Cornet v Incorporated Vil. of Hempstead
2018 NY Slip Op 34216(U)
November 7, 2018
Supreme Court, Nassau County
Docket Number: Index No. 607063-16
Judge: Steven M. Jaeger
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU - IAS/TRIAL PART 35

X

JESULA P. CORNET AND SANDRA CORNET,

Plaintiffs,

-against-

INCORPORATED VILLAGE OF HEMPSTEAD AND HEMPSTEAD FIRE DEPARTMENT JAMEL BROWNIEE,

Defendants.

X

Index #: 607063-16
Motion Sequence Nos.: 004, 005
Mot. Submitted: 10/16/18
Present: Hon. Steven M. Jaeger
Decision & Order

XXX

Papers submitted on the motion:

Notice of Motion, Affirmation & Exhibits (004)	X
Affirmation in Opposition & Exhibits (004 & 005)	X
Reply Affirmation	X
Notice of Motion, Affirmation & Exhibits (005)	X
Reply Affirmation	X

Plaintiff, Sandra Cornet, moves [Mot. Seq. 004], for an Order, awarding her summary judgment on the Defendant's Counterclaim dismissing co-plaintiff Jesula P. Cornet's complaint on the grounds that her injuries do not satisfy the "serious injury" threshold requirement of Insurance Law §5102(d). The motion is granted.

Defendants, Incorporated Village of Hempstead and Jamel Browniee, move [Mot. Seq. 005], for an Order, awarding them summary judgment dismissing the plaintiffs' Jesula P. Cornet and Sandra Cornet's complaint on the issue of liability; and, granting them summary judgment dismissing the plaintiffs' Jesula P. Cornet and Sandra Cornet's complaint on the grounds that neither plaintiffs' injuries satisfy the "serious injury" threshold requirement of Insurance Law §5102(d). The motion is granted.

This action arises out of a motor vehicle accident which took place on April 13, 2016 at approximately 8:50 a.m. in the intersection of South Franklin Avenue and West Graham Avenue in the Village of Hempstead, Nassau County, New York (Bill of Particulars,¶¶1-2). At the time of the accident, plaintiff, Sandra Cornet ("Sandra"), was driving her mother, co-plaintiff, Jesula P. Cornet ("Jesula"), from their home to Jesula's place of employment – at a patient's home in Hempstead (Jesula Tr., p. 45). The accident occurred as the plaintiffs' vehicle collided with the defendant, Incorporate Village of Hempstead's ("Village") fire truck being operated by defendant, Jamel Browniee ("Browniee").

At her oral examination before trial, Sandra Cornet testified that she was traveling on West Graham Avenue which she described as "two lanes, two ways" (63,66) . Plaintiff stated that she was traveling in the lane closest to the middle of the street until approximately a block before the subject intersection when she changed to the lane closer to the sidewalk so as to avoid the traffic in front of her that wanted to make a left turn (67). Plaintiff stated that the subject intersection – West Graham Avenue and Franklin Street – was governed by a traffic light (67-68). She stated that she first noticed the traffic light when she changed lanes and that at that time, the light was green (68-69). She stated that there were no vehicles traveling ahead of her in the right lane (71). She stated that had this accident not happened, it was her intention to go straight through the subject intersection (78). She stated that immediately before this accident, she was looking straight ahead because she had the green light (88). Notably, plaintiff Sandra Cornet stated that she had the windows up that day because it was a cold day (72).

As to the defendants' fire truck, plaintiff testified as follows:

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Q: At any time before this accident occurred, did you ever hear the sirens of a fire truck or other emergency vehicle?

A: No.

Q: At any time before this accident occurred, had you ever heard any horns sounding?

A: Yes, I heard the horn.

Q: What horns did you hear?

A: The fire truck horn.

Q: When did you hear the fire truck horn?

A: As I was approaching to the intersection.

***

(79-80).

Plaintiff testified that she heard the horn coming from her right side, and that when she heard the horn, she pushed her brakes (80). Notably, while at first, the plaintiff stated that at no point before this accident, did she ever see the fire truck (she only heard the horn), she later stated that the first time she saw the fire truck was as she was slowing down and pushing her brake (82-83). According to the plaintiff, the front of her vehicle had just reached the intersection when she saw the fire truck for the first time (84).

Plaintiff approximated that she was three to four feet from the intersection when she heard the fire truck or emergency horn (80-81). She stated that after she applied the brake and after she heard the horn, her vehicle was in the intersection (82). According to the plaintiff, the fire truck was traveling north to south on Franklin Avenue – from her right to her left (83, 101).

Plaintiff testified that her vehicle came to a full stop prior to the collision (84, 86). She looked to her right (after she heard the horn) as she was entering the intersection and she saw the fire truck "trying to maneuver its way from behind a car that was at the red light" (88). She stated that she kept the fire truck under her constant observation until the collision (89). She testified as follows:

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Q: What did you see the fire truck do?

A: I saw the fire truck goes [sic] in the opposite lane of traffic coming from behind a car that was at the red light, and I had noticed that had stopped in the middle of the — as the driver noticed that I stopped in the middle of the traffic, he tried to go back to its original lane, but the back of the fire truck hit the front of my bumper.

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(89).

Notably, plaintiff testified that while she did not know the rate of speed of the fire truck when she first noticed it, she stated "I don't know, but I could guess it was fast, because it was going to an emergency" (90). She stated that at no time before this accident did she see any lights on the fire truck (90). She described the resulting impact as "heavy" (97). The airbags did not deploy as a consequence of the collision (98). Plaintiff stated that when the ambulance arrived at the scene, she was "too shaky" and therefore she declined the ambulance (122).

Notably, plaintiff also admitted that she was told and taught at her driving school that when you see an emergency vehicle approaching the intersection you should yield and stop (93-94).

Defendant Jamel Browniee was also deposed. At his oral examination before trial, defendant Browniee testified that at the time of this accident, he was a volunteer firefighter with the Village of Hempstead Fire Department (Browniee Tr., p. 8). He testified that in connection to his membership with the Village of Hempstead Fire Department, he received, among other things, basic operations and driving training pertaining to the operation of the Hempstead Fire Department

vehicles (10). Specifically, he testified that he received training on the exact type of vehicle – a 1996 Spartan, a red fire truck engine – that was involved in this accident (13).

Browniee stated that at the time of this accident, he was operating the Spartan with no other passengers on the truck (14). He testified that he first started driving the Spartan to respond to calls in May 2014 (15-16). He described the Spartan as being equipped with two horns - an electronic and an air horn - but that only the air horn was used (16-17). He added that the Spartan was also equipped with emergency lighting on the top, the sides, the front and the back, which lighting was operated by a switch (17-18). The truck was also equipped with two sirens one of which was operated by a foot pedal and the other with a switch (18). He stated that both sirens would be used in conjunction (19).

Defendant Browniee testified that at the time of this accident, he was responding to an automatic fire alarm at a restaurant on North Franklin Avenue and Fulton Avenue (23). Defendant stated that prior to leaving the firehouse, he turned on a master switch which controlled and turned on all of the emergency lights on the truck (28). He also turned on the electronic sirens upon leaving the firehouse (29). He stated that the siren was a continuous sound with no pauses (29).

Defendant stated that he saw the plaintiffs' vehicle prior to the accident (20). He described the traffic conditions on South Franklin Avenue as heavy (27). As to the traffic traveling on West Graham Avenue, he observed the following:

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A: Traffic stopped, they had the red light, I came to a complete stop, I made sure I had control of the intersection, all traffic stopped in all four directions, I proceeded through, I moved over to the right lane, I observed the minivan [plaintiff's vehicle] in the far right lane on West Graham move to the clear left lane and proceeded through the intersection striking the truck.

***

(34).

Defendant testified that he proceeded through the intersection on a green light (30). He stated that the front half of the fire truck was within the intersection at the time of the impact (35-36). He did not see the plaintiff's vehicle prior to entering the intersection (37). According to the defendant, at the time of the impact, the truck was moving at approximately 5 miles per hour (36). He stated that the plaintiff's vehicle was also moving at the moment of impact and that he saw the collision occur through his left side view mirror (36). Defendant testified that, prior to the impact, he sounded his air horn that sounded continuously through the intersection (37). He stated that the plaintiff's vehicle was not completely within the intersection at the time of the impact (39).

Plaintiff Jesula Cornet was also deposed. At her examination pursuant to Section 50-H of the General Municipal Law, Jesula testified that she saw the fire truck before the accident and told her daughter, plaintiff driver, Sandra Cornet, "here comes a fire truck" (Jesula Tr., p. 8). Jesula did not know whether or not the fire truck had its emergency lights on at the time of the accident (12). Moreover, she added that while she did not hear a siren, she heard a horn from the fire truck before it reached the intersection (12). At her oral examination before trial, plaintiff confirmed that she first saw the fire truck when he honked his horn (47).

Upon the instant motion (005), the defendants Village and Browniee, seek summary judgment dismissal of the plaintiffs' complaint on the issue of liability.

Vehicle and Traffic Law ("VTL") §1104 entitled "Authorized emergency vehicles" provides operators of particular vehicles a well recognized privilege and allows for actions not typically permitted for normal drivers. VTL §1104 provides, in pertinent part, as follows:

(a) The driver of an authorized emergency vehicle, when involved in an emergency operation, may exercise the privileges set forth in this section, but subject to the conditions herein stated.

(b) The driver of an authorized emergency vehicle may:

1. Stop, stand or park irrespective of the provisions of this title;

2. Proceed past a steady red signal, a flashing red signal or a stop sign, but only after slowing down as may be necessary for safe operation;

3. Exceed the maximum speed limits so long as he does not endanger life or property;

4. Disregard regulations governing directions of movement or turning in specified directions.

(c) Except for an authorized emergency vehicle operated as a police vehicle or bicycle, the exemptions herein granted to an authorized emergency vehicle shall apply only when audible signals are sounded from any said vehicle while in motion by bell, horn, siren, electronic device or exhaust whistle as may be reasonably necessary, and when the vehicle is equipped with at least one lighted lamp so that from any direction, under normal atmospheric conditions from a distance of five hundred feet from such vehicle, at least one red light will be displayed and visible.
***
(e) The foregoing provisions shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect the driver from the consequences of his reckless disregard for the safety of others
***

Thus, "[t]he manner in which an authorized emergency vehicle is operated in an emergency situation may not form the basis for civil liability unless the driver acted in reckless disregard for the safety of others" (*Woodard v. Thomas*, 77 AD3d 738, 739 [2nd Dept. 2010]; see Vehicle and Traffic Law § 1104). This standard requires proof that the driver intentionally committed an act of an unreasonable character, while disregarding a known or obvious risk that was so great as to make it highly probable that harm would follow (*Woodard v. Thomas*, *supra* at 739; *Puntarich v. County of Suffolk*, 47 AD3d 785, 786 [2nd Dept. 2008]). However, Vehicle and Traffic Law § 1104(c) states

that "the exemptions herein granted to an authorized emergency vehicle shall apply only when audible signals are sounded from any said vehicle while in motion by bell, horn, siren, electronic device or exhaust whistle as may be reasonably necessary, and when the vehicle is equipped with at least one lighted lamp so that from any direction, under normal atmospheric conditions from a distance of five hundred feet from such vehicle, at least one red light will be displayed and visible."

In support of their motion herein, the defendants submit, inter alia, the deposition testimonies of both plaintiffs as well the deposition testimony of the defendant operator of the fire truck, Jamel Browniee. Based on this evidence, this Court finds that the defendants have established their prima facie entitlement to judgment as a matter of law. Specifically, the defendants have established that they are entitled to the protections of the Vehicle and Traffic Law §1104 which, as stated above, provides operators of "Authorized Emergency Vehicles" including fire trucks a well recognized privilege and allows for actions not typically permitted for normal drivers including "proceed past a steady red signal, a flashing red signal or a stop sign, but only after slowing down as may be necessary for safe operation" and "exceed the maximum speed limits so long as he does not endanger life or property" (Vehicle and Traffic Law §1104 [b][2], [3]). Indeed, inasmuch as the record here is uncontroverted that the defendant Browniee was "involved in an emergency operation" with Sandra Cornet herself testifying that while she did not know the rate of speed of the fire truck when she first noticed it, she "guess[ed] it was fast, because it was going to an emergency" (Sandra Cornet Tr., p. 90; see also Vehicle and Traffic Law §114-b). Moreover, the record here is clear that while neither plaintiff heard a siren, both plaintiffs agreed that the fire truck sounded an air horn prior to entering the intersection. Moreover, plaintiff Sandra Cornet, testified that she believed that her mother heard a horn which prompted her to warn Sandra that an accident was approaching and she

even indicated that the horn was "pretty loud" (Sandra Tr., p. 88). As to the lights on the truck, there is no testimony (or other proof) on this record that contradicts defendant's testimony that the emergency lights were on at the time of the accident. Indeed, while Sandra testified at her deposition that she did not see any lights on the truck before this accident, she nevertheless stated that she knew that the fire truck was responding to an emergency.

Therefore, the defendants having established that Browniee was operating an authorized emergency vehicle, was involved in an emergency operation of that vehicle and that the lights were on and an air horn was sounded before entering the intersection, and moreover, there being no evidence on this record that Browniee acted with reckless disregard for the safety of others, this Court finds that he defendants have established their prima facie entitlement to judgment as a matter of law (Vehicle and Traffic Law §1104).

Furthermore, it is plain to this Court that given the application of the VTL §1104 to the facts at hand, the plaintiff was under a duty to act in accordance with the VTL §1144 which addresses the operation of vehicles on approach of authorized emergency vehicles. Specifically, VTL §1144 entitled "Operation of vehicles on approach of authorized emergency vehicles" provides:

> (a) Upon the immediate approach of an authorized emergency vehicle equipped with at least one lighted lamp exhibiting red light visible under normal atmospheric conditions from a distance of five hundred feet to the front of such vehicle other than a police vehicle or bicycle when operated as an authorized emergency vehicle, and when audible signals are sounded from any said vehicle by siren, exhaust whistle, bell, air-horn or electronic equivalent; the driver of every other vehicle shall yield the right of way and shall immediately drive to a position parallel to, and as close as possible to the right-hand edge or curb of the roadway, or to either edge of a one-way roadway three or more lanes in width, clear of any intersection, and shall stop and remain in such position until the authorized emergency vehicle has passed, unless otherwise directed by a police officer.
>
> (b) This section shall not operate to relieve the driver of an authorized emergency vehicle from the duty to drive with reasonable care for all persons using the highway.

Thus, the law requires that where the record, as here, establishes that the fire engine operated was on its way to the scene of a fire, and that the engine's lights and air horn had been activated pursuant to VTL §1144, the adverse driver – i.e., the plaintiff herein – is required to yield the right of way and, among other precautions, stay clear of the intersection (*Tobacco v North Babylon Fire Dept.*, 251 AD2d 398 [2nd Dept. 1998]; *Felice v Gershkon*, 34 AD2d 1008 [2nd Dept. 1970]). Therefore, this Court finds that on this record, the defendants have established their prima facie entitlement to judgment as a matter of law.

In opposition, the plaintiffs have failed to raise any triable issue of fact as to liability. Indeed, the plaintiffs opposition fails to make any reference to the qualified privilege afforded to the defendants under VTL §1104 – as operators of authorized emergency vehicles engaged in the emergency operation of that vehicle. Nor do the plaintiffs offer any evidence demonstrating that the defendants breached the higher standard of "reckless disregard" (VTL §1104[e]). While each of the plaintiffs submit affidavits in opposition to the defendants' instant motion wherein they both contradict their earlier sworn testimonies at their 50-H hearings and their examinations before trial, this Court cannot find such testimonies to be sufficient to defeat defendants' motion.

The law is clear. A party's affidavit in opposition to a summary judgment motion which contradicts her prior sworn testimony creates only a feigned issue of fact insufficient to defeat a properly supported motion for summary judgment (*Mallory v. City of New Rochelle*, 41 AD3d 556 [2nd Dept. 2007]; *see Popovec v Great Atl. & Pac. Tea Co., Inc.*, 26 AD3d 321 [2nd Dept. 2006]; *Garvin v Rosenberg*, 204 AD2d 388 [2nd Dept. 1994]; *Nieves v. Iss Cleaning Servs. Group*, 284 AD2d 441 [2nd Dept. 2001]; *Buziashvili v. Ryan*, 264 AD2d 797 [2nd Dept. 1999]).Given the contradictions between the plaintiffs' prior testimony and the testimony in the affidavits, the

plaintiffs' self serving affidavits offered in opposition to the defendants' motion for summary judgment are deemed inadmissible (*Marcelle v. New York City Transit Authority*, 289 AD2d 459 [2nd Dept. 2001]; *Prunty v. Keltie's Bum Steer*, 163 AD2d 595 [2nd Dept. 1990]).

Moreover, this Court cannot overlook the fact that the plaintiffs in opposition fail to discuss their clear violation of the VTL §1144 by failing to steer clear of the intersection upon the approach of an authorized emergency vehicle.

In the end, having failed to establish with admissible evidence that the defendants are not entitled to the qualified privilege afforded to them under the Vehicle and Traffic Law §1104 or that the defendant acted with "reckless disregard" as required under the statute, this Court herewith grants the defendants' summary judgment dismissal of the plaintiff's complaint on the issue of liability.

The complaint is dismissed as against Incorporated Village of Hempstead and Jamel Browniee.

The plaintiff, Sandra Cornet's motion [Mot. Seq. 004], for an Order, awarding her summary judgment on the counterclaim dismissing co-plaintiff Jesula P. Cornet's complaint on the grounds that her injuries do not satisfy the "serious injury" threshold requirement of Insurance Law §5102(d), is also granted.

Jesula Cornet (the co-plaintiff Sandra Cornet's mother) was the front seated passenger in the vehicle being operated by Sandra Cornet. At her examination before trial, plaintiff explained that, at the accident scene, she declined an ambulance because she "was in so much shock that [she] didn't know anything" (Jesula Tr., pp. 39-40) and that "[a]t that instant, [she] didn't feel anything" (40). She did not lose consciousness (40). Jesula Cornet testified that, following this accident, she went with Sandra in a bus to a church in Jamaica to pray for an hour before going home (41-43).She

first sought medical attention two days after this accident when she presented to the doctor's office with complaints to her back, neck and right shoulder (49-51).

The approximately 57 year old Jesula Cornet also testified that she has been involved in a prior motor vehicle accident wherein she sustained injuries – in March 2014 where she was a passenger and in which she injured her left shoulder and back (11-12). Plaintiff testified that in that accident (March 2014), she sustained a tear in her left shoulder that required surgery which she had done in July 2014 (12-13). She stated that she also injured her entire back in the March 2014 accident (13-14).

Plaintiff explained that at the time of this accident she was employed as a Home Health Aide at York Healthcare and that she continues to be employed there (15-16). She explained that on the date of this accident, she was assigned to a patient in Hempstead (45). She stated that as a result of the injuries sustained in this accident, she missed two weeks from work (46).

At her oral examination before trial, plaintiff testified that there was nothing that was bothering her from this accident and that there are no activities that she did before this accident that are affected in any way; specifically, she stated "[n]ow I'm okay" (60). After this accident, however, she stated that for the first two weeks, she could not bend over and could not walk well (60-61)

Plaintiff testified that she is not claiming aggravation or exacerbation of injuries because "[t]here was nothing wrong with me prior" (66).

Upon the instant motions, the plaintiff Sandra Cornet seeks summary judgment on her counterclaim dismissing her co-plaintiff Jesula P. Cornet's complaint on the grounds that her injuries do not satisfy the "serious injury" threshold requirement of Insurance Law §5102(d).

"Serious injury" is defined by § 5102(d) of the New York Insurance Law as follows:

> 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 persons' usual and customary daily activities for not less than ninety days during one hundred and eighty days immediately following the occurrence of the injury or impairment. (Ins. Law § 5102(d)).

The law provides that by establishing that any one of several injuries sustained in an accident is a serious injury within the meaning of Insurance Law § 5102 (d), a plaintiff is entitled to seek recovery for all injuries incurred as a result of the accident (*O'Neill v O'Neill*, 261 AD2d 459, 460 [2nd Dept. 1999]; *Prieston v Massaro*, 107 AD2d 742, 743-744 [2nd Dept. 1985]).

Plaintiff, who was approximately 57 years old at the time of this accident, claims that, as a result of this accident, she sustained, *inter alia*, right shoulder partial intrasubstance tear of the *supra*spinatus tendon anteriorly; right shoulder hypertrophic change at the acromioclavicular joint with mild down sloping of the acromion and narrowing of the subacromial space; right shoulder subacromial impingement syndrome; C2-3 right lateral disc bulge with right sided neural foraminal narrowing; C3-4 broad based disc bulge with bilateral neural foraminal narrowing/lateral recess stenosis; C4-5 broad based disc bulge with left sided neural foraminal narrowing; C7-T1 subligamentous left lateral disc bulge with left sided neural foraminal narrowing; L2-3 lateral disc bulge with bilateral neural foraminal narrowing/lateral recess stenosis; L3-4 broad based disc bulge with bilateral neural foraminal narrowing/lateral recess stenosis and spinal stenosis; L4-5 central disc herniation with bilateral neural foraminal narrowing/lateral recess stenosis and spinal stenosis; L5-S1 central and right paracentral disc herniation with bilateral neural foraminal narrowing /lateral recess

stenosis, right greater than left and spinal stenosis (Bill of Particulars, ¶5).

Notably, the plaintiff claims that her injuries fall within the following four categories of the serious injury statute: to wit, 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; and 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 (Bill of Particulars, ¶20).

Based upon a plain reading of the papers submitted herein, however, it is clear that the plaintiff's injuries do not satisfy the "permanent loss of use" category of the Insurance Law §5102(d). That is, the plaintiff's failure to allege and claim, much less establish through admissible evidence, that she has sustained a "total loss of use" of a body organ, member, function or system, is fatal to her attempt to establish a claim for serious injury under this category of Insurance Law §5102(d) (*Oberly v. Bangs Ambulance, Inc.*, 96 NY2d 295 [2001]).

Additionally, there is no evidence on this record that the plaintiff's alleged injuries satisfy the 90/180 category of the "serious injury" statute.

The law provides that under the 90/180 category, a plaintiff need not show a limitation that is "significant" or "consequential," but must show, by objective evidence, the existence of a medically determined injury or impairment of a non-permanent nature that affects substantially all of the material acts that constitute her daily activities for at least 90 days during the 180 days following the occurrence (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Blake v Portexit*

Corp., 69 AD3d 426 [1st Dept. 2010]).

Notably, the statutory requisite that injury be "medically determined" applies to "injury or impairment," not to the period of disability (*Shiner v. Insetta*, 137 Misc. 2d 1012 [App. Term, 2nd Dept. 1987]). Likewise, a plain reading of the statute confirms that the modifying phrase "nonpermanent nature" refers to both injury and impairment (*Wymer v. National Fuel Gas Distrib. Corp.*, 217 AD2d 920 [4th Dept. 1995]). In addition, the words "substantially all" as used in the statute are construed to mean that the person had been curtailed from performing his or her usual activities to a great extent rather than some slight curtailment (*Gaddy v Eyler*, 79 NY2d 955 [1992]; *Licari v Elliott*, 57 NY2d 230 [1982]; *Kim v Cohen*, 208 AD2d 807 [2nd Dept. 1994]; *Thompson v. Abbasi*, 15 AD3d 95 [1st Dept. 2005]).

In the end, a medically determined injury is one that is supported by the testimony of a physician or a chiropractor. That is, the 90/180-day threshold is satisfied by evidence that the plaintiff's physicians placed restrictions on her activities (*see generally*, *Cummings v Jiayan Gu*, 42 AD3d 920 [4th Dept. 2007]). Significantly, general statements by the plaintiff or her physician that the plaintiff was advised to avoid certain activities or that the plaintiff was somewhat restricted in daily-living activities are not sufficient to establish serious injury under the 90/180 category (*Mercado-Arif v Garcia*, 74 AD3d 446 [1st Dept. 2010]; *Onishi v N & B Taxi, Inc.*, 51 AD3d 594 [1st Dept 2008]). Instead, the plaintiff must submit expert medical evidence supporting the disability for the requisite period of time (*Blake v Portexit Corp.*, *supra*).

Initially, this Court notes that the plaintiff testified that she only missed two weeks from work and that she continues to work as a home care attendant (which work involved things like cooking, cleaning and running errands for the patient). While she testified that for the first two weeks after

this accident, she could not bend over and could not walk well, there is no accompanying testimony or other corroborating evidence that these "limitations" or "restrictions" were the product of any "*medically* determined injury or impairment" thereby satisfying the 90/180 category of the "serious injury" statute.

In the end, the plaintiff's failure to substantiate her claims through competent, objective proof, that she sustained (1) a "medically determined injury or impairment"; (2) of a "non permanent nature"; (3) which has caused the alleged limitations on her *usual* and *daily activities*; and (4) that the curtailment of any such activities is "to a great extent", is fatal to her claim that his injuries satisfy the 90/180 category of the Insurance Law §5102(d) (*Licari v. Elliott*, *supra* at 236; *see also Sands v. Stark*, 299 AD2d 642 [3rd Dept. 2002]).

Thus, it is clear to this Court that the plaintiff's injuries herein also fail to satisfy the 90/180 category of the Insurance Law §5102(d) (*Galofaro v. Wylie*, 78 AD3d 652 [2nd Dept. 2010]; *Elshaarawy v. U–Haul Co. of Miss.*, 72 AD3d 878 [2nd Dept. 2010]).

Therefore, this Court will restrict its analysis to the remaining two categories of the serious injury statute as they pertain to the plaintiff herein; to wit, permanent consequential limitation of use of a body organ or member and significant limitation of use of a body function or system.

Under the no-fault statute, to meet the threshold "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, the law requires that the body organ or member or a body function or system not operate at all or operate only in some limited way.

While it is not necessary for the plaintiff to establish "a total loss of the use" in the "permanent consequential limitation of use" and "significant limitation of use" categories, the

limitations of use must nevertheless be consequential and significant, respectively, i.e., important or meaningful. The essential difference between the "significant limitation" category and the "permanent consequential" category is that "significant limitation of use" does not require that the limitation be total or permanent (*Lopez v Senatore*, 65 NY2d 1017 [1985]; *Estrella v GEICO Ins. Co.*, 102 AD3d 730 [2nd Dept. 2013]; *Partlow v Meehan*, 155 AD2d 647 [2nd Dept. 1989]; *Velez v Svehla*, 229 AD2d 528 [2nd Dept. 1996]). In either case, however, the law requires that the plaintiff's limitations be more than minor, mild, or slight and that the claim be supported by medical proof based upon credible medical evidence of an objectively measured and quantified medical injury or condition (*Licari v. Elliot*, *supra* at 236; *Gaddy v. Eyler*, *supra*).

That is, in order to constitute quantified proof of a medical injury or condition and in order to prove the extent or degree of the physical limitation, an expert's designation of a numeric percentage of plaintiff's loss of range of motion is acceptable (*Toure v. Avis Rent A Car Sys.*, *supra*). Notably, an expert's qualitative assessment of a plaintiff's condition is also probative, provided that: (1) the evaluation has an objective basis, and, (2) the evaluation compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system (*Id*). Ultimately, however, a minor, mild or slight limitation, whether quantified or qualitatively established, is deemed "insignificant" within the meaning of the statute (*Licari v. Elliot*, *supra*; *Grossman v. Wright*, 268 AD2d 79, 83 [2nd Dept. 2000]).

Essentially, in order to satisfy the statutory serious injury threshold, the legislature requires objective proof of a plaintiff's injury. However, even where there is ample objective proof of plaintiff's injury, the Court of Appeals held in *Pommells v. Perez,* 4 NY3d 566 (2005), that certain factors may override a plaintiff's objective medical proof of limitations and nonetheless permit

dismissal of plaintiff's complaint. Specifically, in *Pommells v. Perez*, the Court of Appeals has held that additional contributing factors, such as a gap in treatment, an intervening medical problem, or a preexisting condition, would interrupt the chain of causation between the accident and the claimed injury (*Id*). Thus, to establish a claim for "serious injury" plaintiff must not only offer contemporaneous findings with the accident, but recent findings (based upon medical examinations) as well (*Perl v. Meher*, 18 NY3d 208 [2011]).

However, in 2011, the Court of Appeals clarified in *Perl v. Meher*, *supra*, that while the law requires both quantitative proof of a "serious injury" as well as "contemporaneous" evidence of a "serious injury", a quantitative assessment of a plaintiff's injuries does not have to be made during an initial examination and may instead be conducted much later, in connection with litigation (*Perl v. Meher*, *supra*). Thus, when relying on the quantitative prong of *Toure v Avis Rent A Car Systems, Inc.*, *supra*, to establish a permanent consequential limitation of use and/or significant limitation of use based on a limitation of movement, a plaintiff is not required to submit quantitative range of motion findings "contemporaneous" to the accident (*Perl v Meher*, *supra*). Rather, the plaintiff may submit qualitative medical evidence establishing plaintiff's symptoms shortly after the accident, and quantitative measurements of range of motion taken later in preparation for litigation (*Id*). The qualitative evidence generated shortly after the accident serves to establish that the accident was a proximate cause of plaintiff's injuries, while the quantitative evidence generated in preparation for litigation serves to demonstrate the severity of plaintiff's injuries (*Id*).

Ultimately, in support of a claim that the plaintiff has not sustained a serious injury, a defendant may rely either on the sworn statements of the defendant's examining physician or the unsworn reports of the plaintiff's examining physician (CPLR 2106; *Pagano v. Kingsbury*, 182

AD2d 268 [2nd Dept 1992]). It is only when the defendant's motion is sufficient to raise the issue of whether a "serious injury" has been sustained that the burden shifts, making it incumbent upon the plaintiff to produce *prima facie* evidence in admissible form to support the claim for serious injury (*Pommells v. Perez, supra*; *see also, Grossman v. Wright*, *supra* at 84). However, unlike the movant's proof, unsworn reports of plaintiff's examining doctor or chiropractor are not sufficient to defeat a motion for summary judgment (*Grasso v. Angerami*, 79 NY2d 813 [1991]). Otherwise, a medical affirmation or affidavit which is based on a physician's personal examination and observations of plaintiff, is an acceptable method to provide a doctor's opinion regarding the existence and extent of a plaintiff's serious injury (*see Reid v. Wu*, 2003 WL 21087012 [Sup. Ct. Bronx 2003], *citing O'Sullivan v. Atrium Bus Co., Inc.*, 246 AD2d 418 [1st Dept. 1998]).

It is noted at the outset that inasmuch as Jesula Cornet claims herein that her injuries satisfy the "permanent consequential" category of the Insurance Law §5102(d), her sworn testimony at her deposition that there was nothing that was bothering her from this accident and that there are no activities that she did before this accident that are affected in any way, specifically stating that "[n]ow I'm okay", is fatal to any such claim. As stated above, the essential difference between the "significant limitation" category and the "permanent consequential" category is that "significant limitation of use" does not require that the limitation be total or permanent (*Lopez v Senatore*, *supra*; *Estrella v GEICO Ins. Co.*, *supra*; *Partlow v Meehan*, *supra*; *Velez v Svehla*, *supra*). Having testified that now she is "okay" and that there is nothing bothering her is fatal to her claim that her injuries satisfy the "permanent consequential limitation or use of a body organ or member" category of the Insurance Law (*Id*).

As to her claim that her injuries satisfy the "significant limitation of use" (and "permanent consequential limitation or use") category of the Insurance Law, in support of her motion herein, the co-plaintiff, Sandra Cornet, submits, *inter alia*, the sworn report of Jeffrey Neil Guttman, MD, an orthopedist, who performed an independent orthopedic evaluation of the plaintiff Jesula Cornet on March 12, 2018; and the sworn reports of Jonathan Lerner, M.D., a physician who reviewed the MRI of the right shoulder of Jesula Cornet which MRI was taken on July 14, 2016 and the separate MRI scans of the plaintiff's cervical and lumbar spines which MRIs were taken on May 5, 2016.

With this evidence, the plaintiff, Sandra Cornet, has established her prima facie entitlement to judgment as a matter of law.

Specifically, Dr. Guttman, attests in his sworn report that he examined the plaintiff, performed quantified range of motion testing on her cervical spine and lumbar spine with a goniometer, compared his findings to normal range of motion values and concluded that the ranges of motion measured of plaintiff's cervical spine and lumbar spine, were full and normal. As to the right shoulder, Dr. Guttman determined as follows:

> **Right shoulder**: Examination of the right shoulder revealed no swelling. There was subacromial tenderness noted. Range of motion was forward flexion 180/180 degrees, extension 60/60 degrees, abduction 150/180 degrees, external rotation 90/90 degrees, internal rotation 70/70 degrees. Level: T10/T10. Strength is 5/5. No instability. Neurovascularly intact.
> ***

In the end, Dr. Guttman concludes as follows:

> ***
> IMPRESSION:
> - Status post cervical strain superimposed upon pre-existing cervical disc disease.
> - Status post contusion right shoulder superimposed upon pre-existing right shoulder degenerative joint disease.
> - Status post lumbar strain superimposed upon pre-existing lumbar disc disease.

> DISCUSSION:
> Based on today's examination there are pre-existing conditions to the cervical spine superimposed upon cervical disc disease, right shoulder degenerative joint disease and lumbar disc disease. The claimant does not require any further treatment including physical therapy. There is no disability. The prognosis is good.
> There is no degree of disability.
> ***
> (Motion, Ex. L).

In a separate sworn document (letter), Dr. Guttman, provides an addendum to his report commenting on the plaintiff's decreased range of motion. He opines as follows:

> ***
> The claimant did exhibit decreased range of motion of the right shoulder, however this was due to patient guarding. Motor strength was 5/5; sensation was intact and there were no positive orthopedic tests noted on my examination.
> ***
> (Motion, Ex. M).

Thus, based upon these medical submissions, and when read in conjunction with the plaintiff's MRI reports dated May 2016 and July 2016 – i.e., only one and three months from the date of this accident – it is clear to this Court that the plaintiff Jesula Cornet did not sustain any injury or limitation from this accident and that if she sustained any injury at all, such injury and/or impairment constituted nothing more than a minor, mild or slight restriction. Therefore, this Court finds that the plaintiff Sandra Cornet has established that the plaintiff Jesula Cornet's alleged injuries fail to satisfy the "significant limitation of use of a body function or system" category (as well as the "permanent consequential limitation of use of a body organ or member" category) of the "serious injury" statute (*Cuevas v Compote Cab Corp.*, 61 AD3d 812 [2nd Dept. 2009]).

Thus, based upon Sandra Cornet's proof, this Court finds that the movant herein has demonstrated that Jesula Cornet's injuries do not satisfy any of the categories of the "serious injury"

statute. Accordingly, the burden shifts to the plaintiff Jesula Cornet to come forward with evidence to overcome Sandra Cornet's submissions, in admissible form, to support her claim that she did sustain a "serious injury"(*Licari v. Elliot*, *supra*).

In opposition, Jesula Cornet offers the sworn affidavit of Mark Slamowitz, D.C., a chiropractor, who claims he first examined the plaintiff on April 15, 2016 through December 9, 2016 (with no specific dates of his examination during this time period) and not again until August 21, 2018; the unsworn reports and records of "Micah S. Katz, PA-C Marc Rosenblatt DO, FAAPMR, Physical Medicine and Rehabilitation"; and the sworn report of Daniel Schlusselberg, M.D., a radiologist who supervised the taking of an MRI of plaintiff's lumbar spine on May 5, 2016; and, the sworn report of Robert N. Waxman, M.D., a radiologist who supervised the taking of an MRI of the right shoulder of the plaintiff on July 14, 2016.

The law is clear. To defeat a motion for a summary judgment, the plaintiff must meet the statutory threshold requirement of establishing a "serious injury" by competent, admissible medical evidence, and, as in this case, the statements and reports by the plaintiff's examining and treating physicians that are unsworn or which are not affirmed to be true under penalty of perjury do not meet that test (*Magid v. Lincoln Servs. Corp.*, 60 AD3d 1008 [2nd Dept. 2009]; *Goldin v. Lee*, 275 AD2d 341 [2nd Dept. 2000]). Indeed, unsworn reports and records – medical and otherwise – are not admissible in opposition to a motion for summary judgment based on the plaintiff's failure to establish a serious injury within the meaning of the statute (*Bonsu v. Metropolitan Suburban Bus Auth.*, 202 AD2d 538 [2nd Dept. 1994]). Therefore, the unsworn reports and records of "Micah S. Katz, PA-C Marc Rosenblatt DO, FAAPMR, Physical Medicine and Rehabilitation" will not be considered by this Court.

The law also provides that in order to be deemed competent medical evidence, a radiologist who supervises the taking of an MRI must not only read said MRI but must also report an opinion as to the causality of the findings (*Collins v. Stone*, 8 AD3d 321 [2nd Dept. 2004]; *Betheil-Spitz v. Linares*, 276 AD2d 732 [2nd Dept. 2000]). Here, neither Dr. Schlusselberg nor Dr. Waxman, offer any opinions as to causality. Therefore, said reports will also not be considered by this Court in opposition to the co-plaintiff, Sandra Cornet's motion.

Thus, the only competent evidence offered by the plaintiff in opposition to Sandra Cornet's motion for summary judgment is the sworn affidavit of Mark Slamowitz, D.C., a chiropractor, who claims he first examined the plaintiff on April 15, 2016 through December 9, 2016 (with no specific dates of his examination during this time period) and not again until August 21, 2018. This submission is insufficient and does not present any triable issue of fact.

First, although Mr. Slamowitz claims to have performed range of motion testing upon the plaintiff's cervical and lumbar regions, he fails to sets forth his quantified measurements as well as what objective testing he used to determine such measurements. This is fatal. Indeed, failure to indicate which objective test was performed to measure the loss of range of motion is contrary to the requirements of *Toure v. Avis Rent a Car Systems*, *supra*. It renders the expert's opinion as to any purported loss worthless, and the Court can not consider such (*Id*; *Powell v. Alade*, 31 AD3d 523 [2nd Dept. 2006]).

Furthermore, Mr. Slamowitz never mentions, let alone addresses, the plaintiff's prior injuries to the cervical spine and lumbar spine. Failure to address plaintiff's preexisting conditions and other medical problems is fatal and do not provide any foundation or objective "medical" basis (chiropractors cannot render medical opinions) supporting the conclusions reached by Mr. Slamowitz

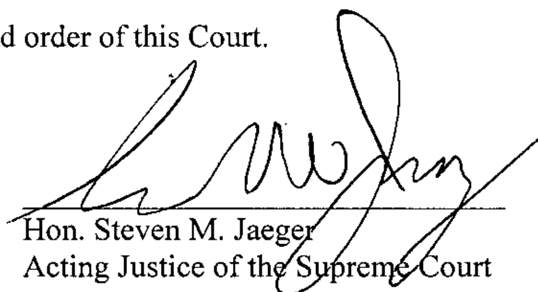
(*Franchini v. Palmieri*, 1 NY3d 536 [2003]; *Norton v. Roder*, 65 AD3d 1317 [2nd Dept. 2009]). Mr. Slamowitz's failure to acknowledge or account for a prior accident involving the plaintiff which resulted in a back injury for which the plaintiff underwent surgery and physical therapy renders his entire findings speculative and baseless (*Moore v. Sarwar*, 29 AD3d 752 [2nd Dept. 2006]).

Accordingly, this Court finds that the plaintiff, Jesula Cornet, has failed to establish that her injuries satisfy the "significant limitation" (and "permanent consequential") category of the Insurance Law. Therefore, the plaintiff Sandra Cornet's motion for an Order, awarding summary judgment dismissing the Counterclaim on the grounds that her injuries do not satisfy the "serious injury" threshold requirement of Insurance Law §5102(d), is granted.

For the reasons stated above, the complaint is dismissed as against Incorporated Village of Hempstead and Jamel Browniee.

Any applications not specifically addressed are denied.

This shall constitute the decision and order of this Court.



Hon. Steven M. Jaeger
Acting Justice of the Supreme Court

Dated: November 7, 2018
Mineola, NY

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NOV 08 2018
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