SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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JILLIAN CAREY,

Plaintiffs,

-against-

DECISION & ORDER
Index No. ~~030237/16~~ 035627/2016
Motion.#3 - MD
Motion #4 - MD
DC - N
Adj: 12/19/18

CARLOS M. ALMONTE, EASTERN STATE TIRE CORP., and JASON HERNANDEZ

Defendants.

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Hon. Thomas E. Walsh II, J.S.C.

The following papers numbered 1- 3 read on this Notice of Motion (Motion #3) by Defendants CARLOS M. ALMONTE and EASTERN STATE TIRE CORP. for an Order pursuant to *Civil Practice Law and Rules* § 3212 for summary judgment due to Plaintiff's failure to meet the threshold limits set by *New York State Insurance Law*, Sections 5102 and 5104; and also considered in connection with a Notice of Motion (Motion #5) by Defendants CARLOS M. ALMONTE and EASTERN STATE TIRE CORP for an Order pursuant to 22 NYCRR Section 202.17 and 202.21 striking this action from the trial calendar and vacating Plaintiff's Note of Issue and Statement of Readiness on the grounds that the action is not ready for trial in that all necessary or proper preliminary proceedings have not been completed severely prejudicing movant's trial preparation and further an Order extending the time of the Defendant to move for summary judgment:

PAPERS	**NUMBER**
Notice of Motion (Motion #3)/Affirmation of Andrea E. Ferruci, Esq./ Exhibits (A-G)	1
Notice of Motion (Motion #5)/Affirmation of Jennifer L. Devenuti, Esq./ Exhibits (A-H)	2
Affirmation of Antonio Marano, Esq. in Opposition (Motion #3)/Exhibits (A-D)	3

This action arises from a three (3) car accident on March 25, 2015 on Haverstraw Road near the intersection with Lime Kiln Road in Wesley Hills. Plaintiff filed and served the Summons and Complaint on December 20, 2016. Issued was joined by co-Defendant ALMONTE and EASTERN STATE TIRE CORP., with the filing of an Answer. Defendant HERNANDEZ joined issue upon filing of an answer on February 17, 2017. Defendant HERNANDEZ filed a motion for summary judgment as to liability on May 1, 2017, which was denied by the undersigned by Decision and Order dated September 25, 2017. Specifically, Defendant HERNANDEZ's previous motion was denied as premature since none of the parties to the action had been deposed before the motion was filed. Defendant HERNANDEZ submitted the instant motion for summary judgment as to liability on his behalf after all parties depositions were completed. Plaintiff filed a Note of Issue on April 27, 2018. Defendants ALMONTE and EASTERN STATE TIRE CORP. filed the instant Notice of Motion (Motion #3) seeking summary judgment due to Plaintiff's failure to meet the threshold limits set by New York State Insurance Law §§ 5102 and 5104. Subsequently, Defendants ALMONTE and EASTERN STATE TIRE CORP. filed a Notice of Motion (Motion #5) seeking to vacate the Note of Issue.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (MOTION #3)

In the instant action Plaintiff was turning left and states that she was at a complete stop when her vehicle was struck by a vehicle driven by Defendant JASON HERNANDEZ. According to Defendant HERNANDEZ his vehicle was struck in the rear by a van driven by Defendant CARLOS ALMONTE (vehicle owned by Defendant EASTERN STATE TIRE CORP.).

In this action plaintiff's bill of particulars alleges that she sustained the following injuries: L5-S1 broad-based posterior disc bulge and central annular tear, L1-L2 disc bulge, Levoscoliosis of the thoracolumbar spine, the disc bulge effaces the epidural fat ventral to the left S1 intraspinal nerve root, S1 radiculopathy, low back pain and pain radiating down both legs, severe lumbar pain and pain radiating down both legs, severe lumbar pain, tenderness, soreness, swelling and effusion, severe pain with any use of movement of the lumbar spine, severe

restriction with all planes of range of motion of the lumbar spine, C5-6 and C6-7 disc bulges, severe cervical pain, tenderness, soreness, swelling and effusion, severe pain with any use or movement of the cervical spine, severe restriction with all planes of range of motion of the cervical spine, post-traumatic arthritis, head pain and severe and intractable headaches.

Plaintiff's Bill of Particulars further alleges that Plaintiff sustained a serious injury as defined by *Insurance Law* § 5102 in that Plaintiff sustained a personal injury which resulted in 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 if 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 following the occurrence of the injury or impairment.

On October 9, 2017 the Plaintiff was examined by Dr. Loren Rosenthal at the request of the Defendant. In his affirmed report of that examination, Dr. Rosenthal states that she conducted a physical examination of the Plaintiff and that she reviewed Plaintiff's medical records. Dr. Rosenthal reports: that Plaintiff was involved in a motor vehicle accident on March 25, 2015 while her vehicle was stopped and her vehicle was rear-ended; there was no loss of consciousness, but Plaintiff did inform the doctor that she had "cervical whiplash. Dr. Rosenthal reports that Plaintiff presented to Good Samaritan Hospital on March 25, 2015 and was discharged the same day. Dr. Rosenthal further reports she reviewed medical records, as delineated on the third (3rd) page of her report. She further provided the following five (5) diagnoses (1) cervical-thoracic scoliosis, which has been present prior to the accident of 03/25/2015, (2) low back pain without clinical evidence of radiculopathy, L1-L2 disc bulge per MRI report, (3) headaches, resolved, (4) left S1 nerve root impingement per MRI report without clinical evidence of radiculopathy and (5) C5-C6 and C6-C7 disc bulges, per MRI report. Dr. Rosenthal's findings were that there were no objective findings of cervical or lumbar radiculopthay, that the Plaintiff has a full range of motion to the cervical and lumbar spine, a congenital condition, levoscoliosis, which was pre-existing and not related to the instant accident, no evidence of an acute traumatic injury to the spine, no clinical evidence of stenosis or impingement and multi-level degenerative disc disease which was pre-existing and unrelated to

the accident. Additionally, Dr. Rosenthal states that there is no objective evidence of a disability, the Plaintiff is performing her usual and customary activities of daily life with no restrictions and no objective evidence of permanency or residual effect.

On October 20, 2017 the plaintiff was examined by Marc A. Berezin, M.D. at the request of the Defendant. In his affirmed report of that examination, Dr. Berezin states that he conducted a physical examination of the Plaintiff and that he reviewed the Bill of Particulars, emergency room records from Good Samaritan Hospital 3/25/15, a spinal survey from April 9, 2015 and handwritten notes from Dr. Suchoff from April, May, June, July, October, November 2015 and December 2012. Dr. Berezin noted the handwritten notes were not clear and difficult to read. Dr Berezin reports: that Plaintiff sustained injuries secondary to a motor vehicle accident as she was the driver of a car which was stopped and struck in the rear end. The Plaintiff informed Dr. Berezin that her car did not hit any other objects and that she was brought by ambulance to Good Samaritan Hospital due to immediate neck pain following the accident. Dr. Berezin's impression/diagnosis was (1) cervical st[r]ain an d(2) lumbar strain. Additionally, Dr. Berezin reported that the MRI studies did not reveal evidence of traumatic findings. Demonstrated disc bulges that are not traumatic findings, degenerative changes and disc bulging that are consistent with degenerative process and not traumatic. Further, Dr. Berezin states that the findings of scoliosis is not a contributing factor to Plaintiff's complaints. Dr. Berezin's conclusion was that there was no objective evidence of disability, or permanency and he observed no objective evidence of neurologic changes.

On December 1, 2017 the Plaintiff was examined by Arthur Fruauff, M.D. at the request of the Defendant. In his affirmed report of that examination, Dr. Fruauff states that he conducted a physical examination of the Plaintiff and he reviewed MRI performed at Hudson Valley Radiology Associates on July 1, 2016. Dr. Fruauff reports that upon review of the aforementioned MRI his impression is that the Plaintiff has congenital left scoliosis of the thoracic/lumbar spine and degenerative disc disease with a secondary diffuse bulging disc and small posterior annular tear at L5-S1. As a result, Dr. Fruauff states that there are no findings which are secondary to the subject accident.

The Plaintiff testified at his examination before trial and stated therein, in relevant substance, that: she presented to Good Samaritan Hospital via ambulance after the accident with

complaints of a headache and back pain (no neck complaints at that time), that she was examined and provided anti-inflammatories and told to "take it easy and get some rest," that she sought further medical treatment with her primary care physician the next day complaining of lower back and neck pain, that she was instructed to continue anti-inflammatoreis and return if pain persistsed. According to Plaintiff's EBT she sought treatment from Dr. Suchoff, a chiropractor ten (10) days after the accident for neck and back pain; began treatment with Dr. Suchoff including stretches and pressure twice a week for six weeks, the once a week for six weeks and then once every two weeks for six weeks - treating for a total of eighteen weeks. The Plaintiff also testified that prior to the accident she was diagnosed and treated for scoliosis. Plaintiff testified she missed six days from work as a result of the accident and when she returned she needed assistance with her work for a month.

The affirmed medical report of, Dr. Lawrence Suchoff, states that he saw the Plaintiff most recently on May 31, 2018 and that she continues to have significant restrictions in her cervical spine which restrict her motion and significant cervical pain and restriction. Further Dr. Suchoff states that in his professional opinion based upon the most recent examination of the Plaintiff she has sustained a permanent, consequential and significant limitation of her cervical spine which is directly related to the subject motor vehicle accident. He continues stating her prognosis is poor and there is a direct cause and effect relationship between Plaintiff's current condition and the subject accident.

In order to be entitled to summary judgment it is incumbent upon the defendant to demonstrate that plaintiff did not suffer from *any* condition defined in *Insurance Law* §5102(d) as a serious injury [*Healea v. Andriani*, 158 A.D.2d 587 (2d Dept 1990)]. As the proponent of this summary judgment motion defendants must make a prima facie showing of entitlement to judgment as a matter of law, by tendering sufficient evidence to eliminate any material issues of fact from the case and to warrant a court to direct judgment in their favor, as a matter of law [*Civil Practice Law and Rules* § 3212(b); *Giuffrida v. Citibank Corp., et al*, 100 NY2d 72 (2003), *citing Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986); and *Zuckerman v. City of New York*, 49 NY2d 557 (1980)]. Summary judgment will be granted only if there is no triable issue of fact, issue finding, rather than issue determination, is the key to summary judgment, and the papers on the motion should be scrutinized carefully in the light most favorable to the party

opposing the relief [*Judice v. DeAngelo*, 272 AD2d 583 (2d Dept 2000)].

To meet their summary judgment burden plaintiffs must come forward with sufficient evidentiary proof in admissible form to raise a triable issue of fact as to whether Plaintiff suffered a "serious injury" within the meaning of the Insurance Law [*Zoldas v. St. Louis Cab Corp.*, 108 A.D.2d 378 (1st Dept. 1985), *Dwyer v. Tracey*, 105 A.D.2d 476 (3rd Dept. 1984)]. 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 [*Bonner v Hill*, 302 A.D.2d 544 (2d Dept., 2003); *O'Neill v O'Neill*, 261 A.D.2d 459 (2d Dept., 1999)].

In opposition to defendant's summary judgment motion Plaintiffs submit the affirmed report of Dr. Lawrence Suchoff. Based on the medical report of Dr. Lawrence Suchoff Plaintiff argues that she, in response to Defendant's motion, demonstrated factual disputes as to Plaintiff's claim of having sustained a personal injury which resulted in 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 if 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 following the occurrence of the injury or impairment

Where as here Plaintiff's doctor's findings are set forth in admissible form in sworn statements and are based on their personal examination and observations, the such examination and observation form an acceptable basis for that doctor's opinion regarding the existence and extent of Plaintiff's range of motion limitation, and, where those findings conflict with those of the Defendant's examining doctor issues of fact exist that preclude summary judgment and that require a trial [*O'Sullivan v. Atrium Bus Co.*, 246 AD2d 418 (1st Dept 1998)].

Where conflicting medical evidence is offered on the issue of whether the Plaintiff's injuries are permanent or significant, and varying inference may be drawn, the question is one for the jury [*Martinez v. Pioneer Transportation Corp.*, 48 AD 3d. 306 (1st Dept 2008)]. Summary judgment will be granted only if there is no triable issue of fact. Issue finding, rather than issue determination, is the key to summary judgment, and the papers on the motion should be

scrutinized carefully in the light most favorable to the party opposing the relief [*Judice v. DeAngelo*, 272 AD2d 583 (2nd Dept 2000)].

Where the medical affirmations submitted create a triable issue of fact on the question of whether Plaintiff sustained a serious injury, Defendant's motion should be denied [*Chand v. Asghar*, 6 Misc.3d 1010(A), 800 N.Y.S.2d 344, 2005 N.Y. Slip Op. 50025(U)] and discrepancies between the competing reports of the treating physicians and the defendants's examining physicians create issues of credibility and issues of fact that cannot be resolved on summary judgment and that require a trial [*Francis v. Basic Metal, Inc.*, 144 AD2d 634 (2d Dept 1981); *Cassagnol v. Williamsburg Plaza Taxi*, 234 AD2d 208 (1st Dept 1996)].

In arriving at this decision the Court has reviewed, evaluated and considered all of the issues framed by these motion papers and the failure of the Court to specifically mention any particular issue in this Decision and Order does not mean that it has not been considered by the Court in light of the appropriate legal authority.

DEFENDANT'S MOTION TO VACATE THE NOTE OF ISSUE (MOTION #5)

The Court has before it an unopposed motion to vacate the Note of Issue filed by plaintiff on April 27, 2018 asserting that the instant action is not ready for trial based upon the existence of a second action which is the result of the same subject accident. That action has been filed and served as of February 8, 2018 under Index # 30715/2018 and is currently assigned to Judge Thorsen in Rockland Supreme Court. Defendants ALMONTE and EASTERN STATE TIRE CORP. argue that they appeared on the related action before Judge Thorsen on April 23, 2018 and the Plaintiffs (as directed by the undersigned) filed a Note of Issue in the instant action on April 27, 2018. According to Defendants ALMONTE and EASTERN STATE TIRE CORP. the two actions arise from a single common accident and the issues in both are the same, as are the parties and witnesses, but discovery has not been completed in the second action. The Defendants seek to vacate the Note of Issue in the instant case for the purpose of completing discovery in the second action and allowing it to "catch up" so that no parties suffer prejudice.

Pursuant to *Civil Practice Law and Rules* § 3402(a) provides that a note of issue may be filed at any time after the issue is joined, or forty (40) days after service of the summons

irrespective of the joinder of issue and must be accompanied by the items required in 22 NYCRR 202.21(a). The purpose of a certificate of readiness is to certify that all discovery is complete, waived or not required and that the action is ready for trial. [22 NYCRR § 202.21(b)]. A certificate of readiness ordinarily foreclosures further discovery. [*Blondell v. Malone*, 91 AD2d 1201 (4th Dept); *Niagara Falls Urban Renewal Agency v. Pomery Real Estate Corp.*, 74 AD2d 734 (4th Dept 1980)].

After a Note of Issue is filed there are two (2) methods to obtain further disclosure: (1) pursuant to 22 NYCRR § 202.21(d) and 22 NYCRR 202.21 (e). Pursuant to 22 NYCRR § 202.21(d):

> Where unusual or unanticipated circumstances develop subsequent to the filing of a note of issue and certificate of readiness which require additional pretrial proceedings to prevent substantial prejudice, the court, upon motion supported by affidavit, may grant permission to conduct such necessary proceedings.

Pursuant to 22 NYCRR § 202.21(e) provides:

> [w]ithin 20 days after service of a note of issue and certificate of readiness, any party to the action or special proceeding may move to vacate the note of issue, upon affidavit showing in what respects the case is not ready for trial and the court may vacate the note of issue if it appears that a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of this section is one material respect.

Therefore, where additional discovery is sought more than twenty (20) days after the filing of the note of issue, the moving party is required to demonstrate unusual or unanticipated circumstances and substantial prejudice absent the additional discovery. [*Blinds to Go (U.S.), Inc. v. Times Plaza Development*, L.P., 111 AD3d 775 (2d Dept 2013)]. Accordingly, a motion seeking further pretrial proceedings after a note of issue and certificate of readiness has been filed is only granted upon a showing of the movant of good cause or the presence of unusual and unanticipated circumstances subsequent to the filing of the note of issue and certificate of readiness. [*Osawonyi v. Grigorian*, 220 AD400 (2d Dept 1995); *Davididan by Davididan v. County of Nassau,* 152 AD2d 617 (2d Dept 1989)]. Absent a finding of the trial court of "unusual or unanticipated circumstances" the Court does not have discretion to *sua sponte* vacate a field note of issue.

Vacatur of the Note of Issue pursuant to 22 NYCRR 202.21(e)

The Court notes that the Defendants have made their application to vacate the Note of Issue in the instant action pursuant to 22 NYCRR 202.21(e) within twenty (20) days of the date of its filing. The Note of Issue was filed on April 27, 2018. Additionally, Defendants submit that they intended to file a motion for a joint trial, but at the pre-motion conference before the undersigned on April 25, 2018 the parties were directed to try to complete discovery in the second action before seeking to move for a joint trial.

The Defendants relied on 22 NYCRR 202.21(e) as the basis of their argument. Defendants contend that in a circumstance in which there is a false statement in the certificate of readiness regarding outstanding requests for discovery that the actions should be stricken from the calendar. The Defendants have failed to provide an argument as to the false statement contained within the certificate of readiness which would warrant a vacatur of the Note of Issue filed in the instant action. As such, the Court declines to vacate the Note of Issue and Certificate of Readiness in the instant action pursuant to 22 NYCRR 202.21(e).

Accordingly, it is hereby

ORDERED that Defendants Motion for Summary Judgment (Motion # 3) is denied in its entirety; and it is further

ORDERED that Defendants Motion to Vacate the Note of Issue (Motion #5) is denied it is entirety; and it is further

ORDERED that the parties are directed to appear for a pre-trial conference on **WEDNESDAY DECEMBER 19, 2018 at 9:30 a.m. in TAP** before the Honorable William Sherwood.

The foregoing constitutes the Decision and Order of this Court on Motions #3 and #5.

Dated: New City, New York
September 19, 2018

HON. THOMAS E. WALSH, II
Justice of the Supreme Court

TO:

To:
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(via e-file)

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