

**Harsch v Ali**

2014 NY Slip Op 32816(U)

June 16, 2014

Supreme Court, Westchester County

Docket Number: 59862/2011

Judge: James W. Hubert

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This opinion is uncorrected and not selected for official publication.

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.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

**DECISION & ORDER**

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ANGELA HARRSCH,

Index No: 59862/2011

Plaintiff,

Motion Seq. 002

-against-

JAMEEL ALI, individually and JAMEEL ALI, INC.,

Defendants.

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Hubert, A.J.S.C.

This is an action for personal injuries as a result of an accident that occurred on May 17, 2011, on the Van Wyck Expressway near JFK Airport. Plaintiff alleges that she was driving to the airport when her vehicle was struck from behind by a taxi driven by Defendant Jameel Ali. In the motion presently before the Court, Defendants move for summary judgment on the ground that the plaintiff has not suffered a serious injury as defined by Insurance Law § 5102 (d).

In her bill of particulars, plaintiff alleges that she sustained a “left shoulder rotator cuff impingement; acromioclavicular joint supraspinatus tendinosis; superior labral tear of the shoulder with resulting limitation of motion of the left arm and shoulder.” Plaintiff subsequently underwent a left shoulder arthroscopy, arthroscopic acromioplasty, and arthroscopic distal clavicle excision. The bill of particulars further states that as a result of the car accident, “plaintiff suffered sprain to the muscles, ligaments and nerves of cervical spine and lumbar spine; tingling and numbness down the right leg affecting primarily her right foot; L3-L4 through L5-S1 degenerative

disc disease causing radiculopathy in the right leg to her foot causing difficulty ambulating and change of gait while walking even short distances; limitation of rotation and flexion and extension of the cervical and lumbar spine.”

Whether the evidence warrants a jury finding that the injury qualifies as a serious injury is a threshold legal question for the court to decide. *Licari v. Elliott*, 57 N.Y.2d 230, 236, 455 N.Y.S.2d 570 (1982). New York State Insurance Law §5102 (d) defines a “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 eighty days immediately following the occurrence of the injury or impairment.

On a motion for summary judgment, a defendant must establish a prima facie case that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d). Once the defendant has met this initial burden, the plaintiff must rebut with sufficient admissible evidence to raise a genuine issue of fact as to whether the plaintiff has sustained a serious injury. *Gaddy v. Eyster*, 79 N.Y.2d 955, 956-57, 582 N.Y.S.2d 990 (1992).

In support of the instant motion, Defendants have submitted a report affirmed by Dr. Jacquelin Emmanuel, a board certified orthopedic surgeon who examined Plaintiff on February 25, 2013. In her report, Dr. Emmanuel noted that plaintiff complained of neck pain and pain in her left shoulder and lower back. However, upon a physical examination, Dr. Emmanuel noted that the range of motion of plaintiff’s cervical spine and lumbosacral spine was normal. With respect to

Plaintiff's left shoulder, Dr. Emanuel found that:

Examination of the left shoulder reveals healed entry portals. There is no deltoid atrophy. There is no tenderness on palpation of the acromioclavicular joint or over the greater tuberosity. Range of motion of the shoulder reveals anterior flexion to 170 degrees (170 degrees normal), abduction to 180 degrees (180 degrees normal), adduction to 45 degrees (45 degrees normal), internal rotation to 45 degrees (45 degrees normal) and posterior extension to 45 degrees (45 degrees normal). Apley, drop arm, and apprehension tests are all negative. Impingement sign is negative. There is no winging of the scapula. There is no sensory loss to light touch or pinprick.

Dr. Emmanuel concluded that plaintiff suffered a sprain/strain of the cervical and lumbar spine, which was "resolved," and "resolved left shoulder arthroscopic surgery."

Based on this evidence, the Court finds that defendants have established a prima facie case of entitlement to judgment as a matter of law. The burden thus shifts to Plaintiff to come forward with sufficient evidence that she did in fact sustain a serious injury. *Toure v Avis Rent-A-Car Sys.*, 98 N.Y.2d 345, 746 N.Y.S.2d 865 (2002); *Taylor v Zhao*, 279 A.D.2d 518, 718 N.Y.S.2d 876 (2d Dep't 2001).

In opposition, plaintiff has submitted an affirmation of Dr. Robert Israel, also a board certified orthopedic surgeon, who examined Plaintiff on June 20, 2013. Dr. Israel reported that Plaintiff's cervical spine was normal, and plaintiff had no pain with movement. With respect to Plaintiff's left shoulder, however, Dr. Israel stated:

Examination of the left shoulder revealed well healed portals. There was subacromial tenderness and tenderness over the acromio-clavicular joint. The scapular muscles seem atrophic. Range of motion of the shoulders revealed anterior flexion to 170° (170° being normal) abduction to 180° (180° being normal), external rotation to 90° (90° being normal), internal rotation to 60° (60° being normal) and posterior extension to 40° (40° being normal). Forward flexion and abduction beyond 90° degrees were especially painful. When she raised her arm she hitched and winced. There was no instability present. The drop arm, Yergason's apprehension, Speed

and O'Brien and clunk tests were all negative. The cross arm test was positive. There was a positive impingement sign and Hawkins. Strength in abduction and forward flexion was 4+/5. The gap between the distal end of the clavicle and the acromion seemed less than a centimeter.

Dr. Israel further concluded that:

She will require another arthroscopy. Her acromio-clavicular joint was arthritic and there was residual impingement. It was unclear if there was a torn labrum. [ . . . ] In further explanation, on 1/10/12, Ms. Harrsch had an arthroscopy of the left shoulder and despite this procedure has continued to have pain and difficulty raising her left arm. Although my examination of her range of motion indicated full passive range of motion, that full range could only be achieved with accompanying complaints of significant pain, which, in my opinion, serves as a limitation of use and qualitative functioning of her left upper extremity. Moreover, her active range of motion was limited by the pain in her left shoulder injury and surgery. By clinical observation, there was a positive cross arm test and a positive impingement sign. Although it is reported that an acromioplasty was performed, she has persistent findings of impingement and will require further surgery to correct this. In addition, further excision of the distal clavicle is required. She is very tender in the gap between the distal end of the clavicle and acromion and it does not appear that the gap created is sufficient. Normally, a true Mumford or Gurd procedure removes one centimeter, otherwise with extreme elevation and in crossing the arm across the chest there still will be contact between the cut end of the clavicle and acromion. This is very painful and restricts the use of the arm. It is also unclear whether there is a tear of the labrum and certainly when this lady undergoes another arthroscopy this should be checked.

Plaintiff has also submitted a detailed affidavit, stating that immediately after the accident, she experienced back and neck pain. She went to the emergency room where she was given muscle relaxers for the pain. She was then treated by a chiropractor twice a week for three to four months. Plaintiff ultimately sought medical treatment and underwent an MRI confirming the need for surgery. She received cortisone injections for 3-4 weeks, and underwent physical therapy twice a week for three months. After shoulder surgery, Plaintiff again went to physical therapy three

times a week for five months, and continues to suffer from stiffness and pain.

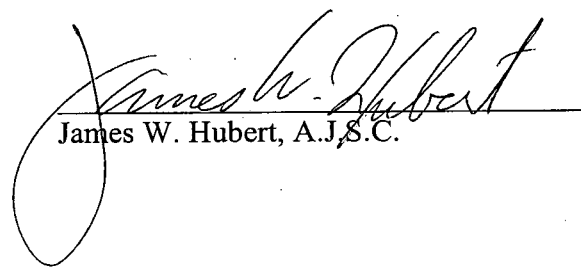
Plaintiff states that due to the continuing shoulder pain, she cannot sleep through the night and resigned her job as the manager of a wine and liquor store because she could no longer lift heavy items and stock shelves. Plaintiff states that the injury to her shoulder has made daily living "very difficult;" that she cannot wear certain garments; and carrying hand bags causes her a great deal of pain. Plaintiff further states that she can no longer do various types of gardening or engage in certain outdoor activities that she previously enjoyed with her family.

As a general matter, a Plaintiff's subjective complaints of pain are insufficient to establish the existence of a serious injury in the absence of objective medical findings. *Dantini v. Cuffie*, 59 A.D.3d 490 (2d Dep't 2009). Likewise, minor, mild or slight limitations are classified as insignificant within the meaning of the statute. *Licari v. Elliott*, 57 N.Y.2d at 236. Here, however, the Court finds that Plaintiff's affidavit, coupled with competent medical evidence she submitted, is sufficient to meet her burden of coming forward with sufficient proof to raise a triable issue of fact as to whether she sustained a serious injury pursuant to Insurance Law 5102 (d). *See, e.g., Ottavio v. Moore*, 141 A.D.2d 806, 807, 529 N.Y.S.2d 876, 877 (2d Dep't 1988) ("permanency of an injury could refer to persistent pain, or operation of the organ, member or system in some limited way, or only with pain").

Accordingly, Defendants' motion for summary judgment is denied. The parties are hereby directed to appear in the Settlement Conference Part, Room 1600, on July 14<sup>th</sup>, 2014 at 9:30 a.m.

The foregoing constitutes the Decision and Order of the Court.

Dated: White Plains, New York  
June 16, 2014



James W. Hubert, A.J.S.C.

KEEGAN KEEGAN & STRUTT, LLP  
*Attorneys for Plaintiff*  
81 Main Street, Suite 118  
White Plains, NY 10601

SKENDERIS & CORNACCHIA, P.C.  
*Attorneys for Defendant*  
45-07 Davis Street - Third Floor  
Long Island City, NY 11101