| **Gonzalez v Valenzuela** |
| --- |
| 2023 NY Slip Op 30743(U) |
| March 7, 2023 |
| Supreme Court, Kings County |
| Docket Number: Index No. 503631/2020 |
| Judge: Debra Silber |
|  |
|  |

**SUPREME COURT OF THE STATE OF NEW YORK**
**COUNTY OF KINGS: PART 9**

---x

**ENLIDA GONZALEZ,**

**Plaintiff,**

**-against-**

**FERNANDO VALENZUELA,**

**Defendant.**

---x

**DECISION / ORDER**

**Index No. 503631/2020**
**Motion Seq. No. 3**
**Date Submitted: 2/3/23**

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

| **Papers** | **NYSCEF Doc.** |
|---|---|
| Notice of Motion, Affirmation and Exhibits Annexed..... | 49-58 |
| Affirmation in Opposition and Exhibits Annexed..... | 63-72 |
| Reply Affirmation..... | |

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

This is a personal injury action arising out of a motor vehicle accident that took place on November 15, 2019, in Manhattan. Defendant hit plaintiff while she was crossing the street in the crosswalk, and plaintiff's motion for summary judgment on the issue of liability was previously granted. Plaintiff was removed from the scene in an ambulance and taken to New York Presbyterian Hospital. She subsequently sought medical treatment. At the time of the accident, plaintiff was approximately 65 years of age. In her Bill of Particulars [Doc 55], plaintiff claims that as a result of the accident, she sustained injuries to, among other claims, her left shoulder, her cervical, thoracic and lumbar spine, her left elbow, her left hand, both knees, her right ankle, and her right foot.

Defendant moves for summary judgment, and contends that plaintiff did not sustain a "serious injury" as defined by Insurance Law § 5102(d). In support of the motion, defendant submits the pleadings, an attorney's affirmation, plaintiff's bill of particulars, plaintiff's EBT

transcript, and affirmed reports from an orthopedist and a radiologist.

Dr. Jeffrey Guttman, an orthopedist, examined plaintiff on April 8, 2022, on behalf of the defendant. This was two and a half years after the accident. Dr. Guttman did not review any of the plaintiff's medical records. He tested plaintiff's range of motion with a goniometer and reports that plaintiff had normal ranges of motion in her thoracic spine, with no tenderness or spasm. Dr. Guttman reports that all related tests were negative. However, with regard to her cervical and lumbar spine, his findings are abnormal. For her cervical spine, he says, "Range of motion reveals flexion to 50 degrees (50 degrees normal), extension to 50 degrees (60 degrees normal), right and left rotation to 80 degrees (80 degrees normal), and right and left lateral flexion to 45 degrees (45 degrees normal), without pain." For her lumbar spine, he states, "Range of motion reveals flexion to 60 degrees (90 degrees normal), extension to 25 degrees (25 degrees normal), and right and left rotation to 25 degrees (25 degrees normal), without pain." All related tests were negative. His testing of plaintiff's left shoulder did not produce normal results either. She had arthroscopic surgery to this shoulder. He reports "Range of motion reveals forward elevation to 160 degrees (180 degrees normal), extension to 60 degrees (60 degrees normal), abduction to 145 degrees (180 degrees normal), external rotation to 60 degrees (90 degrees normal) and internal rotation to 45 degrees (70 degrees normal), without pain. Muscle strength is reduced in the rotator cuff 4/5, with no noted atrophy." Testing of her left elbow and left hand produced normal results. Testing of her right ankle produced normal results. Testing of her knees did not produce normal results, as he found that her range of motion in both knees was "flexion to 130 degrees (140 degrees normal) and extension to 0 degrees (0 degrees normal)." Dr. Guttman states that he used a hand-held goniometer and that normal values were based on AMA Guide to the Evaluation

of Permanent Impairment, 5th Edition. He states that "Measurements were taken 3 times." He does not offer one word to explain the abnormal findings.

Dr. Guttman concludes that plaintiff's "alleged" cervical spine sprain, thoracic sprain, lumbar spine sprain, left elbow sprain, left hand sprain, bilateral knee sprains, and right ankle/foot sprain have all resolved, that her left shoulder arthroscopy has healed, and states that "[b]ased on today's examination, there is no evidence of disability or permanent injury. The claimant can perform activities of daily living and work duties. All orthopedic testing was negative, there were no muscle spasms or trigger points and reflexes, muscle strength, sensation and muscle tone were all normal. There is no need for any further diagnostic testing, orthopedic or physical therapy treatment."

The defendant's radiologist, Scott A. Springer, M.D. did not examine the plaintiff. He reviewed the MRI films taken for plaintiff's cervical and lumbar spine, her left shoulder, right knee, right ankle, and right foot [Doc 57]. In this exhibit, several of these affirmations duplicates, so it is unclear if there were other affirmed reports which were not included. Dr. Springer concludes that all of the abnormal findings on the MRIs are degenerative, longstanding and not causally related to the date of the accident.

Defendant contends that the medical evidence, combined with plaintiff's testimony at her EBT, eliminate all categories of injuries in the statute. Counsel avers that "[b]y finding no current limitations, and also normal results on a variety of objective clinical tests, defendant's doctors also ruled out any basis for a permanent consequential limitation. . . Lastly, defendants' proof ruled out the 90/180-day category of the statute. Putting aside, for the moment, that this category requires proof that there was a causally related, medically determined injury, this category requires proof that plaintiff was medically prevented from performing 'substantially all' of his [sic] usual and customary activities for the requisite period."

The court notes that plaintiff was not asked any questions at her EBT about her activities in the first six months after the accident. The EBT was held on October 11, 2021. She testified that she went for physical therapy for more than a year [Doc 58 Page 27], and had MRIs. She had arthroscopic surgery to her left shoulder on January 16, 2020 [Page 30]. She wore a sling on her arm for two months after the surgery [Page 31]. This was within the first six months after the accident. She testified that she uses a cane as a result of this accident [Page 33], which was prescribed by a doctor. She was asked "how often does her left shoulder bother her", and she responded "a lot, because I am not able to do my things" [Page 37]. There were no follow up questions. Plaintiff was asked if she was able to cook, and she responded [Page 38] "I do very little cooking because I can't be standing for a long time." She testified that she cannot clean, vacuum, sweep or mop, and her husband does these tasks. She cannot carry heavy things [Page 39] and she has difficulty bathing herself. Clearly, these questions were for the present time, not for the 90/180 day category of injury.

The court finds that the defendants have failed to make out a prima facie case for dismissal of the complaint by establishing that plaintiff did not sustain a serious injury within the 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]). There is nothing in the motion papers to meet defendant's burden with regard to the 90/180 category of injury. Further, Dr. Guttman reports restrictions in plaintiff's range of motion in her cervical and lumbar spine, left shoulder and both knees, and offers no explanation.

In addition, an affirmed report of a radiologist cannot, on its own, make a prima facie case for dismissal, as a radiologist does not perform an exam. The New York State Court of Appeals has held that a defendant's allegations of a pre-existing condition based solely upon the defendant's radiologist's "conclusory notation" of a degenerative condition

following review of an MRI and nothing more is "itself insufficient to establish that plaintiff's pain might be . . . unrelated to the accident" (*see Pommells v Perez*, 4 NY3d 566, 577-579 [2005]; *see also De La Cruz v Hernandez,* 84 AD3d 652 [1st Dept 2011]).

When a defendant has failed to make a prima facie case with regard to all of plaintiff's injuries and all of the applicable categories of injury, the motion must be denied, and it is unnecessary to consider the papers submitted by plaintiff in opposition (see *Yampolskiy v Baron*, 150 AD3d 795 [2d Dept 2017]; *Valerio v Terrific Yellow Taxi Corp.*, 149 AD3d 1140 [2d Dept 2017]; *Koutsoumbis v Paciocco*, 149 AD3d 1055 [2d Dept 2017]; *Aharonoff-Arakanchi v Maselli*, 149 AD3d 890 [2d Dept 2017]; *Lara v Nelson*, 148 AD3d 1128 [2d Dept 2017]; *Sanon v Johnson*, 148 AD3d 949 [2d Dept 2017]; *Weisberg v James*, 146 AD3d 920 [2d Dept 2017]; *Marte v Gregory*, 146 AD3d 874 [2d Dept 2017]; *Goeringer v Turrisi*, 146 AD3d 754 [2d Dept 2017]; *Che Hong Kim v Kossoff*, 90 AD3d 969 [2d Dept 2011]).

Since the movant has not sustained his prima facie burden, it is unnecessary to determine whether the papers submitted by the plaintiff in opposition are sufficient to raise a triable issue of fact (*Hodge v St. Eloi*, 168 AD3d 690, 691 [2d Dept 2019]).

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

This constitutes the decision and order of the court.

Dated: March 7, 2023

**ENTER:**

**Hon. Debra Silber, J.S.C.**