

**Hanniford v Carrasco**

2019 NY Slip Op 35171(U)

December 31, 2019

Supreme Court, Bronx County

Docket Number: Index No. 30290/2018E

Judge: John R. Higgitt

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: **PART 14**

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**HANNIFORD, JULIA**

Index No. **30290/2018E**

- against -

Hon. **JOHN R. HIGGITT,**

**CARRASCO, RAMON, et ano**

A.J.S.C.

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The following papers in the NYSCEF System were read on this motion for **SUMMARY JUDGMENT (DEFENDANT)**, noticed on **November 8, 2019** and duly submitted as No. **49** on the Motion Calendar of **December 20, 2019**

	NYSCEF Doc. Nos.
Notice of Motion – Exhibits and Affidavits Annexed	11-21
Notice of Cross-Motion – Exhibits and Affidavits Annexed	
Answering Affidavit and Exhibits	23-29
Replying Affidavit and Exhibits	
Filed Papers	
Memoranda of Law	
Stipulations	

Upon the foregoing papers, defendant’s motion for summary judgment on the ground that plaintiff did not sustain a “serious injury” in the subject March 10, 2018 motor vehicle accident is granted in part, in accordance with the annexed decision and order.

Dated: **12/31/2019**

Hon.   
**JOHN R. HIGGITT, A.J.S.C.**

**Check one:**

- Case Disposed in Entirety
- Case Still Active

**Motion is:**

- Granted  GIP
- Denied  Other

**Check if appropriate:**

- Schedule Appearance  Settle Order
- Fiduciary Appointment  Submit Order
- Referee Appointment

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

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JULIA HANNIFORD,

Plaintiff,

DECISION AND ORDER

- against -

Index No. 30290/2018E

RAMON CARRASCO and JOHN DOE,

Defendants.  
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John R. Higgitt, J.

Upon defendant’s September 27, 2019 notice of motion and the affirmation and exhibits submitted in support thereof; plaintiff’s December 9, 2019 affirmation in opposition and the exhibits submitted therewith; and due deliberation; defendant’s motion for summary judgment on the ground that plaintiff did not sustain a “serious injury” in the subject March 10, 2018 motor vehicle accident is granted in part.

Plaintiff claims injuries to her left shoulder, left ankle and the cervical and lumbar aspects of her spine, and alleges “serious injury” under the Insurance Law § 5102(d) categories of fracture, permanent loss of us, permanent consequential limitation, significant limitation and 90/180-day injury (*see* CPLR 3043[a][6]).

In support of the motion, defendant submits the affirmed reports of orthopedic surgeon Dr. Ferriter and radiologists Drs. Fitzpatrick and Springer, and the transcript of plaintiff’s July 17, 2019 deposition testimony.

Dr. Ferriter examined plaintiff on August 19, 2019, approximately a year and a half after the accident. Dr. Ferriter measured full ranges of motion in all tested planes of movement of plaintiff’s left shoulder, left ankle, and cervical and lumbar spine, without tenderness or spasm, and all objective provocative testing, including straight-leg raising, yielded negative results. Dr. Ferriter found that plaintiff had sustained resolved cervical, lumbar and shoulder sprain/strain

and was status post healed ankle surgery. He concluded that there was no orthopedic disability or permanent residuals.

Dr. Fitzpatrick reviewed the films from the May 25, 2018 MRI of plaintiff's left ankle, finding that they depicted an unremarkable study without evidence of traumatic injury. Dr. Fitzpatrick also reviewed the films from the May 14, 2018 MRI of plaintiff's cervical spine, finding that they depicted degenerative disease, without evidence of traumatic injury.

Dr. Springer reviewed the films from the March 30, 2018 MRI of plaintiff's left shoulder, finding that they depicted degeneration typical of arthritis, non-traumatic developmental variants, degenerative non-traumatic spurs and cysts, and chronic tendinosis.

Defendant's proof was sufficient to meet his prima facie burden of demonstrating that plaintiff did not sustain a permanent consequential or significant limitation (*see Hamilton v Marom*, 2019 NY Slip Op 08615 [1st Dept 2019]; *Cano v U-Haul Co. of Ariz.*, 2019 NY Slip Op 08603 [1st Dept 2019]). Furthermore, with respect to plaintiff's cervical spine and left shoulder, defendant's proof was sufficient to demonstrate a lack of causal connection between the accident and the claimed injuries (*see Massillon v Regalado*, 176 AD3d 600 [1st Dept 2019]; *Blake v Cadet*, 175 AD3d 1199 [1st Dept 2019]; *Pouchie v Pichardo*, 173 AD3d 643 [1st Dept 2019]).

In opposition, plaintiff submitted the affirmation and records of podiatric surgeon Dr. Yager, who performed arthroscopy on June 22, 2018; the affirmation of Dr. Villafuerte and the records of Physical Medicine and Rehabilitation of New York (PMR); and the affirmed report of orthopedic surgeon and no-fault examiner Dr. Miller.

Dr. Yager initially examined plaintiff's ankle function on June 12, 2018. He opined that, based upon his examinations of plaintiff, review of the MRI report and observations during surgery, plaintiff's ankle injuries were caused by the accident. Dr. Miller examined plaintiff on June 27, 2019, finding reduced ranges of motion and reduced sensation in plaintiff's ankle,

requiring further treatment (the remainder of the examination was normal). This proof was sufficient to raise an issue of fact as to whether plaintiff sustained a permanent consequential or significant limitation of use of her ankle (*see Jenkins v Livo Car Inc.*, 176 AD3d 568 [1st Dept 2019]).

Furthermore, medical professionals at PMR assessed plaintiff's cervical, lumbar and shoulder function on 14 occasions from March 15, 2018 to October 9, 2019, finding reduced ranges of motion on each occasion. Dr. Villafuerte opined that, based upon the examinations and plaintiff's history, the MRI reports demonstrated injuries resulting in the limitations found, and plaintiff's injuries were related to the subject accident. This was sufficient to raise an issue of fact as to whether plaintiff's injuries were caused by the accident and whether plaintiff's resulting limitations are consequential or significant (*see Riollano v Leavey*, 173 AD3d 494 [1st Dept 2019]).

With respect to plaintiff's 90/180-day injury claim, plaintiff's allegations in her bill of particulars that she was confined to bed for five weeks and to home for eight weeks defeats the claim (*see Tejada v LKQ Hunts Point Parts*, 166 AD3d 436 [1st Dept 2018]), as does plaintiff's testimony that, while she was out of work as a nanny for approximately seven months following the accident, she was never confined to bed (*see Ortiz v Boamah*, 169 AD3d 486 [1st Dept 2019]). In opposition, plaintiff failed to raise an issue of fact (*see Barry v Arias*, 94 AD3d 499 [1st Dept 2012]). That plaintiff missed more than 90 days from work is not determinative (*see Amamedi v Archibala*, 70 AD3d 449, 450 [1st Dept 2010]; *Reyes v Se Park*, 127 AD3d 459 [1st Dept 2015]), and it is apparent that she informed her doctors that she returned to work in some capacity shortly following the accident. A reduced or changed work schedule is also insufficient to raise an issue of fact (*see Colon v Tavares*, 60 AD3d 419 [1st Dept 2009]). Drs. Villafuerte's and Yager's bare recitations that plaintiff's injuries prevented her from performing substantially

all of her usual and customary daily activities were insufficient (*see Browne v Covington*, 82 AD3d 406 [1st Dept 2011]; *Dieujuste v Kiss Mgt. Corp.*, 60 AD3d 514 [1st Dept 2009]).

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]).

It is apparent that plaintiff did not sustain a fracture in the subject accident. Plaintiff's medical records are devoid of mention of a fracture or treatment for same (*see e.g. Brackenbury v Franklin*, 93 AD3d 423 [1st Dept 2012]; *O'Bradovich v Mrijaj*, 35 AD3d 274 [1st Dept 2006]; *cf. Seidel v Rabassa*, 170 AD3d 430 [1st Dept 2019]). In any event, plaintiff abandoned the fracture claim in opposition (*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 that category are therefore dismissed (*see Ng v NYU Langone Med. Ctr.*, 157 AD3d 549 [1st Dept 2018]).

Accordingly, it is

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

ORDERED, that defendant's motion is otherwise denied.

The parties are reminded of the February 3, 2020 pre-trial conference before the undersigned.

This constitutes the decision and order of the court.

Dated: December 31, 2019

  
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John R. Higgitt, J.S.C.