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

_____x

MICHELLE DAVIS,

Plaintiff,

-against-

FR LIMO INC. and MOHAMMED AHMED,

Defendants.

_____x

DECISION / ORDER

Index No. 524293/2019
Motion Seq. No. 4
Date Submitted: 3/17/23

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

Papers	**NYSCEF Doc.**
Notice of Motion, Affirmation and Exhibits Annexed.....	66-76
Affirmation in Opposition and Exhibits Annexed.....	88-99
Reply Affirmation.....	103

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

This is a personal injury action arising from a motor vehicle accident which took place on February 10, 2019. The plaintiff was a front seat passenger in her husband's car. He has his own action, Kevin Davis v FR Limo Inc. et al, 518955/2019. The car she was a passenger in was traveling on Warwick Street in Brooklyn, NY, and collided at the intersection of Arlington Avenue with a vehicle owned and operated by the defendants, which was traveling on Arlington Avenue. [Plaintiff Tr at Doc 71, page 16]. The plaintiff testified that, as a result of the impact, her left knee came into contact with the dashboard, and that she injured her left shoulder when she braced for the impact [*id.* Page 28]. The police were called and came to the scene. Plaintiff declined medical attention and drove home from the scene with her husband and children [*id.* Pages 32-33].

Plaintiff first sought medical attention at Wyckoff Hospital the following day, where she made complaints about her neck, left shoulder, left hip and left knee [*id.* Page 39], and x-rays were taken [*id.* Page 41]. Plaintiff testified that three to four days after her hospital visit, she went to a doctor in Brooklyn [*id.* Pages 43-44]. Plaintiff testified that she treated at a physical therapy facility 3-4 times per week, for six to eight months, and that she stopped treatment after she had the surgery to her knee, "because the pain eased up a little bit" [*id.* Page 45]. Plaintiff had MRIs of her neck, back, left shoulder, left hip and left knee, and was thereafter referred to an orthopedic surgeon to discuss the possibility of surgery to her left shoulder and left knee [*id.* Pages 46-48]. Plaintiff testified that she had the arthroscopic surgery performed on her left knee but declined to have the surgery to her left shoulder [*id.* Page 48]. After the surgery, the plaintiff went back to physical therapy for another four to five months [*id.* Page 50]. Plaintiff testified that she stopped physical therapy because the pain "was getting a little bit better" [*id.* Page 50].

Plaintiff testified that she was confined to her bed and home for approximately two months after the accident [*id.* Pages 56-57]. At her deposition, which was held in May of 2021, plaintiff testified that she returned to physical therapy for four to five months after the surgery to her knee in June of 2019. Plaintiff also testified that she did not miss any time from work as a result of the subject accident because she was already out of work on a Worker's Compensation claim for post-traumatic stress disorder, after an attempted assault at her job which had occurred one month prior to the subject accident. Plaintiff further testified that, as a result of the attempted assault, she was out of work for one year in total, then returned to work as a bus operator for the NYC Transit Authority [*id.* Pages 15 and 57-59].

At the time of the accident, plaintiff was 27 years of age. In her bill of particulars

[Doc 69] plaintiff claims that as a result of the accident, she sustained a horizontal tear of the posterior horn of the lateral and medial menisci and an interstitial tear of the anterior cruciate ligament in her left knee, and she had arthroscopic surgical repairs on June 14, 2019; a tear of the rotator cuff at the anterior supraspinatus tendon in the left shoulder, for which surgery was recommended, but the plaintiff declined; a disc "protrusion" in her lumbar spine; loss of strength, loss of function, and restricted ranges of motion in her lumbar spine. The plaintiff further states, in her bill of particulars, that she has scarring at the incision site where the arthroscopic surgery was performed on her left knee, as well as scarring on her left shoulder, even though she elected not to have surgery to that shoulder[1]; and that the injuries are permanent. Finally, in her bill of particulars, plaintiff contends that she satisfies the threshold for "serious injury" as defined in Insurance Law §5102[d] in that she sustained "significant disfigurement/scarring; permanent loss of use of body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; and a medically determined injury or impairment of a non-permanent nature, which prevented her from performing substantially all of the material acts, which constituted her usual and customary daily activities for 90 days during the 180 days following the occurrence or impairment."

The defendants contend in their motion (Motion Seq. #4) that they are entitled to summary judgment dismissing the complaint, as plaintiff did not sustain a serious injury as a result of the accident, as defined by Insurance Law §5102(d). The defendants support their motion with an attorney's affirmation, copies of the pleadings, plaintiff's bill

[1] The court infers that counsel was sloppy at copying and pasting from her husband's bill of particulars. He had surgery to his left shoulder and his left knee.

of particulars, plaintiff's deposition transcript, and affirmed IME reports from an orthopedist, Dr. Dana Mannor [Doc 73], and a radiologist, Dr. Audrey Eisenstadt [Doc 74].

Dr. Mannor, an orthopedist, examined plaintiff on July 22, 2021, on behalf of the defendants. This was two years and five months after the accident. Under the section of his report entitled "Review of Submitted Medical Records," he only lists "verified bill of particulars," and "police accident report." Plaintiff told him that she injured her left knee, left shoulder, neck and lower back and told the doctor that she had arthroscopic surgery on her left knee. Dr. Mannor tested plaintiff's range of motion with a goniometer and reports that plaintiff had normal ranges of motion in her cervical and lumbar spine, her left shoulder, and her left knee, with no tenderness, swelling or spasm. In his exam of the plaintiff's left knee Dr. Mannor noted that "there is patellofemoral crepitus." Dr. Mannor reports that all related tests were negative.

Dr. Mannor concludes that plaintiff sustained sprains and strains to her cervical, and lumbar spine, to her left shoulder, and to her left hip, all of which are "resolved." His impression of the left knee is "[s]tatus post left knee surgery on 06/14/2019 – healed by exam." Dr. Mannor opines that "[t]he examinee presents with a normal orthopedic examination on all objective testing. The orthopedic examination is objectively normal and indicates no findings which would result in orthopedic limitations in use of the body parts examined. The examinee is capable of functional use of the examined body parts for normal activities of daily living as well as usual daily activities including work duties. There is no permanency or disability."

Dr. Audrey Eisenstadt, the defendants' expert radiologist, provides an affirmation describing her review of the MRIs of plaintiff's hips and left knee, which were taken in April of 2019. In her report on the MRI of the plaintiff's hips, Dr. Eisenstadt notes that

"[t]he osseous structures were intact. No osteochondral defect or bone contusion is seen. No fracture or dislocation is noted. No joint effusions are seen. The iliofemoral bands and iliotibial bands are normal in appearance. The flexor and extensor tendons are intact. No ascites is seen and no soft tissue induration or trochanteric bursitis is noted," and concludes that "[t]he MRI scan of the bilateral hips is unremarkable. No osseous, muscular, tendinous, or soft tissue induration is seen. Not even a joint effusion to indicate recent trauma or active inflammation is noted bilaterally." In her report on the MRI of the plaintiff's left knee, Dr. Eisenstadt notes that "[t]he osseous structures are intact. No osteochondral defect, bone contusion or fracture is seen. No patella subluxation or dislocation is seen. No joint effusion is identified. The anterior and posterior cruciate ligaments are well visualized and are normal in appearance. The medial and lateral collateral ligaments are intact. The patella and quadriceps tendons are normal. The retinaculum is intact. Grade II mucoid intrasubstance degenerative signal change is seen in the posterior horn of the medial meniscus. No articular extension is noted. The lateral meniscus is intact. No parameniscal cysts are seen." Her impression of the left knee MRI is "[m]ucoid grade II intrasubstance degenerative signal change posterior horn medial meniscus. No joint effusion, osseous contusion or fracture seen and no ligamentous or tendinous disruption identified." Dr. Eisenstadt concludes that the "[r]eview of the left knee MRI scan performed two months, nine days following the incident reveals a wear and tear breakdown of the posterior horn of the medial meniscus. Minimal grade II mucoid intrasubstance degenerative change is seen in the posterior horn of the medial meniscus, the most common location for meniscal degenerative changes to occur. This is not a traumatic process and did not develop in two months' time. Any traumatic meniscal injury occurring two months prior to this examination would be associated with bone contusions,

ligamentous and tendinous disruption and a large joint effusion, all findings absent on this study. No acute or recent posttraumatic changes are seen." For reasons that are not explained, the defendants do not provide any independent radiological reviews of the MRIs of the plaintiff's cervical spine, lumbar spine, or left shoulder.

Although the defendants initially correctly identify Drs. Mannor and Eisenstadt as the physicians who provided affirmations regarding the plaintiff on their behalf, defense counsel immediately thereafter contends that "Dr. Dana Guttman" is the orthopedist that examined the plaintiff on behalf of the defendants and proceeds to only mention Dr. Guttman and not Dr. Mannor. Counsel states that a report from Dr. Guttman is annexed at Exhibit F to their papers, but the report at Exhibit F in NYSCEF is the report of Dr. Dana Mannor. There is no report from Dr. Guttman attached. The court can only conclude that this is the result of sloppy cutting and pasting by counsel for the defendants. Despite the confusion, attorneys' affirmations have no evidentiary value, unless the attorney has personal knowledge of the facts, which is not the case here. The court will rely on the annexed reports from Drs. Mannor and Eisenstadt, not what counsel states in the attorney's affirmation.

Defendants contend that "[b]ased on the medical evidence submitted by defendants coupled with plaintiffs' testimony, we submit that plaintiffs' allegations of injury were not the result of this minor accident that plaintiffs did not sustain trauma, and the alleged injuries do not rise to the level of impairment sufficient to qualify under any category of the statute. Specifically, defendants' showing includes objective evidence establishing an 'absence of trauma.' See, *Kester v Sendoya*, 123 AD3d 418 [1st Dept 2014]. Defendants provide radiological evidence confirming that no traumatic injury was sustained. This negates a claim of any causally related serious injury under the statute

and is therefore sufficient to meet the defendants' burden on this motion. See *Ikeda v Hussain*, 81 AD3d 496 [1st Dept 2011]; *Johnson v Singh*, 82 AD3d 565 [1st Dept 2011]; *Arroyo v Morris*, 85 AD3d 679 [1st Dept 2011]; *Valentin v Pomilla*, 59 AD3d 184 [1st Dept 2009]."

As defendants have not provided any medical records which were generated during the first six months after the accident, the court must turn to plaintiff's EBT transcript to determine whether the defendants have submitted any admissible evidence with regard to the 90/180-day category of injury.

Plaintiff testified at her EBT that on the date of the accident, she was employed by the New York City Transit Authority as a bus operator [Plaintiff tr at Doc 71, Pages 13-14], and that she did not miss any time from work as a result of this accident [*id.* Page 15]. She was already out of work on a Worker's Compensation claim on the date of the accident, as mentioned above. She testified that the Worker's Compensation claim resulted in her being out of work for approximately one year, and that she thereafter returned to her job as a bus operator [*id.* Pages 58-59]. However, plaintiff also testified that, at some point in 2020, after she had returned to work, she had another work-related accident and Worker's Compensation claim, which resulted in her missing another six months from work in 2020 [*id.* Page 72]. She had returned to her job full time by the time of her EBT in May of 2021.

Plaintiff testified that she was confined to her bed and home for two months following the subject accident [*id.* Pages 56-57]. Although plaintiff claims in her bill of particulars that she has scars from the surgery to her knee, no one asked her about her claim of scarring at her deposition. However, arthroscopic surgery scars, marks from

three small portal holes, do not qualify as a "serious injury" as this category of injury in Insurance Law 5102(d) has been interpreted.

Defendants' attorney argues (Aff. Doc 67 ¶32) that "defendant's proof rules out the 90/180-day category of the statute. Putting aside that this category requires proof that there was a causally related, medically determined injury, which we do not believe plaintiffs can establish, the 90/180 category requires proof that plaintiffs were medically prevented from performing 'substantially all' of his usual and customary activities for the requisite period." The only "proof" that counsel could be referring to would be the plaintiff's EBT [Doc 72].

Plaintiff testified at her EBT, which was held more than two years after the subject accident, that at the time of the accident, she was still employed as a bus operator, but was out from work on a Worker's Compensation claim that was unrelated to the subject accident. Plaintiff testified that she was out of work for one year and then had to go to a physical examination before she returned to her job as a bus operator [Doc 71 Pages 58-59]. Plaintiff further testified that at the time of her EBT in May of 2021, that there are a number of activities she can no longer do, including "laundry, grocery shopping, walking up and down the stairs," and further testified that she has problems lifting more than five pounds, can only walk five to ten minutes before feeling pain, and can only climb approximately four steps before she has pain in her knee [*id.* Page 61-62].

Although plaintiff was asked if there were activities that she used to do before the accident but could no longer do, or that she had difficulty doing at the time that the deposition was held, plaintiff was not asked at her EBT if there were any activities that she could not perform in the months immediately following the accident, and in particular, the first six months. The court finds that plaintiff's testimony does not make a prima facie

case for defendants with regard to the 90/180-day category of injury, as she was not asked any questions about whether her usual and customary activities had been curtailed in the first six months after the accident.

There is thus nothing in the pleadings, the bill of particulars, or the plaintiff's EBT transcript that supports defendants' claim that plaintiff's usual and customary daily activities were not curtailed during the ninety days immediately following the accident.

As the defendants have failed to meet their burden of proof as to all claimed injuries and all 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]).

In any event, had defendants made a prima facie case for dismissal, plaintiff's treating doctors' affirmations, and in particular, the affirmation of Dr. Wert, who performed the surgery on the plaintiff's left knee, is sufficient to overcome the motion and raise a triable issue of fact 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]).

Plaintiff opposes the motion with an affirmation of counsel, a copy of plaintiff's deposition transcript as well as an affidavit from the plaintiff, a copy of the hospital records from Wyckoff Hospital [Doc 90], affirmed medical records from Drs. Conrad Cean and Ifran David of New York PM Associates, Inc. [Doc 92], an affirmed report from Dr. David

Kolb, the radiologist who interpreted the plaintiff's left shoulder MRI [Doc 94], an affirmation and affirmed records from Dr. Matthew Wert, the orthopedist who performed the surgery on plaintiff's left knee, and who also personally reviewed all of the plaintiff's MRI films [Doc 89], unaffirmed copies of plaintiff's physical therapy records [Doc 91], unaffirmed copies of the reports from the MRIs of plaintiff's cervical and lumbar spine [Doc 93], and an unaffirmed copy of the report from the MRI of plaintiff's left hip [Doc 95].

After visiting Wyckoff Hospital on the day after the accident, plaintiff sought treatment at New York PM Associates, Inc. for the first time on February 14, 2019, four days after the accident. At the first visit, she was seen by Dr. Ifran David, who noted the plaintiff's medical history and conducted a physical examination. He measured the plaintiff's range of motion in her cervical and lumbar spine and noted that, when compared to normal, the plaintiff had reduced ranges of motion in flexion, extension, and rotation. He prescribed physical therapy and home exercises and sent the plaintiff for MRIs of her cervical spine, lumbar spine, left shoulder, left hip and left knee.

Plaintiff offers the report from the MRI of her left shoulder, which is affirmed by Dr. Thomas Kolb, who interpreted the MRI study taken on March 13, 2019. Although the MRI report is technically submitted in admissible form, the copy of the report offered by the plaintiff is completely illegible and, as such, cannot be reviewed by the court.

Dr. Wert, an orthopedic surgeon, saw plaintiff for the first time on May 17, 2019. He states that he reviewed the plaintiff's hospital record, her medical records from New York PM Associates, Inc., and radiology records from Dynamic Medical Imaging, Kolb Radiology and New Age Medical Radiology. On her first visit in May of 2019, three months after the subject accident, Dr. Wert noted loss of range of motion in both the plaintiff's left shoulder and left knee, when compared to normal. Dr. Wert states that "I have personally

reviewed the MR images associated with the reports detailed above, and I concur with the radiologists' findings in each case." In addition to his treatment records and narrative report, Dr. Wert also offers his surgical report from the arthroscopic surgery that he performed on the plaintiff's left knee, wherein he diagnosed the plaintiff with hypertrophic synovitis, a medial meniscus tear and adhesions.

In his most recent examination of the plaintiff on January 27, 2023, he measured the plaintiff's range of motion in her cervical and lumbar spine, her left knee and left shoulder, and noted that the plaintiff still has reduced ranges of motion across all planes. In his report, Dr. Wert opines that "[t]he impact caused by the accident of 2/10/2019 exerted insult to the structural integrity of Ms. Davis's left shoulder, left knee, cervical and lumbar spine." Regarding the plaintiff's left shoulder and cervical and lumbar spine, he further opines that "Ms. Davis's disability is partial, maybe permanent, and has resulted in chronic pain with progressive remission and exacerbation during overuse of the left shoulder, cervical and lumbar spine." Regarding her left knee, Dr. Wert opines that "Ms. Davis's disability is partial, permanent, and has resulted in chronic pain with progressive remission and exacerbation during overuse of the left knee." Dr. Wert concludes his report by opining that "Ms. Davis may continue to experience pain and limitation of her activities. The prognosis for a full and complete anatomic recovery of the left shoulder, left knee, cervical and lumbar spine is currently poor. Based upon the history given by Ms. Davis and the above objective findings, including signs on physical examination, objective testing, and decreased range of motion, it may be stated with a reasonable degree of medical certainty that the accident of February 10th, 2019, was the direct competent producing cause of Ms. Davis's above noted injuries."

Plaintiff thus raises a "battle of the experts." This is sufficient to raise a triable issue of fact which requires a trial.

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

This constitutes the decision and order of the court.

Dated: July 11, 2023

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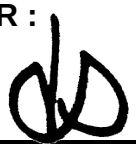

Hon. Debra Silber, J.S.C.