Castillo Arroyo v Hamilton
2014 NY Slip Op 31391(U)
May 21, 2014
Supreme Court, Suffolk County
Docket Number: 11-35076
Judge: Jerry Garguilo
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SHORT FORM ORDER

INDEX No. 11-35076

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 47 - SUFFOLK COUNTY

PRESENT:

Hon. JERRY GARGUILO
Justice of the Supreme Court

MOTION DATE 11-26-13
ADJ. DATE 3-19-14
Mot. Seq. # 002 - MD

ROBERTO CASTILLO ARROYO, MARIA VILLA HERRERA, YOLANDA GUTIERREZ, DILCIA APARICIO and EVELYN GUADALUPE GUILLEN-RIVERA,

Plaintiffs,

- against -

A.L. HAMILTON and MARIAN L. HENDRICKSON,

Defendants.

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Upon the following papers numbered 1 to 36 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (002) 1-19; Notice of Cross Motion and supporting papers _; Answering Affidavits and supporting papers 20-34; Replying Affidavits and supporting papers 35-36; Other _; (~~and after hearing counsel in support and opposed to the motion~~) it is.

ORDERED that motion (002) by defendants A. L. Hamilton and Marian L. Hendrickson pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that none of the plaintiffs sustained a serious injury as defined by Insurance Law § 5102 (d) is denied as to all plaintiffs.

This negligence action arises out of an automobile accident which occurred on January 25, 2011, on Route 110 at or near its intersection with Melville Park Road, in Melville, New York, when the automobile operated by plaintiff, Roberto Castillo Arroyo, came into contact with the vehicle operated by defendant A.L. Hamilton and owned by defendant Marian L. Hendrickson. Plaintiffs, Maria Villa Herrera, Yolanda Gutierrez, Dilcia Aparicio, and Evelyn Guadalupe Guillen-Rivera were passengers in the vehicle operated by plaintiff Arroyo. The plaintiffs allege they each sustained a serious injury as defined by Insurance Law § 5102 (d). The defendants have interposed an answer, asserting a counterclaim against plaintiff Robert Castillo Arroyo for judgment over against him for contribution based upon his proportionate share of liability. However, it is noted that such counterclaim against plaintiff on the counterclaim was discontinued by defendants by stipulation dated April 15, 2013.

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In support of motion (002), the defendants submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, and answer with counterclaim and plaintiffs' verified bill of particulars; expert disclosure and reports dated April 4, 2013 by Isaac Cohen, M.D. concerning his independent orthopedic examination of each plaintiff; copies of the transcripts of the examinations before trial of Roberto Castillo Arroyo, Maria Villa Herrera, Yolanda Gutierrez, Dilcia Aparicio, and Evelyn Guadalupe Guillen-Rivera.

Pursuant to Insurance Law § 5102 (d), "'[s]erious injury' means a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use 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."

The term "significant," as it appears in the statute, has been defined as "something more than a minor limitation of use," and the term "substantially all" has been construed to mean "that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment (***Licari v Elliot***, 57 NY2d 230, 455 NYS2d 570 [1982]).

On a motion for summary judgment to dismiss a complaint for failure to set forth a prima facie case of serious injury as defined by Insurance Law § 5102 (d), the initial burden is on the defendant to "present evidence in competent form, showing that plaintiff has no cause of action" (***Rodriquez v Goldstein***, 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once the defendant has met the burden, the plaintiff must then, by competent proof, establish a *prima facie* case that such serious injury exists (***DeAngelo v Fidel Corp. Services, Inc.***, 171 AD2d 588, 567 NYS2d 454, 455 [1st Dept 1991]). Such proof, in order to be in competent or admissible form, shall consist of affidavits or affirmations (***Pagano v Kingsbury,*** 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). The proof must be viewed in a light most favorable to the non-moving party, here the plaintiff (***Cammarere v Villanova***, 166 AD2d 760, 562 NYS2d 808, 810 [3d Dept 1990]).

In order to recover under the "permanent loss of use" category, a plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance Inc.***, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, either a specific percentage of the loss of range of motion must be ascribed or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott***, *supra*).

It is determined that motion (002) is insufficient as a matter of law. The reports by defendants' expert, Isaac Cohen, M.D. are unsupported with evidentiary proof, such as medical records and reports of diagnostic testing relating to the plaintiffs' care and treatment for the injuries claimed to have been sustained in this accident, as required pursuant to CPLR 3212. Expert testimony is limited to facts in evidence (*see* ***Allen v Uh***, 82 AD3d 1025, 919 NYS2d 179 [2d Dept 2011]; ***Marzuillo v Isom***, 277 AD2d 362, 716 NYS2d 98 [2d Dept 2000]; ***Stringile v Rothman***, 142 AD2d 637, 530 NYS2d 838 [2d Dept 1988]; ***O'Shea v Sarro***, 106 AD2d 435, 482 NYS2d 529 [2d Dept 1984]; ***Hornbrook v Peak Resorts, Inc.***, 194 Misc2d 273, 754 NYS2d 132 [Sup Ct, Tomkins County 2002]), which evidence has not been provided in this case. Thus, defendants' moving papers are insufficient as a matter of law, leaving the court to speculate as to the contents of the medical records and reports.

ROBERT CASTILLO ARROYO

Robert Castillo Arroyo alleges that as a result of this accident, he sustained injuries consisting of C4-4 disc herniation indenting the dural sac; C5-6 disc herniation indenting the dural sac; C6-7 disc herniation indenting the dural sac; C3-4 disc bulge; L4-5 disc bulge; L5-S1 disc bulge; and multiple epidural injections.

Defendants' expert, Isaac Cohen, M.D., performed an independent orthopedic examination of Robert Castillo Arroyo. He stated that plaintiff Arroyo is a 32 year old male from Mexico who speaks Spanish. Dr. Cohen stated that Arroyo spoke to him in his native language so no communication problem exists. However, Dr. Cohen's proficiency in Spanish has not been established for this court to determine comprehension and understanding.

While Dr. Cohen indicated that he performed range of motion testing and employed either the goniometer and/or a bubble inclinometer, he did not indicate which was used, and whether the method was used for all range of motion testing. While he indicated that cervical compression testing was negative, he did not indicate what testing was employed.

Dr. Cohen reviewed plaintiff's cervical and lumbar MRI reports, the reports, however, copies of the reports setting forth the findings have not been provided, leaving this court to speculate as to the content in those reports. He reported that the MRI of the cervical spine demonstrated "minimal degenerative disc herniation at multiple levels, but did not provide measurements to establish that the herniations were minimal, and or define what he meant by degenerative disc herniation, or the duration of the same (***Estella v Geico Insurance Company***, 102 AD3d 730, 959 NYS2d 210 [2d Dept 2013]; ***Partlow v Meehan***, 155 AD2d 647, 548 NYS2d 239 [2d Dept 1989]). Although the plaintiff was treated by Dr. Anand and EMG/NCV testing was performed, those reports have not been provided. It is additionally noted that no report from a neurologist who performed an independent neurological examination of the plaintiff have been provided (*see* ***McFadden v Barry***, 63 AD3d 1120, 883 NYS2d 83 [2d Dept 2009]; ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]; ***Lawyer v Albany OK Cab Co.***, 142 AD2d 871, 530 NYS2d 904 [3d Dept 1988]; ***Faber v Gaugler***, 2011 NY Slip Op 32623U, 2011 NY Misc Lexis 4742 [Sup Ct Suffolk County 2011]).

Dr. Cohen stated in a broad and conclusory opinion that he found no indication for the performance of epidural injections which the plaintiff received, raising factual issues due to the differing opinions between the plaintiff's treating physician who provided the epidurals, and Dr. Cohen as a physician who was not treating the plaintiff at the time and did not combine his opinion with a contemporary clinical examination of the plaintiff.

Robert Castillo Arroyo testified to the extent that he missed three weeks from work due to the injuries sustained in this rear-end car accident. At the time of the accident, he was coming home from work at a factory where he was off-loading trailers with a forklift with a manual pump. He began attending therapy for about one year, three times a week at first, then reducing frequency to once a week for pain in his neck, back, and right shoulder. He had two MRIs, then received epidural injections into his back on three separate occasions. When he returned to work after the accident, he switched to packing pieces and reduced his work hours. Most of the work was off-loading trailers, which he could not do because of the pain in his back and inability to bend. He denied prior injuries and subsequent injuries to his neck, back, and shoulder. He can no longer lift heavy items or go to the gym. If he rides a bicycle, he gets tired and has to sit because of the pain in his back, so he no longer rides. He has difficulty sitting. He used to play in the soccer league, but is no longer able to do so. He can not do his prior job and is now washing cars instead. He walks to work and gets back pain.

It is noted that the movants' examining physician did not examine Arroyo during the statutory period of 180 days following the accident, thus rendering their physician's affidavit insufficient to demonstrate entitlement to summary judgment on the issue of whether the plaintiff was unable to substantially perform all of the material acts which constituted his usual and customary daily activities for a period in excess of 90 days during the 180 days immediately following the accident (***Blanchard v Wilcox***, 283 AD2d 821, 725 NYS2d 433 [3d Dept 2001]; *see* ***Uddin v Cooper***, 32 AD3d 270, 820 NYS2d 44 [1st Dept 2006]; ***Toussaint v Claudio***, 23 AD3d 268, 803 NYS2d 564 [1st Dept 2005]), and the expert offers no opinion with regard to this category of serious injury (*see* ***Delayhaye v Caledonia Limo & Car Service, Inc.***, 61 AD3d 814, 877 NYS2d 438 [2d Dept 2009]).

Based upon the aforementioned factual issues raised in the moving papers, it is determined that the defendants failed to establish prima facie entitlement to summary judgment dismissing the complaint on the basis that Arroyo did not sustain a serious injury as defined by Insurance Law § 5102 (d).

MARIA VILLA HERRERA

Maria Villa Herrera alleges that as a result of this accident, she sustained injuries consisting of L5-S1 disc herniation abutting the nerve root and epidural fat; C5-6 disc herniation deforming the dural sac; C6-7 disc herniation deforming the dural sac; and lumbar epidural injections.

Dr. Cohen performed an independent orthopedic examination of Maria Villa Herrera on April 4, 2013, and set forth that she is a 28 year old female who was a front seat passenger in a vehicle when it was involved in an accident. She denied any prior trauma or significant medical or surgical history. He stated that she was four months pregnant at the time of the examination. As a result of this accident, she lost about two weeks from work as a cosmetic packer. Initially, she was treated and released at an

emergency room where she complained of neck, back, and right shoulder pain. At the time of Dr. Cohen's examination, she complained of ongoing back pain. Although Dr. Cohen reviewed MRI reports of her lumbar and cervical spine, and records concerning lumbar epidural records, none of plaintiff's records and reports reviewed by him have been provided to this court. While Dr. Cohen stated that the MRI examination of the plaintiff's lumbar spine was essentially unremarkable, he continued that there was a small right paracentral disc herniation deforming the epidural fat, and that the disc abutted the S1 nerve root but did not impinge upon it. He stated that an independent radiographic review of the film is warranted, however, none was provided with the moving papers, raising factual issues. Additionally, Ms. Herrera testified that she had numbness in her right lower extremity and underwent "needle testing." Dr. Cohen did not comment on this, and no report from a neurologist who examined her on behalf of the defendants has been submitted (*see* ***McFadden v Barry***, *supra*; ***Browdame v Candura***, *supra*; ***Lawyer v Albany OK Cab Co.***, *supra*; ***Faber v Gauger***, *supra*). Dr. Cohen indicated that she had epidural injections in her back, but stated in a conclusory and unsupported opinion that there was no clinical indication to perform epidural injections, thus raising factual issues.

Dr. Cohen set forth that the MRI examination of Herrera's cervical spine was unremarkable, but continued that there were degenerative changes at C 5-6 and C6-7 of no clinical significance. However, this opinion which is conclusory, raises factual issues, as he does not address causation, duration of the degenerative changes, or what those degenerative changes were, precluding summary judgment (***Estella v Geico Insurance Company***, *supra*; ***Partlow v Meehan***, *supra*). Dr. Cohen did not specify whether he employed the use of the goniometer or the bubble inclinometer in obtaining range of motion values of the cervical and lumbar spine, nor did Dr. Cohen indicate whether he spoke Spanish or English to the plaintiff during her examination.

Maria Villa Herrera testified through a Spanish interpreter that upon impact to the vehicle from behind, her head struck the dashboard, and her back, neck and shoulders twisted. After the pain in her neck, back, and right shoulder continued for about three weeks, she sought additional medical care and treatment, including physical therapy three to four days a week for eight months. MRIs were conducted and she later received tests with needles due to there being no feeling in her right lower side. She underwent three epidural injections into her back. She stated that the injuries have affected her in everything from her job to her personal life. She continues to experience neck and back pain and headaches, and gets numbness in her legs and her right hand. For three weeks, she could do nothing following the accident and had to stay in bed. At work, she now has difficulty bending down, or lifting heavy things. She used to play basketball, but due to the pain in her shoulder, she cannot. She used to go to the gym three or four days a week, but she is not able to run or lift any weights any longer. At home, she cannot move furniture.

It is noted that the movants' examining physician did not examine Herrera during the statutory period of 180 days following the accident, thus rendering their physician's affidavit insufficient to demonstrate entitlement to summary judgment on the issue of whether the plaintiff was unable to substantially perform all of the material acts which constituted her usual and customary daily activities for a period in excess of 90 days during the 180 days immediately following the accident (***Blanchard v Wilcox***, *supra*; *see* ***Uddin v Cooper***, *supra*; ***Toussaint v Claudio***, *supra*) and the expert offers no opinion with regard to this category of serious injury (*see* ***Delayhaye v Caledonia Limo & Car Service, Inc.***,

supra).

Based upon the aforementioned factual issues raised in the moving papers, it is determined that the defendants failed to establish prima facie entitlement to summary judgment dismissing the complaint on the basis that Herrera did not sustain a serious injury as defined by Insurance Law § 5102 (d).

YOLANDA GUTIERREZ

Yolanda Gutierrez alleges that as a result of this accident, she sustained injuries consisting of L5-S1 disc herniation; L3-4 disc bulge; L4-5 disc bulge; C4-5 disc bulge; C5-6 disc bulge; right shoulder tenosynovitis for which surgery has been recommended; and epidural injections.

Dr. Cohen stated that Yolanda Gutierrez is not proficient in English and that he interviewed her in her native language, Spanish. As set forth previously, his expertise in Spanish has not been demonstrated to this court. He stated that she is a 23 year old female who was a restrained passenger in a car when it was rear-ended. As a result of this accident, she was treated and released in the emergency room and claims continuing pain in her back, neck, and shoulder. Dr. Cohen set forth the materials and reports which he reviewed, including MRI studies of the plaintiff's cervical spine, lumbar spine, and right shoulder. However, he has not provided copies of these reports. Although the plaintiff alleges to have sustained lumbar disc herniation and bulges, cervical disc bulges, and right shoulder tenosynovisitis, Dr. Cohen, in conducting his independent orthopedic examination, did not comment on those injuries. His opinion that MRI examinations of the cervical spine and right shoulder are completely unremarkable and that there was no need for the cervical epidural injections received by the plaintiff is unsupported, raising factual issues. Dr. Cohen did not comment upon the plaintiff's claim that surgery has been recommended for her right shoulder tenosynovitis, although he reviewed the records of her treating and consulting orthopedists. The failure to address this injury and claim raises further factual issues precluding summary judgment.

Dr. Cohen opined that the neurological examination was unremarkable in both upper and lower extremities, but did not indicate what testing, if any, was conducted to make such determination, raising factual issues. No report from an examining neurologist has been submitted on behalf of the moving defendants (*see* ***McFadden v Barry***, *supra*; ***Browdame v Candura***, *supra*; ***Lawyer v Albany OK Cab Co.***, *supra*; ***Faber v Gauger***, *supra*).

Yolanda Gutierrez testified through a Spanish interpreter that as a result of this accident, she sustained injuries to her back, neck, and both shoulders. She was treated at the emergency room and released, then sought follow-up care and treatment, including MRI studies of her neck, back, and right shoulder, and nerve conduction studies. She underwent physical therapy and chiropractic treatment. At first she went three days a week, then two days a week, then once a week. She had cervical epidural injections, which she stated helped her neck a little. One of her doctors recommended surgery to her right shoulder to remove liquid. She missed two to three weeks from work packaging bluetooth cellular phones. During that time, she was confined to bed. As a result of the injuries, she cannot bend down or run, and has difficulty lifting and sitting. Prior to the accident, she ran three to four times a week about a half hour each time. She belonged to the gym prior to the accident, but can no longer attend due to the

pain in her back and legs and both knees, which were struck at the time of the accident. She still suffers from pain in her shoulders, neck and back. She denied prior or subsequent injuries to those parts of her body which she claimed were injured in this accident.

It is noted that the movants' examining physician did not examine Gutierrez during the statutory period of 180 days following the accident, thus rendering their physician's affidavit insufficient to demonstrate entitlement to summary judgment on the issue of whether the plaintiff was unable to substantially perform all of the material acts which constituted her usual and customary daily activities for a period in excess of 90 days during the 180 days immediately following the accident (***Blanchard v Wilcox***, *supra*; *see* ***Uddin v Cooper***, *supra*; ***Toussaint v Claudio***, *supra*), and the expert offers no opinion with regard to this category of serious injury (*see* ***Delayhaye v Caledonia Limo & Car Service, Inc.***, *supra*).

Based upon the aforementioned factual issues raised in the moving papers, it is determined that the defendants failed to establish prima facie entitlement to summary judgment dismissing the complaint on the basis that Yolanda Gutierrez did not sustain a serious injury as defined by Insurance Law § 5102 (d).

DILCIA APARICIO

Dilcia Aparicio alleges that as a result of this accident, she sustained injuries consisting of cervical sprain/strain; thoracic sprain/strain; right hip contusion; exaggerated lumbar lordosis; loss of normal cervical lordosis; and shoulder contusion.

Dr. Cohen examined Dilcia Aparicio on May 2, 2013 and indicated that she is a 27 year old Spanish speaking female, and that the interview was conducted in Spanish with no communication problem. Dr. Cohen does not set forth his proficiency in Spanish. It is noted that Dr. Cohen indicated in his report that the plaintiff is the mother of three healthy children. At her deposition on March 6, 2013, the plaintiff testified that she had one child who was three months of age. Thus, there are factual issues concerning information related during the independent examination conducted without an interpreter being present.

Dr. Cohen indicated the reports and records he reviewed, including MRIs of Aparicio's cervical spine and lumbosacral spine, and EMG and nerve conduction studies. These records have not been provided with the moving papers. Relative to the MRI studies, he opined in a conclusive and unsupported statement that the cervical and lumbosacral MRIs were essentially unremarkable, but he did not state what he meant by "essentially unremarkable" and did not provide a statement of the findings. Such factual issues preclude summary judgment.

Dr. Cohen opined in a conclusory and unsupported statement that the electrical studies were essentially unremarkable, however, he did not provide the results of the studies, and no report from an examining neurologist has been submitted on behalf of the moving defendants (*see* ***McFadden v Barry***, *supra*; ***Browdame v Candura***, *supra*; ***Lawyer v Albany OK Cab Co.***, *supra*; ***Faber v Gauger***, *supra*),

raising factual issues precluding summary judgment.

Dilcia Aparicio gave testimony through a Spanish interpreter. She was a seat-belted passenger in the rear of the plaintiff vehicle at the time of the accident. The impact caused her to move forward, but she stayed in her seat. She felt pain in her back when her body moved forward and there was a bruise on her back. She received treatment at an emergency room for pain in her neck and back and was released. She denied prior and subsequent injuries to those parts of her body. Thereafter, the pain would not stop, so she received treatment from Advanced Physical Therapy, three times a week for about four months, then continued for a total of six months. She had MRIs of her neck and back. She is currently employed full time as a machine operator at LNK, which she described as a laboratory for medication. She pours powder into a machine which makes the powder into tablets. Her job requires that she stand all day. At the time of the accident, she was working in a factory at an assembly line. She missed 15 days from work following the accident, but then returned full time. She now experiences difficulty doing laundry due to the pain in her neck and back, so her husband helps her. She experiences pain in her neck and back and difficulty lifting 16 kilo boxes at work. She was not restricted prior to the accident.

It is noted that the movants' examining physician did not examine the plaintiff during the statutory period of 180 days following the accident, thus rendering their physician's affidavit insufficient to demonstrate entitlement to summary judgment on the issue of whether the plaintiff was unable to substantially perform all of the material acts which constituted her usual and customary daily activities for a period in excess of 90 days during the 180 days immediately following the accident (***Blanchard v Wilcox***, *supra*; *see* ***Uddin v Cooper***, *supra*; ***Toussaint v Claudio***, *supra*), and the expert offers no opinion with regard to this category of serious injury (*see* ***Delayhaye v Caledonia Limo & Car Service, Inc.***, *supra*).

Based upon the aforementioned factual issues raised in the moving papers, it is determined that the defendants failed to establish prima facie entitlement to summary judgment dismissing the complaint on the basis that Dilcia Aparicio did not sustain a serious injury as defined by Insurance Law § 5102 (d).

EVELYN GUADALUPE GUILLEN-RIVERA

Evelyn Guadalupe Guillen-Rivera alleges that as a result of this accident, she sustained injuries consisting of C7-T1 disc herniation indenting the ventral thecal sac; L5-S1 disc herniation which effaces the epidural fat; cervical sprain/strain; thoracic sprain/strain; lumbar sprain/strain/ and left shoulder contusion.

Dr. Cohen performed an independent orthopedic examination on Evelyn Guadalupe Guillen-Rivera on May 2, 2013. Dr. Cohen stated that Ms. Rivera was Spanish speaking and that they communicated in her native language without any problem. While Dr. Cohen indicated that she has one healthy son, she testified that her husband, sister, and brother live with her, and she has no children. Again, Dr. Cohen's proficiency in Spanish raises factual issues precluding summary judgment.

Dr. Cohen indicated that Guillen-Rivera was a 31 year old female who was a passenger in the Arroyo vehicle at the time of the accident. She alleged that she sustained cervical and lumbosacral spine

injuries. Dr. Cohen stated that he reviewed the cervical and lumbar spine MRI studies and EMG and nerve conduction studies, but these records and reports, as well as the additional materials reviewed by him, have not been provided. He opined, without basis, that the C7-T1 small centrally herniated disc, and the L5-S1 disc herniation, are of no clinical significance. He did not rule out that her injuries are causally related to the accident, and further indicated that there is no neural compromise. However, he did not comment upon the findings reported on the EMG and nerve conduction studies in support of that opinion. No report from a neurologist has been submitted on behalf of the defendants to rule out neural compromise or involvement (*see* ***McFadden v Barry***, *supra*; ***Browdame v Candura***, *supra*; ***Lawyer v Albany OK Cab Co.***, *supra*; ***Faber v Gauger***, *supra*), precluding summary judgment.

Ms. Guillen-Rivera gave testimony through a Spanish interpreter. She indicated that she is currently employed at LNK, full time, packages medicine in an assembly line, and seals the boxes. This requires that she stand. At the time of the accident, she was working full time as an assembler at a factory on Daniel Avenue. As a result of the injuries to her neck and back, she missed eight days from work. However, when she returned to work, she could no longer lift the heavy boxes, and someone else had to do the lifting. The company closed about five months later. She went home following the accident, but had pain in her neck. She took medication for about ten days, but then started going to Advanced Physical Therapy for her neck and back, three times a week for six months. She had MRIs of her neck and back which she was told showed problems with her discs. Prior to the accident, she did all her own housework, laundry, and shopping. Since the accident, she requires help from her husband.

Based upon the aforementioned factual issues raised in the moving papers, it is determined that the defendants have failed to establish prima facie entitlement to summary judgment dismissing the complaint on the basis that Evelyn Guadalupe Guillen-Rivera did not sustain a serious injury as defined by Insurance Law § 5102 (d).

Inasmuch as the moving parties failed to establish prima facie entitlement to judgment as a matter of law in the first instance on the issue of "serious injury" as to each plaintiff within the meaning of Insurance Law § 5102 (d), it is unnecessary to consider whether the opposing papers are sufficient to raise a triable issue of fact (*see* ***Yong Deok Lee v Singh***, 56 AD3d 662, 867 NYS2d 339 [2d Dept 2008]); ***Krayn v Torella***, 40 AD3d 588, 833 NYS2d 406 [2d Dept 2007]; ***Walker v Village of Ossining***, 18 AD3d 867, 796 NYS2d 658 [2d Dept 2005]).

Accordingly, motion (002) for summary judgment dismissing the complaint is denied in its entirety.

Dated: 5/21/14

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION