

**Greene v Greene**

2019 NY Slip Op 32218(U)

March 11, 2019

Supreme Court, Bronx County

Docket Number: 23515/2017E

Judge: John R. Higgitt

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: I.A.S. PART 14

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JULIE D. GREENE,

Plaintiff,

DECISION AND ORDER

- against -

Index No. 23515/2017E

ROSE A. GREENE,

Defendant.

-----X  
ROSE A. GREENE,

Third-Party Plaintiff,

Third-Party Index No.  
43227/2017E

- against -

BARBARA S. GREENE,

Third-Party Defendant.

-----X

John R. Higgitt, J.

Upon defendant’s October 4, 2018 notice of motion and the affirmation and exhibits submitted in support thereof; third-party defendant’s November 6, 2018 notice of cross motion and the affirmation and exhibits submitted in support thereof; plaintiff’s January 14, 2019 affirmation in opposition and the exhibits submitted therewith; defendant’s January 23, 2019 affirmation in reply; and due deliberation; the motion and cross motion for summary judgment on the ground that plaintiff did not sustain a “serious injury” in the subject January 24, 2017 motor vehicle accident are granted in part.

Plaintiff alleges injuries to the ligaments of her cervical spine and alleges “serious injury” under the Insurance Law § 5102(d) categories of significant disfigurement, permanent loss of use, permanent consequential limitation, significant limitation and 90/180-day injury.

In support of the motion, defendant submits the affirmed reports of orthopedic surgeon Dr. Miller and radiologist Dr. Greenfield, and the transcript of plaintiff’s deposition testimony.

Dr. Miller examined plaintiff on April 19, 2018, approximately 15 months after the

accident. Dr. Miller found no tenderness, swelling, spasm or crepitus upon his examination of plaintiff's cervical spine and shoulders. Plaintiff apparently refused to participate in range-of-motion testing. Dr. Miller found her to be non-compliant, and further found that her complaints were subjective and her limitations in motion voluntarily imposed, given the absence of objective evidence of residual injury. Dr. Miller concluded that plaintiff had sustained a resolved cervical sprain, and that there was no evidence of an orthopedic disability.

Dr. Greenfield reviewed the films from the February 2, 2017 MRIs of plaintiff's left shoulder and cervical spine. With respect to the shoulder MRI, Dr. Greenfield found no evidence of tears, fractures, edema or impingement, and concluded that there was no evidence of soft tissue injury, foreign body or a penetrating trauma. With respect to the spine MRI, Dr. Greenfield found diffuse degeneration at all levels without evidence of acute trauma that could be attributed to the accident with any degree of medical certainty.

Dr. Miller's report was insufficient to meet defendant's burden of demonstrating that plaintiff had not sustained a permanent consequential or significant limitation of plaintiff's cervical spine, because he did not specify any objective tests used to determine plaintiff's ranges of motion and did not otherwise adequately indicate the absence of objective evidence of orthopedic injury because he referred only to "residual" injury (*see Washington v Delossantos*, 44 AD3d 748 [2d Dept 2007]).

Dr. Greenfield's findings of degeneration, without more, were insufficient to meet defendant's prima facie burden with respect to causation, given plaintiff's age of 26 years at the time of the imaging (*see Angeles v American United Transp., Inc.*, 110 AD3d 639 [1st Dept 2013]; *De La Cruz v Hernandez*, 84 AD3d 652 [1st Dept 2011]; *cf. Amaro v American Med. Response of N.Y., Inc.*, 99 AD3d 563 [1st Dept 2012]), particularly because he found

degeneration of structures other than those claimed to have been injured in the accident.<sup>1</sup>

With respect to plaintiff's 90/180-day injury claim, plaintiff's bill of particulars indicating that she missed one day from her work as a public school teacher and her deposition testimony that she could not estimate how much time she lost from work, but that it was fewer than 90 days, and that she had never been advised by a doctor during the statutory period that she could not work, refute the claim (*see Thompson v Bronx Merch. Funding Servs., LLC*, 166 AD3d 542 [1st Dept 2018]), and plaintiff's proof was insufficient to raise an issue of fact (*see Zambrana v Timothy*, 95 AD3d 422 [1st Dept 2012]).

It is obvious that plaintiff did not sustain a significant disfigurement. Plaintiff's medical records are devoid of evidence of scarring or other abnormality that could be considered unattractive, objectionable or the subject of pity or scorn (*see Fernandez v Hernandez*, 151 AD3d 581 [1st Dept 2017]). Additionally, it is obvious that plaintiff did not sustain a permanent loss of use. Such loss must be total (*see Oberly v Bangs Ambulance Inc.*, 96 NY2d 295 [2001]), and evidence of mere limitations of use are insufficient (*see Byong Yol Yi v Canela*, 70 AD3d 584 [1st Dept 2010]).

In any event, in opposition, plaintiff abandoned the claims of "serious injury" under the categories of significant disfigurement, permanent loss of use and 90/180-day injury (*see Kuehne & Nagel, Inc. v Baiden*, 36 NY2d 539 [1975]; *Henry v Carr*, 161 AD3d 424 [1st Dept 2018]), and the "serious injury" claims based on those categories are therefore dismissed (*see Ng v NYU Langone Med. Ctr.*, 157 AD3d 549 [1st Dept 2018]).

Accordingly, it is

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<sup>1</sup> Dr. Greenfield's review of films from an MRI of plaintiff's left shoulder is gratuitous. No such injury was pled in either the original or supplemental bill of particulars, and defendants were not required to address it (*see Hernandez v Marcano*, 161 AD3d 676 [1st Dept 2018]). Any claim based on such injury is deemed waived by plaintiff (*see Boone v Elizabeth Taxi, Inc.*, 120 AD3d 1143 [1st Dept 2014]; *Whisenant v Farazi*, 67 AD3d 535 [1st Dept 2009]).

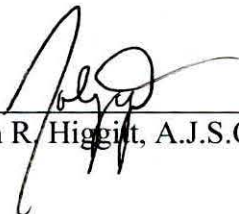
ORDERED, that the aspects of the motion and cross motion for summary judgment dismissing plaintiff's claim of "serious injury" under the Insurance Law § 5102(d) categories of significant disfigurement, permanent loss of use and 90/180-day injury are granted, and those claims are dismissed; and it is further

ORDERED, that the motion and cross motion are otherwise denied.

The parties are reminded of the April 15, 2019 pre-trial conference before the undersigned.

This constitutes the decision and order of the court.

Dated: March 11, 2019

  
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John R. Higgin, A.J.S.C.