Acosta v Ramos
2015 NY Slip Op 31907(U)
September 22, 2015
Supreme Court, Bronx County
Docket Number: 306803/2012
Judge: Betty Owen Stinson
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FILED Sep 28 2015 Bronx County Clerk

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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YOLANDA ACOSTA,

Plaintiff,

INDEX № 306803/2012

-against-

DECISION/ORDER

HECTOR A. RAMOS and CANADA DRY BOTTLING COMPANY OF NEW YORK, L.P.,

Defendants.

----------X

HON. BETTY OWEN STINSON:

This motion by defendants for summary judgment dismissing the complaint is granted.

Plaintiff was the driver of a 2011 Honda Accord side-swiped on its left front side by a beverage delivery truck owned by defendant Canada Dry Bottling Company of New York, L.P., and operated by defendant Hector A. Ramos. According to the plaintiff, the accident ripped off her left front bumper and left front headlight (deposition of Yolanda Acosta, June 5, 2013 at 53).

Plaintiff sued the defendants claiming injuries to her neck, back, left knee, left elbow and right shoulder. After discovery was completed, defendants made the instant motion for summary judgment dismissing the complaint for plaintiff's failure to demonstrate she had suffered a serious injury as a result of the accident.

Summary judgment is appropriate when there is no genuine issue of fact to be resolved at trial and the record submitted warrants the court as a matter of law in directing judgment (*Andre v Pomeroy*, 35 NY2d 361 [1974]). A party opposing the motion must come forward with admissible proof that would demonstrate the necessity of a trial as to an issue of fact (*Friends of*

Animals v Associated Fur Manufacturers, 46 NY2d 1065 [1979]).

In order to recover for non-economic loss resulting from an automobile accident under New York's "No-Fault" statute, Insurance Law § 5104, the plaintiff must establish, as a threshold matter, that the injury suffered was a "serious injury" within the meaning of the statute. "Serious injury" is defined by Insurance Law § 5102(d) to include, among other things not relevant here, a "permanent loss of use of a body organ, member, function or system", a "permanent consequential limitation of use of a body organ or member", a "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 constitutes such person's usual and customary activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment."

The initial burden on a threshold motion is upon the defendants to present evidence establishing that plaintiff has no cause of action, i.e.: that no serious injury has been sustained. It is only when that burden is met that the plaintiff would be required to establish *prima facie* that a serious injury has been sustained within the meaning of Insurance Law § 5102(d) (*Franchini v Palmieri*, 1 NY3d 536 [2003]; *Licari v Elliot*, 57 NY2d 230 [1982]).

To make out a *prima facie* case of serious injury, a plaintiff must produce competent medical evidence that the injuries are either "permanent" or involve a "significant" limitation of use (*Kordana v Pomelito*, 121 AD2d 783 [3rd Dept 1986]). A finding of "significant limitation" requires more than a mild, minor or slight limitation of use (*Broderick v Spaeth*, 241 AD2d 898, *lv denied*, 91 NY2d 805 [1998]; *Gaddy v Eyler*, 167 AD2d 67, *aff'd*, 79 NY2d 955 [1992]). Strictly subjective complaints of a plaintiff unsupported by credible medical evidence do not

suffice to establish a serious injury (*Scheer v Koubek*, 70 NY2d 678 [1987]).

To satisfy the requirement that plaintiff suffered a medically determined injury preventing her from performing substantially all of her material activities during 90 out of the first 180 days, a plaintiff must show that "substantially all" of her usual activities were curtailed (*Gaddy*, 167 AD2d 67). The "substantially all" standard "requires a showing that plaintiff's activities have been restricted to a great extent rather than some slight curtailment" (*Berk v Lopez*, 278 AD2d 156 [1st Dept 2000], *lv denied*, 96 NY2d 708).

Allegations of sprains and contusions do not fall into any of the categories of serious injury set forth in the statute (*Maenza v Letkajornsook*, 172 AD2d 500 [2nd Dept 1991]). Where surgery resolved the injury, with no permanent loss of use or limitation, there is no issue of permanent serious injury (*Fortune v Sacks & Sacks*, 272 AD2d 277 [1st Dept 2000]). "Absent an explanation of the basis for concluding that the injury was caused by the accident, as opposed to other possibilities evidenced in the record, an expert's 'conclusion that plaintiff's condition is causally related to the subject accident is mere speculation', insufficient to support a finding that such a causal link exists" (*Diaz v Anasco*, 38 AD3d 295 [1st Dept 2007], citing *Montgomery v Pena*, 19 AD3d 288 [2005]). A claim of exacerbation of prior injuries or conditions is without support if plaintiff's experts fail to provide any basis for determining the extent of limitation caused by that exacerbation beyond any pre-existing limitations (*Brand v Evangelista*, 103 AD3d 539 [1st Dept 2013]). Standing alone, range of motion tests are insufficient to show a serious injury because they are subjective in nature to the extent they are dependent on a plaintiff's complaints of pain (*Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345 [2002]).

An unexplained gap in treatment is fatal to a plaintiff's claim of serious injury (*Colon v*

Kempner, 20 AD3d 372 [1st Dept 2005]). Explanations for gaps in treatment must be proffered by doctors within medical reports or affidavits (*Pommels v Perez*, 4 NY3d 566 [2005]; *Farozes v Kamran*, 22 AD3d 458 [2nd Dept 2005]).

An injury is disfiguring if it alters for the worse the plaintiff's natural appearance (Pattern Jury Instructions 3d, 2:88B [2005]). A disfigurement is significant if a reasonable person viewing the plaintiff's body in its altered state would regard the condition as unattractive, objectionable, or as the object of pity or scorn (*id.*). Although the question of whether a plaintiff has suffered a serious injury is usually for the jury, it is incumbent upon the court to decide in the first instance if reasonable people could differ as to whether plaintiff's scar was a significant disfigurement (*Loiseau v Maxwell*, 256 AD2d 450 [2nd Dept 450][summary judgment granted where reasonable person would not regard 5-cm. scar on infant's lower leg unattractive, objectionable or subject of pity or scorn]; *cf. Abdulai v Roy*, 232 AD2d [1st Dept 1996][doctor's testimony sufficient to satisfy serious injury threshold where line-shaped scar under right eye was deeply discolored and scar on nose was thickened]).

The defendant may rely on medical records and reports prepared by plaintiff's treating physicians to establish that plaintiff did not suffer a serious injury causally related to the accident (*Franchini*, 1 NY3d 536). Once the burden has shifted however, an affidavit or affirmation by the person conducting a physical examination of the plaintiff is necessary to establish a serious injury, unless plaintiff is offering unsworn reports already relied upon by the defendant (*Grossman v Wright*, 268 AD2d 79 [3rd Dept 2000]; *see also Zoldas v Louise Cab Co.*,108 AD2d 378 [1st Dept 1985]). The affirmation must set forth the objective medical tests and quantitative results used to support the opinion of the expert (*Grossman*, 268 AD2d 79). "An expert's *qualitative* assessment

of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system (cite omitted)" (*Toure v Avis Rent A Car Systems*, 98 NY2d 345 [2002]). A conclusory affidavit of the doctor does not constitute medical evidence (*Zoldas*, 108 AD2d 3778; *see also Lopez v Senatore*, 65 NY2d 1017 [1985] [conclusory assertions tailored to meet statutory requirements insufficient to demonstrate serious injury]).

In support of their motion, defendants offered copies of the pleadings; the bills of particulars; plaintiff's deposition testimony; affirmations by Drs. A. Robert Tantleff, Edward Crane and Adam Bender and a report of plaintiff's cervical spine MRI. In her bills of particulars, plaintiff claimed sprains and strains of her cervical and lumbar spine, left elbow, left knee, and tears of her right shoulder rotator cuff and glenoid labrum requiring arthroscopic surgery, resulting in significant disfigurement. All injuries were alleged to be permanent.

Plaintiff testified that, initially, she felt nothing after the accident (deposition, Yolanda Acosta, June 5, 2013 at 71). Two days later, she felt pain in her right shoulder and went to a hospital where she was examined and released (*id.* at 71). Her neck was stiff and sore (*id.* at 103). She went to Community Medical Care on the Grand Concourse a week after the accident and saw Drs. Raiz and Ahmad (*id.* at 81-82, 84). She had two MRIs (*id.* at 87). She underwent physical therapy at the clinic, including chiropractic treatments, acupuncture and electric stimulation (*id.* at 85). She quit physical therapy after three months in May 2012 because she became pregnant (*id.* at 85-86, 93).

Plaintiff was working at the time of the accident and took a month off from work to recover (id. at 102). She was never confined to her bed, and confined to her home for only a week

or two (*id.* at 103, 105). A doctor at Lenox Hill Hospital said she should stay home for a week, but her boss said she could take more time if she wanted to, so she did (*id.* at 102). No other doctor recommended she take more time than a week (*id.*). Plaintiff was also attending school at the same time but decided to stay out for the Spring semester (*id.* at 107).

Plaintiff was told by a Dr. Mian that she needed surgery for her right shoulder (*id.* at 91). He said her neck pain was related to her shoulder pain and surgery would take care of that (*id.* at 112-113). Other than that, plaintiff testified that she never complained to any medical doctor or facility of headaches, depression, anxiety, left knee pain, left elbow pain or low back pain as a result of the accident (*id.* at 98-99). She claimed to have developed low back pain some time later when she became pregnant, but not before (*id.* at 99).

Now she cannot wear high heels because of pain in her right upper back (*id.* at 106). She cannot shop because she cannot carry heavy bags due to pain in her right shoulder (*id.*). If she turns her head to the right side for too long, her neck hurts all day (*id.* at 112). She has constant pain in her neck and right shoulder every day (*id.* at 112-113). She has no other complaints related to the accident besides her neck and right shoulder (*id.* at 114).

Plaintiff testified at a second deposition after having shoulder surgery on October 23, 2013. She was working as a bank teller at the time and missed a week of work due to the surgery (testimony, February 28, 2014 at 7-8). After surgery, she only went to physical therapy one time because the exercises hurt, so she quit (*id.* at 30). She was told by the physical therapist that she had to continue in order to get better, but she got "scared and paranoid" and did not go back again (*id.*).

Plaintiff saw Dr. Mian once two weeks after the surgery, but has not gone back because

she is too busy at work (*id.* at 32). Nevertheless, she called him in January because her arm was "really hurting", but he said she had to call her lawyers first (*id.* at 32, 40-41). She had not called her lawyers yet at the time of the second deposition (*id.* at 40).

Plaintiff takes over-the-counter Tylenol about three times a week for her pain (*id.* at 24). She has not seen any healthcare providers since she last saw Dr. Mian because she is too busy with work and caring for her daughter (*id.* at 33). She has made no more complaints about her neck since 2013 (*id.* at 38-39). No one has suggested she needs more surgery (*id.* at 33).

Plaintiff is able to carry her approximately 19-pound daughter after the surgery with both hands for five minutes and carries her cash box at work with her left hand (*id.* at 43-45). Her right shoulder "always hurts" (*id.* at 54). It is worse than before (*id.* at 55). She cannot brush her hair, sleep on that shoulder, cannot "carry", and cannot clean as she used to (*id.* at 54). She cannot "broom", but has to use a "sweeper" (*id.* at 58). She cannot go to school because of the stress (*id.* at 58). She no longer plays volleyball as she did when she was in high school and college (*id.* at 58-60). She does not, however, suffer from any depression, anxiety, fear or emotional upset (*id.* at 62).

Plaintiff had three incisions with one stitch each from the surgery (*id.* at 26-26). She described the scars from her arthroscopic surgery as "slightly raised", approximately half an inch long (1.5 cm.), and a little more than two lines drawn by a pen in width, which "gross" her out (*id.* at 35, 37-38). She no longer wears strapless tops or tops with one shoulder out (at 36). She does not want people to know she had surgery so she always wears a blazer (*id.* at 36). She offered no photographs or allowed anyone at the deposition to view the scars.

Dr. Tantleff, a radiologist, examined the MRI of plaintiff's right shoulder performed on

May 12, 2012, four and a half months after the accident. Dr. Tantleff found a superior anterior labral tear with a large, associated paralabral cyst. This finding was consistent with a chronic, degenerative tear and not an acute tear, despite the plaintiff's age. Otherwise, the findings were normal. The rotator cuff appeared intact. The supraspinatus tendon showed no evidence of traumatic tears or rupture. There was no effusion and no bursitis.

Dr. Crane, orthopedic surgeon, examined plaintiff on December 12, 2013, finding a 5' 7" woman weighing 190 pounds. She complained of continuing pain in her right shoulder after having had surgery two months previously. Dr. Crane found her cervical spine to have full range of motion, measured numerically and compared to normal numbers. There was no tenderness or spasm and a Hoffman test was negative. Plaintiff had a negative Straight Leg Raising test and normal strength in both legs. Dr. Crane had to wait four more months to evaluate her shoulder because of the recent surgery.

On April 21, 2014, Dr. Crane was able to examine plaintiff's right shoulder. She complained of "constant" pain. The day of her examination, she reported having taken no Tylenol. Dr. Crane found no swelling, atrophy, deformity, crepitation or instability. Hawkins, Drop-Arm, O'Brien and Speed tests were all negative. Plaintiff had normal strength in her right shoulder. She actively resisted passive range of motion testing, however. Dr. Crane found no purely objective evidence of orthopedic residuals. He stated that range of motion is a combination of subjective and objective results. It can be limited by pain, apprehension, adhesions and inflammation. It can also be voluntarily restricted as in this case. Plaintiff told Dr. Crane that she stopped physical therapy after surgery because she was too busy. Dr. Crane stated that she needs more physical therapy for about three months. If she does that, her prognosis is "good to

excellent".

Dr. Bender, neurologist, examined plaintiff's medical records and examined the plaintiff on September 26, 2013. The records reflected that plaintiff felt no pain at the time of the accident on December 24, 2011. She got out of the car, did not report any injury to police and did not go to a hospital. The next morning she reported feeling pain in her neck, but not in her shoulder. The following day, December 26, 2011, she presented to Lenox Hill Hospital and complained of neck and back pain and menstrual cramps. There was no mention of shoulder pain. Her trauma assessment was unremarkable. She reported "no upper extremity weakness or sensory deficits". The diagnosis was "[s]prain - cervical". There was no mention of shoulder pain.

Plaintiff reported to Dr. Bender that, on December 30, 2011, she first started to feel shoulder pain. She saw Dr. Ahmad Riaz at Community Medical Care of New York. At that facility she was found to have a normal neurological examination. The diagnosis was cervical sprain/strain, cervical radiculopathy, and thoracic sprain/strain. The recommendation was physical therapy. There was still no mention of shoulder pain.

When plaintiff met with a chiropractor at the same facility, she reported having complained of shoulder pain at the hospital. This is the first mention of shoulder pain in her records. Her cervical MRI was negative except for straightening of the lordosis. Plaintiff reported that her neck pain had subsided by December 2012.

Upon examination, Dr. Bender found a negative Romberg test and no head, neck or spinal tenderness on palpation. Range of motion of her cervical and lumbar spine were normal, measured numerically and compared to normal numbers. Strength testing of muscles was all normal. Dr. Bender concluded that plaintiff's injuries were minor since she experienced no

symptoms until the day after the accident when she experienced neck pain. There was no record of her feeling shoulder pain until four days later. The cervical MRI report did not support her continuing subjective complaints about injury to her neck other than strains and sprains. Her neurological examination was normal and there was no evidence of any injury caused by the accident.

In opposition to the motion, plaintiff offered plaintiff's affidavit, the affirmations of Dr. Riaz, Dr. Alan S. Lubitz and Dr. Shahid Mian, Dr. Mian's surgical report, and the medical records from doctors who treated plaintiff before her shoulder surgery.

Plaintiff stated in an affidavit on October 17, 2014 that the left side of her body hit the door and her neck and back hit the seat at the time of the accident. She stated that the next day she complained of pain in her neck and right shoulder at Lenox Hill Hospital. Dr. Riaz examined her at Community Medical Care where she complained of pain in her neck, back and right shoulder. She was given physical therapy for about three months. Then she was "forced" to stop because of pregnancy. At some point she was referred to Dr. Mian who recommended surgery. Due to plaintiff's injuries after the accident, she was out of work for one month. Despite all her physical therapy, she still has pain in her right shoulder and neck. She has difficulty sleeping, carrying heavy objects, lifting, cleaning, washing her hair, driving, playing with her child, dressing herself and going to the gym. Plaintiff stated she stopped treating because she could not afford treatment.

Dr. Lubitz, radiologist, affirmed his review of MRI films of plaintiff's right shoulder performed on May 12, 2012. He saw fluid consistent with biceps tendinosis, joint effusion and fluid in the subacromial/subcoracoid and deltoid bursae. His opinion was tear of the anterior

aspect of the supraspinatus tendon, tear of the anterior labrum and biceps tendinosis. He offered no opinion as to causation and did not mention a paralabral cyst.

Dr. Mian first examined plaintiff on May 3, 2012, four months after the subject accident. Plaintiff complained of neck pain radiating to her right upper extremity with paresthesias and numbness. She complained she had difficulty lifting her arm and that her shoulder clicked. Dr. Mian found decreased range of motion in plaintiff's cervical spine at that initial examination, measured numerically and compared to normal numbers. Plaintiff had tenderness and muscle spasm, but full 5/5 motor strength in the neck. Dr. Mian found an impingement sign present in plaintiff's right shoulder and a positive apprehension test. There was clicking and range of motion was decreased, measured numerically and compared to the normal. An MRI of the cervical spine was normal apart from straightening of the lordosis. An MRI of the right shoulder showed tears of the supraspinatus tendon and the anterior labrum according to Dr. Mian. Follow-up examinations on July 11, 2013 and October 14, 2013 revealed no significant changes.

Dr. Mian operated on October 23, 2013. The operation consisted of repair to plaintiff's right shoulder rotator cuff, subacromial decompression with an oval burr and debridement of the labrum tear. At a follow-up examination six days later on October 29, 2013, plaintiff complained of "mild pain" in her right shoulder. The impingement sign was absent, the apprehension test was negative and sensations were intact.

At a follow-up examination six months later on April 1, 2014, there was "no significant change" and Dr. Mian recommended Motrin, exercise and physical therapy. At another follow-up examination on September 30, 2014 plaintiff continued to complain of neck and right shoulder pain off and on. Plaintiff reported to Dr. Mian that "[r]ange of motion is better but, [she] feels

increased pain in bad weather and on extreme range of motion". There was "[n]o neck pain and no radiation, paresthesias or numbness". Upon examination, cervical spine range of motion was decreased but there was no tenderness or spasm. Motor strength was full at 5/5. There was some tenderness and clicking in plaintiff's right shoulder, but no impingement sign and a negative apprehension test. Range of motion was decreased, measured numerically and compared to normal measurement.

Dr. Mian affirmed on December 18, 2014, that his medical opinion was based on review of the MRI films, his observations during surgery, a lack of prior right shoulder injury and plaintiff's complaints after the accident, and that plaintiff's right shoulder injury was causally related to the subject accident. He disagreed with plaintiff's radiologist's MRI report referring to a degenerative condition in her right shoulder, but provided no further explanation. Dr. Mian's post-operative diagnosis was a tear of the anterior glenoid labrum, a full-thickness tear of the rotator cuff at the supraspinatus tendon and impingement syndrome. He offered no specific comment as to the cause of plaintiff's impingement syndrome or why decompression was necessary. He made no mention of a paralabral cyst, either that one was found or not found during surgery.

Dr. Riaz affirmed on December 16, 2014 that he saw plaintiff on December 30, 2011 when she complained of right shoulder pain and there was decreased range of motion in her cervical spine. In his opinion, plaintiff's injuries to her right shoulder and cervical spine were causally related to the subject accident. Dr. Riaz' records of his two examinations of the plaintiff on December 30, 2011 and March 2, 2012, however, address only neck and upper back pain. The diagnosis reported by Dr.Riaz was cervical and thoracic sprain/strain and radiculitis. Dr. Riaz

stated that plaintiff stopped physical therapy because she was pregnant and also because her no-fault benefits were "cut off" and she could not afford further treatment.

The records show another examination on December 30, 2011 by a chiropractor, reporting an initial diagnosis of "cervical disc herniation, spinal subluxation of cervical vertebra whiplash injury", although a second checklist recorded an aditional complaint of right shoulder pain. Acupuncture records related complaints of pain in the neck, back and "severe" right shoulder pain. The diagnosis by the acupuncturist was "right shoulder joint, lumbago, cervicalgia".

Daily Notes by a Dr. Peter Sansone recorded treatment to plaintiff's neck and thoracic spine and mentioned complaints of moderate neck and right shoulder pain during various visits from January 3, 2012 through April 2, 2012. On that last date, however, the record reported that plaintiff had "no pain" in any area. There is no record of treatment by these providers for plaintiff's right shoulder pain.

Defendants have established their entitlement to summary judgment which plaintiff has not refuted with admissible medical evidence. Defendants met their *prima facie* burden of showing by admissible medical evidence that the plaintiff suffered from sprain injuries to her neck which have completely resolved and any injury to her right shoulder was a pre-existing, degenerative condition.

Plaintiff testified that she lost no more than one month from work as a result of the accident. Even together with the week she took later for shoulder surgery, this amount of time does not add up to 90 days out of the first 180 days following the accident in which she was prevented from performing substantially all her daily activities.

Plaintiff also testified that she never complained to any medical provider of depression,

anxiety, fear, emotional upset, left knee, left elbow or low back pain due to the accident (testimony on June 5, 2013 at 98-99), eliminating those allegations in the bill of particulars as a basis for a claim of serious injury. Plaintiff's testimony, describing the narrow, 1.5-cm-long arthroscopy scars on her right shoulder, is sufficient to eliminate any consideration of the scars as causing plaintiff to be regarded by a reasonable person as an object of pity or scorn as a matter of law (see *Loiseau*, 256 AD2d 450 [reasonable person would not regard 5-cm scar on lower leg of infant as objectionable]). In addition, plaintiff testified that her only complaints related to the accident were of injury to her neck and right shoulder (testimony on June 6, 2013 at 114).

Defendants have made a *prima facie* case for summary judgment regarding plaintiff's cervical spine, notwithstanding plaintiff's subjective complaints of neck pain. Plaintiff did not experience any pain at all in her neck until a day after the accident, eliminating neck pain, even if it resulted from the accident, as a significant injury (testimony on June 5, 2013 at 71, 103). The objective tests performed by Dr. Crane and Dr. Bender found plaintiff's cervical spine functioning normally in every aspect.

Plaintiff testified that she experienced no shoulder pain until two days following the accident (testimony on June 5, 2013 at 71), although she claims sufficient force at the time of the accident to have caused soft tissue tears in her right shoulder requiring surgical repair. Injuries caused by the accident cannot have been so significant as to require surgery when there was admittedly no subjective clinical experience of any such injury until days after the accident. Dr. Tantleff reviewed plaintiff's shoulder MRI and was able to see a labral tear associated with a cyst, all consistent with degeneration despite plaintiff's relative youth.

As far as plaintiff's continuing complaints of pain and limitation in her right shoulder after

surgery, she admitted rejecting her surgeon's repeated recommendation to undergo post-surgical physical therapy because the first session of therapy "hurt". On the other hand, she told Dr. Crane that she chose to forego physical therapy because she was too busy. He affirmed that, if she followed through with the physical therapy recommendation of her surgeon, her prognosis was "good to excellent". Since surgery had corrected any problem with her right shoulder, plaintiff could not claim a permanent shoulder injury as a result of the subject accident. Nor could such a shoulder injury have been "significant" when she was able to wait almost two years for treatment of the shoulder in spite of her claims of continuing pain.

Plaintiff's submissions in opposition did not raise an issue of fact for trial. Her affidavit claiming she could not afford to continue physical therapy does not distinguish between physical therapy after the accident or after the surgery. She never made an allegation of an inability to afford therapy in either of her depositions. Instead, she claimed she stopped the first regime of therapy because she was pregnant. There is no medical evidence that she was prevented from continuing because of pregnancy. In addition, her treatment records reflect that she had "no pain" at the end of her initial three months of therapy. When asked at her deposition, she testified only that she quit later physical therapy after surgery because she was "scared and paranoid" and it hurt.

Dr. Riaz' affirmation that plaintiff's neck and shoulder injuries were caused by the accident is only partially supported by his records. Plaintiff's neck injury was never found to be anything more than sprain/strain/whiplash injury, not enough to qualify as a serious injury according to the no-fault statute. That lack of serious injury was confirmed by MRI studies. There is no record of treatment of plaintiff's right shoulder by Dr. Riaz or anyone else at Community

Medical Care of New York. Plaintiff testified that she was referred to Dr. Mian for that treatment.

Plaintiff's subjective complaints of decreased range of motion, pain and limitation are insufficient to raise an issue of fact as to whether she suffered a permanent or significant shoulder injury, especially when she refused to cooperate with Dr. Mian's recommendation for physical therapy to improve the mobility of her shoulder after surgery.

Dr. Mian's affirmation attributing plaintiff's shoulder injury to the subject accident is entirely conclusory. It is admittedly based only on the MRI, Dr. Mian's observations during surgery almost two years after the accident, observations that he does not explain in any way, and plaintiff's hearsay denial of any prior injury, together with her subjective complaints of pain. Dr. Mian's post-operative report does not explain how plaintiff's shoulder impingement was related to the trauma of the accident, and why decompression (enlarging) of an obviously hard space in the shoulder with a burr was necessary to relieve it. This procedure was in addition to debridement of the soft tissue tears. Dr. Mian neither confirmed nor denied the presence of the paralabral cyst, which supported Dr. Tantleff's finding of degeneration on the MRI studies of plaintiff's shoulder. The MRI report by Dr. Lubitz was accompanied by no opinion as to causation.

The complaint is, therefore, dismissed. Movant is directed to serve a copy of this order with notice of entry on the Clerk of Court who shall enter judgment dismissing the plaintiffs' complaint.

This constitutes the decision and order of the court.

Dated: September 22, 2015
Bronx, New York

BETTY OWEN STINSON, J. S.C..