

**Tram Thuy Mai Ta v Fiorella**

2022 NY Slip Op 32046(U)

June 30, 2022

Supreme Court, New York County

Docket Number: Index no. 155913/2019

Judge: James G. Clynnes

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. JAMES G. CLYNES PART 22M**

*Justice*

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TRAM THUY MAI TA,

Plaintiff,

- v -

ANTHONY J. FIORELLA, VICTOR D. RUSSO,

Defendant.

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INDEX NO. 155913/2019

MOTION DATE 10/27/2020

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, the instant motion is decided as follows:

In this action to recover damages for personal injuries allegedly sustained as a result of an October 24, 2018, motor vehicle accident, defendants move for an order pursuant to CPLR 3212 granting them summary judgment dismissing plaintiff’s complaint on the ground that plaintiff did not suffer a “serious injury” within the meaning of Insurance Law 5102 (d).

Plaintiff’s bill of particulars alleges injuries to her neck, back, head, left knee, post-concussion syndrome with headaches, cognitive deficits including speech and weakness ambulating distances. Plaintiff avers that these injuries meet the following Insurance Law 5102 criteria: permanent loss; permanent and consequential limitation; and 90/180 days.

Defendant’s orthopedic surgeon Dr. Jeffrey Dermksian reviewed the bill of particulars, the police accident report and the Plaintiff’s medical records, MRI reports and other doctors’ notes. And he conducted an independent medical examination on July 8, 2020. Dr. Dermksian found no objective abnormalities in the Plaintiff’s cervical spine or lumbar spine and he noted that the MRI reports showed a pre-existing, degenerative condition not causally related to the accident. Dr. Dermksian tested the plaintiff’s range of motion using a goniometer he did not find much difference to a normal range of motion. He also found that the MRI scans of Plaintiff’s right leg showed a contusion that would resolve itself, the Plaintiff’s left knee showed a pre-

existing condition not causally related to the accident and that the sprains would resolve on their own. Dr. Dermksian observed that Plaintiff moved her head and neck freely and walked with a normal gait but then magnified and embellished her symptoms when he examined her. Dr. Dermksian concluded after his examination that there was no objective evidence of physical disability or limitations due to the accident and that Plaintiff was capable of working and performing her usual and customary activities normally.

Defendant's neurologist, Dr. William B. Head, Jr., reviewed the verified bill of particulars, police accident report and the Lenox Hill medical records including a report of Plaintiff's CT brain scan from the accident date. Dr. Head found no objective evidence of any neurological condition such as a brain injury or cervical or lumbar radiculopathy from the accident. Dr. Head noted peripheral neuropathy of Plaintiff's ankles but concluded that this was likely due to a medical condition unrelated to trauma. Dr. Head found that Plaintiff magnified her symptoms by attempting to simulate pathology through errors in simple calculation, general sensory and general motion testing. He also concluded that there was no evidence of permanent neurological condition or disability. Accordingly, Dr. Head concluded that Plaintiff could continue with her usual and customary work duties.

Dr. Dermksian found that the MRI scans showed a degenerative and preexisting condition not causally related to the October 24, 2018 accident. Dr. Head's examination of Plaintiff's ankles indicated a pre-existing condition unrelated to trauma. Further, neither doctor found evidence that Plaintiff was incapable of performing her customary activities or duties for work. (*Rabb v Mohammad*, 132 AD3d 527 [1st Dept 2015] [holding defendants met their prima facie burden by submitting a radiologist affirmation who opined that the MRI of the plaintiff's spine showed disc bulge of degenerative origin]; *Amaro v Am. Med. Response of NY, Inc.*, 99 AD3d 563 [1st Dept 2012] [holding, in part, defendants met their prima facie burden by submitting radiologist report who opined MRIs of the plaintiff's lumbar spine were degenerative]). Defendants met their prima facie burden of showing that Plaintiff did not sustain a serious injury to her cervical and lumbar spine, her left knee or right leg through the affirmations of Dr. Dermksian and Dr. Head who found no disability or limitation related to the accident.

Plaintiff raises a triable issue of fact as to whether she sustained a permanent consequential and significant limitation of use to her cervical spine, lumbar spine, and left knee

by submitting reports from Dr. Delman of DHD Medical PC. On her initial visit on October 30, 2018, Dr. Delman measured Plaintiff's range of motion using a goniometer and found up to a 33 percent loss in motion in her lumbar spine and limited motion in her left knee. Dr. Delman recorded no prior injuries and a negative past medical and surgery history. Plaintiff visited DHD Medical PC for follow up visits on February 25, 2019, August 20, 2019 when she had her last formal physical therapy treatment, and July 20, 2020. During this July 2020 visit, Plaintiff admitted that she had not seen her orthopedic specialist, Dr. Wasserman, or her pain management specialist, Dr. Kosharsky, that year. Plaintiff returned to DHD Medical PC on November 10, 2020 during which Dr. Delman found an increased loss in range of motion in her cervical spine extension, lumbar spine and her left knee. Dr. Delman stated that these restrictions occurring more than two years post trauma, meant that Plaintiff suffered a permanent loss and recovery was poor. Dr. Delman did not address whether the MRI scans revealed a degenerative or pre-existing condition unrelated to the accident. Dr. Delman noted that Plaintiff had returned to work but continued to have difficulty with her daily activities.

Plaintiff admitted that she returned to work two weeks after the accident and continued to work until January 2020. Plaintiff doesn't offer any evidence to show that she is currently unemployed or unable to work.

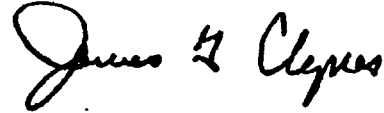
Defendants met their burden of proof as to Plaintiff's 90/180-day claim. In Plaintiff's deposition testimony, she admitted to returning to work two weeks after the accident. She testified that she returned to a full-time schedule at her same position and salary and that she didn't request any accommodations. She continued working until the end of January 2020 when she resigned. Plaintiff testified that her bosses always positively reviewed her work and that, except for the first two weeks, she was able to shop for herself, attend physical therapy sessions, and do her own laundry. Defendants rely on Plaintiff's admissions and on Dr. Head's and Dr. Dermksian's medical opinions that Plaintiff's injuries were not causally related to the accident. (*Fathi v Sodhi*, 146 AD3d 445 [1st Dept 2017]).

Accordingly, based on the foregoing, it is hereby

**ORDERED** that defendant's motion for summary judgment and dismissal of the complaint is DENIED as to Plaintiff's claim of serious injury to her cervical spine, lumbar spine and left knee under the significant limitation of use and permanent consequential limitation categories of Insurance Law 5102 (d); and it is further

**ORDERED** that Defendants' summary judgment motion is GRANTED as to Plaintiff's claim of serious injury under the 90/180 day category of Insurance Law 5102(d).

This constitutes the Decision and Order of the Court.



JAMES G. CLYNES, J.S.C.

6/30/2022

DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE