

<b>Shpakovskaya v Etienne</b>
2004 NY Slip Op 30123(U)
July 7, 2004
Supreme Court, Kings County
Docket Number: 3004628/2002
Judge: M. Randolph Jackson
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS

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TATYANA SHPAKOVSKAYA,

CIVIL TERM, PART 11

Plaintiff,

DECISION and ORDER

-against-

Index No. 46284/2002

WILFRED ETIENNE and AL-EL CAB  
CORPORATION,

PRESENT:  
HON. RANDOLPH JACKSON

Defendants.

July 7, 2004

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THE FOLLOWING PAPERS NUMBERED 1 TO 21 READ ON THIS  
MOTION:

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NO. 27 ON CALENDAR OF May 18, 2004 PAPERS NUMBERED

NOTICE OF MOTION - ORDER TO SHOW CAUSE - AFFIDAVIT(S)

AFFIRMATION(S) - PETITION - EXHIBITS ANNEXED 1-8

ANSWERING AFFIDAVIT(S) - AFFIRMATION(S) - EXHIBITS 9-20

REPLY AFFIDAVIT(S) - AFFIRMATION(S) \_\_\_\_\_

AFFIDAVIT(S) - AFFIRMATION(S) \_\_\_\_\_

EXHIBITS AND OTHER PAPERS \_\_\_\_\_

AFFIDAVIT OF PLAINTIFF, TATYANA SHPAKOVSKAYA 21

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After oral argument and upon the foregoing papers:

Defendants, WILFRED ETIENNE ("ETIENNE") and AL-EL CAB CORPORATION ('AL-EL"), move for an order granting summary judgment dismissing the complaint on the grounds that plaintiff, TATYANA SHPAKOVSKAYA ("SHPAKOVSKAYA"), did not sustain a "serious injury" within the meaning of the Insurance Law.

This motion arises out of a lawsuit commenced by plaintiff to recover for personal injuries allegedly sustained on November 13, 2000 while she was a pedestrian crossing 6<sup>th</sup> Avenue near 34<sup>th</sup> Street in Manhattan.

In the Verified Bill of Particulars, plaintiff alleges the following injuries:

Bulging disc at C4-C5, C5-C6, and C6-C7  
levels;  
Disc herniations at L4-L5, and L5-S1

During her examination before trial, plaintiff testified that after the accident she was taken by Emergency Medical Service to St. Claire's Hospital where she was evaluated by physicians and released. While there plaintiff complained of pain in her knee, hand and arm. X-rays taken revealed no fractures. Plaintiff stated that on November 24, 2000, she was referred to the Modern Health Center and evaluated by a Dr. Lyudmila Poretskaya. At this health center, plaintiff received physical therapy 3-4 times a week for more than four months.

Plaintiff, who was a student at the time of the accident, testified that her present complaints include neck and lower back pain traveling to her right leg and right knee pain.

To succeed on a motion for summary judgment, defendants must meet an initial burden of showing that the plaintiff did not sustain "serious injuries" as defined by Insurance Law §5102 (Blusiewicz v. Comeau, 212 AD2d 657 [2<sup>nd</sup> Dept., 1995]; Fenstamacher v. Revell, 152

AD2d 890 (NYAD, 1989). Insurance Law §5102(d) defines "serious injury" as 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 and eighty days immediately following the occurrence of the injury or impairment.

Defendants meet that burden through the submission of the affirmed report prepared by Dr. Robert Zaretsky, an orthopedist, who conducted an independent medical examination upon plaintiff on June 27, 2003. In that report, Dr. Zaretsky states that he reviewed all of plaintiff's medical records, including the MRI of her right knee, cervical spine and lumbar spine. Upon examination, his impressions revealed a resolved cervical/lumbar strain; herniated lumbar discs L4-L5, L5-S1; resolved right shoulder and right knee sprain/strain, as well as a resolved right knee contusion. Dr. Zaretsky further opined that there is no objective evidence of any disability or permanency and found plaintiff capable of performing all activities of daily living. The range of motion in plaintiff's cervical/lumbar spine and knees revealed no spasm and range of motion was normal.

Defendants also submit the affirmed report of Dr. Lourdes P. Esteban, a neurologist, who examined plaintiff on July 2, 2003. She

also reviewed all of plaintiff's medical, diagnostic and MRI reports. Upon examination, Dr. Esteban determined that plaintiff had a full and normal range of motion in the cervical/thoraco-lumbar spine. Based upon this, she opined that plaintiff had no neurologic disability; that there is no need for formal treatment; and that plaintiff is currently able to work on a full time basis without any neurological limitations resulting from the accident.

The burden now shifts to plaintiff to establish either a prima facie case that she suffered a "serious injury" or that there are triable issues of fact as to whether she did so (Jackson v. United Parcel Serv., 204 AD2d 605 [2<sup>nd</sup> Dept., 1994]; Bryan v. Brancato, 213 AD2d 577 [2<sup>nd</sup> Dept., 1995]). Where, as here, plaintiff is alleging a permanent significant or consequential limitation of the lower back and right leg, and herniated lumbar discs resulting in radiculopathy, to meet her burden, plaintiff may submit an expert's quantitative assessment of her loss of range of motion or an expert's qualitative assessment of plaintiff's physical condition "provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function (Toure v. Avis Rent a Car Systems, Inc., 98 NY2d 345 [2002], see, Balanta v. Stanlaine Taxi Corp., 307 AD2d 1017 [2003]).

In opposition, plaintiff provides the following: 1) Exhibit "5", the unsworn initial evaluation report dated November 24, 2000 of Dr. Lyudmila Poretskaya; 2) Exhibit "6" which consists of 12 pages of **No Fault bills and an unsworn narrative report by Dr. Poretskaya dated**

May 10, 2001; 3) Exhibit "7", unsworn MRI reports from Dr. James Badia and Dr. Randall James and an unsworn electrodiagnostic study report of plaintiff; and 4) Exhibit "10" is the unsworn physician certification for continuation of physical medicine treatment and follow-up report. The Court notes that only 2 pages of the abovementioned No Fault bills (Exhibit "6") specifically relate to plaintiff, while 3 pages relate to a claimant known as "Hasan Mollaahmetoglu".

It is well-settled law that unsworn reports submitted by physicians are inadmissible for the purpose of establishing serious injury in opposition to a summary judgment motion. Grasso v. Anserami, 79 NY2d 831 (NY, 1991); Cannizaro v. King, 187 AD2d 842 (3<sup>rd</sup> Dept., 1992). Nor does the MRI report of the injured plaintiff's radiologist constitute competent evidence. Grasso v. Anserami, supra; Zhu v. Lin, 1 AD3d 416 (2<sup>nd</sup> Dept., 2003). Accordingly, in reaching its determination of the instant motion, the Court rejects all of the aforementioned unsworn medical reports and will only consider the affirmed report of Dr. John Rigney, a radiologist, and the affidavit of Dr. Lyudmila Poretskaya.

Dr. Rigney reviewed the MRI scan of plaintiff's right knee performed on November 30, 2000. He stated that the anterior and posterior horn of both medial and lateral meniscus demonstrate no abnormality, and that there is no obvious or definite abnormality of the body of the meniscus. His impressions were sprains and/or partial thickness tears of both the anterior cruciate ligament and the medial collateral ligament, and opined that these soft tissue injuries are

causally related to the accident. Additionally, Dr. Rigney reviewed the report of Dr. James Badia noting that there were herniated discs at L4-L5 and L5-S1 with edema at site of posterior annular tear consistent with a recent injury. Dr. Rigney opined that these findings are significant and permanent to the plaintiff's musculoskeletal system and may progress to the point where surgery is necessary.

The Court finds that the report of Dr. Rigney is likewise not probative as the report failed in any manner to explain how a cervical MRI revealing cervical herniated disc supports a finding of a permanent loss of function or to identify any other objective or diagnostic test used to support the claim of permanency. Dr. Rigney also relied upon Dr. Badia's MRI report of the knee which stated that there was no evidence of meniscal tear.

In Dr. Poretskaya's affidavit, dated March 26, 2004, she states that during the initial examination of plaintiff on November 24, 2000, she had significant pain, spasms and limitation of motion in her right leg, as well as in the cervical and lumbar spine. There was also swelling in plaintiff's right knee. Dr. Poretskaya treated plaintiff four additional times from December 1, 2000 through January 15, 2001.

During the most recent examination, conducted on March 24, 2004, Dr. Poretskaya stated that plaintiff continues to experience a significant limitation in her range of motion. Examination of the lumbar spine revealed flexion of 55 degrees compared to a normal

flexion of 90 degrees. Lumbar extension was 15 degrees compared to the normal of 30 degrees. Examination of the cervical spine revealed a flexion of 15 degrees compared to a normal flexion of 45 degrees and an extension of 30 degrees compared to a normal extension of 45 degrees. Right hip range of extension was limited to 15 degrees compared to a normal range of 30 degrees. Decreased sensation was found in the L5-S1 area. There was also decreased range of motion and decreased muscle strength in the right knee. Further, plaintiff continues to complain of frequent headaches, pain and numbness in her right leg and pain in her right knee.

Dr. Poretskaya's clinical observation that plaintiff's range of motion are restricted does not suffice to defeat a motion for summary judgment 'unless supported by objective proof such as x-rays, MRI's, straight-leg or Leseque tests, and any other similarly recognized tests or quantitative results.'" (Grossman v. Wright, 268 AD2d 79 [2<sup>nd</sup> Dept., 2003]). Although Dr. Poretskaya refers to some quantified range of motion limitations, she fails to identify the tests that she relied on in determining that plaintiff suffered from a limited range of motion.

Plaintiff testified at her deposition that she stopped all medical treatment during the Spring of 2001 because the insurance company covering the loss refused to pay for any further treatment, but she fails to submit proof. Of the 12 pages of No-Fault bills annexed as "Exhibit 6", only 2 pages relate to Ms. SHPAKOVSKAYA. Here, plaintiff has failed to render competent proof explaining the

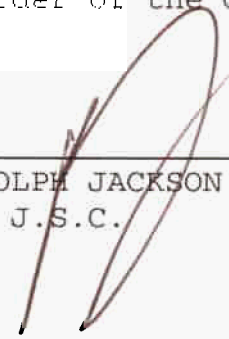
gap in treatment which extended from January 15, 2001 until she saw Dr. Poretskaya on March 24, 2004. Unexplained gaps in treatment generally militate against a finding of serious injury. Grossman v. Wriaht, supra.

Finally, the Court also rejects plaintiff's affidavit which consists solely of self-serving subjective complaints and is overall insufficient to raise a triable issue of fact. See, Grossman v. Wriaht, supra.

In view of the foregoing, the Court determines that plaintiff's opposition papers fail to raise a triable issue of fact as to whether the injured plaintiff sustained a serious injury.

Accordingly, based upon the above, the defendant's motion for summary judgment dismissing the complaint is granted.

This shall constitute the decision and order of the Court.



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RANDOLPH JACKSON  
J.S.C.