

Mercado v Gonikman
2020 NY Slip Op 31207(U)
April 23, 2020
Supreme Court, Kings County
Docket Number: 517261/2017
Judge: Debra Silber
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 9**

_____x

JANICE MERCADO,

Plaintiff,

-against-

**VYACHESLAV GONIKMAN and WILBERTO J.
MERCADO,**

Defendants.

_____x

DECISION / ORDER

**Index No. 517261/2017
Motion Seq. No. 1, 2
Date Submitted: 3/5/20
Cal No. 29, 57**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendant Wilberto J. Mercado's motion and defendant Vyacheslav Gonikman's cross motion for summary judgment.

Papers	NYSCEF Doc.
Notice of Motion, Affirmation and Exhibits Annexed.....	<u>16-27</u>
Notice of Cross Motion, Affirmation and Exhibits Annexed.....	<u>28-30</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>32-43</u>
Reply Affirmation.....	<u>46</u>

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

This is a personal injury action arising out of a motor vehicle accident which took place on May 15, 2017 on Avenue X near the intersection with West 2nd Street in Brooklyn, NY. Plaintiff was a rear seat passenger in defendant Wilberto J. Mercado's (her brother) vehicle which, while double parked, was sideswiped by a vehicle owned and operated by defendant Vyacheslav Gonikman. Defendant Mercado moves for summary judgment dismissing the complaint, contending that plaintiff did not sustain a "serious" injury as a result of the accident, as defined by Insurance Law § 5102(d). Defendant Gonikman cross-moves for the same relief and adopts defendant Mercado's contentions.

In her Bill of Particulars, plaintiff, who was 38 years old at the time of the accident, alleges that as a result of the accident, she sustained injuries to her left shoulder, including a bursal surface tear, to her neck and back, including herniated and bulging discs with radiculopathy, and to her left knee. Plaintiff claims she has sustained a serious injury under the significant disfigurement, permanent consequential limitation and significant limitation categories of injury, as well as a medically determined injury or impairment of a non-permanent nature which prevented her from performing substantially all of the material acts which constitute her usual and customary daily activities for not less than ninety out of the one hundred eighty days immediately following the accident.

The movants contend that plaintiff did not sustain a “serious injury” as a result of this accident. Defendants assert that plaintiff was in no way disfigured and that defendant Mercado’s doctor found a full range of motion in plaintiff’s left knee and lumbar and cervical spine and only slight limitations in the range of motion in her shoulder, insufficient to constitute a serious injury. Further, they contend that plaintiff continued to work as a nurse’s aide after the accident and that, after several months of physical therapy, she required no further treatment. Defendants support their motions with an attorney’s affirmation, the pleadings, the parties’ EBTs, medical records from plaintiff’s primary care doctor, and the affirmed IME report from an orthopedist, Richard A. Weiss, M.D.

Conclusions of Law

Defendants have made a *prima facie* showing of their entitlement to summary judgment (see *Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyer*, 79 NY2d 955, 956-957 [1992]). The affirmed report from defendant Mercado’s orthopedist,

Dr. Richard A. Weiss, when read with plaintiff's EBT transcript, makes a prima facie showing that plaintiff did not sustain a "serious" injury from the subject accident.

Dr. Weiss examined plaintiff on October 19, 2018. He reports normal quantified ranges of motion in plaintiff's cervical and lumbar spine, and left knees, and slightly reduced ranges of motion in her left shoulder with otherwise negative test results. He concludes that plaintiff sustained cervical, lumbar, left shoulder and left knee sprains which have resolved, and no evidence of hand/finger numbness. He notes that the decreased range of motion he reports in plaintiff's left shoulder was a subjective response by plaintiff which is not substantiated by any objective findings. Indeed, the minimal reductions in the range of motion in plaintiff's shoulder found by Dr. Weiss are insufficient to constitute a serious injury (see *Broadwood v Bedoya*, 170 AD3d 795 [2d Dept 2019] [restrictions no more than ten percent]). Moreover, the fact that plaintiff testified that she missed no time from work as a nurse's aide as a result of the accident (EBT Page 10) demonstrates that she did not sustain an injury in the 90/180-day category (see *Dacosta v Gibbs*, 139 AD3d 487, 488 [1st Dept 2016] ["Plaintiff's testimony indicating that she missed less than 90 days of work in the 180 days immediately following the accident and otherwise worked "light duty" is fatal to her 90/180-day claim"]; *Strenk v Rodas*, 111 AD3d 920 [2d Dept 2013] [plaintiff returned to work on a partial basis during the relevant period of time]; *Hamilton v Rouse*, 46 AD3d 514, 516 [2d Dept 2007] ["The plaintiff testified at trial that he missed only one month of work, that he then returned to work on a part-time basis, and that, after another month, he had resumed working on a full-time basis"]).

The burden of proof then shifts to plaintiff. Plaintiff opposes the motion. Plaintiff supports her opposition with her own affidavit, her EBT transcript, certified medical records and affirmations from Mark Silverman M.D. and Daniel W. Wilen, M.D.

Plaintiff counters that defendants fail to make a *prima facie* showing of their entitlement to summary judgment as the defendant's IME doctor failed to review any of plaintiff's medical records and found a decreased range of motion in her left shoulder. Alternatively, plaintiff argues that even if defendants have made a *prima facie* showing, triable issues of fact are raised by plaintiff's treating physicians, Dr. Mark M. Silverman and Dr. Daniel W. Wilen. Dr. Silverman examined plaintiff about six months after the accident, and Dr. Wilen has examined plaintiff many times, first two weeks after the accident, several times in 2017 and 2018, and recently in December of 2019. Dr. Wilen reports that plaintiff had significant limitations in her range of motion in the weeks following the accident, and still has significant limitations in her range of motion two years after the accident.

Plaintiff has come forward with sufficient evidence to overcome the motion and raise a triable issue of fact as to whether she sustained a permanent consequential limitation of use of a body organ or member or a significant limitation of use of a body function or system, as a result of the subject accident (*White v Dangelo Corp.*, 147 AD3d 882 [2d Dept 2017]). Daniel W. Wilen, M.D., who treated plaintiff from shortly after the accident and examined her most recently on December 1, 2019, finds significant and quantified restrictions in the range of motion in her lumbar spine and left shoulder as well as moderate restrictions in the range of motion in her cervical spine. He opines that plaintiff's injuries, including disc bulges and herniations in the cervical and lumbar spine, as well as the bursal surface tearing of the distal supraspinatus of the left

shoulder and internal derangement of the left knee and the related losses in her range of motion, were caused by the May 15, 2017 accident. He further opines that the injuries were traumatically induced, and that plaintiff continues to suffer from pain and restrictions in her movement which were caused by the permanent and significant injuries to her cervical spine, lumbar spine, left shoulder and left knee. He expressly disputes Dr. Weiss' conclusion that plaintiff's injuries which arose as a result of the accident have resolved.

Accordingly, it is **ORDERED** that the motion is denied.

This constitutes the decision and order of the court.

Dated: April 23, 2020

ENTER:



Hon. Debra Silber, J.S.C.