

<b>Wanton v Amro Carting Corp.</b>
2020 NY Slip Op 32474(U)
June 22, 2020
Supreme Court, Bronx County
Docket Number: 21870/17E
Judge: Ben R. Barbato
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**SUPREME COURT STATE OF NEW YORK  
COUNTY OF BRONX TRIAL TERM- PART 21**

**Present:** Honorable Ben R. Barbato

GWENDOLYN WANTON,

Plaintiff,

-against-

AMRO CARTING CORP. CHRISTOPHER  
J. INCOGNOLI, NEW YORK CITY TRANSIT  
AUTHORITY, METROPOLITAN TRANSPORTATION  
AUTHORITY and FREDIE M DEANE,

Defendants.

**DECISION/ORDER**

Index No.: 21870/17E

Recitation, as required by CPLR 2219(a) of the papers considered in the review of this motion to dismiss:

<b>Papers</b>	<b>Numbered</b>
<b>Notice of Motion, Affirmation and Exhibits Annexed</b>	<b>1</b>
<b>Affirmation in Opposition and Exhibit Annexed</b>	<b>2</b>
<b>Reply Affirmation</b>	<b>3</b>

The above Motions have been transferred from Justice MaryAnn Brigantti on June 18, 2020 to this court pursuant to Order of the Administrative Judge and shall be decided by this court pursuant to CPLR§9002.

The instant action sounds in personal injury arising from a motor vehicle accident occurring on May 3, 2016, on Westchester Avenue at or near its intersection with Zerega Avenue, in the County of Bronx, City and State of New York. At the time of the accident the Plaintiff, Gwendolyn Wanton, was a passengers on the Metropolitan Transportation Authority BX4 seated on the driver's side of the bus. Just prior to the impact Plaintiff claims that the bus had stopped at a bus stop located on Westchester Avenue to pick up passengers. As the bus pulled away from the bus stop she felt a heavy impact causing her body to jerk backward striking her lower back on the back of her seat. The impact, Plaintiff, alleges was caused by the collision of the bus with a large garbage truck. Plaintiff also indicates that there was a second heavy impact, again between the bus and the garbage truck, also causing her body to jerk backwards and again

striking her lower back on the back of her seat. Plaintiff was removed from the scene of the accident by ambulance and taken to Albert Einstein Hospital. Defendants, AMRO Carting Corp., and Christopher Incognoli, move this court for an Order pursuant to CPLR §3212 granting Summary Judgment in favor of the Defendants dismissing Plaintiff's Complaint claiming that the Plaintiffs cannot meet the serious injury threshold requirement mandated by Insurance Law §§ 5102(d).

Defendants submit the Affirmed narrative report dated, August 28, 2018, by Dr. Marc M. Silverman, a Board Certified Orthopedic Surgeon, who states that he performed an Orthopedic Evaluation of the Plaintiff. Dr. Silverman opines that the evaluation of the Plaintiff revealed status post thoracic spine sprain and strain; status post lumbar sprain and strain with contusion, super imposed with preexisting degenerative disc disease and chronic lower back pain; status post left shoulder sprain, status post left shoulder surgery superimposed on a prior injury and status post sprain and strain. Dr. Silverman notes a prior work related incident where Plaintiff injured her neck and left shoulder for which she underwent physical therapy, chiropractic treatment, diagnostic testing and injections. Dr. Silverman notes that Plaintiff was actively treating her left shoulder injury prior to the instant accident. That the MRI of Plaintiff's left shoulder dated February 12, 2015, reveals a tear at the critical zone of the long head of the biceps tendon and supraspinatus tendinosis with a 7mm partial thickness humeral surface tear. Dr. Silverman opines that Plaintiff's preexisting shoulder condition caused "temporary aggravation of her preexisting left shoulder condition." His examination of Plaintiff's thoracic spine reveals full range of motion at all planes. Dr. Silverman further opines that any injury to the thoracic spine from the previous stated incident was treated and at the time of his examination resolved. With regard to the lumbar spine Dr. Silverman notes prior low back pain for which Plaintiff underwent an epidural injection three months prior to the current accident. He also notes that the

MRI of Plaintiff's lumbar spine reveals preexisting disc degenerative disease at the L4/5 level.

Dr. Silverman opines that any residuals or impairment to the lumbar spine is unrelated to the accident of May 3, 2016. Dr. Silverman's examination of Plaintiff's left hip reveals full range of motion on all planes with no objective impingement or internal derangement.

Plaintiff offers the Affirmation of Dr. Landis L. Barnes, who maintains an office at Central Medical Services Westrock located at 2501 Westchester Avenue, Bronx, New York. Dr. Barnes reviewed the records of the initial evaluation of Plaintiff on June 16, 2016 by Dr. Lisa Daley. Such records Dr. Barnes stated are kept in the regular course of business contemporaneously created during Plaintiff's initial examination at Central Medical Services Westrock. It is noted that Plaintiff also submitted the Initial Office Visit Report, Affirmed by Dr. Lisa Daley. Dr. Daley's physical examination of the Plaintiff revealed muscle spasm and tenderness to palpation of the lumbar paravertebral muscles with straight leg testing being positive. On July 25, 2016, Plaintiff underwent an MRI of the lumbar spine which revealed an accentuated lumbar lordotic curvature, disc herniation at the thoracic spine T10/11, disc bulge at T11/12, disc bulge at L4/5 and L5/S1. Dr. Barnes causally relates the injuries stated to the accident dated May 3, 2016. On January 30, 2017, March 27, 2017 Plaintiff underwent epidural steroid injections under anesthesia. On June 19, 2017, Plaintiff underwent left lumbar facet nerve block injections from L2 through L5. From May 18, 2018 through September 21, 2018, Plaintiff had a series of lumbar trigger point injections. Range of motion testing conducted by Dr. Barnes utilizing a goniometer revealed significant loss of range of motion of the lumbar spine.

Plaintiff also submits the Affirmation of Dr. Ronald Wagner, a radiologist and the MRI report of Dr. Michael Hearn, of Stand-up MRI of the Bronx, P.C., taken on July 26, 2016.

It is settled law that on a motion for summary judgment, the moving party has the initial

burden of demonstrating, by admissible evidence, their right to judgment. The burden then shifts to the opposing party, who must proffer evidence in admissible form establishing that an issue of fact exists warranting a trial. CPLR §3112(b); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980); *Singer v. Friedman*, 220 A.D.2d 574(2d Dept 1995). Further, issue finding rather than issue determination is the function of the court on motions for summary judgment. *Esteve v. Abad*, 271 A.D. 725 (1st Dept. 1947); *Stillman v. Twentieth Century Fox F. Corp.*, 3 N.Y.2d 395 (1957); *Clearwater Realty Co. v. Hernandez*, 256 A.D.2d 100 (1st Dept. 1998). Additionally the role of the court is not to resolve issues of credibility. *Knepka v. Tallman*, 278 A.D.2d 811(4<sup>th</sup> Dept. 2000) Since summary judgment is a drastic remedy it should not be granted where there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223(1978) Thus where the existence of an issue of fact is arguable summary judgment should not be granted. *Stone v. Goodson*, 8 N.Y.2d 8 (1960). In the instant case viewing the evidence in the light most favorable to the party opposing the motion for summary judgment, namely the Plaintiff, there exists a triable issue of material fact for determination by a jury. See: *Bacon v. County of Westchester*, 149 A.D.2d 451 (2<sup>nd</sup> Dept. 1989); *Mutschnik v. Summit Brokerage Corp.*, 148 A.D.2d 427 (2<sup>nd</sup> Dept. 1989) Therefore it is

**ORDERED**, that Defendants, AMRO Carting Corp., and Christopher Incognoli's, motion for an Order pursuant to CPLR §3212 granting summary judgment dismissing the Plaintiff's complaint is **denied**.

Dated: June 22, 2020

  
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Hon. Ben R. Barbato, J.S.C.