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| Galicia v E & N Cab Serv. |
| 2017 NY Slip Op 30932(U) |
| April 26, 2017 |
| Supreme Court, Bronx County |
| Docket Number: 306596/11 |
| Judge: Elizabeth A. Taylor |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 2
ROSA GALICIA and FRANSHEKA FIGUEROA,
Plaintiffs,

Index No. 306596/11

DECISION/ORDER

- against -

Present:
HON. ELIZABETH A. TAYLOR

E AND N CAB SERVICE, MARIANO ARIAS and
MAYYA BABAYEVA,

Defendants.

The following papers numbered 1 to ___ read on this motion, _____

| No. On Calendar of _____ | PAPERS NUMBERED |
|---|-----------------|
| Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed----- | 1-2 |
| Answering Affidavit and Exhibits----- | 3-4 |
| Replying Affidavit and Exhibits----- | 5 |
| Affidavit----- | |
| Pleadings -- Exhibit----- | |
| Stipulation -- Referee's Report --Minutes----- | |
| Filed papers----- | |

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Motion pursuant to CPLR 3212 for an order dismissing the complaint of plaintiff Fransheska Figueroa against defendant Mayya Babayev, on the ground that she has not suffered a serious injury within the meaning of Insurance Law §5102 (d), is denied.

Plaintiffs commenced this personal injury action to recover damages for injuries allegedly sustained in a motor vehicle accident on October 13, 2010. Plaintiff Fransheka Figueroa alleges to have suffered injuries to her right shoulder, left shoulder, right knee, left knee, and cervical and lumbar spine. Pursuant to the order of this court dated May 23, 2016, the action against defendants E and N Cab Service and Mariano Arias was dismissed. Defendant Mayya Babayeva moves for summary judgment dismissing Ms. Figueroa's complaint, on the ground that she has not suffered a "serious" injury, as defined in the Insurance Law.

In the bill of particulars, Ms. Figueroa alleges "serious injuries" in the following categories: 1) "permanent consequential limitation of use of a body organ or member;" 2) "significant limitation of use of a body function or system;" 3) "a medically determined

injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment;" and 4) "a significant disfigurement."

To prevail on a motion for summary judgment, defendants have the initial burden of presenting competent evidence establishing that plaintiff has not suffered a serious injury (*see Spencer v Golden Eagle, Inc.*, 82 AD3d 589 [1st Dept 2011]). Such evidence includes affirmations of medical experts who examined the plaintiff and have concluded that no objective medical findings support plaintiff's claim (*Id.*).

In support of the motion, Ms. Babayeva submits 1) the report of Dr. Bradley Wiener. On January 14, 2014, Dr. Wiener conducted an orthopaedic examination of Ms. Figueroa which included range of motion testing of her right shoulder, left shoulder, right knee, left knee, and cervical and lumbar spine. Dr. Wiener found that Ms. Figueroa did not have restrictions in the range of motion of her right shoulder, left shoulder, right knee, left knee, and cervical and lumbar spine. He concluded that Ms. Figueroa does not require any additional orthopaedic treatment. Dr. Wiener also reviewed the MRI of Ms. Figueroa's right knee and concluded that there was no indication that the operative findings that the injury to her right knee was casually related to the accident.

Based upon the foregoing, this court finds that movant has met her prima facie burden of demonstrating that Ms. Figueroa has not suffered a permanent consequential limitation of use of a body organ or member or a significant limitation of use of a body function or system.

To create an issue of fact, plaintiff must establish a serious injury arising from a "permanent consequential limitation of use of a body organ, member, function or system" or "significant" limitation of use of a body function or system." To establish a

serious injury plaintiff must set forth medical proof containing objective, quantitative evidence with respect to diminished range of motion or a qualitative assessment comparing plaintiff's present limitation to the normal function, purpose and use of the affected body organ, member, function or system (*Perl v Mehis*, 18 NY3d 208 [2011]; *Toure v Avis Rent A Car System, Inc.*, 98 NY2d 345, 353 [2002]).

In opposition, Ms. Figueroa submits the affirmations of 1) Dr. Donald Goldman, an, 2) Dr. Mark Bursztyn; 3) Dr. Allen Rothpearl; 4) Dr. Mark Shapiro; and 5) Dr. John McGee.

On October 18, 2010, Dr. McGee, examined Ms. Figueroa, about five days after the accident. Dr. McGee conducted range of motion testing of her right knee, right shoulder, and cervical and lumbar spine. Dr. McGee concluded that she suffered injuries to her right knee, right shoulder, and cervical and lumbar spine that were causally related to the accident. MRIs of Ms. Figueroa's right knee, cervical spine and left knee were conducted on November 11, 2010, November 17, 2010 and July 27, 2011, respectively. Dr. Shapiro asserts that a review of the MRI of the right knee reveal a tear of the posterior horn of the medial meniscus, ACL edema, and joint effusion. Dr. Rothpearl avers that a review of the MRI films of the cervical spine reveal disc bulges at C3-C4 and C5-C6. Dr. Rothpearl further attests that the MRI of the right knee displays trace supraspinatus effusion and synovitis. Ms. Figueroa underwent physical therapy from for approximately six months after the accident. On March 11, 2011, Dr. Bursztyn performed surgery to Ms. Figueroa's right knee. Dr. Bursztyn concluded that the injury to Ms. Figueroa's right knee was causally related to the accident.

On August 4, 2014, Dr. Goldman reviewed Ms. Figueroa's medical records and conducted an orthopaedic examination including range of motion testing of her right knee and cervical spine. Dr. Goldman found restricted range of motion of her right knee and cervical spine. Dr. Goldman further concluded that the injuries to Ms. Figueroa's right knee and cervical spine were permanent and causally related to the accident. It is

noted that Dr. Goldman did not address the injuries alleged to Ms. Figueroa's left knee, right shoulder, left shoulder and lumbar spine.

Additionally, Ms. Figueroa adequately explained the approximate two-year gap in treatment by asserting in her affidavit that she stopped receiving treatment for her injuries after her no-fault insurance benefits were exhausted and she could not afford to pay the medical expenses (*see Bonilla v Abdullah*, 90 AD3d 466, 467-68 [1st Dept 2011]).

Based upon the affirmations of Ms. Figueroa's experts, this court finds that she raises an issue of fact as to whether she suffered a permanent consequential limitation or a significant limitation of use of a body function or system (*see Grant v United Pavers Co. Inc.*, 91 Ad3d 499 [1st Dept 2012]).

Accordingly, the branch of the motion to dismiss Ms. Figueroa's claims that she suffered from a permanent consequential limitation or a significant limitation, is denied.

The branch of the motion to dismiss Ms. Figueroa's claim that she was unable to perform his usual and customary daily activities for 90 days out of the first 180 days following the date of the accident, is granted.

Movant submits the deposition transcript of Ms. Figueroa. Ms. Figueroa testified that she returned to school immediately after the accident and only missed two or three weeks of school after she had surgery in 2011. Ms. Figueroa's testimony refutes her claim in the bill of particulars that she was disabled for 20 weeks after the accident (*Feaster v Boulabat*, 77 AD3d 440 [1st Dept 2010]; *Toussaint v Claudio*, 23 AD3d 268 [1st Dept 2005]).

Based upon the foregoing, movant met her initial burden with respect to the 90/180 claim. As movant has met her initial burden, the burden shift to plaintiffs to create an issue of fact.

In opposition, plaintiffs fail to submit any expert medical evidence to support their contention that Ms. Figueroa was prevented from performing her usual activities for 90 out of the 180 days immediately following the accident (see *Rosa-Diaz v Maria Auto Corp.*, 79 AD3d 463, 464 [1st Dept 2010]).

Accordingly, the branch of the motion for an order granting summary judgment dismissing the Ms. Figueroa's 90/180 claim, is granted.

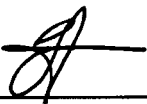
The branch of the motion to dismiss Ms. Figueroa's claim that she suffered a significant disfigurement, is granted.

Movant met her initial burden of summary judgment with respect to the significant disfigurement claim. Ms. Figueroa testified that after the surgery to her right knee, she suffered two "half- inch" scars. Additionally, she testified that the scars are "very little" and can "barely" be seen (*Christopher V v Wanda*, 115 AD3d 462 [1st Dept 2014]).

In opposition, plaintiffs fail to submit photographs or medical testimony to raise an issue of fact as to whether as a result of the accident she suffered a significant disfigurement (see *Salter v New York City Transit Authority*, 13 Ad3d 92 [1st Dept 2004]).

The foregoing shall constitute the decision and order of this court.

Dated: APR 26 2017



A.J.S.C.