

<p>Vargas v Emely Corp.</p>
<p>2014 NY Slip Op 30542(U)</p>
<p>January 7, 2014</p>
<p>Supreme Court, Bronx County</p>
<p>Docket Number: 310407/2010</p>
<p>Judge: Norma Ruiz</p>
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<p>This opinion is uncorrected and not selected for official publication.</p>

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NEW YORK SUPREME COURT ---- COUNTY OF BRONX

PART 22

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

Index No.: 310407/2010

JESSICA VARGAS and NELLY VARGAS

Plaintiffs, Decision and Order
-against-
Present:
HON. NORMA RUIZ

EMELY CORP., JOSE LUCIANO, ALFRED KOOMSON
and DUAH AGYEMANG,
Defendants.

DUAH AGYEMANG and ALFRED Koomson

Plaintiffs Index No.: 302739/2010
-against-
EMELY COPR. and JOSE LUCIANO

The following papers numbered 1 to 4 Read on this motion SUMMARY JUDGMENT
Noticed on /13 and duly submitted as No. 28 on the Motion Calendar of 9/16/13

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion
to: Papers Numbered

Notice of Motions and Affidavits Annexed.....	1-6
Answering Affidavits.....	7
Replying Affidavits	9
Memorandum of Law	
Other:		

Upon the foregoing papers, the foregoing motion(s) [and/or cross-motions(s), as indicated below, are consolidated for disposition] and decided as follows:

Defendants Emely Corp. and Jose Luciano moves for summary judgment on the grounds that the plaintiffs did not sustain a serious injury. Upon a review of the moving papers and opposition submitted thereto, the motion is granted in part and denied in part as set forth below.

This action involves a motor vehicle accident on February 28, 2010. According to the bill of particulars, plaintiff Jessica Vargas sustained the following injuries: herniated disc at C3-C4, bulging disc at C2-3; C4-C7, right upper cervical radiculopathy and impingement by the acromioclavicular joint of right shoulder which required surgical intervention. Plaintiff Nelly Vargas sustained lower back pain and numbness.

The Court finds that the defendants met their *prima facie* burden of establishing that the plaintiffs did not sustain a serious injury by submitting the affirmed reports of their medical experts who, based upon an examination of the plaintiffs, found full range of motion in the plaintiffs' extremities and concluded that all sprains/strains had resolved (*Cruz v Rivera*, 106 AD3d 482 [1st Dept 2012]). Also submitted was plaintiff Nelly Vargas' MRI report for the lumbar spine which revealed no evidence of a bulge or herniation. With respect to plaintiff Jessica Vargas, movant submitted the affirmed report of their expert radiologist, Dr. Audrey Eisenstadt, who noted that the plaintiff's MRI evidenced osteophyte formation anteriorly at the C5-6 intervertebral level with a milder C3-4 osteophyte. The doctor further noted disc desiccation at levels C3-4 to C7-T. Dr. Eisenstadt explained that bony productive changes and disc desiccations take months to develop and could not have developed in the 17 days from when the accident occurred and the MRI was performed. As such the doctor concluded the osteophyte and disc desiccations were evidence of long standing degenerative changes that predated the accident. Thus the cervical herniation and bulging discs are degenerative in nature and not causally related to the accident. Similarly, Dr. Eisenstadt reviewed Jessica Vargas' MRI of the right shoulder and opined that it evidenced hypertrophic disease at the acromioclavicular joint associated with a low-lying acromion and with secondary narrowing of the subacromial space. She stated in her report that the narrowing of the subacromial space was due to degenerative bony productive changes at the acromioclavicular joint and are indicative of preexisting degenerative joint disease, predating the date of the motor vehicle accident.

Additionally, the court finds movants established their entitlement to summary judgment dismissing the plaintiffs' 90/180 claim based upon the plaintiff Jessica Vargas' deposition testimony which establishes that she returned to work before the 90 days of the 180 days immediately after the accident and plaintiff Nelly Vargas' testimony that she was not employed at the time of the accident nor were there any activities that she is unable to perform.

In opposition, plaintiff Nelly Vargas failed to raise an issue of fact. According to her Bill of Particulars, she only sustained back pain and numbness. However, there are no medical records to support the claim of numbness in her back. Her MRI reports were negative. The EMG studies conducted on her lumbar spine were also negative. Upon a recent examination, her treating doctor diagnosed her only with a chronic back strain. He noted a normal straight leg raising test, as well as an active range of motion and manual muscle power testing for all four extremities. The only limitation noted was that the lumber spine was restricted to 15 degrees, with the normal being 30 degrees, upon extension. However, in light of the fact that all of the plaintiff's diagnostic testing was negative and she testified that there are no activities that she is unable to perform as a result of the accident, the court finds the noted limitation is insufficient to raise an issue of fact.

Plaintiff Jessica Vargas' opposition raised an issue of fact only with regard to whether or not she sustained a serious injury involving a consequential or significant limitation in her use of a body function or system - namely her cervical spine - by submitting the affirmed report of her treating doctor wherein he notes positive MRI findings, EMG findings, reduced range of motion in her neck shortly after the accident and upon a recent examination, and opined that the injuries were causally related to the accident. In addition, plaintiff annexed the report of her radiologist who did not find any evidence of any bony process, or extensive disc desiccation, in the cervical spine.

With respect to the right shoulder, the court notes that during Dr. Guy's initial examination of the plaintiff and on follow - up visits on May 10, 2010, June 15, 2010, July 19, 2010 and August 31, 2010, the plaintiff had full range of motion of her right shoulder. Moreover, her radiologist MRI report, which is dated 23 days after the accident, did not show any edema or joint effusion. There was, however, the presence of a lateral subacromial spur which supports the defendants' expert conclusion that the right shoulder injury is degenerative in nature and not caused by the accident. In light of such findings, Dr. Guy's conclusory opinion that there was a causal connection between the plaintiff's shoulder injury and subsequent surgery (performed two years after the accident) is insufficient to raise an issue of fact (*Cruz supra*).

The court also finds that the plaintiff Jessica Vargas failed to raise an issue of fact with regard to her 90/180 claim.

Accordingly, the defendants motion is granted to the extent that the plaintiff Nelly Vargas complaint is dismissed. Plaintiff Jessica Vargas' right shoulder related injuries claims and her 90/180 claim are dismissed.

This constitutes the decision and order of the Court.

Dated: 1/07/14
Bronx, New York



HON. NORMA RUIZ, J.S.C.