

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DANIEL MARTIN
Acting Supreme Court Justice

TRIAL/IAS, PART 31
NASSAU COUNTY

ALIA JETHOO, an infant over the age of fourteen
(14) years by her mother and natural guardian, BIBI
JETHOO and BIBI JETHOO, individually.

Plaintiffs.

- against -

Sequence No.: 001 & 002
Index No.: 007039/06

OSWALDO G. CARRERA.

Defendant.

The following named papers have been read on this motion:

	Papers Numbered
Notice of Motion and Affidavits Annexed	X
Notice of Cross-Motion and Affidavits Annexed	X
Answering Affidavits	X
Replying Affidavits	X

Upon reading the papers submitted and due deliberation having been had herein, defendant's motion for summary judgment dismissing the complaint is hereby denied. Plaintiff on the counter-claim Bibi Jethoo's motion for summary judgment on the issue of liability on defendant's counter-claim is granted.

Plaintiffs herein allegedly suffered personal injuries as a result of an automobile accident between the car which was operated by Bibi Jethoo and in which plaintiff Alia Jethoo was a passenger and that which was owned and operated by defendant on September 25, 2005. Defendant asserted a counter-claim against plaintiff Bibi Jethoo for contribution and/or indemnification. Defendant moves for summary judgment on the basis that plaintiff did not suffer serious injury as defined by Insurance Law §5102(d). Plaintiff on the counter-claim Bibi Jethoo cross-moves for summary judgment dismissing the counter-claim on the grounds that defendant was solely liable for the occurrence of the accident.

Any party moving for summary judgment must demonstrate that there are no issues of fact by the tender of evidence in admissible form. Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). A party opposing a motion for summary judgment must demonstrate an issue of fact

through admissible evidence. Zuckerman v. City of New York, supra.

Defendant's Motion

Insurance Law §5104(a) provides “[n]otwithstanding any other law, in any action by or on behalf of a covered person against another covered person for personal injuries arising out of negligence in the use or operation of a motor vehicle in this state, there shall be no right of recovery for non-economic loss, except in the case of a serious injury, or for basic economic loss.”

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 nonpermanent 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.”

Plaintiffs allege that they suffered the following injuries:

“Alia Jethoo: cervical sprain/strain; cervical radiculitis; cervical brachialgia; restriction of motion of cervical spine; headaches; Bibi Jethoo: cervical sprain/strain; cervical brachiaglia; restriction of motion of cervical spine; lumbar sprain/strain; lumbosacral radiculopathy; bilateral sciatica; restriction of motion of lumbar and lumbosacral spine; right shoulder derangement; right shoulder sprain; restriction of motion of right shoulder.”

Plaintiffs each allege in their bill of particulars that they suffered serious injuries as defined by the Insurance Law in that they suffered personal injuries resulting in 1) a permanent consequential limitation of use of a body organ or member; 2) significant limitation of use of a body function or system; and 3) medically determined impairment of a non-permanent nature which prevents plaintiffs from performing substantially all of the material acts which constitute their usual and customary daily activities for not less than ninety out of 180 days immediately following the occurrence or impairment. (See, plaintiff’s bill of particulars, ¶18).

In support of his motion defendant annexes the medical affirmations of Harold Kozinn, M.D., an orthopedist and C.M. Sharma, M.D., a neurologist.

Both doctors fail to address plaintiffs’ claims that they were unable to perform substantially all of the acts which constitute their usual and customary daily activities for ninety

out of 180 days following the accident. The court will find that defendant has failed to meet his *prima facie* burden on a summary judgment motion such as the instant one where, as here, plaintiffs allege to have suffered serious injury under this category in their bill of particulars and defendants' medical experts do not address this allegation in their affirmations. See, Nemhard v. Delatorre, 16 A.D.3d 390 (2nd Dep't 2005). See, also, Perez v. Ali, 23 A.D.3d 363 (2nd Dep't 2005); Peplow v. Murat, 304 A.D.3d 633 (2nd Dep't 2003).

Where, as here, defendant fails to meet his *prima facie* burden, the court will deny the motion regardless of the sufficiency of the opposition papers. Ayotte v. Gervasio, 81 N.Y.2d 1062 (1993). Defendant's motion is therefore denied.

Plaintiff on the Counter-Claim Bibi Jethoo's Motion

Plaintiff on the counter-claim Bibi Jethoo moves for summary judgment dismissing the counter-claim on the basis that defendant was solely liable for the accident due to his having struck plaintiff's stopped vehicle in the rear.

At his deposition, defendant testified that on the date of the accident he was driving his vehicle in the right lane of Jamaica Avenue in Queens County. He observed a vehicle double parked in that lane ahead of him by approximately one-half block in his lane. Fifteen to twenty seconds after observing the double parked vehicle he struck plaintiff's stopped vehicle in the rear. Plaintiffs at the time were behind another stopped vehicle. (See, defendant's deposition transcript, pp. 33-46).

Where, as here, plaintiff on the counter-claim demonstrates that defendant struck plaintiff's stopped vehicle in the rear, there is a presumption of negligence on the defendant driver's part which shifts the burden to defendant to demonstrate a non-negligent explanation for the occurrence of the accident. Buccesi v. Frazier, 297 A.D.2d 304 (2nd Dep't 2002); Shannah v. Richmond County Ambulance Service, Inc., 279 A.D.2d 564 (2nd Dep't 2001).

Plaintiff on the counter-claim having met her burden of making a *prima facie* demonstration of entitlement to summary judgment, the burden shifts to defendant to demonstrate a triable issue of fact. Zuckerman v. City of New York, supra.

In opposition defendant argues that the court should find that an issue of fact exists as to whether defendant was negligent because the deposition testimony herein reveals that plaintiff's vehicle struck another vehicle in front of them and defendant's vehicle then struck plaintiffs' ten seconds later. (See, defendant's deposition transcript, pp. 43-47). Thus, defendant argues, the accident was the result of the cars in front of defendant's having stopped short.

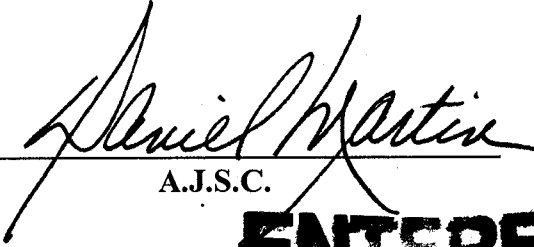
A claim that plaintiffs' vehicle stopped short in front of defendants "standing alone is insufficient to rebut the presumption of negligence" on defendant's part. Ayach v. Ghazal, 25 A.D.3d 742, 743 (2nd Dep't 2006).

The court therefore grants plaintiff on the counter-claim's motion. The court is also

authorized to search the record pursuant to CPLR 3212(b). Thus, the court grants plaintiffs' summary judgment on the issue of liability.

Based upon the foregoing, it is directed that the counter-claim is dismissed and defendant is held solely liable for the accident.

So Ordered.


A.J.S.C.

Dated: February 14, 2008

ENTERED

FEB 20 2008

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**