious injury." Defendants argue that plaintiff fails to establish that she currently is being treated by any doctors currently for her left-knee injury. In fact, plaintiff has not been treated with any doctors for more than four years. Dr. Rosenthal stated that treatment for this alleged injury terminated in 2005 because plaintiff's symptoms were not improving. Plaintiff has no

future appointments with any doctors at this time for this accident. There is no explanation for this four-year gap. Defendants contend that plaintiff is continually seeing Dr. Rosenthal for "general upkeep" and not for the alleged left knee injury.

Defendants point out that plaintiff contends "for the first time" in her opposition that she has (1) a permanent consequential limitation of use of a body function or system, and (2) a significant limitation of use of a body function or system. However, as plaintiff never pleaded such in her Bill of Particulars ("BOP"), she is barred from pleading it in her opposition, defendants argue. Plaintiff failed to plead with sufficiency in Paragraph 14 of her BOP her category of serious injury.[5] Defendants contend that in the absence of an amended bill of particulars, Courts have disregarded evidence that plaintiff was unable to perform her usual and customary daily activities for the requisite 90-day period. Defendants further contend that they will be "highly prejudiced" if plaintiff is allowed to amend her BOP after they have pointed out the deficiencies in plaintiff's proof.

Assuming *arguendo* that the Court accepts plaintiff's BOP as properly pleaded, plaintiff's purported proof is insufficient to defeat their motion, defendants argue. Defendants contend that when it comes to determining whether a limitation of use or function is "significant" or "consequential" (*i.e.*, important), courts look to the objective medical proof and its significance. That involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part. Defendants further contend that there have been numerous cases that state that a left knee "meniscal" signal was not determined to be a

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[5]The Court notes that Paragraph 14 of plaintiff's BOP states: "Serious Injuries: Improper demand for a bill of particulars. The Court, at the time of the trial of this action, will take judicial notice of all applicable laws."

serious injury as a matter of law. For example, the mere existence of a herniated or bulging disc, and even a tear in a tendon, has been determined not to be evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the injury and its duration, defendants contend.

Here, plaintiff's alleged injury does not even amount to a tear, defendants contend. Dr. Rosenthal's reference to a "medial compartment and patellar chondromalacia" and a "giant cell tumor" of the tendon sheath (Rosenthal Affm., p. 3) does not show that plaintiff sustained a "serious injury." Further, Dr. Rosenthal fails to mention the exact date when she began treating plaintiff for the accident-related injuries, and Dr. Rosenthal never performed any type of range-of-motion or objective testing to plaintiff's knee after the accident. The only mention of plaintiff's post-accident range of motion refers to the neck and back. Neither of these alleged injuries are being claimed herein.

Defendants further contend that regarding a "permanent limitation" of a body organ, member or system, the word "permanent" is by itself insufficient, and it can be sustained only with proof that the limitation is not minor mild, or slight but rather consequential. Defendants contend that a finding of "permanency" can be established only by the submission of a recent examination.

Here, the Rosenthal Aff. fails to provide proof a recent 2009 examination, defendants argue. Rather, the Rosenthal Aff. provides a repetition of Dr. Rosenthal's vague treatment history. Further, Dr. Rosenthal performed no recent, specific objective testing that can be compared to plaintiff's immediate post-accident condition to objectively show a permanent injury, defendants argue. Therefore, the Rosenthal Affm. fails to show that Dr. Rosenthal

performed any objective testing that would create an issue of fact as to the permanency of plaintiff's injury or significant limitation of use.

Finally, defendants dispute plaintiff's argument that conflicting medical reports exist. The Decter IME is stale and fails to show any permanency or significant limitation of use, defendants argue. Defendants contend that the Decter IME took place on April 12, 2005, more than four years ago. That IME disclosed some "patellofemoral crepitus" but no "ligamentous instability" or "medial or lateral jointline tenderness" (Decter IME, p. 3). Dr. Decter further observed that plaintiff "had no real pain under the medial or lateral facet of the patella," nor any "anterior or posterior instability" (*id.*) Dr. Decter stated that if the symptoms persisted, plaintiff would be a candidate for surgery. The word "if" is mere speculation, defendants argue. In contrast, the Katz IME is *prima facie* proof of no permanency or significant limitation of use. It shows that plaintiff has fully recovered, and the her symptoms do not persist. As plaintiff's injuries have been resolved, there is no conflicting proof, defendants argue.

*Discussion*

*Summary Judgment*

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR §3212[b]) sufficient to warrant the court as a matter of law to direct judgment in his or her favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 N.Y. Slip Op. 51390 [U] [Sup Ct New York County, 2003]). Thus, the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient

"evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11 [1st Dept 2002]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any material issue of fact (CPLR §3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman* at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546 [1st Dept 2003]). The opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist" and "the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62 NY2d 686 [1984]).

*Serious Injury Pursuant to Insurance Law §§5102 and 5104*

It is well settled that "New York's No-Fault Insurance Law precludes a right of recovery for any 'non-economic loss, except in the case of a serious injury, or for basic economic loss'" (*Martin v Schwartz*, 308 AD2d 318, 319 [1st Dept 2003], quoting Insurance Law §5104[a]). Insurance Law §5102(d) defines "serious injury" in relevant part as a "personal injury which

results in . . . permanent consequential limitation of use of a body organ or member; [or] significant limitation of use of a body function or system." It also is well settled that "[w]hether a claimed injury meets the statutory definition of a 'serious injury' is a question of law which may properly be decided by the court on a motion for summary judgment" (*Martin* at 319).

Further, "[o]bjective proof of the nature and degree of a plaintiff's injury is required to satisfy the statutory serious injury threshold" (*id.*). Expert medical opinions in the form of an affidavit or affirmation from a physician who examined plaintiff and medical reports may constitute such objective proof (*Dufel v Green*, 84 NY2d 795, 798 [1995]; *Gaddy v Eyler*, 79 NY2d 955, 956-957 [1992]). Such opinions must have an "objective medical basis" (*Franchini v Palmieri*, 1 NY3d 536, 537 [2003]). For example, "[w]hether a limitation of use or function is "significant" or "consequential" (*i.e.*, important) relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part" (*Dufel* at 798) (citation omitted). The Court of Appeals explained in *Toure v Avis Rent A Car Systems, Inc.* (98 NY2d 345, 351 [2002]):

> When supported by objective evidence, an expert's qualitative assessment of the seriousness of a plaintiff's injuries can be tested during cross-examination, challenged by another expert and weighed by the trier of fact. By contrast, an expert's opinion unsupported by an objective basis may be wholly speculative, thereby frustrating the legislative intent of the No-Fault Law to eliminate statutorily-insignificant injuries or frivolous claims.
> (*Id.* at 351)

Finally, the "mere repetition of the word 'permanent' in the affidavit of a treating physician is insufficient to establish 'serious injury'" (*Lopez v Senatore*, 65 NY2d 1017, 1019 [1985]).

Here, defendants met their initial burden of demonstrating that plaintiff had not sustained a serious injury within the statutory definition. Defendants submit the Katz IME, wherein Dr.

Katz states that he examined plaintiff on September 24, 2008, conducting range of motion tests, and reviewed her medical records, including MRI reports of her left knee. Dr. Katz made the following observation:

> Examination of the Left Knee: There is a normal valgus attitude about the knee in the standing position. There is no swelling about the knee. Range of motion is normal. There is no effusion within the knee. The range of motion is 0-135 degrees (normal 135 degrees) in the flexion/extension arc. The patellar reflex is 2+. There is no medial or lateral joint line tenderness. *Lachman's test* is negative for anterior/posterior instability. The *patellar apprehension test* is negative. The motor strength of the Quadriceps is 5/5. The knee is stable to varus and valgus stress. There is a negative *pivot shift test*. The posterior drawer sign is negative. The posterior sag sign is negative. There is no demonstrable crepitus. The prepatellar bursa is supple and lacks swelling, erythema, or induration. The patella is mildly tilted bilaterally. She does localize her pain to the lateral facet of the patella and states that she has that on the left side but not on the right side. (Katz IME, p. 3) (emphasis added)

Dr. Katz concludes: "Currently, [plaintiff] *is not disabled* based on the event of 12/05/04. She is capable of her gainful employment as an elementary school music teacher. She is capable of her activities of daily living" (*id.* at 4) (emphasis added).

Therefore, defendants have presented a *prima facie* case that plaintiff's claimed injury is not "serious" as defined by Insurance Law §5102 (*see DeJesus v Paulino*, 61 AD3d 605 [1st Dept 2009] [holding that defendants' submissions were sufficient to meet their initial burden and thus shift the burden to plaintiffs where defendants' experts detailed the specific objective tests used in their personal examinations, as well as the underlying data from those tests]).

In response, plaintiff failed to meet her burden in that the evidence she submitted failed to raise a triable issue of fact as to whether she sustained a serious injury in the nature of (1) a permanent consequential limitation of use of her left knee, or (2) a significant limitation of use of her left knee.

It is well settled that "an expert's qualitative assessment of the seriousness of a plaintiff's injury may be sufficient to defeat summary judgment if it is 'supported by objective evidence'" (*Martin* at 319, quoting *Toure* at 350-351). For example, evidence of "range of motion limitations is sufficient to defeat summary judgment" (*Brown v Achy*, 9 AD3d 30, 32 [1st Dept 2004]). Further, "[a]n expert's qualitative assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system" (*Toure* at 350-351). However, in order "to raise a triable issue of fact, plaintiff must demonstrate a limitation of range of motion sustained by objective medical findings that are 'based on a recent examination of the plaintiff'" (*Thompson v Abbasi*, 15 AD3d 95, 97 [1st Dept 2005]; *Lopez v Abdul-Wahab*, 889 NYS2d 178, 179 [1st Dept 2009]). Finally, a minor, mild or slight limitation of use "should be classified as insignificant within the meaning of the statute" (*Licari v Elliott*, 57 NY2d 230, 236 [1982]).

Here, plaintiff first submits the Rosenthal Affm. Although Dr. Rosenthal does not give an exact date of plaintiff's first visit after the December 5, 2004 accident, she states:

> On her first visit to my office following the accident, she presented with complaints of bilateral knee pain [greater on the left], headaches with neck pain and stiffness radiating to her shoulders, arms, hands and fingers, and mid and low back pain. . . . I started her on a course of chiropractic therapy [conservative treatment] in an attempt to alleviate her symptoms. . . . Although extensive chiropractic treatment [60 visits] over the next several months did alleviate many of her symptoms of pain in her cervical and lumbar spine, her bilateral knee pain persisted, particularly on the left."
> (Rosenthal Affm., pp. 2-3)

Upon Dr. Rosenthal's referral, MRIs of plaintiff's left and right knees were conducted on September 27, 2005. Dr. Rosenthal states: "The MRI of her left knee confirmed medial

compartment and patellar chondromalacia and a 'giant cell tumor' of the tendon sheath . . . The results of these objective tests confirmed my clinical findings that Ms. Levine had of [*sic*] decreased knee strength and patellar tenderness in the left knee as a result of the motor vehicle collision of December 5, 2004." Physical therapy on plaintiff's left knee was discontinued in December 2005 due to the "lack of improvement in her complaints and condition and the increased pain of therapy." Dr. Rosenthal ordered another MRI of plaintiff's left knee, which was conducted on January 12, 2006. The results were the same as the earlier MRI, Dr. Rosenthal states. Dr. Rosenthal goes on to say that she has continued to treat plaintiff "although the number of my treatments has decreased from once per month through January 2006 to four to five times per year at present." Dr. Rosenthal concludes:

> Despite extensive treatment, physical therapy and chiropractic treatment, Ms. Levine's left knee remains painful and weak. . . . Based upon my review of the medical records, my treatment, the results of the MRIs, and the objective range of motion tests, I state, with a reasonable degree of medical certainty, that Ms. Levine's injuries to her left knee are permanent and have resulted in pain and significant restriction and limitation of use and activities of left knee and that the motor vehicle accident of December 5, 2004 was the sole cause of her injury which has resulted in this permanent partial disability. (Rosenthal Affm., pp. 4-5)

Although Dr. Rosenthal mentions "objective range of motion tests," she only discusses in detail the tests conducted on plaintiff's spine, not on plaintiff's left knee (Rosenthal Aff., pp. 2-3). Further, while Dr. Rosenthal describes "pain and significant restriction and limitation of use and activities of left knee," she fails to describe the degree of limitation in plaintiff's left knee,[6] or compare plaintiff's limitations to the normal function, purpose and use of the knee (*Toure* at

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[6]The Court notes that Dr. Rosenthal provided a detailed assessment of the degrees of limitation to various areas of plaintiff's *spine*: "In her initial visit, the range of motion of her cervical spine was limited to 60% of normal movement in all planes, except for lateral flexion to the right and the left which was only 35% of normal movement. . . . Extension of her lumbar spine was only 20% of normal, while bilateral rotation was 30% of normal and lateral flexion was 25% of normal movement" (Rosenthal Aff., pp. 2-3).

350-351; *Antonio v Gear Trans Corp.*, 65 AD3d 869, 870 [1st Dept 2009]). In *Dembele v Cambisaca* (59 AD3d 352, 352 [1st Dept 2009]), the First Department makes clear that the existence of a injury "standing alone and with no evidence of any limitations caused thereby, is not sufficient to establish 'serious injury.'" The Court further went on to note: "The affirmation of plaintiff's orthopedist also fails to raise an issue of fact as to permanent injury, *as he does not explain the significance of his findings with respect to plaintiff's left knee's range of motion (ROM), or provide any comparison of his ROM findings with normal ranges*" (*id.*) (emphasis added). Similarly, here, evidence of an objective basis for Dr. Rosenthal's assessment is lacking.[7]

The Decter IME also is insufficient proof that plaintiff suffered a serious injury. The Decter IME establishes that Dr. Decter conducted range of motion tests: "Examination of the left knee revealed some patellofemoral crepitus but no ligamentous instability or medial or lateral jointline tenderness. There was no anterior or posterior instability. She had no real pain under the medial or lateral facet of the patella" (Decter IME, p. 3). He continues:

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[7]The Court notes that, contrary to defendants' arguments, the Court does not find sufficient evidence of a four-year gap in plaintiff's treatment under Dr. Rosenthal (*see Danvers v New York City Transit Authority*, 869 NYS2d 41, 42 [1st Dept 2008] [holding that "an unexplained gap of two years and nine months in her primary physician's treatment" negated any showing of serious injury]; *Pou* at 1 [holding that a 41/2-year gap in treatment is too remote]). Dr. Rosenthal states that plaintiff "underwent regular physical therapy for her left knee until December 2005 when the therapy was discontinued due to a lack of improvements in her complaints" (Rosenthal Aff., pp. 3-4). Dr. Rosenthal also states that since January 2006 to the present she continues to treat plaintiff's left knee (*id.* at 4). Although plaintiff does not explain this inconsistency, it is not clear that the physical therapy that ended in December 2005 is the same treatment that continues to the present.

Further, also contrary to defendants' arguments, Dr. Rosenthal's reliance on "unsworn" MRI reports is not fatal because it is clear from the Rosenthal Affm. that Dr. Rosenthal relied on the reports in forming her opinions (*Ayala v Douglas*, 57 AD3d 266, 267 [1st Dept 2008]; *Thompson* at 97 [holding that "the motion court erred in rejecting plaintiff's unsworn MRI reports submitted in opposition to the dismissal motion. [The defendant] had presented plaintiff's MRI results through its experts' affirmations in support of its motion for summary judgment. Therefore, these results were properly before the motion court"]). The Court also notes that the Katz IME, on which defendants rely, also cites to unsworn MRI reports.

> Regarding her left knee, she still has evidence of some patellofemoral chondrosis, and there may have been a chondral lesion to the undersurface of the patella as a result of the trauma. If her symptoms persist, it is my opinion that she will be a candidate for arthroscopic surgery on her left knee. There are positive findings of crepitus and grinding in the patellofemoral area of the left knee on today's examination. Taking into account the fact that she has no history of prior problems with her left knee, I would causally relate the current findings to the accident of 12/5/04.
> (*Id.*)

However, while Dr. Decter links plaintiff's injury to the accident, he, too, fails to specify any degree of limitation or restriction caused by the injury (*Antonio at* 870; *Dembele* at 352). Further, the Court notes that in the paragraph immediately preceding Dr. Decter's assessment of plaintiff's left knee, he states that, in reference to the injuries to plaintiff's right knee and back, "there is no functional impairment. She can perform her usual duties as an opera singer and a music teacher" (Decter IME, p. 3). However, in the subsequent paragraph wherein Dr. Decter discusses the injury to plaintiff's left knee, the IME is silent as to whether such an injury constitutes a "functional impairment," or how such an injury affects her duties as an opera singer and music teacher.

Further, plaintiff fails to provide recent proof establishing a serious injury (*Thompson* at 97, quoting *Grossman v Wright*, 268 AD2d 79, 84 [2d Dept 2000] ["In order to raise a triable issue of fact, plaintiff must demonstrate a limitation of range of motion sustained by objective medical findings that are '*based on a recent examination* of the plaintiff'" (emphasis added)]; *Lopez* at 179 ["The report of plaintiff's expert was, in the absence of objective, *contemporaneous evidence* of the extent and duration of the alleged physical limitations resulting from the injury, insufficient" (emphasis added)]; *Bent v Jackson*, 15 AD3d 46, 48 [1st Dept 2005] ["Dr. Marini neither indicates he examined this plaintiff that day, *nor describes any current objective testing*

*or significant range-of-motion restriction*" (emphasis added)]). Here, neither the Rosenthal Affm. nor the Decter IME refers to any recent range of motion testing of plaintiff's left knee. Therefore, the Rosenthal Affm. and Decter IME fail to establish that plaintiff sustained a serious injury as a matter of law.[8]

*Conclusion*

Based on the foregoing, it is hereby

ORDERED that the motion of defendants New Jersey Transit Corp. and "John Doe," intended to be the operator of a New Jersey Transit Corporation Bus pursuant to CPLR §3212, granting them summary judgment, on the ground that plaintiff failed to sustain a "serious injury" as required by New York State Insurance Law §5102 and §5104 is granted; and it is further

ORDERED that defendants serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: January 5, 2010

Hon. Carol R. Edmead, J.S.C.

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JAN 11 2010
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NEW YORK

[8] Since defendants raise the argument challenging plaintiff's BOP for the first time in reply, and plaintiff has not been given an opportunity to address their argument in any sur-reply, this Court does not reach the issue of whether plaintiff's BOP is sufficiently pleaded (*Dannasch v Bifulco*, 184 AD2d 415, 417 [1st Dept 1992]; *Apartment Recycle Co. of Manhattan Inc., citing Fiore v Oakwood Plaza Shopping Center, Inc.*, 164 AD2d 737, 739 [1st Dept], *affd*, 78 NY2d 572 [1991], *cert denied*, 506 US 823 [1992]).