

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

SCAN

-----X
SUSAN A. DIFRANCESCO,

Plaintiff,

-against-

ROBERT LEONARDO and RONALD PACCHIANA,

Defendants.
-----X

MICHELE M. WOODARD

J.S.C.

TRIAL/IAS Part 14

Index No.:018114/07

Motion Seq. Nos.: 01 & 02 & 03

DECISION AND ORDER

Papers Read on this Motion:

Plaintiff's Notice of Motion for Summary Judgment	01
Defendant Pacchiana's Reply Affirmation	xx
Plaintiff's Affirmation in Opposition	xx
Defendant Pacchiana's Notice of Cross-Motion	02
Defendant Leonardo's Notice of Cross-Motion	03
Plaintiff's Affirmation in Partial Opposition	xx
Defendant Pacchiana's Affirmation in Opposition to Plaintiff's Summary	xx

Motion by Plaintiff for an order pursuant to CPLR §3212 granting her summary judgment against Defendant Ronald Pacchiana ("Pacchiana") on the issue of liability and setting this matter down for an immediate assessment of damages is **granted**. Cross-motion by Defendant Robert Leonardo ("Leonardo") for an order pursuant to CPLR §3212 granting him summary judgment dismissing the complaint as against him and for an order granting costs and disbursements pursuant to CPLR §8303-a(ii) is **granted** as to the former relief and **denied** as to the latter relief. Cross-motion by Defendant Pacchiana for an order pursuant to CPLR §3212 granting him summary judgment dismissing the complaint on the grounds that Plaintiff did not sustain a serious injury as defined by Insurance Law § 5102(d) is **denied**.

On April 19, 2007, Plaintiff allegedly sustained personal injuries in a multi-motor vehicle accident. The accident allegedly occurred when the vehicle owned and operated by Pacchiana struck the rear of Plaintiff's vehicle, causing Plaintiff's vehicle to strike the rear of the vehicle owned by Defendant Leonardo.

Initially, we note that Plaintiff does not oppose the branch of Leonardo's cross-motion which seeks summary judgment dismissing the complaint as against him. Accordingly, Leonardo's cross-motion is **granted** to the extent that the complaint is dismissed as against him.

The branch of the cross-motion which seeks an order granting him costs and disbursements pursuant to CPLR §8303-a(ii) is **denied**. Leonardo has not established that the action was "commenced or continued in bad faith without any reasonable basis in law or fact. . ." (CPLR §8303-a[ii]). Hence, this branch of Leonardo's cross-motion is **denied**.

Plaintiff's motion for summary judgment against Pacchiana is **granted**.

"A rear-end collision with a stopped or stopping vehicle creates a *prima facie* case of liability with respect to the operator of the rearmost vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision." (*Brodie v Global Asset Recovery, Inc.*, 12 AD3d 390 (2d Dept 2004); *Kimyagarov v Nixon Taxi Corp.*, 45 AD3d 736 [2d Dept 2007]; see *Harriott v Pender*, 4 AD3d 395 [2004]; *Hollis v Kellog*, 306 AD2d 244 [2003]). Plaintiff testified that she was stopped for five minutes when she was rear-ended by a vehicle driven by Pacchiana. Leonardo testified that he was stopped for approximately five seconds when he heard the screeching of tires behind him, he then heard an impact presumably to Plaintiff's vehicle, and then there was an impact to his vehicle. Plaintiff established her *prima facie* entitlement to judgment as a matter of law on the issue of liability by showing that Pacchiana's vehicle struck the rear of her stopped

vehicle.

Pacchiana's testimony at his examination-before-trial that Plaintiff contributed to the happening of the accident by cutting in front of his vehicle before stopping suddenly is insufficient to rebut the inference of negligence (*Brant v Senatobia Operating Corp.*, 269 AD2d 483 [2d Dept 2000]; *Bando-Twomey v Richheimer*, 224 AD2d 554 [2d Dept 1996]). Furthermore, Pacchiana's reliance upon *Tutrani v County of Suffolk*, 10 NY3d 906 (2008), is misplaced as the facts in that case are clearly distinguishable.

Serious Injury

In her bill of particulars, Plaintiff alleges that she sustained the following injuries:

- subligamentous posterior disc herniations of C3-4, C5-6 and C6-7 abutting the anterior aspect of the spinal cord;
- posterior disc herniations at L4-5 and L5-S1 impinging on the anterior aspect of the spinal canal and on the right nerve root at L5-S1;
- cervical radiculitis;
- left shoulder sprain;
- left knee sprain; and
- left ankle sprain.

Defendant Pacchiana moves for summary judgment dismissing the complaint on the grounds that Plaintiff did not sustain a serious injury as defined by Insurance Law § 5102(d).

In support of the dismissal motion, Pacchiana submits the affirmed medical reports of Lawrence J. Robinson, M.D., and Carl Austin Weiss, M.D.; and the films of Plaintiff's cervical and lumbar spine MRIs, which were independently reviewed by Peter Ross, M.D. on November 19, 2007.

On August 25, 2008, Dr. Robinson performed an independent neurological examination of Plaintiff. After performing various objective tests, Dr. Robinson concluded that Plaintiff exhibited a full range of motion in both the cervical and lumbar spines. Dr. Robinson found that "there is no objective

evidence to indicate symptomatic cervical or lumbar disc disorder or radiculopathy or any evidence of intracranial or spinal cord dysfunction." Dr. Robinson further found that Plaintiff's examination did not "objectively substantiate causality regarding [her] subjective complaints to the 4/19/07 incident."

On August 27, 2008, Dr. Weiss performed an independent orthopedic examination of Plaintiff. After performing various objective tests, Dr. Weiss opined that there is normal range of motion of Plaintiff's cervical spine, knees, lumbosacral spine and shoulders. Dr. Weiss concluded that Plaintiff "suffered cervical and lumbosacral sprain injuries in the car accident in question and she has not recovered. She no longer requires orthopedic and physical therapy."

On a motion for summary judgment where the issue is whether a Plaintiff has sustained a serious injury under the no-fault law, the movant bears the initial burden of presenting competent evidence that there is no cause of action (*Hughes v Cai*, 31 AD3d 385 [2d Dept 2006]; *Browdame v Candura*, 25 AD3d 747, 748 [2d Dept 2006]). 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 (*Browdame v Candura*, *supra* at 748). Even where there is medical proof, when contributory factors interrupt the chain of causation between the accident and the claimed injury—such as a gap in treatment, an intervening medical problem or a pre-existing condition—summary dismissal of the complaint may be appropriate (*Pommells v Perez*, 4 NY3d 566, 572 [2005]; *Harris v Boudart*, 2008 WL 2625142 [N.Y. Sup. 2008]). Whether a limitation of use or function is significant or consequential 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 a body part (*Dufel v Green*, 84 NY2d 795, 798 [1995]).

Defendant Pacchiana has made a *prima facie* showing of entitlement to judgment as a matter of law by submitting the affirmed medical reports of Dr. Robinson and Dr. Weiss. Consequently, the burden shifts to Plaintiff to demonstrate, by the submission of objective proof of the nature and degree of the injury, that he/she sustained a serious injury or that there are questions of fact as to whether the purported injury, in fact, is serious (*Flores v Leslie*, 27 AD3d 220, 221 [1st Dept 2006]).

In order to satisfy the statutory serious injury threshold, a Plaintiff must have sustained an injury that is identifiable by objective proof; subjective complaints of pain do not qualify as serious injury within the meaning of Insurance Law § 5102(d) (*see Toure v Avis Rent A Car Sys., Inc.*, 98 NY2d 345, 351 (2002); *Scheer v Koubek*, 70 NY2d 678, 679 [1987]; *Munoz v Hollingsworth*, 18 AD3d 278, 279 [1st Dept 2005]).

In opposition, Plaintiff submits the affirmed medical reports of Dr. Rupolo, Dr. Ruggi, and Dr. Hausknecht.

On November 17, 2008, Kevin Hausknecht, M.D., performed a comprehensive neurological history and examination of Plaintiff. In his affirmed medical report, Dr. Hausknecht concluded that:

Range of motion testing of the cervical spine reveals that she is able to perform right cervical rotation to 55 degrees (normal 80 degrees). she could perform left cervical rotation to 60 degrees (normal 80 degrees). She could perform cervical flexion to 25 degrees (normal 45 degrees). She could perform cervical extension to 25 degrees (normal 35 degrees). She had limitation on side bending to 30 degrees in both directions (normal 45 degrees). She had pain on right and left rotation. ROM findings were analyzed with a goniometer. The findings were reliable and reproducible.

Range of motion testing in the lumbar spine reveals she is able to perform lumbar flexion to 60 degrees (normal 90 degrees). She could perform lumbar extension to 10 degrees (normal 20 degrees). She had limitation on right side bending to 15 degrees (normal 25 degrees). She had limitation on left side bending to 20 degrees (normal 25 degrees). She has positive straight leg raise testing at around 45 degrees bilaterally. She is noted to have pain on range of motion testing. ROM findings were

analyzed with a goniometer. The findings were reliable and reproducible.

In addition, Dr. Hausknecht concluded as follows:

"With a reasonable degree of medical certainty, I believe that the injuries described above are causally related to the motor vehicle accident on 04/19/07. Ms. DiFrancesco appears to be a good historian; she denies any pre-existing pain, problem or injury in the lower back She has never had similar problems in the past. The significant nature of her injuries have been well documented in the medical records and substantiated by abnormal objective clinical findings on her examinations as well as abnormal objective diagnostic testing."

In his affidavit dated January 5, 2009, Plaintiff's treating chiropractor Dr. George Ruggi stated that he examined Plaintiff on November 2, 2007 and has been treating Plaintiff for over one year and still to date. After conducting objective medical testing, Dr. Ruggi stated, in pertinent part, as follows:

It is my opinion, with a reasonable degree of chiropractic certainty, that Susan DiFrancesco sustained neck and left shoulder injury. I believe that her injuries are causally related to the motor vehicle accident of April 19, 2007 and that Susan DiFrancesco would need further care. I instructed her to continue a regimen of home exercise and stretching.

I believe that Susan DiFrancesco sustained a permanent consequential loss of function in her neck and left shoulder that affected her daily life functions including bending, lifting and turning that would be consistent with her having difficulty in her household chores, grooming and other normal functions.

It is in my opinion, with a reasonable degree of chiropractic certainty, that Susan DiFrancesco has sustained a permanent partial disability to her cervical spine and left shoulder. It is also my opinion, with a reasonable degree of chiropractic certainty that Susan DiFrancesco has sustained herniated discs that are causally related to the motor vehicle accident of April 19, 2007.

As to Dr. John Rupolo, D.C., he notes that he first examined Plaintiff on April 23, 2007 and performed range of motion testing of the cervical and lumbar spine which revealed the following:

	Normal	Examination
Flexion	50%	35%
Extension	60%	34%
Left Lateral Flexion	45%	24%
Right Lateral Flexion	45%	23%
Left Rotation	80%	34%
Right Rotation	80%	34%

Range of motion of the thoracic spine revealed:

	Normal	Examination
Flexion	60%	40%
Extension	25%	20%
Left Lateral Flexion	30%	25%
Left Rotation	45%	20%
Right Rotation	45%	30%

Range of motion of the lumbar spine revealed:

	Normal	Examination
Sacral Hip Angle	45%	33%
True Lumbar Flexion	60%	43%
Extension	25%	23%
Right Lateral Flexion	25%	20%

Dr. Rupolo indicated that Plaintiff treated in his office three times a week for more than six months with a course of physical therapy.

On December 15, 2008, Dr. Rupolo re-examined Plaintiff. Dr. Rupolo performed the following tests which revealed positive: "Hibb bilaterally; Goldwaith left side; Braggard bilaterally at 35 degrees (70 degrees normal); Well leg raise right side at 35 degrees (70 degrees normal); Fajersztajn bilaterally at 35 degrees (70 degrees); Kerning's on the right side at 35 degrees (70 degrees normal); Sitting leg raise on the right side at 35 degrees (70 degrees normal), Ely bilaterally; Nachlas bilaterally; Kemp test bilaterally; Fabere-Patrick."

Range of motion of the cervical spine revealed:

	Normal	Examination
Flexion	50%	40%
Extension	60%	40%
Right Lateral Flexion	45%	40%
Left Rotation	80%	40%
Right Rotation	80%	40%

Range of motion of the lumbar spine revealed:

	Normal	Examination
Sacral Hip Angle	45%	30%
True Lumbar Flexion	60%	40%
Extension	30%	25%

Dr. Rupolo also concluded "that Susan DiFrancesco sustained a permanent consequential loss of function in her neck and back that affected her daily life functions including bending, lifting and turning that would be consistent with her having difficulty in her household chores, grooming and other normal functions."

On this record, Plaintiff has satisfied her burden of demonstrating, by the submission of objective proof of the nature and degree of the injury, that there are questions of fact as to whether she sustained a serious injury (*see Torre v Avis Rent A Car, supra; Flores v Leslie, supra*). Plaintiff has: 1) provided affidavits and/or physician's affirmations describing Plaintiff's present difficulties in daily living activities; 2) presented objective medical evidence of injuries in the form of range of motion results and positive MRIs which are consistent with Plaintiff's present physical limitations; and 3) causally related the injuries and resulting limitations to the accident.

As to the gap in treatment, Plaintiff offers a sufficient explanation, to wit: "[a]fter five months my no-fault benefits were cut-off" but that she continued to treat on a lien and performed home exercise to the best of her ability (*see Black v Robinson, 305 AD2d 438 [2d Dept 2003]*).

Plaintiff, however, has not presented competent medical evidence that she was unable to

perform substantially all of her daily activities for not less than 90 days of the first 180 days subsequent to the accident (*Albano v Onolfo*, 36 AD3d 728 [2d Dept 2007]; *Picott v Lewis*, 26 AD3d 319 [2d Dept 2006]).

"When 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 extent, rather than some slight curtailment" (*Thompson v Abbasi*, 15 AD3d 95 [1st Dept 2005]; *Gaddy v Eyer*, 79 NY2d 955 [1992]).

In light of Plaintiff's admission that she went back to work the day after the accident (Plaintiff's examination before trial at p. 55) and that she was only confined inside her house for two days (*Id* at p. 56), Plaintiff has not satisfied the 90/180 day category of serious injury.

In view of the foregoing, Plaintiff's motion for summary judgment on the issue of liability against Pacchiana is **granted**; Leonardo's cross-motion for summary judgment dismissing the complaint against him is **granted and denied** as to an award of costs and disbursements pursuant to CPLR §8303-a(ii) and Pacchiana's motion for summary judgment is **denied**.

This constitutes the Decision and Order of the Court.

DATED: February 2, 2009
Mineola, N.Y. 11501

ENTER:


HON. MICHELE M. WOODARD
J.S.C.

ENTERED

FEB 05 2009

NASSAU COUNTY
COUNTY CLERK'S OFFICE

H:\DiFrancesco v Leonardo.wpd