Tirino v Village of Freeport
2018 NY Slip Op 34340(U)
November 20, 2018
Supreme Court, Nassau County
Docket Number: Index No. 608121/16
Judge: Denise L. Sher
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

SUZANN TIRINO,

Plaintiff,

- against -

THE VILLAGE OF FREEPORT, FREEPORT FIRE DEPARTMENT and GEAUDI MARINES-INFANTE,

Defendants.

TRIAL/IAS PART 32
NASSAU COUNTY

Action No. 01
Index No.: 608121/16

CARMEN DIAZ-RIVERA,

Plaintiff,

- against -

INCORPORATED VILLAGE OF FREEPORT, GEAUDI MARINES-INFANTE and SUZANN J. TIRINO,

Defendants.

Action No. 02
Index No.: 2789/16
Motion Seq. No.: 01
Motion Date: 05/18/18

ALLSTATE INSURANCE COMPANY AS SUBROGEE OF CARMEN DIAZ-RIVERA,

Plaintiff,

- against -

SUZANN J. TIRINO, GEAUDI MARINES-INFANTE and VILLAGE OF FREEPORT,

Defendants.

Action No. 03
Index No.: 606553/17

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation and Exhibits and Memorandum of Law	1
Affirmation in Partial Support and Partial Opposition and Exhibits	2
Affirmation in Opposition and Exhibits	3
Reply Affirmation	4

Upon the foregoing papers, it is ordered that the motion is decided as follows:

In Action No. 02, defendant Suzann J. Tirino ("Tirino") moves, pursuant to CPLR § 3212, for an order granting her summary judgment on the issue of liability; and moves, pursuant to CPLR § 3212 and Article 51 of the Insurance Law of the State of New York, for an order granting her summary judgment dismissing plaintiff Carmen Diaz-Rivera's ("Diaz-Rivera") Verified Complaint on the grounds that plaintiff Diaz-Rivera did not suffer a "serious injury" in the subject accident as defined by New York State Insurance Law § 5102(d). Defendants Incorporated Village of Freeport ("Freeport") and Geaudi Marines-Infante ("Marines-Infante") submitted an affirmation in partial support to the motion and in partial opposition to the motion. Plaintiff Diaz-Rivera opposes the threshold branch of the motion.

Action No. 02 was commenced with the filing of a Summons and Verified Complaint on or about April 13, 2016. *See* Defendant Tirino's Affirmation in Support Exhibit B. Issue was joined by defendant Tirino on or about January 5, 2017. *See id.*

The action arises from a motor vehicle accident which occurred on August 7, 2015, at approximately 4:40 p.m., on Brooklyn Avenue, at or near its intersection with North Ocean Avenue, Freeport, County of Nassau, State of New York. The subject accident involved three (3) vehicles - a 2008 Lexus, owned and operated by defendant Tirino, a 2004 Chevrolet, owned by defendant Freeport and operated by defendant Marines-Infante, and a 2008 Chevrolet, owned and

operated by plaintiff Diaz-Rivera. *See* Defendant Tirino's Affirmation in Support Exhibit D of Exhibit A.

In support of the motion, counsel for defendant Tirino submits, in pertinent part, that, "[t]his accident occurred when the vehicle (owned by co-defendant, Incorporated Village of Freeport, and operated by co-defendant Geaudi Marines-Infante), was travelling eastbound on Brooklyn Avenue. The movant defendant Tirino was travelling northbound on North Ocean Avenue. At the subject intersection of Brooklyn Avenue and North Ocean Avenue, **the co-defendants were governed by a stop sign as well as a flashing red traffic light**. After failing to yield to the stop sign and blinking red traffic signal, the co-defendants unlawfully entered the subject intersection, which was occupied by movant Tirino, travelling with the right of way. The co-defendant vehicle struck the Tirino vehicle and flipped over, then subsequently slid on its roof, to impact the vehicle of Plaintiff in Action #2, Carmen Diaz-Rivera. The Diaz-Rivera vehicle had been stopped at the stop sign in the westbound lane of Brooklyn Avenue. There was **no contact** between the movant Tirino vehicle and the Diaz-River (*sic*) vehicle." *See id.*

Counsel for defendant Tirino further asserts that, at defendant Tirino's February 19, 2016 Examination Under Oath and August 18, 2017 Examination Before Trial ("EBT"), she testified that, on the date and time of the subject incident, she was proceeding through the intersection, with the right of way, when defendant Marines-Infante failed to yield the right of way resulting in said accident. Specifically, she testified that there was a blinking yellow traffic light controlling the direction in which her automobile was traveling, while there was a blinking red traffic light controlling the direction in which defendant Marines-Infante's automobile was traveling.

Defendant Tirino further testified that there were stop signs controlling the traffic on both sides of Brooklyn Avenue, the road upon which defendant Marines-Infante's automobile was traveling, and no stop signs on Ocean Avenue, the road upon which her automobile was traveling. *See* Defendant Tirino's Affirmation in Support Exhibits E and F of Exhibit A.

Plaintiff Diaz-Rivera also testified at an EBT and confirmed the location of the blinking red light and stop signs on Brooklyn Avenue. *See* Defendant Tirino's Affirmation in Support Exhibit G of Exhibit A.

Counsel for defendant Tirino further submits that defendant Marines-Infante testified at an EBT and contends that "[d]uring said deposition, Defendant testified that he was proceeding on Brooklyn Avenue and failed to yield the right of way to the [defendant], SUZANN TIRINO resulting in the motor vehicle accident." *See* Defendant Tirino's Affirmation in Support Exhibit H of Exhibit A.

Counsel for defendant Tirino argues that, "[i]t is clear [defendant Tirino] established a prima facie case that defendant [Marines-Infante] was negligent as a matter of law in proceeding into the intersection, and failing to yield the right-of-way to [defendant Tirino's] vehicle when Defendant [Marines-Infante] was faced with a stop sign.... Here, the fact that the defendant [Marines-Infante] asserts that he brought his vehicle to a stop before proceeding into the intersection does not absolve the defendant [Marines-Infante] of liability, as defendant [Marines-Infante] was required to stop and remain stationary until it was clear to proceed across the intersection.... Furthermore, conclusory assertions that [defendant Tirino] may have been speeding before the collision and may have had time to take evasive action to avoid the accident were completely speculative and were undermined by the evidence in the record [citations omitted]. [Defendant Tirino] had the right of way and was entitled to anticipate that the

Defendant [Marines-Infante] would obey any and all traffic laws requiring him to yield (*sic*) right of way. [citations omitted]. [Defendant Tirino] has demonstrated that defendant [Marines-Infante], proceeded into the intersection when it was hazardous to do so, and failed to yield the right of way to [defendant Tirino's] vehicle. Defendant [Marines-Infante] was required to stop and remain stationary until it was clear to proceed across the intersection, but he proceeded into the intersection after [defendant Tirino's] vehicle had already entered the intersection, and struck [defendant Tirino's] vehicle. This establishes defendant [Marines-Infante] failed to keep a proper lookout under the circumstances, to see and be aware of what was in his view, and failed to see that which, under the circumstances, he should have seen with the proper use of his senses, which was the sole proximate cause of the accident. [citations omitted]. Thus, [defendant Tirino] has established his (*sic*) prima facie entitlement to judgment as a matter of law on the issue of liability." *See* Defendant Tirino's Affirmation in Support Exhibit A.

In opposition to the liability branch of defendant Tirino's motion, counsel for defendants Freeport and Marines-Infante argues, in pertinent part, that, "[t]hroughout [defendant Tirino's] entire Affirmation, she makes one argument and one argument only: defendants [Freeport and Marines-Infante] had a stop sign/blinking red light and [defendant Tirino] did not. It is the portion cited in [defendant Tirino's] Examination Under Oath, the portion cited in [defendant Tirino's] deposition, the portion cited in plaintiff Diaz-Rivera's deposition, and the portion cited in defendant [Marines-Infante's] deposition. It is the only argument made by [defendant Tirino's] counsel, who assumes this is enough to warrant summary judgment on liability, as if the existence of a stop sign, without anything else, precludes a reasonable jury from finding 1% negligence for the other party in every case. What [defendant Tirino] neglects to mention is that defendant [Marines-Infante] entered the intersection first, that the points of impact to the vehicles

clearly show [defendant Tirino] 'T-boning' defendant [Marines-Infante], and that under such circumstances a reasonable jury can find comparative negligence on the part of [defendant Tirino], as she is required to 'see and be aware of what was in [her] view.'... It is clear that the front of [defendant Tirino's] vehicle struck the mid to rear passenger side of defendant [Marine-Infante's] vehicle.... [Defendant] Tirino claimed that defendant [Marine-Infante's] vehicle climbed on top of her hood, as opposed to a 'T-Bone' accident, and this accounts for the damage to the front of her vehicle.... However, defendant Marines-Infante testified that his vehicle was struck by the Tirino vehicle in the side, which corresponds to a more traditional 'T-bone' accident.... Thus, there is an issue of fact as to how the accident occurred, and all issues of fact must be resolved in favor of the non-moving party for purposes of summary judgment. Moreover, [defendant] Tirino's version of the accident does not correspond to the damage to the vehicles.... The photographs of damage to [defendant] Tirino's vehicle also support the premise that she T-boned the defendant [Marines-Infante].... They show crush damage to the front of her vehicle, and the center of her hood pushed in and up." *See* Defendant Tirino's Affirmation in Support Exhibit A - Defendants Freeport and Marines-Infante's Affirmation in Opposition Exhibit A.

Counsel for defendants Freeport and Marines-Infante further contends that, "[d]efendant Marines-Infante testified at his deposition that he arrived at the stop sign, waited, and looked both ways.... He saw one vehicle, and waited for it to pass.... He then looked again, and did not see any other vehicle.... He was stopped for about five seconds in total.... He entered the intersection, traveling approximately five miles per hour.... He first saw the Tirino vehicle after he already entered the intersection. At this time, the Tirino vehicle was still 'under the train tracks', about 20 feet from the intersection.... When he was in the center of the intersection, the

front bumper, front grille, and front hood of Tirino's vehicle struck the back door, back fender, and back tire of his vehicle.... He was about 85 percent through the intersection when the accident occurred.... The force of impact was strong enough such that defendant Marines-Infante's vehicle flipped over, and was pushed across the remainder of the intersection, coming into contact with plaintiff Diaz-Rivera's vehicle which was on the other side of the intersection.... As there is an issue of fact as to whether the points of impact show [defendant Tirino] T-boned defendant [Marines-Infante], and defendant [Marines-Infante] testified that he had already entered the intersection when [defendant Tirino] was still under the train tracks, 20 feet from the intersection, and was 85 percent done with the intersection when he was T-boned, there exists an issue of fact as to whether defendant [Marines-Infante] entered the intersection first." *See* Defendant Tirino's Affirmation in Support Exhibit H of Exhibit A.

Counsel for defendants Freeport and Marines-Infante adds, in pertinent part, that, "[a]s the within matter has been set for joint trial ..., and involves the same accident across all three actions, it would be an absurd incongruence to grant summary judgment in one action but not the other. After all, each action pertain to the same accident, and it is the same person who is filing both motions (albeit represented by two separate counsels). Therefore, we ask that the Court adopt the same decision for the within summary judgment motion as it adopts for the motion filed in Action #1. Furthermore, there are no arguments made in the within moving papers which were not made by Tirino as a plaintiff in the first motion for summary judgment.... While Suzann Tirino is technically represented by two different counsels, one as a plaintiff and one as a defendant, she should not be able to get two bites at the apple for the same relief." *See* Defendants Freeport and Marines-Infante's Affirmation in Opposition Exhibit B; Defendant Tirino's Affirmation in Support Exhibit A.

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. *See* CPLR § 3212 (b); *Olan v. Farrell Lines Inc.*, 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York, supra.* When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. *See Sillman v. Twentieth Century-Fox Film Corp., supra.* Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. *See Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the Court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues

exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989). It is the existence of an issue, not its relative strength that is the critical and controlling consideration. *See Barrett v. Jacobs*, 255 N.Y. 520 (1931); *Cross v. Cross*, 112 A.D.2d 62, 491 N.Y.S.2d 353 (1st Dept. 1985). The evidence should be construed in a light most favorable to the party moved against. *See Weiss v. Garfield*, 21 A.D.2d 156, 249 N.Y.S.2d 458 (3d Dept. 1964).

Summary judgment is rarely appropriate in negligence actions (*see Ugarriza v. Schmeider*, 46 N.Y.2d 471, 414 N.Y.S.2d 304 (1979)), even where the salient facts are conceded, since the issue of whether the defendant or the plaintiff acted reasonably under the circumstances is generally a question for jury determination. *See Andre v. Pomeroy*, 35 N.Y.2d 361, 362 N.Y.S.2d 131 (1974); *Davis v. Federated Department Stores, Inc.*, 227 A.D.2d 514, 642 N.Y.S.2d 707 (2d Dept. 1996); *John v. Leyba*, 38 A.D.3d 496, 831 N.Y.S.2d 488 (2d Dept. 2007).

It is well settled that there may be more than one proximate cause of a traffic accident (*see Steiner v. Dincesen*, 95 A.D.3d 877, 943 N.Y.S.2d 585 (2d Dept. 2012); *Gause v. Martinez*, 91 A.D.3d 595, 936 N.Y.S.2d 272 (2d Dept. 2012); *Lopez v. Reyes-Flores*, 52 A.D.3d 785, 861 N.Y.S.2d 389 (2d Dept. 2008)) and "the proponent of a summary judgment has the burden of establishing freedom from comparative negligence as a matter of law." *See Antaki v. Mateo*, 100 A.D.3d 579, 954 N.Y.S.2d 540 (2d Dept. 2012); *Simmons v. Canady*, 95 A.D.3d 1201, 945 N.Y.S.2d 138 (2d Dept. 2012); *Pollack v. Margolin*, 84 A.D.3d 1341, 924 N.Y.S.2d 282 (2d Dept. 2011). "The issue of comparative fault is generally a question for the trier of facts." *See Allen v. Echols*, 88 A.D.3d 926, 931 N.Y.S.2d 402 (2d Dept. 2011); *Gause v. Martinez*, *supra*.

Further, all drivers are required to "see that which through proper use of [his or her] senses [he or she] should have seen." *Steiner v. Dincesen*, *supra*, *quoting Vainer v. DiSalvo*, 79 A.D.3d 1023, 914 N.Y.S.2d 236 (2d Dept. 2010) *quoting Bongiovi v. Hoffman*, 18 A.D.3d 686, 795 N.Y.S.2d 354 (2d Dept. 2005).

Based upon the evidence presented in the papers before it, the Court finds that there are issues of fact as to the exact cause of the subject accident and which party failed to act reasonably under the circumstances and failed to see that which he or she should have seen through the proper use of his or her senses.

Additionally, the Court finds that the facts and circumstances surrounding the subject motor vehicle accident involve determining the credibility of the parties involved in said accident and, in rendering a decision on a summary judgment motion, the Court is not to determine matters of credibility.

Accordingly, the branch of defendant Tirino's motion, pursuant to CPLR § 3212, for an order granting her summary judgment on the issue of liability, is hereby **DENIED**.

The Court will now address the threshold branch of defendant Tirino's motion.

As a result of the accident, plaintiff Diaz-Rivera claims that she sustained the following injuries and/or aggravation of pre-existing conditions:

Disc herniation at L2-L3, impinging the extraforaminal left L2 nerve;

Aggravation/Exacerbation of disc bulge at L3-L4;

Aggravation/Exacerbation of disc bulge at L4-L5;

Aggravation/Exacerbation of disc bulge at L5-S1, with impingement of the descending S1 nerve roots;

Disc herniation at T4-T5;

Disc herniation at T6-T7;

Disc herniation at T8-T9;

Disc herniation at T9-T10;

Disc herniation at C4-C5;

Disc herniation at C5-C6;

Cervical radiculopathy;
Lumbar radiculopathy;

Cervicalgia;

Lumbago;

Cervical, thoracic and lumbosacral radiculitis;

Cervical, thoracic and lumbosacral sprain/strain;

Myofascial pain syndrome;

Traumatically induced arthritis. *See* Defendant Tirino's Affirmation in Support Exhibit D ¶¶ 6-7.

Within the particular context of a threshold motion which seeks dismissal of a personal injury complaint, the movant bears a specific burden of establishing that the plaintiff did not sustain a "serious injury" as enumerated in Article 51 of the Insurance Law § 5102(d). *See Gaddy v. Eyler*, 79 N.Y.2d 955, 582 N.Y.S.2d 990 (1992). Upon such a showing, it becomes incumbent upon the non-moving party to come forth with sufficient evidence in admissible form to raise an issue of fact as to the existence of a "serious injury." *See Licari v. Elliott*, 57 N.Y.2d 230, 455 N.Y.S.2d 570 (1982).

In support of a claim that the plaintiff has not sustained a serious injury, the defendant may rely either on the sworn statements of the defendant's examining physicians or the unsworn reports of the plaintiff's examining physicians. *See Pagano v. Kingsbury*, 182 A.D.2d 268, 587 N.Y.S.2d 692 (2d Dept. 1992). However, unlike the movant's proof, unsworn reports of the

plaintiff's examining doctors or chiropractors are not sufficient to defeat a motion for summary judgment. *See Grasso v. Angerami*, 79 N.Y.2d 813, 580 N.Y.S.2d 178 (1991).

Essentially, in order to satisfy the statutory serious injury threshold, the legislature requires objective proof of a plaintiff's injury. The Court of Appeals in *Toure v. Avis Rent-a-Car Systems*, 98 N.Y.2d 345, 746 N.Y.S.2d 865 (2002) stated that a plaintiff's proof of injury must be supported by objective medical evidence, such as sworn MRI and CT scan tests. However, these sworn tests must be paired with the doctor's observations during the physical examination of the plaintiff. Unsworn MRI reports can also constitute competent evidence if both sides rely on those reports. *See Gonzalez v. Vasquez*, 301 A.D.2d 438, 754 N.Y.S.2d 7 (1st Dept. 2003).

Conversely, even where there is ample proof of a plaintiff's injury, certain factors may nonetheless override a plaintiff's objective medical proof of limitations and permit dismissal of a plaintiff's complaint. Specifically, additional contributing factors such as a gap in treatment, an intervening medical problem or a pre-existing condition would interrupt the chain of causation between the accident and the claimed injury. *See Pommells v. Perez*, 4 N.Y.3d 566, 797 N.Y.S.2d 380 (2005).

Plaintiff Diaz-Rivera claims that, as a consequence of the above described automobile accident with defendants, she has sustained serious injuries as defined in New York State Insurance Law § 5102(d) and which fall within the following statutory categories of injuries:

> 1) a permanent consequential limitation of use of a body organ or member; (Category 7)
>
> 2) a significant limitation of use of a body function or system; (Category 8)
>
> 3) 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.(Category 9). *See* Defendant Tirino's Affirmation in Support Exhibit D ¶ 19.

To meet the threshold regarding significant limitation of use of a body function or system or permanent consequential limitation of a body function or system, the law requires that the limitation 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. *See Gaddy v. Eyler*, *supra*; *Licari v. Elliot*, *supra*. A minor, mild or slight limitation will be deemed insignificant within the meaning of the statute. *See Licari v. Elliot*, *supra*. A claim raised under the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories can be made by an expert's designation of a numeric percentage of a plaintiff's loss of motion in order to prove the extent or degree of the physical limitation. *See Toure v. Avis Rent-a-Car Systems*, *supra*. In addition, an expert's qualitative assessment of a plaintiff's condition is also probative, provided: (1) the evaluation has an objective basis and (2) the evaluation compares the plaintiff's limitation to the normal function, purpose and use of the affected body organ, member, function or system. S*ee id.*

Finally, to prevail under the "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" category, a plaintiff must demonstrate through competent, objective proof, a "medically determined injury or impairment of a non-permanent nature" (Insurance Law § 5102(d)) "which would have caused the alleged limitations on the plaintiff's daily activities." *See Monk v. Dupuis*, 287 A.D.2d 187, 734 N.Y.S.2d 684 (3d Dept. 2001). A curtailment of the plaintiff's usual activities must be "to a great extent rather than some slight curtailment." *See Licari v. Elliott*, *supra* at 236. Under this category specifically, a gap or cessation in treatment is

irrelevant in determining whether the plaintiff qualifies. *See Gomez v. Ford Motor Credit Co.*, 10 Misc.3d 900, 810 N.Y.S.2d 838 (Sup. Ct., Bronx County, 2005).

With these guidelines in mind, the Court will now turn to the merits of defendant Tirino's motion. In support of the motion, defendant Tirino submits the pleadings, plaintiff Diaz-Rivera's Verified Bill of Particulars, the transcript of plaintiff Diaz-Rivera's EBT testimony, the certified report of Raymond A. Shebairo, M.D., who performed an independent orthopedic examination of plaintiff Diaz-Rivera on September 13, 2017 and the affirmed reports of Evan Mair, M.D., who performed independent radiology reviews of plaintiff Diaz-Rivera's MRIs.

When moving for dismissal of a personal injury complaint, the movant bears a specific burden of establishing that the plaintiff did not sustain a serious injury. *See Gaddy v. Eyler*, *supra*. Within the scope of the movant's burden, defendant's medical expert must specify the objective tests upon which the stated medical opinions are based, and when rendering an opinion with respect to the plaintiff's range of motion, must compare any findings to those ranges of motion considered normal for the particular body part. *See Gastaldi v. Chen*, 56 A.D.3d 420, 866 N.Y.S.2d 750 (2d Dept. 2008); *Malave v. Basikov*, 45 A.D.3d 539, 845 N.Y.S.2d 415 (2d Dept. 2007); *Nociforo v. Penna*, 42 A.D.3d 514, 840 N.Y.S.2d 396 (2d Dept. 2007); *Meiheng Qu v. Doshna*, 12 A.D.3d 578, 785 N.Y.S.2d 112 (2d Dept. 2004); *Browdame v. Candura*, 25 A.D.3d 747, 807 N.Y.S.2d 658 (2d Dept. 2006); *Mondi v. Keahan*, 32 A.D.3d 506, 820 N.Y.S.2d 625 (2d Dept. 2006).

Raymond A. Shebairo, M.D. ("Dr. Shebairo"), a board certified orthopedic surgeon, reviewed plaintiff Diaz-Rivera's medical records and conducted a physical examination of her on September 13, 2017. *See* Defendant Tirino's Affirmation in Support Exhibit F. Dr. Shebairo performed quantified and comparative range of motion tests on plaintiff Diaz-Rivera's cervical

spine, thoracic spine and lumbar spine. The range of motion testing was conducted by way of a goniometer and the results of the tests indicated deviations from normal with respect to her cervical spine, thoracic spine and lumbar spine. Dr. Shebairo's diagnosis was "1. Cervical spine sprain/strain - resolved. 2. Thoracic spine sprain/strain - resolved. 3. Lumbar spine sprain/strain - resolved." *Id.* Dr. Shebairo concluded, "[b]ased on today's examination and within a reasonable degree of medical certainty, there is no objective evidence of an orthopaedic disability. Though the claimant did exhibit a decrease in ROM it should be noted that they are voluntary moves which are under the control of an individual. There were no objective correlative findings noted such as muscle spasm, decreased sensation, muscle atrophy or positive orthopaedic tests to substantiate subjective loss of motion." *Id.*

Evan Mair, M.D. ("Dr. Mair"), a board certified radiologist, conducted independent film reviews of the MRI of plaintiff Diaz-Rivera's cervical spine which was obtained on October 23, 2015 at Zwanger Pesiri Radiology, the MRI of plaintiff Diaz-Rivera's thoracic spine which was obtained on October 23, 2015 at Zwanger Pesiri Radiology and the MRI of plaintiff Diaz-Rivera's lumbar spine which was obtained on October 23, 2015 at Zwanger Pesiri Radiology. *See* Defendant Tirino's Affirmation in Support Exhibit G.

With respect to his review of plaintiff Diaz-Rivera's cervical spine MRI, Dr. Mair concluded that, "[t]he straightening of the cervical spine is a nonspecific finding, which may be related to muscle spasm or patient positioning during the exam. In my opinion, the findings of degenerative spondylotic ridging, multilevel degenerative endplate spurring, uncovertebral hypertrophy, and facet hypertrophy, and multilevel degenerative disc narrowing and bulging, and absence of fracture or disc herniation, are not causally related to the reported injury of August 7, 2015." *Id.*

With respect to his review of plaintiff Diaz-Rivera's thoracic spine MRI, Dr. Mair concluded that, "[i]n my opinion, the findings of degenerative endplate spurring and spondylotic ridging, and multilevel degenerative disc narrowing and bulging, and absence of fracture or disc herniation, are not causally related to the reported injury of August 7, 2015." *Id.*

With respect to his review of plaintiff Diaz-Rivera's lumbar spine MRI, Dr. Mair concluded that, "[i]n my opinion, the findings of multilevel degenerative endplate spurring and multilevel degenerative disc narrowing and bulging, and absence of fracture or disc herniation, are not causally related to the reported injury of August 7, 2015." *Id.*

Counsel for defendant Tirino further asserts that, according to the EBT testimony of plaintiff Diaz-Rivera, plaintiff Diaz-Rivera did not miss any time from work as a result of the subject accident, and her job duties did not change at all as a result of said accident; her only limitations at work being bending and going down stairs to file. Plaintiff Diaz-Rivera was not confined to her bed or home for any period. As a result of the accident plaintiff Diaz-Rivera claims she cannot go bowling or dance, but then she conceded that she has not tried to do any of these activities since the date of the accident. Plaintiff Diaz-Rivera's limitations entail not being able to clean her house the way she used to, going on leisure walks, food shopping, carrying groceries and cooking." *See* Defendant Tirino's Affirmation in Support Exhibit E.

Defendants Freeport and Marines-Infante joined in the threshold branch of defendant Tirino's motion. Defendants Freeport and Marines-Infante also had plaintiff Diaz-Rivera submit to an orthopedic Independent Medical Examination with Joseph Lopez, M.D. ("Dr. Lopez"), a board certified orthopedist, on December 11, 2017. *See* Defendants Freeport and Marines-Infante's Affirmation in Partial Support and in Partial Opposition Exhibit C.

Dr. Lopez performed range of motion tests on plaintiff Diaz-Rivera's cervical spine, thoracic spine and lumbar spine. The range of motion was "determined using direct visualization" and the results of the tests only indicated a deviation from normal with respect to flexion of her thoracic spine and lumbar spine. Dr. Lopez's impression was "1. The claimant has a resolved strain to her cervical, thoracic and lumbar spine. 2. Normal right shoulder exam. As of this time, there is no permanency.... If the history related to me is correct, I believe there is a high degree of medical probability that the alleged accident was the competent producing cause of injury which temporarily aggravated preexisting conditions to the cervical spine and lumbar spine. It should be noted the bill of particulars does not allege a right shoulder injury, At this time I do not see a need for further treatment in my specialty. At this time, her prognosis is good." *Id.*

As previously stated herein, defendants' medical experts must specify the objective tests upon which the stated medical opinions are based, and, when rendering an opinion with respect to plaintiff's range of motion, must compare any findings to those ranges of motion considered normal for the particular body part. Applying the aforesaid criteria to the reports of Dr. Shebairo and Dr. Lopez, the Court finds that defendants have failed to demonstrate that plaintiff Diaz-Rivera did not sustain a "serious injury" with respect to Categories 7 and 8. *See Gaddy v Eyler*, *supra*. Here, while Dr. Shebairo specified the basis for his findings and compared plaintiff Diaz-Rivera's range of motion measurements to those which are deemed normal, Dr. Shebairo observed limitations in all of the specific areas tested. *See Zamaniyan v. Vrabeck*, 41 A.D.3d 472, 835 N.Y.S.2d 903 (2d Dept. 2007); *Bentivegna v. Stein*, 42 A.D.3d 555, 841 N.Y.S.2d 316 (2d Dept. 2007); *Morales v. Theagene*, 46 A.D.3d 775, 848 N.Y.S.2d 325 (2d Dept. 2007); *Tchjevskaia v. Chase*, 15 A.D.3d 389, 790 N.Y.S.2d 175 (2d Dept. 2005). The Court also finds that Dr. Lopez failed to identify the methods in which he obtained the range of motion

measurements, merely attributing them to "visualization." Dr. Lopez also did not identify the authoritative guideline for the standard of normal ranges upon which he allegedly based his comparisons. Dr. Lopez also failed to set forth what objective testing was done to support his determinations, thus rendering his determinations conclusory. *See Cedillo v. Rivera*, 39 A.D.3d 453, 835 N.Y.S.2d 238 (2d Dept. 2007); *Chiara v. Dernago*, 70 A.D.3d 746, 894 N.Y.S.2d 129 (2d Dept. 2010).

Since defendant Tirino has failed to establish her *prima facie* burden with respect to Categories 7 and 8, it is unnecessary to consider whether plaintiff Diaz-Rivera's opposition papers were sufficient to raise a triable issue of fact as to same. *See Tchjevskaia v. Chase*, *supra*; *Mariaca-Olmos v. Mizrhy*, 226 A.D.2d 437, 640 N.Y.S.2d 604 (2d Dept. 1996). Where defendants fail to demonstrate that they have met their *prima facie* burden, the Court will deny the motion for summary judgment regardless of the sufficiency of the opposition papers. *See Ayotte v. Gervasio*, 81 N.Y.2d 1062, 601 N.Y.S.2d 463 (1993); *David v. Bryon*, 56 A.D.3d 413, 867 N.Y.S.2d 136 (2d Dept. 2008); *Barrera v. MTA Long Island Bus*, 52 A.D.3d 446, 859 N.Y.S.2d 483 (2d Dept. 2008); *Breland v. Karnak Corp.*, 50 A.D.3d 613, 854 N.Y.S.2d 765 (2d Dept. 2008).

Accordingly, the branches of defendant Tirino's motion, pursuant to CPLR § 3212 and Article 51 of the Insurance Law of the State of New York, for an order granting her summary judgment on the issue of serious injury with respect to Category 7 (permanent consequential limitation of use of a body organ or member) and Category 8 (significant limitation of use of a body function or system), are hereby **DENIED**.

With respect to Category 9 (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), "[w]hen construing the statutory definition of a 90/180 day claim, the words 'substantially all' should be construed to mean that the person has been prevented from performing his usual activities to a great extend, rather than some slight curtailment." *See Thompson v. Abbasi*, 15 A.D.3d 95, 788 N.Y.S.2d 48 (1st Dept. 2005); *Gaddy v. Eyler, supra.*

The Court finds that plaintiff Diaz-Rivera's testimony at her EBT does not establish that she was unable to perform substantially all of the material acts that constitute her customary and daily activities for no less than 90 out of the first 180 days following the subject accident. *See* Defendant Tirino's Affirmation in Support Exhibit E.

Accordingly, the branch of defendant Tirino's motion, pursuant to CPLR § 3212 and Article 51 of the Insurance Law of the State of New York, for an order granting her summary judgment on the issue of serious injury with respect to Category 9 (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), is hereby **GRANTED**.

All parties shall appear for Trial in Nassau County Supreme Court, Central Jury Part, at 100 Supreme Court Drive, Mineola, New York, on January 9, 2019, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
November 20, 2018

ENTERED

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NASSAU COUNTY
COUNTY CLERK'S OFFICE