Davino v Pomarico
2021 NY Slip Op 33267(U)
March 1, 2021
Supreme Court, Suffolk County
Docket Number: Index No. 612649/2018
Judge: Joseph A. Santorelli
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SHORT FORM ORDER ORIGINAL

INDEX No. 612649/2018
CAL. No. 202000164MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 6/11/20 (001)
MOTION DATE 10/1/20 (002)
MOTION DATE 10/22/20 (003)
MOTION DATE 10/29/20 (004)
ADJ. DATE 11/5/20 (001 & 002)
ADJ. DATE 10/29/20 (003 & 004)
Mot. Seq. # 001 MD;
Mot. Seq. # 002 XMD
Mot. Seq. # 003 MG
Mot. Seq. # 004 MD

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JANAE DAVINO,

Plaintiff,

- against -

JOHN POMARICO, JENNIFER SEMENDOFF and COURTNEY SEMENDOFF,

Defendants.

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RAPPAPORT GLASS LEVINE & ZULLO
Attorney for Plaintiff
1355 Motor Parkway
Islandia, New York 11749

MILBER MAKRIS PLOUSADIS & SEIDEN
Attorney for Defendant Pomarco
1000 Woodbury Road, Suite 402
Woodbury, New York 11797

GENTILE & TAMBASCO
Attorney for Defendants Semendoff
115 Broad Hollow Road, Suite 300
Melville, New York 11747

Upon the following papers read on this motion and cross motion for summary judgment and these motions to strike the pleadings : Notice of Motion/ Order to Show Cause and supporting papers by defendant Pomarico, dated May 6, 2020, by defendant Pomarico, dated October 15, 2020, and by defendants Semendoff, dated October 21, 2020 ; Notice of Cross Motion and supporting papers by plaintiff, dated September 9, 2020 ; Answering Affidavits and supporting papers by plaintiff, dated October 22, 2020, by defendant Pomarico, dated October 15, 2020, and by defendants Semendoff, dated October 21, 2020 ; Replying Affidavits and supporting papers by defendant Pomarico, dated October 29, 2020 ; Other ___; it is

ORDERED that the parties' motions are consolidated for purpose of this determination; and it is

ORDERED that the motion by defendant John Pomarico seeking summary judgment dismissing the complaint is denied; and it is

ORDERED that the cross motion by plaintiff Janae Davino seeking summary judgment in her favor on the ground that she sustained a serious injury within the meaning of Section 5102 (d) of the Insurance Law is denied; and it is

ORDERED that the motion by defendant John Pomarico for, inter alia, an order striking plaintiff's supplemental verified bill of particulars is granted; and it is further

ORDERED that the motion by defendants Jennifer Semendoff and Courtney Semendoff for, inter alia, an order striking the supplemental verified bill of particulars is denied, as moot.

Plaintiff Janae Davino commenced this action to recover damages for injuries she allegedly sustained as a result of a motor vehicle accident that occurred at the intersection of Smithtown Avenue and South 2nd Street in the Town of Islip on August 7, 2015. Plaintiff, by her complaint, alleges that while she was riding as a front seat passenger in the vehicle owned by defendant Jennifer Semendoff and operated by defendant Courtney Semendoff, the vehicle was struck in the rear right passenger side by the vehicle owned and operated by defendant John Pomarico as it attempted to make a left turn from South 2nd Street onto Smithtown Avenue. The force of the impact allegedly caused the Semendoff vehicle to flip over and land on its roof. By her bill of particulars, plaintiff alleges, among other things, that she sustained a left wrist central triangular fibrocartilage disc tear and intrasubstance tear of the left dorsal scapholunate ligament as a result of the accident.

Defendant Pomarico now moves for an order striking plaintiff's supplemental bill of particulars dated September 8, 2020. In particular, defendant Pomarico asserts that, approximately eight months after the filing of the note of issue, plaintiff, in an attempt to undermine his defenses and to oppose his motion for summary judgment, served an amended bill of particulars, improperly denoted as a supplemental bill of particulars, alleging new claims. Defendant Pomarico further contends that plaintiff was required to obtain leave of the Court to serve the new bill of particulars after the note of issue was filed. Alternatively, defendant Pomarico seeks an order, pursuant to CPLR 3043, precluding plaintiff from presenting evidence at the time of trial as to the new injury set forth in the supplemental bill of particulars. Defendants Jennifer Semendoff and Courtney Semendoff also move to strike the supplemental bill of particulars on the same grounds as defendant Pomarico and rely on the same evidence as defendant Pomarico.

Plaintiff opposes the motion on the ground that the supplemental bill of particulars does not contain any new injuries. Rather, plaintiff asserts, the injuries set forth in the supplemental bill of particulars evince the continuing consequence of injuries that were previously suffered by her as a result of the subject accident, and that defendants were aware of the claimed injury of significant disfigurement and scarring, since she was questioned extensively on the issue at her deposition, and cannot claim they are being prejudiced by its inclusion.

"The purpose of a bill of particulars is to amplify the pleadings, limit the proof, and prevent surprise at trial" (***Jones v LeFrance Leasing Ltd. Partnership***, 61 AD3d 824, 825, 877 NYS2d 424 [2d Dept 2009]; *see* ***Jurado v Kalache***, 93 AD3d 759, 940 NYS2d 300 [2d Dept 2012]). While a party may serve a bill of particulars once, as of right, before the filing of a note of issue (CPLR 3042 [b]), once discovery is complete and the case is certified as ready for trial, a party will not be permitted to amend his or her bill of particulars except upon a showing of "special and extraordinary circumstances" (***Schreiber-Cross v State of New York***, 57 AD3d 881, 884, 870 NYS2d 438 [2d Dept 2008]).

Furthermore, a party may serve a supplemental bill of particulars with respect to claims of continuing special damages and disabilities, provided that no new causes of action are alleged or new injuries claimed (*see* CPLR 3043 [b]; ***Erickson v Cross Ready Mix,*** Inc., 98 AD3d 717, 950 NYS2d 717[2d Dept 2012]; ***Alami v 215 E6th St., L.P.***, 88 AD3d 924, 931 NYS2d 647 [2d Dept 2011]). Thus, a supplemental bill of particulars may be served without leave of the court when a plaintiff is updating continuing claims of special damages or alleging continuing consequences of the injuries allegedly suffered and described in the original bill of particulars (*see* ***Kraycar v Monahan***, 49 AD3d 507, 856 NYS2d 123 [2d Dept 2008]; ***Aversa v Taubes***, 194 AD2d 580, 598 NYS2d 801 [2d Dept 1993]). However, where a supplemental bill of particulars asserts new injuries, a new theory of liability or a new category of damages, it will be deemed an amended bill of particulars (*see* ***Pearce v Booth Mem. Hosp.***, 152 AD2d 553, 543 NYS2d 157 [2d Dept 1989]), requiring the plaintiff to obtain leave of the court (*see* CPLR 3025 [b]).

In the instant matter, plaintiff served defendant Pomarico with a purported supplemental verified bill of particulars after the filing of the note of issue. "A plaintiff cannot simply avoid the application of the rule that a supplemental pleading does not supersede the original pleading, but is in addition to it (*see* ***Lovisa Constr. Co. v Facilities Dev. Corp.***, 148 AD2d 913, 539 NYS2d 541 [2d Dept 1989]), by denominating as a 'supplemental' pleading one that asserts new injuries [or] a new category of damages, and which is therefore properly an amended pleading" (***Mendrzycki v Cricchio***, 58 AD3d 171, 175, 868 NYS2d 107 [2d Dept 2008], quoting ***Fuentes v City of New York***, 3 AD3d 549, 550, 771 NYS2d 178 [2d Dept 2004]). Here, plaintiff's supplemental bill of particulars was, in reality, an amended bill of particulars, as it sought to add a new category of injury (*see* ***Kyong Hi Wohn v County of Suffolk***, 237 AD2d 412, 654 NYS2d 826 [2d Dept 1997]). As a consequence, the bill of particulars served in September 2020 was a nullity (*see* ***Bartkus v New York Methodist Hosp.***, 294 AD2d 455, 742 NYS2d 554 [2d Dept 2002]; ***Golub v Sutton***, 281 AD2d 589, 723 NYS2d 59 [2d Dept 2001]).

Plaintiff's original bill of particulars, dated November 9, 2018, alleged, among other things, that she sustained a left wrist central triangular fibrocartilage disc tear and an intrasubstance tear of the left dorsal scapholunate ligament. Plaintiff's original bill of particulars does not state that she sustained a significant disfigurement or any scarring to her left wrist or to any part of her body. However, plaintiff, in the September 2020 bill of particulars, alleges for the first time that she suffered an injury within the "significant disfigurement" and the "permanent consequential limitation of use" categories of Insurance Law § 5102 (d) (*see* ***Brackenbury v Franklin***, 93 AD3d 423, 939 NYS2d 63 [2d Dept 2012]; ***DeNicola v Mary Immaculate Hosp.***, 272 AD2d 505, 708 NYS2d 152 [2d Dept 2000]; *cf.* ***Alicino v Rochdale Vil., Inc.***, 142 AD2d 937, 37 NYS3d 557 [2d Dept 2016]). Defendant Pomarico has shown that the inclusion of a claim of a serious disfigurement in the "supplemental" bill of particulars served upon him,

approximately eight months after the filing of the note of issue, is not merely sequelae of plaintiff's original injuries, but is an entirely new claim; therefore, it cannot be said that plaintiff merely was particularizing her originally pleaded allegations in the amended verified bill of particulars, which can be asserted, as of right, pursuant to CPLR 3043 (b) (*see* ***Davis v South Nassau Communities Hosp.***, 26 NY3d 563, 26 NYS3d 231 [2015]; ***Pines v Muss Dev. Co.***, 172 AD2d 600, 568 NYS2d 422 [2d Dept 1991]). Rather, plaintiff is adding a new claim for significant disfigurement, that was not in the original complaint or bill of particulars, and consequently, such attempt was improper (*see* ***Castleton v Broadway Mall Props., Inc.***, 41 AD3d 410, 837 NYS2d 732 [2d Dept 2007]; ***Fuentes v City of New York***, 3 AD3d 549, 771 NYS2d 178 [2d Dept 2004]). Nor can it be said that defendant Pomarico was put on notice that such a category of injury would be claimed, and as a result, plaintiff was required to seek and obtain the Court's permission to serve an amended bill of particulars (*see* CPLR 3043; ***Hewitt v Palmer Veterinary Clinic, PC***, 35 NY3d 541, 134 NYS3d 312 [2020]; ***Marrero v 720 DeGraw Funding Corp.***, 150 AD2d 762, 542 NYS2d 211 [2d Dept 1989]; ***Kurnitz v Croft***, 91 AD2d 972, 457 NYS2d 560 [2d Dept 1983]). Accordingly, defendant Pomarico's motion for, inter alia, an order striking plaintiff's supplemental bill of particulars is granted.

Since the Court has granted defendant Pomarico's motion to strike plaintiff's supplemental bill of particulars, the Semendoff defendants' cross motion for the same relief is denied, as moot.

Defendant Pomarico also moves for summary judgment on the basis that the alleged injuries sustained by plaintiff as a result of the subject accident fail to meet the serious injury threshold requirement of Insurance Law § 5102 (d). In support of the motion, defendant Pomarico submits copies of the pleadings, plaintiff's deposition testimony, uncertified copies of plaintiff's medical records concerning the injuries at issue, a certified copy of the police accidet report, and the sworn medical report of Dr. Anthony Spaturo, who conducted an independent orthopedic examination of plaintiff on August 16, 2015.

The purpose of New York State's No-Fault Insurance Law is to "assure prompt and full compensation for economic loss by curtailing costly and time-consuming court trial[s]" (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]), and requiring every case, even those with minor injuries, to be decided by a jury would defeat the statute's effectiveness (*see* ***Licari v Elliott***, *supra)*. Therefore, the No-Fault Insurance law precludes the right of recovery for any "non-economic loss, except in the case of serious injury, or for basic economic loss" (*see* Insurance Law § 5104 [a]; ***Martin v Schwartz***, 308 AD2d 318, 766 NYS2d 13 [1st Dept 2003]). Any injury not falling within the definition of "serious injury" is classified as an insignificant injury, and a trial is not allowed under the No-Fault statute (*see* ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Martin v Schwartz***, *supra*).

Insurance Law § 5102 (d) defines a "serious injury" as "a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less

than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment."

A defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred under the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a "serious injury" (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant's own witnesses, "those findings must be in admissible form, [such as], affidavits and affirmations, and not unsworn reports" to demonstrate entitlement to judgment as a matter of law (***Pagano v Kingsbury***, 182 AD2d 268, 270, 587 NYS2d 692 [2d Dept 1992]). A defendant may also establish entitlement to summary judgment, using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (*see* ***Fragale v Geiger***, 288 AD2d 431, 733 NYS2d 901 [2d Dept 2001]; ***Grossman v Wright***, 268 AD2d 79, 707 NYS2d 233 [2d Dept 2000]; ***Vignola v Varrichio***, 243 AD2d 464, 662 NYS2d 831 [2d Dept 1997]; ***Torres v Micheletti***, 208 AD2d 519, 616 NYS2d 1006 [2d Dept 1994]). Once a defendant has met this burden, the plaintiff must then submit objective and admissible proof of the nature and degree of the alleged injury in order to meet the threshold of the statutory standard for "serious injury" under New York's No-Fault Insurance Law (*see* ***Dufel v Green***, 84 NY2d 795, 622 NYS2d 900 [1995]; ***Tornabene v Pawlewski***, 305 AD2d 1025, 758 NYS2d 593 [2d Dept 2003]; ***Pagano v Kingsbury***, 182 AD2d 268, 270, 587 NYS2d 692 [2d Dept 1992]). However, if a defendant does not establish a prima facie case that the plaintiff's injuries do not meet the serious injury threshold, the court need not consider the sufficiency of the plaintiff's opposition papers (*see* ***Burns v Stranger***, 31 AD3d 360, 819 NYS2d 60 [2d Dept 2006]; ***Rich-Wing v Baboolal***, 18 AD3d 726, 795 NYS2d 706 [2d Dept 2005]; *see generally* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

Defendant Pomarico, by submitting competent medical evidence and plaintiff's deposition transcript, has established a prima facie case that plaintiff's alleged injuries sustained as a result of the subject collision do not meet the serious injury threshold requirement of Insurance Law § 5102 (d) (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, *supra*; ***Luckey v Bauch***, 17 AD3d 411, 792 NYS2d 624 [2d Dept 2005]). Defendant Pomarico's examining orthopedist, Dr. Spaturo, used a goniometer to test the ranges of motion in plaintiff's lumbar spine and left wrist, and compared his respective findings to the normal range of motion values for each region (*see e.g.* ***Cantave v Gelle***, 60 AD3d 988, 877 NYS2d 129 [2d Dept 2009]; ***Staff v Yshua***, 59 AD3d 614, 874 NYS2d 180 [2d Dept 2009]; ***Desulme v Stanya***, 12 AD3d 557, 785 NYS2d 477 [2d Dept 2004]). Dr. Spaturo states in his medical report that an examination of plaintiff reveals she has full range of motion in her left wrist, that there is no swelling or tenderness observed, that there is no evidence of deformity or atrophy in her left wrist, and that the Tinel sign is negative. Dr. Spaturo opines that the sprains plaintiff sustained to her left wrist as a result of the accident have resolved. Dr. Spaturo further states that plaintiff does not require any further orthopedic treatment, and that she is capable of performing her normal activities of daily living without restrictions.

Plaintiff testified at an examination before trial that at the time of the accident she was a student and did not miss any time from school. Plaintiff testified that she did not receive any treatment for the injuries she sustained to her left wrist until approximately two and a half years after the subject accident,

because she had been admitted into Silver Oaks Behavioral Hospital to treat her schizoaffective disorder condition. She testified that she underwent surgery on her left wrist on August 30, 2018, but that she continues to have pain in the left wrist. She testified that she was discharged from physical therapy after approximately four months, that her no-fault insurance already had been terminated, that she paid for her treatment with her private healthcare coverage, and that she does not currently have any appointments scheduled for any treatment for the injuries she sustained in the accident. Plaintiff further testified that when she was nine years old she sustained injuries to her neck and back in a prior motor vehicle accident, and that, although she received physical therapy for the injuries to those regions following the prior accident, she was not receiving any medical treatment for those injuries and was asymptomatic at the time of the subject accident.

Therefore, defendants have shifted the burden to plaintiff to come forward with evidence in admissible form to raise a material triable issue of fact as to whether they sustained an injury within the meaning of the Insurance Law (*see* ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]; *see generally* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). A plaintiff claiming a significant limitation of use of a body function or system must substantiate his or her complaints with objective medical evidence showing the extent or degree of the limitation caused by the injury and its duration (*see* ***Ferraro v Ridge Car Serv.***, 49 AD3d 498, 854 NYS2d 408 [2d Dept 2008]; ***Mejia v DeRose***, 35 AD3d 407, 825 NYS2d 772 [2d Dept 2006]; ***Laruffa v Yui Ming Lau***, 32 AD3d 996, 821 NYS2d 642 [2d Dept 2006]; ***Kearse v New York City Tr. Auth.***, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]). Whether a limitation of use or function is 'significant' or 'consequential' (i.e. important . . .), relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part" (***Dufel v Green***, *supra* at 798). To prove the extent or degree of physical limitation with respect to the "limitations of use" categories, either objective evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration based on a recent examination of the plaintiff must be provided or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (*see* ***Perl v Meher***, 18 NY3d 208, 936 NYS2d 655 [2011]; ***Toure v Avis Rent A Car Systems, Inc.***, *supra* at 350; *see also* ***Valera v Singh***, 89 AD3d 929, 923 NYS2d 530 [2d Dept 2011]; ***Rovelo v Volcy***, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]). However, evidence of contemporaneous range of motion limitations is not a prerequisite to recovery (*see* ***Perl v Meher***, *supra*; ***Paulino v Rodriguez***, 91 AD3d 559, 937 NYS2d 198 [1st Dept 2012]).

Plaintiff opposes the motion, arguing that defendant Pomarico failed to establish a prima facie case that she did not sustain an injury within the "limitations of use" category of the Insurance Law, and that the evidence submitted in opposition demonstrates that she sustained injuries within the "limitations of use" and the "90/180" categories of the Insurance Law. In opposition to motion, plaintiff submits the sworn medical report of Dr. Justin Mirza and photographs of the scar on her left wrist.

In opposition, plaintiff has submitted competent medical evidence raising a triable issue of fact as to whether she sustained a serious injury to her left wrist under the limitations of uses categories of the Insurance Law (*see* ***Foy v Pieters***, ___ AD3d ___, 135 NYS3d 899 [2d Dept 2021]; ***Ledee v Matthes***,

188 AD3d 857, 132 NYS3d 311 [2d Dept 2020]; ***Reyes v Kashem***, 187 AD3d 1080, 131 NYS2d 175 [2d Dept 2020]). A plaintiff is required to present nonconclusory expert evidence sufficient to support a finding not only that the alleged injury is within the serious injury threshold of Insurance Law § 5102 (d), but also that the injury was casually related to the subject accident in order to recover for noneconomic loss related to personal injury sustained in a motor vehicle accident (*see* ***Valentin v Pomilla***, 59 AD3d 184, 873 NYS2d 537 [1st Dept 2009]). Plaintiff has submitted the affirmed medical report of Dr. Justin Mirza, her treating orthopedic surgeon, who opines that she suffers from a left wrist ulnar impaction syndrome, left carpal and cubital tunnel syndrome, and tears in the central triangular fibrocartilage disc and the left dorsal scapholunate ligament of the left wrist, that her prognosis is guarded, and that such injuries were causally related to the subject accident (*see* ***Vaughan-Ware v Darcy***, 103 AD3d 621, 959 NYS2d 698 [2d Dept 2013]; ***Bykova v Sisters Trans, Inc.***, 99 AD3d 654, 952 NYS2d 95 [2d Dept 2012]; ***Kanard v Setter***, 87 AD3d 714, 928 NYS2d 782 [2d Dept 2011]; ***Harris v Boudart***, 70 AD3d 643, 893 NYS2d 631 [2d Dept 2010]; ***Pearson v Guapisaca***, 61 AD3d 833, 876 NYS2d 890 [2d Dept 2009]). Dr. Mirza further states that, although plaintiff has undergone surgery, she continues to have limited range of motion in her left wrist, and that she will require additional surgery in the future. Thus, Dr. Mirza's affidavit is sufficient to raise a triable issue of fact as to whether plaintiff sustained a serious injury to her left wrist within the limitations of use categories of the Insurance Law as a result of the subject accident (*see* ***Young Chool Yoi v Rui Dong Wang***, 88 AD3d 991, 931 NYS2d 373 [2d Dept 2011]; ***Gussack v McCoy***, 72 AD3d 644, 897 NYS2d 513 [2d Dept 2010]).

Consequently, the affirmed medical report of plaintiff's expert conflicts with that of defendant's experts, who found that there were no significant limitations in the plaintiff's range of motion in her left wrist, and that she did not have an orthopedic disability causally related to the subject collision. "Where conflicting medical evidence is offered on the issue of whether a plaintiff's injuries are permanent or significant, and varying inferences may be drawn, the question is one for the jury" (***Noble v Ackerman***, 252 AD2d 392, 395, 675 NYS2d 86 [1998]; *see* ***LaMasa v Bachman***, 56 AD3d 340, 869 NYS17 [1st Dept 2008]; ***Ocasio v Zorbas***, 14 AD3d 499, 789 NYS2d 166 [2d Dept 2005]; ***Reynolds v Burghezi***, 227 AD2d 941, 643 NYS2d 248 [4th Dept 1996]). Thus, plaintiff has submitted sufficient evidence to raise a triable issue of fact as to whether her injuries are causally related to the subject accident (*see* ***Barry v Valerio***, 72 AD3d 996, 902 NYS2d 97 [2d Dept 2010]; ***Paula v Natala***, 61 AD3d 944, 879 NYS2d 153 [2d Dept 2009]; ***Azor v Torado***, 59 AD3d 367, 873 NYS2d 655 [2d Dept 2009]).

Having determined that there is a triable issue of fact as to whether the plaintiff sustained a serious injury within the meaning of the Insurance Law, plaintiff's cross motion for summary judgment in her favor on the same issue is denied.

Dated: MAR 0 1 2021

HON. JOSEPH A. SANTORELLI
J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION