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| <b>Gutierrez v County Waste Mgt. Inc.</b>  |
| 2020 NY Slip Op 35024(U)   |
| February 3, 2020   |
| Supreme Court, Westchester County  |
| Docket Number: Index No. 54862/18  |
| Judge: Linda S. Jamieson   |
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Disp \_\_\_\_\_ Dec \_\_x\_\_ Seq. No. 2 \_\_\_\_\_ Type SJ \_\_\_\_\_

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

PRESENT: HON. LINDA S. JAMIESON

-----X  
VICTORIA GUTIERREZ, and DANIEL GUTIERREZ,

Index No. 54862/18

Plaintiffs,

DECISION AND ORDER

-against-

COUNTY WASTE MANAGEMENT INC. and  
MICHAEL J. MITCHELL,

Defendants.

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The following papers numbered 1 to 4 were read on this motion:

| <u>Paper</u>                                      | <u>Number</u> |
|---|---------------|
| Notice of Motion, Affirmation, and Exhibits       | 1             |
| Affidavit, Affirmation and Exhibits in Opposition | 2             |
| Memorandum of Law in Opposition                   | 3             |
| Reply Affirmation                                 | 4             |

Defendants bring their motion seeking summary judgment dismissing the action on the basis that plaintiff Victoria Gutierrez did not suffer a "serious injury" in this car accident action.

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.

In the complaint, 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 her usual and customary activities for at least 90 out of the 180 days following the accident. In their motion, defendants allege that plaintiff returned to work fairly soon after the accident, and also allege that plaintiff had previous accidents. Nonetheless, defendants fail to make out a prima facie case of a lack of a "serious injury" as a result of the car accident.

Plaintiff had right shoulder surgery in March 2018. One of defendants' doctors, who examined plaintiff in July 2019, states that more than a year post-surgery, plaintiff has some significant reduced ranges of motion in her right shoulder. In his conclusion, the doctor found that although most of plaintiff's injuries had resolved, her right shoulder had "orthopedic disability with regards to the right shoulder due to

post-op." The doctor went on to find a causal relationship between the "current diagnosis and the reported accident," and further found that "There is an evidence of permanency to the right shoulder."

Defendants' doctor himself thus establishes that plaintiff suffered a serious injury to her right shoulder. Defendants' motion must be denied in its entirety.

As an aside, plaintiff's own doctors found even more significant decreases in her ranges of motion, as well as other limitations in her functioning. 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.").

The motion is 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

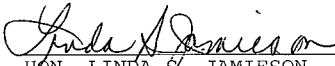
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The foregoing constitutes the decision and order of the Court.

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

  
HON. LINDA S. JAMIESON  
Justice of the Supreme Court

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