

<b>Jordan-Covert v Petroleum Kings LLC</b>
2020 NY Slip Op 34665(U)
February 3, 2020
Supreme Court, Westchester County
Docket Number: Index No. 51886/2017
Judge: Linda S. Jamieson
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

NYSCEF DOC. NO. 162

To commence the statutory time period for appeals as of right (CPLR § 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Disp \_\_\_\_\_ Dec \_\_x\_\_ Seq. Nos. 4-5 Type \_SJ\_

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

PRESENT: HON. LINDA S. JAMIESON  
-----X  
JANINE JORDAN-COVERT,

Plaintiff,

-against-

Index No. 51886/2017

PETROLEUM KINGS LLC and KENNETH MARIN,

DECISION AND ORDER

Defendants.

-----X

The following papers numbered 1 to 6 were read on these motions:

<u>Paper</u>	<u>Number</u>
Notice of Motion, Affirmation, and Exhibits	1
Notice of Motion, Affirmation and Exhibits	2
Affirmation in Opposition	3
Reply Affirmation	4
Affirmation and Exhibits in Opposition	5
Affirmation and Exhibits in Reply	6

There are two motions before the Court. The first motion is filed by defendants. It seeks summary judgment dismissing the action on the grounds that plaintiff did not suffer a "serious injury." Plaintiff filed the second motion. She seeks summary judgment on the issue of liability. She also seeks summary judgment finding that she did suffer a "serious injury."

Section 5102(d) of the Insurance Law governs car accident cases such as this. That section provides that

"Serious injury" means a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a 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; or 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.

Plaintiff alleges that she suffered serious injuries in that she has a significant limitation of use of a body function or system; she has a permanent consequential use of a body organ or member; and she was prevented from performing his usual and customary activities for at least 90 out of the 180 days following the accident.<sup>1</sup> "In order to establish a permanent consequential limitation or a significant limitation of use, the medical evidence submitted must contain objective, quantitative evidence with respect to diminished range of motion or a qualitative assessment comparing the plaintiff's present limitations to the normal function, purpose and use of the affected body organ, member, function or system. Moreover, the

<sup>1</sup>Curiously, neither side explores the 90/180 argument in any detail.

submitted medical evidence must demonstrate that the limitation of use that the plaintiff sustained was more than mild, minor or slight." *Kesick v. Burns-Leader*, 169 A.D.3d 1313, 1317, 94 N.Y.S.3d 710, 714 (2d Dept. 2019).

Plaintiff had spinal surgery in July 2016. Defendants' doctor, who examined plaintiff in May 2019, found that plaintiff had seriously compromised flexion, extension and rotation in her cervical spine. He did not set forth the method by which he made these measurements. Notwithstanding these findings, the doctor opined that plaintiff had not suffered a serious injury. He also found that any injuries, which were resolved, were related to other accidents.

The Court is troubled by defendants' doctor's findings of her extremely limited movement, even if he failed to set forth his methodology. The Court finds that as a result of these findings, it cannot grant summary judgment to defendants.

As an aside, plaintiff's own doctors found even more significant limitations in her functioning, all of which they relate to the accident at issue. This raises triable issues of fact, which would also require the Court to deny the motion for summary judgment. *Johnston v. Peluso*, 105 A.D.3d 1008, 963 N.Y.S.2d 388 (2d Dept. 2013). See also *Armella v. Olson*, 134 A.D.3d 1412, 1413, 22 N.Y.S.3d 722, 723 (2d Dept. 2015); *Fludd v. Pena*, 122 A.D.3d 436, 436, 997 N.Y.S.2d 14, 15-16 (1<sup>st</sup> Dept.

2014) ("In opposition, plaintiff raised a material issue of fact. . . . Her treating orthopedist confirmed that she exhibited limitations in range of motion in her lumbar spine when she was examined shortly after the accident and again when she was examined after defendants moved for summary judgment." ). However, plaintiff's doctors' reports do not convince the Court that her injuries are serious enough to warrant summary judgment in her favor. See *Cassagnol v. Williamsburg Plaza Taxi Inc.*, 234 A.D.2d 208, 210, 651 N.Y.S.2d 518, 519. (1<sup>st</sup> Dept. 1996) ("the conflicting affidavits submitted to the motion court presented a factual dispute regarding the extent of plaintiff's injury and that court properly recognized that it could not resolve this material factual question in the context of a summary judgment motion."). Accordingly, the Court denies both sides' motions for summary judgment on serious injury.


With respect to plaintiff's motion for summary judgment on liability, the Court finds that plaintiff has established her prima facie case. Plaintiff testified at her deposition that she was in the right lane, driving northbound, when defendant, who was in the left lane driving a large truck, swung into the right lane to turn right, hitting her. In her motion, plaintiff cites defendant Marin's deposition testimony in which he says, in response to a question if he had ever looking in his passenger rear view mirror, that he did not look until he felt the impact.

But this is not the entire story. In opposition to this prima facie showing, defendants set forth a different story. In this alternate scenario, Marin was in the right lane, ahead of plaintiff, when he moved halfway into the left lane, with his blinker on, in order to swing wide enough make the right turn ahead. Marin testified at his deposition that he was well aware that plaintiff was behind him, because he had been looking in his mirrors constantly. He further testified that the accident occurred when plaintiff, seeing him moving leftward, tried to scoot past him to make the right turn before him. The parties present entirely different factual accounts of the accident. The Court finds that this is a question for the jury to determine.

The motions are thus denied in its entirety. The parties are directed to appear for a Settlement Conference in the Settlement Conference Part on March 10, 2020 at 9:15 a.m. in Courtroom 1600.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York  
*February 3,* 2020

  
HON. LINDA S. JAMIESON  
Justice of the Supreme Court

NYSCEF DOC. NO. 162

RECEIVED NYSCEF: 02/05/2020

To: Gash & Associates, PC  
Attorneys for Plaintiff  
235 Main St., 3d Fl.  
White Plains, NY 10601

Lewis Brisbois et al.  
Attorneys for Defendants  
77 Water St., #2100  
New York, NY 10005