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| <b>Bertresse v Bhola</b>                                                                                                                                                                                                       |
| 2022 NY Slip Op 30015(U)                                                                                                                                                                                                       |
| January 3, 2022                                                                                                                                                                                                                |
| Supreme Court, Kings County                                                                                                                                                                                                    |
| Docket Number: Index No. 526448/2019                                                                                                                                                                                           |
| Judge: Debra Silber                                                                                                                                                                                                            |
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : PART 9**

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**MAUDE BERTRESSE,**

**Plaintiff,**

**-against-**

**NATASHA BHOLA,**

**Defendant.**

**DECISION / ORDER**

**Index No.: 526448/2019**

**Motion Seq. No. 1**

**Date Submitted: 9/23/21**

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**Recitation, as required by CPLR § 2219 (a), of the papers considered in the review of defendant's motion for summary judgment**

| <b>Papers</b>                                             | <b>NYSCEF Doc.</b> |
|-----------------------------------------------------------|--------------------|
| Notice of Motion, Affirmation, and Exhibits Annexed ..... | <u>16-23</u>       |
| Affirmation in Opposition and Exhibits Annexed .....      | <u>27-38</u>       |
| Affirmation in Reply .....                                | <u>39</u>          |

**Upon the foregoing cited papers, the Decision and Order on this motion is as follows:**

This is an action for personal injuries arising from a motor vehicle accident. The accident took place on September 13, 2019 on Nostrand Avenue near the intersection with Winthrop Street in Brooklyn, NY. Plaintiff was driving her car and was in the process of parking it on the left side of Nostrand Avenue, a one-way street, when her vehicle was hit by a car owned and driven by defendant. The police were called. She drove home and subsequently went for medical treatment. Her bill of particulars alleges injuries to her lumbar spine, her cervical spine, and to her right shoulder. At the time of the accident, plaintiff was approximately forty-nine years old.

Defendant contends that the plaintiff did not sustain a "serious injury" as a result of this accident and thus the complaint should be dismissed. Movant supports her motion with an affirmation of counsel, the pleadings, plaintiff's bill of particulars, plaintiff's EBT transcript, and an affirmed IME report from an examining orthopedist.

Plaintiff testified at her EBT that she didn't miss any time from work after the accident [E-File Doc. 22 Page 23], which took place on a Friday at 6:00 p.m. She is a school nurse in an elementary school [Page 19].

Dr. P. Leo Varriale, an orthopedist, examined plaintiff on February 19, 2021, a year and a half after the accident (Doc 23). Plaintiff told him that she was still experiencing pain in her neck and lower back and, according to him, her left shoulder.<sup>1</sup> She told Dr. Varriale that she treated for nine months with a physical therapist and a chiropractor. Dr. Varriale's range of motion testing of plaintiff's cervical, thoracic, and lumbar spine produced completely normal results. He states that he found no tenderness or spasm. Dr. Varriale tested the range of motion in both of plaintiff's shoulders, and found normal range of motion in both, with full strength in the muscles and without any tenderness or indications of any tears or impingement. He also tested the range of motion in her hips, wrists, ankles, elbows, and knees, none of which are claimed to have been injured, and states that all tests produced normal results. He concludes that plaintiff sustained strains to her cervical and lumbar spine, and to her right shoulder, which have all resolved. He states "there are no objective findings consistent with and proportional to the subjective complaints. The diagnosis is causally related to the accident. The mechanism of injury supports the diagnosis based on subjective complaints with no objective findings. There is no history of comorbidities, prior injuries and / or pre-existing conditions."

The court finds that the defendant has made out a prima facie case for dismissal of the complaint by establishing that plaintiff did not sustain a serious injury within the

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<sup>1</sup> Plaintiff's bill of particulars and EBT transcript make it clear that she claims she injured her right shoulder.

meaning of Insurance Law § 5102(d) as a result of the subject accident (See, *Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]).

The burden then shifts to the plaintiff to overcome the motion and raise a triable issue of fact.

Plaintiff opposes the motion with, in addition to again electronically filing the pleadings and plaintiff's EBT transcript, an affirmation of counsel, an affidavit of the plaintiff which does not include affidavit language, instead stating that she "affirms and attests, upon information and belief", six exhibits described as medicals, and, oddly, a copy of the IME from Dr. Varriale. The court will discuss the medical exhibits one at a time. Plaintiff's "affidavit" was not considered.

Dr. Daniel Beyda, a radiologist, affirms his MRI reports of the cervical and lumbar spine [Docs 32 and 33]. For the cervical spine, he reports that plaintiff has five disc herniations, one which "encroaches the right and left neural foramina" and one which "touches the ventral aspect of the spinal cord." For the lumbar spine, he reports two bulges, at L4-5 and L5-S1, with no discussion of any other findings.

Dr. Steven Losik, a radiologist, affirms his MRI report of the plaintiff's right shoulder, taken on September 27, 2019 [Doc 35]. He states, in part, that the films show "a Type III acromion with impingement of rotator cuff; the distal subscapularis tendon is thickened with heterogeneously increased signal consistent with a partial tear, in combination with tendinosis/tendinopathy". He also says that he sees "several sub-centimeter subcortical cysts in the humeral head under the insertion of the rotator cuff."

Document 31 comprises 39 pages of medical records from the office of James Avellini M.D., with an affirmation from the doctor on the last page. They reflect five office

visits, from September 18, 2019 to May 13, 2020. They are handwritten, and there is no narrative.

Document 36 is six pages of records from Dr. Alexios Apazidis of Total Spine and Sports Care. Plaintiff went to see him on November 19, 2019 for pain in her right shoulder. There is no affirmation or certification for these records. The last two visits, in January and February of 2020, plaintiff reported that she had no pain on those dates, that her shoulder was “better.” The court will consider these statements in her records as admissions against interest and thus an exception to the hearsay rule.

Document 34 is 46 pages of records from Dr. Leonid Reyfman, at Pain Physicians NY, with offices in Brooklyn, NY as well as Manhattan and Queens. He provides an affirmation dated June 17, 2021, which states that “because of her injuries the plaintiff, Maude Bertresse was unable to perform the majority of her usual daily activities. At the time after the accident the plaintiff, Maude Bertresse was prescribed physical therapy, chiropractic care and pain management. At the time it was my opinion that the plaintiff Maude Bertresse sustained cervical discs herniations and lumbar disc bulges as well as a partial tear of the right shoulder with tendinosis/tendinopathy. The plaintiff, Maude Bertresse underwent six months of rigorous physical therapy and treatment in an attempt to alleviate her symptoms. During this time period plaintiff, Maude Bertresse was partially disabled. Her treatments were largely discontinued in March of 2020 due to the COVID pandemic. She indicates that she continued with home exercises as prescribed by her physical therapist. Unfortunately for Maude Bertresse her symptoms did not alleviate and in fact have recently increased which is the reason she explained that she returned to my office.. As such, I recently examined the plaintiff Maude Bertresse on May 10, 2021 and June 1, 2021. She complained that she was experiencing continuing pain and limitation in

range of motion in her neck, back and right shoulder. Maude Bertresse presently complained that she had difficulties performing her normal everyday activities such as housework, walking long distances, jogging/exercising, driving, and lifting heavy objects." Dr. Reyfman tested plaintiff's range of motion in her cervical and lumbar spine, and in her right shoulder, and reports significant restrictions in her range of motion, with pain and tenderness upon palpation and spasm. He concludes "It is my further opinion that these injuries are causally related to the motor vehicle accident on the 13th of September, 2019 as her clinical symptomatology was consistent with post traumatic injuries, and that her prognosis for recovery was guarded. It is my opinion that the plaintiff, Maude Bertresse has sustained a permanent consequential limitation of use of her cervical spine, lumbar spine and right shoulder as a result of the car accident on the 13th day of September, 2019. I have instructed her to resume physical therapy and return to my office for my review and to establish a continued plan of care." After this affirmation are the narrative reports prepared by Dr. Reyfman following plaintiff's ten visits to his office from December 30, 2019 to June 1, 2021, with an affirmation at the end listing all the dates of the reports and stating that he affirms that the statements therein are true and accurate.

Based upon the foregoing, the court finds that the plaintiff has sufficiently raised triable issues of fact regarding her claims of "a permanent consequential limitation of use of a body organ or member" and "a significant limitation of use of a body function or system", so as to warrant denial of the defendant's motion for summary judgment.

In conclusion, plaintiff's treating doctors' affirmed reports are sufficient to overcome the motion and raise an issue of fact as to whether plaintiff sustained a "serious" injury" as a result of the subject accident (see *Young Chan Kim v Hook*, 142 AD3d 551, 552 [2d Dept 2016]). These reports indicate significant, quantified restrictions

in plaintiff's range of motion, both contemporaneously with the accident and recently, and these doctors opine that plaintiff's injuries were caused by the subject accident. Thus, they raise a "battle of the experts." This is sufficient to raise an issue of fact which requires a trial.

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

This constitutes the decision and order of the court.

Dated: January 3, 2022

ENTER:



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Hon. Debra Silber, J.S.C.