

**Shea v Smith**

2008 NY Slip Op 32149(U)

June 27, 2008

Supreme Court, Nassau County

Docket Number: 2044-07/

Judge: Karen V. Murphy

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

Short Form Order

**SUPREME COURT - STATE OF NEW YORK  
TRIAL TERM, PART 22 NASSAU COUNTY**

**PRESENT:**

**Honorable Karen V. Murphy**  
**Justice of the Supreme Court**

\_\_\_\_\_ X

**ERIN SHEA,**

**Index No. 2044/07**

**Plaintiff(s),**

**Motion Submitted: 3/18/08**

**Motion Sequence: 001, 002**

**-against-**

**ALEXIS SMITH and KRIS SMITH,**

**Defendant(s).**

\_\_\_\_\_ X

The following papers read on this motion:

- Notice of Motion/Order to Show Cause.....XX
- Answering Papers.....X
- Reply.....X
- Briefs: Plaintiff's/Petitioner's.....
- Defendant's/Respondent's.....

In motion sequence 001, Defendants move this Court pursuant to CPLR §3212 for an order granting summary judgment in their favor in that Plaintiff did not suffer a serious injury as that term is defined by the Insurance Law 5102(d). Plaintiff opposes the requested relief. In motion sequence 002, the Plaintiff cross-moves pursuant to CPLR § 3212 for an order granting partial summary judgment in her favor on the issue of Defendants' negligence. Defendants do not oppose the motion.

The instant action involves an automobile accident that occurred on August 18, 2006 at approximately 6:15 p.m.. on or about the Northern State Parkway Eastbound near Exit 28 approximately twenty feet east of Willis Avenue, County of Nassau, State of New York. According to her deposition, this incident involved three separate vehicles including her own. Plaintiff's boyfriend had been traveling as a passenger in the vehicle with her. As a result of her impact with the other two automobiles, Plaintiff's driver's side air-bag deployed. In addition, her left shoulder came into contact with the interior of the vehicle. It is alleged in the Plaintiff's Verified Complaint dated February 1, 2007 and the Verified Bill of Particulars dated April 30, 2007, that Plaintiff suffered permanent and serious injuries as a result of Defendant's negligent operation of the motor vehicle. According to the Bill of Particulars, Plaintiff alleges that she suffered, "L1 – 2, L4 – 5, and L5 – SI posterior disc herniations impinging on the anterior aspect of the spinal canal and on the neural foramina bilaterally; compression deformity of the L2 vertebral body; multiple herniations and bulges at the cervical spine; whiplash type injury to cervical spine; chronic pain and stiffness in the neck and lower back, with radiating numbness and pain to extremities; restricted range of motion of neck and lower back; loss of energy; bouts of depression; restricted movement and activities; dizziness and light-headedness; headaches, nausea, nightmares and other psychic injuries attributable to the occurrence."

The Bill of Particulars provides that at the time of the incident, Plaintiff was 18 years of age. It further establishes that at the time of the occurrence in 2006, Plaintiff was employed by Great Neck Signs as a receptionist and secretary where she worked part-time only during the summer months. She typically worked three to four days a week for four to five hours. Plaintiff testified at her sworn Deposition on August 9, 2007 that Great Neck Signs is a "family business" staffed by her parents and three siblings. Plaintiff worked there for approximately three summers prior to the subject accident. On the date of the accident she was preparing to begin her first year of college at Fairfield University. During the deposition, Plaintiff further testified that she had missed two days of work after the August 18, 2006 accident. Moreover, Plaintiff stated that she did not miss any time from school as a result of the accident.

Plaintiff further explained at her deposition that at the scene immediately after the accident she could not recall whether or not she spoke to police officers who had arrived. However, Plaintiff did make complaints of continuous sensations of pain in her neck and back immediately following the accident. Plaintiff stated that no part of her body was bleeding. From the scene of the accident, she was taken by an ambulance, accompanied by her boyfriend, to North Shore Hospital. Upon arrival at the Emergency Room of North Shore – Manhasset Hospital, Plaintiff was given time to rest and was administered Tylenol for her pain. She did not receive x-rays or any other diagnostic tests for her complaints of neck and

back pain. Plaintiff testified that she remained at the hospital for approximately three hours. She stated at the deposition that she was released from the hospital on the same day and was told to wear a soft neck brace until the pain subsided. No other medication besides Tylenol was given or prescribed to her by the Hospital. After leaving the hospital, Plaintiff went home and rested. She missed the two following days of work.

According to her testimony, Plaintiff went to see a chiropractor, Dr. Richard Grosso, approximately three days after the accident on August 18, 2006. At that office visit, Plaintiff complained of pain in her neck and back. While there the doctor made adjustments on Plaintiff's neck and back. In addition, she received heat therapy using hot towels which improved her condition "slightly," according to her testimony. Plaintiff continued to see Dr. Grosso on eight subsequent visits. Thereafter, she described that the condition of her neck and lower back became "slightly better." Her last visit was sometime prior to September 1, 2006. Judging by the record, it is unclear exactly how long Plaintiff continued her chiropractic treatments with Dr. Grosso.

During her visits with Dr. Grosso, Plaintiff was referred by him to receive an MRI of her lumbosacral spine. She received the MRI from Dr. Richard J. Rizzuti, a Board Certified Radiologist, on August 30, 2006. After receiving the MRI, she consulted Dr. Grosso about her results. Plaintiff testified that upon examining the MRI, Dr. Grosso found that she had sustained herniated discs. He instructed her to continue treatment for her injuries when she returned to college in September.

The record indicates that once Plaintiff arrived at school on September 3, 2006, she began seeing a new chiropractor, Dr. Michael A. Tierney. Plaintiff asserted that she was treated or examined by Dr. Tierney approximately eighteen times until her last visit in December 2006. While being treated by Dr. Tierney, Plaintiff would perform movement exercises and would receive stimulators on her back. Plaintiff testified that as a result of those treatments, the condition of her neck and back improved "slightly."

Approximately two weeks prior to Plaintiff's deposition taken on August 9, 2007, Plaintiff sought a consultation with orthopedist Dr. Sebastian Lattuga. She visited Dr. Lattuga's office only once complaining of "on and off pain" in her neck and back. Dr. Lattuga reviewed her history and was given her MRI report. After that examination, he advised the Plaintiff to "be careful" and not to strain herself too much. Additionally, he did not recommend that she receive surgery, physical therapy, or further chiropractic care.

When asked about her present condition at the Deposition, Plaintiff stated that she experiences pain in her neck and back "a few times a week." On those days, Plaintiff explained that the pain generally lasts for ten to fifteen minutes. Additionally, Plaintiff

testified that she experiences pain when lifting, running, holding her neck in a certain direction, and twisting her back. She further asserted that prior to the accident she had been a cheerleader for Herricks High School. She was planning to tryout for the Fairfield University Cheerleading Team; however, she stated that after the accident she did not try to do any cheerleading activities. Plaintiff explained that she is unable to perform the jumps inherent in the sport of cheerleading.

After the Deposition was taken, Plaintiff was examined by Board Certified Orthopedic Surgeon Dr. Elliott Friedel on September 18, 2007. At that visit, Plaintiff complained of pain in her neck and her mid and lower back. On the same day, Plaintiff was also examined by Board Certified Neurologist Dr. Warren Cohen.

With respect to the motion pertaining to the level of injury Plaintiff may have suffered, it is well recognized that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact. (*Andre v. Pomeroy*, 35 N.Y.2d 361, 320 N.E.2d 853, 362 N.Y.S.2d 131 [1974]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact. (*Nassau Diag. Imag. & Radiation Oncology Assoc. v. Winthrop University Hosp.*, 197 A.D.2d 563, 602 N.Y.S.2d 650 [2d Dept., 1993]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein the Plaintiff. (*Makaj v. Metropolitan Transportation Authority*, 18 A.D.3d 625, 796 N.Y.S.2d 621 [2d Dept., 2005]).

The Defendants must in the first instance establish their prima facie entitlement as a matter of law by demonstrating that the Plaintiff did not sustain a serious injury within the meaning of Insurance Law Section 5102(d) as a result of this accident. (*Felix v. New York City Transit Auth.*, 32 A.D.3d 527, 819 N.Y.S.2d 835 [2d Dept., 2006]). This Court is satisfied that they have met this threshold requirement.

The Insurance Law defines serious injury to mean, in relevant part, a personal injury which results in "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 customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment." (*Insurance Law Section § 5102[d]*).

In support of the Defendants' motion for summary judgment, they submit a sworn affidavit from Dr. Elliot Friedel. According to his September 18, 2007 report, Dr. Friedel

examined Plaintiff in relation to the injuries she sustained to her neck and mid and lower back. He performed a range of motion test on Plaintiff's Cervical spine. According to Dr. Friedel's report, on extension, bilateral rotation, and bilateral motion, Plaintiff's range of motion was normal. However, Dr. Friedel noted that on flexion of the cervical spine, Plaintiff's range of motion was 30 degrees. This finding showed a 15 degree deviation from the normal range. In addition to examining the cervical spine, Dr. Friedel performed motion tests on the thoracic spine. According to the report, the findings were normal and there was no spasm or tenderness noted. He also performed tests on Plaintiff's lumbar spine finding that her range of motion fell within the normal range. Plaintiff's Supine Straight Leg Raise and Reverse Seated Straight Leg Raise were negative bilaterally. Dr. Friedel ultimately concluded in his report that Plaintiff did not require further orthopedic care, physical therapy or follow up visits. Additionally, he opined that Plaintiff had no permanent or residual injuries.

Defendants also submitted the sworn report of Dr. Warren Cohen, prepared following his examination of Plaintiff on September 18, 2007. At that examination, Plaintiff again made complaints of intermittent neck and back pain and tightness without radiation. Dr. Cohen conducted several objective tests on Plaintiff's Cervical, Thoracic, and Lumbar spine. The Spurling, Jackson's Compression, Shoulder Depression, Soto-Hall, Sitting Boot Tests, Forward Flexion and Cervical Distraction tests all had negative results. There was no tenderness or spasm. According to Dr. Cohen's report, the Plaintiff's range of motion in the Cervical and Lumbar spine was completely normal with no deviation from the standard range of motion. Based on his findings, Dr. Cohen concluded that Plaintiff's Cervical and Lumbar sprains had resolved and that there was no evidence of radiculopathy or traumatic neuropathy. He stated that it was not necessary for Plaintiff to receive further treatment as there would be no benefit from it. According to his report, Plaintiff's injuries were not permanent.

The medical reports of Dr. Friedel and Dr. Cohen, demonstrate to this Court that Plaintiff's injuries were not serious as required by No-Fault Insurance Law. The reports of both doctors show that Plaintiff did not sustain either "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body organ or member." (*Insurance Law Section § 5102[d]*). The Court recognizes that a "permanent" or "significant limitation of use of a body organ or member" is construed to mean something more than a minor limitation. (See, *Joseph v. Forman*, 16 Misc.3d 743, 838 N.Y.S.2d 902 [Sup. Ct., Nassau Co., 2007]). Although Dr. Friedel did find that Plaintiff's range of motion had decreased by 15 degrees on one motion test, such a limitation does not qualify as permanent or significant under the statute. Rather, a limitation of 15 degrees must be considered minor or insignificant. (See, *Duncan v. New York City Transit Auth.*, 273 A.D.2d 437, 710 N.Y.S.2d 255 [2d Dept., 2000]).

Moreover, the other various objective tests performed by both doctors indicated negative results. Both doctors also opined that Plaintiff did not require further treatment, and she was not disabled from any of her activities. Those reports do not substantiate the Plaintiff's claim of a serious injury under the theories of "permanent"; therefore, Defendants have proven that there was no serious injury. Although there is little doubt that the Plaintiff did experience pain and discomfort as a result of the accident, this Court finds that such pain was mild. It is well recognized that slight or minor pain, tenderness or sprain in the neck and shoulder areas does not constitute a "serious injury" within the meaning of the Insurance Law. (See, *Coughlan v. Donnelly*, 172 A.D.2d 480, 567 N.Y.S.2d 835 [2d Dept., 1991]).

Defendants have also established that there was no serious injury under the theory that she sustained "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 customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment." (*Insurance Law Section § 5102[d]* ). According to her sworn deposition, Plaintiff was confined to bed for two days following the accident, thus missing two days of work. However, after those two days she returned to work at her full capacity. Plaintiff further testified that she did not miss any time from school as a result of the injuries she sustained during the motor vehicle accident on August 18, 2006. There is no testimony in the record where Plaintiff indicates that her injuries prevented her from such customary daily activities as dressing herself, performing household chores, or going to work or school. Plaintiff did state that due to the pain in her neck and back she was unable to participate in cheerleading. She was hoping to be a cheerleader at Fairfield University; however, she did not try out for the team. She also stated that she was unable to run with the same frequency and intensity. Prior to the accident Plaintiff would run a few times a week; however, she testified that she is now only capable of running sometimes for less than twenty minutes.

In considering the meaning of this theory, the Court adheres to the opinion in *Licari*, "that the words 'substantially all' should be construed to mean that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment." (*Licari v. Elliot*, 57 N.Y.2d 230, 236, 441 N.E.2d 1088, 1091, 455 N.Y.S.2d 570, 573 [1982]). Plaintiff's testimony clearly indicates that she was not hindered from performing her everyday activities for the ninety day period. She continued to go to work and school during the ninety days immediately following the accident. In addition, she was able to perform "substantially all" of her daily activities. Although Plaintiff was unable to participate in cheerleading, and experienced a diminution in her capacity to run, those are the only activities Plaintiff was prevented from doing. A limitation such as that is slight and does not fall within the definition of a serious injury as required by the statutory provision. (*Id.*).

The Court finds that the Defendants have submitted evidence in admissible form to make a “prima facie showing of entitlement to judgment as a matter of law” that the Plaintiff did not sustain a serious injury. Accordingly, the burden has shifted to the plaintiff to establish such an injury and to raise a triable issue of fact. (See, *Gaddy v. Eyley*, 79 N.Y.2d 955, 582 N.Y.S.2d 990 [1992]). This Court finds that she has failed to do so.

The medical reports of Orthopedic Surgeon Dr. Sebastian Lattuga submitted by Plaintiff in opposition are not in proper form and therefore will not be considered.

Plaintiff submits an affidavit from Board Certified Chiropractic Physician, Dr. Michael A. Tierney. In his affidavit, Dr. Tierney attests that he performed objective range of motion tests on Plaintiff’s cervical spine. Although these tests returned deviations from the normal range, they were insignificant. Moreover, Dr. Tierney found only moderate tenderness of the mid-cervical segments on the left and the upper trapezius muscles bilaterally. There was no evidence of gross motor or sensory loss in the upper extremities. According to Dr. Tierney’s report, Plaintiff was diagnosed with cervical, thoracic, and lumbar strain and sprain. He stated that Plaintiff continued treatments of hot moist packs, muscle stimulation, and soft tissue massage until December 5, 2006, at which time she reached “maximum medical improvement.” However, on November 2, 2007, Plaintiff returned to Dr. Tierney’s office complaining of back and neck pain. Again, at this visit, Dr. Tierney reported the Plaintiff’s symptoms to be mild.

Plaintiff additionally submits the report of Dr. Richard J. Rizzuti who conducted an MRI of her lumbosacral spine. In his report, he found subligamentous posterior disc herniations at L1-2, L4-5, and at L5-S impinging on the anterior aspect of the spinal canal and on the neural foramina bilaterally. Dr. Rizzuti also noted mild anterior compression deformity of the L2 vertebral body. Despite the findings from the MRI, it has been established that disc bulging and even disc herniation do not provide sufficient evidence to establish that Plaintiff suffered a serious injury. (See, *Kearse v. New York City Tr. Auth.*, 16 A.D.3d 45; 789 N.Y.S.2d 281 [2d Dept., 2005]). There is nothing in the MRI report to indicate that Plaintiff suffered a serious injury; therefore no question of fact exists based on that evidence.

Finally, Plaintiff’s self-serving affidavit does little to overcome her burden of proving a triable issue of fact. (See, *Fisher v. Williams*, 289 A.D.2d 288, 734 N.Y.S.2d 497 [2d Dept., 2001]).

Having failed to raise a question of fact with respect to serious injury, Defendants’ motion is granted and the complaint is dismissed.

With respect to Plaintiff's motion for partial summary judgment on the issue of Defendants' negligence, that unopposed motion is denied as moot, in light of the dismissal of the Complaint.

The foregoing constitutes the Order of this Court.

Dated: June 27, 2008  
Mineola, N.Y.

*James V. Murphy*  
\_\_\_\_\_  
J. S. C.  
**ENTERED**  
JUL 14 2008  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE