

<b>Raghunandan v Ejere</b>
2015 NY Slip Op 31309(U)
April 14, 2015
Supreme Court, Queens County
Docket Number: 2378/2013
Judge: Robert J. McDonald
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK  
CIVIL TERM - IAS PART 34 - QUEENS COUNTY  
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD  
**Justice**

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ASHA RAGHUNANDAN, Index No.: 2378/2013  
Plaintiff, Motion Date: 03/04/15  
- against - Motion No.: 115  
MARK OKORONKWO EJERE, Motion Seq.: 4  
UMBA INC. and SANDRA M. DEPERCIN,  
Defendants.

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The following papers numbered 1 to 16 were read on this motion by defendants, Mark Okoronkwo Ejere and Umba Inc, and the cross-motion of defendant, Sandra M. Depercin, both for an order pursuant to CPLR 3212, granting summary judgment in favor of the defendants and dismissing the plaintiff's complaint on the ground that the plaintiff, Asha Raghunandan, did not sustain a serious injury within the meaning of Insurance Law §§ 5102 and 5104:

Papers  
Numbered

Notice of Motion-Affidavits-Exhibits-Memo of Law.....1 - 6  
Depercin Cross-Motion-Affidavits-Exhibits.....7 - 11  
Affirmation in Opposition-Affidavits-Exhibits.....12 - 16

This is a personal injury action in which the plaintiff, Asha Raghunandan, seeks to recover damages for injuries she sustained as a result of a motor vehicle accident that occurred on April 20, 2012 on Jamaica Avenue at or near the intersection with 161<sup>st</sup> Street, Queens County, New York. At the time of the accident the plaintiff was a passenger in the vehicle owned by Umba, Inc. and operated by Mark Okoronkwo Ejere when it rear-ended the vehicle owned and operated by defendant, Sandra M. Depercin.

The plaintiff commenced this action by filing a summons and complaint on February 6, 2013. Issue was joined by service of the the verified answer with cross-claim of defendants Ejere and Umba, Inc. dated June 6, 2013. Defendant Depercin served an answer with cross-claim dated February 28, 2013. The plaintiff filed a Note of Issue on July 30, 2014. The matter is presently on the calendar in the Trial Scheduling Part for June 11, 2015.

Defendants each move for an order pursuant to CPLR 3212(b), granting summary judgment dismissing the plaintiff's complaint on the ground that plaintiff did not suffer a serious injury as defined by Insurance Law § 5102. In support of the motion, defendant Ejere submits an affirmation from counsel, Kevin Burke, Esq; a copy of the pleadings; a copy of plaintiff's verified bill of particulars and supplemental verified bill of particulars; a copy of the transcript of the plaintiff's examination before trial; the uncertified records from the emergency room at Jamaica Hospital; the affirmed report of defendant's retained orthopedist, Dr. Christopher J. Cassels; and the affirmed medical report of defendants' retained radiologist, Dr. Michael Setton.

Defendant Depercin who has cross-moved for summary judgment submits an affirmation from counsel, John J. Ferretti, Esq., and an affirmation from cardiologist, Dr. Jonathan H. Sumner.

The plaintiff alleges that as a result of the accident she sustained physical injuries including, a rotator cuff tear of the right shoulder requiring arthroscopic surgery; and brain damage and memory loss as a result of cerebral anoxia after going into cardiac arrest during the arthroscopic surgery on December 13, 2012.

Plaintiff asserts that she sustained a serious injury as defined in Insurance Law § 5102(d) in that he sustained a permanent loss of use of a body organ, member function or system; a permanent consequential limitation or use of a body organ or member; a significant limitation of use of a body function or system; significant disfigurement; and a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff from performing substantially all of the material acts which constitute her 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 her examination before trial taken on May 21, 2014, the plaintiff, Ms. Raghunandan, age 53, was not able to answer questions regarding the accident itself as she is claiming that she has memory loss resulting from cardiac arrest during the arthroscopic surgery procedure. She does not remember the date of

the accident, the time, the day of the week, or the weather at the time. She does not remember whose car she was in or anything else associated with the accident. She does not remember going to the hospital and she doesn't remember undergoing arthroscopic surgery. She doesn't remember going for physical therapy or who the doctors are who have provided treatment to her. She states that she still has pain in her shoulder but her neck and back are ok.

The emergency room records from the plaintiff's admission at Jamaica Hospital on April 20, 2012 show that she was admitted with severe head pain. The x-rays performed at the emergency room of the lumbar spine, thoracic spine and cervical spine were negative for fractures. The CT scan performed on the plaintiff's head showed no fractures and no acute trauma. She was discharged from the emergency room the same day.

Dr. Christopher J. Cassels, an orthopedist retained by the defendants, examined the plaintiff on July 8, 2014. Dr. Cassels states that on the date of the examination the plaintiff could not remember the events surrounding the accident. Her daughter provided the majority of the medical history. He states that the plaintiff was a front seat passenger and it is unclear whether she was wearing a seatbelt. The daughter stated that her mother underwent a surgical procedure on her right shoulder and immediately following the surgery suffered cardiac arrest. She was admitted to Mount Sinai Hospital of Queens County following the procedure where she stayed for about one week. From that point on the plaintiff lost significant cerebral function and has considerable difficulty with memory. The plaintiff told Dr. Cassels that she has constant pain to the right shoulder. She has difficulty combing her hair, dressing herself and hygiene because of her shoulder discomfort. The doctor reports that there is a question as to a prior accident in 2009 or 2010 in which the plaintiff suffered a significant neck injury. The daughter stated that due to that prior injury the plaintiff underwent surgical procedures to her neck.

Dr. Cassels tested the plaintiff's range of motion with a goniometer and found that plaintiff had no limitations of range of motion of the bilateral shoulders although she did complain of pain to the right shoulder. He states that although the plaintiff actively resists flexion and abduction of the shoulder this does not represent a true loss of motion. He states that there is little on the operative report to account for the claimants loss of motion. He states that the plaintiff's subjective complaints and physical findings are not consistent with a successful operative procedure. He finds that any residual complaints of pain most likely reflect pre-existing conditions and a post-surgical state. He states that in his opinion a hit in the rear accident would not be the competent cause of a significant injury to the right shoulder.

Dr. Setton, a radiologist reviewed the MRI films of the plaintiff's right shoulder and found that there is a mild tear of the supraspiantus and infraspinatus tendon. He states, however, that the MRI reveals no evidence of a soft tissue injury which may have resulted from the accident. He states that the MRI reveals evidence of a chronic repetitive overuse injury with no causal relationship to recent trauma and no evidence to indicate a traumatic rotator cuff injury. He states that there was no abnormality to indicate any type of recent traumatic injury to the right shoulder.

The defendants also submit the affirmation of Dr. Jonathan Sumner, an internist/cardiologist, who examined the plaintiff on August 8, 2014 on behalf of the defendants. Dr. Sumner's history states that the plaintiff was an unrestrained backseat passenger at the time of the accident. The emergency room records indicated no cerebral or cardiovascular injuries on the date of the accident. After discharge plaintiff commenced physical therapy at Greenwood Medical Services. On December 10, 2012 she was seen by orthopedic surgeon Dr. Avshalumov who performed arthroscopic surgery on her right shoulder on December 13, 2012. Dr. Sumner states that the plaintiff was not well oriented and easily confused since the procedure which the daughter attributed to cerebral anoxia. He states that the cardiac arrest was not related specifically to the accident but was related to poor monitoring during the arthroscopic surgery. He states that plaintiff's problem with cerebral anoxia is due to her receiving full anesthesia outside of a hospital setting which then caused her to have a cardiopulmonary arrest.

Defendant's counsel contends that the medical report of Drs. Cassels, Sumner and Setton are sufficient to demonstrate that the plaintiff has not sustained a permanent consequential limitation or use of a body organ or member; a significant limitation of use of a body function or system; or a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff from performing substantially all of the material acts which constitute her 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 opposition, plaintiff's attorney, Mark R. Bernstein, Esq., submits his own affirmation as well as the certified medical records of Greenwood Medical Services; the affirmation of radiologist, Mark J. Decker; the operative records of Dr. Stanislav Avshalumov; the hospital records from Mount Sinai Hospital in Queens; the affirmation of Board Certified Orthopedic surgeon, Dr. Thomas P. Nipper; the affirmation of orthopedist, Dr. David J. Weissberg; and the affidavit of plaintiff's daughter.

The records of Greenwood Medical Services shows that the plaintiff was first examined on June 8 2012 for injuries she received on April 20, 2012. Her presenting complaints were pain in the right shoulder, mid back and low back. The records state she plaintiff underwent a fusion in the neck in 2000 and 2011 for a prior injury. After initial examination Dr. Martino found that the plaintiff had right shoulder impingement and thoracic spine strain. Dr. Martino recommended physical therapy three times per week and an MRI of the right shoulder

Radiologist, Dr. Mark J. Decker, reviewed the MRI of the plaintiff's right shoulder and found evidence of a supraspinatus tendon tear of the right shoulder.

The surgical report of Dr Stanislav Avshalumov indicates that he performed arthroscopic surgery on the plaintiff's right shoulder on December 13, 2012 for rotator cuff repair. The report states that after extubation it was noted that the plaintiff was not responsive and had no heart rate and was in cardiac arrest. He immediately resuscitated the plaintiff and reestablished a heart rate. The patient was then transferred to the emergency room at Mount Sinai Queens Hospital where she was admitted to the ICU for cardiac arrest. She was discharged after six days with some cognitive impairment and no motor impairment.

Dr. David J. Weissberg, an orthopedist examined the plaintiff's right shoulder on February 10, 2015. Upon examination using a goniometer/artroidal protractor he found that the plaintiff had significant loss of range of motion of the right shoulder. He states that based upon her history of a motor vehicle accident, her MRI, and his physical examination, his opinion is that plaintiff's range of motion is permanently decreased and causally related to the subject motor vehicle accident. He also states that based on his review of the surgical report, it is his opinion that the right shoulder arthroscopic surgery was medically necessary due to the right shoulder injuries suffered by the plaintiff in the motor vehicle accident of April 20, 2012.

In her affidavit, plaintiff's daughter Samantha Raghunandan states that her mother began to have right shoulder pain and difficulty moving her right shoulder after the accident. She states that her mother suffers from severe memory loss, imbalance, and headaches ever since the arthroscopic surgery and her cardiac event. Plaintiff can no longer endure physical therapy because of her headaches,

imbalance, and right arm and hand tremors and because of her fragile overall physical condition. She states that her mother continues to complain of right shoulder pain and difficulty with moving her right shoulder and right arm.

On a motion for summary judgment, where the issue is whether the plaintiff has sustained a serious injury under the no-fault law, the defendant bears the initial burden of presenting competent evidence that there is no cause of action (Wadford v Gruz, 35 AD3d 258 [1st Dept. 2006]). "A defendant can establish that a plaintiff's injuries are not serious within the meaning of Insurance Law § 5102(d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (Grossman v Wright, 268 AD2d 79 [1st Dept. 2000]). Whether a plaintiff has sustained a serious injury is initially a question of law for the Court (Licari v Elliott, 57 NY2d 230 [1982]).

Where defendant's motion for summary judgment properly raises an issue as to whether a serious injury has been sustained, it is incumbent upon the plaintiff to produce evidentiary proof in admissible form in support of his or her allegations. The burden, in other words, shifts to the plaintiff to come forward with sufficient evidence to demonstrate the existence of an issue of fact as to whether he or she suffered a serious injury (see Gaddy v Eyler, 79 NY2d 955 [1992]; Zuckerman v City of New York, 49 NY2d 557[1980]; Grossman v Wright, 268 AD2d 79 [2d Dept 2000]).

Here, the proof submitted by the defendants, including the affirmed medical reports of Drs. Setton, Sumner and Cassels are sufficient to meet defendant's prima facie burden by demonstrating that the plaintiff did not sustain a serious injury to her right shoulder within the meaning of Insurance Law § 5102(d) as a result of the subject accident (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]).

The issue of whether the plaintiff is entitled to damages for alleged brain damage and memory loss as pled in the supplemental verified bill of particulars is a question which will be determined by the trial court based upon whether the plaintiff can show that defendants' negligence caused a rotator cuff tear and whether there are sufficient facts to demonstrate whether the surgeon who performed arthroscopic surgery on the plaintiff for the rotator cuff tear caused an aggravation of injuries and additional pain

and suffering as a result of negligence or malpractice (see PJI 2:305; Tatluci v APA Truck Leasing Corp., 8 AD3d 656 [2d Dept. 2004]; LaGrasta v Ettayyim, 5 AD3d 737 [2d Dept. 2004]; Lebron v St. Vincent's Hosp. & Med. Ctr., 261 AD2d 246 [2d Dept. 1999]).

In addition, this Court finds that the plaintiff raised triable issues of fact by submitting the affirmed medical reports of Greenwood Medical Services and Dr. Weissberg as well as radiologist, Dr. Mark Decker, attesting to the fact that the plaintiff sustained a rotator cuff tear in the right shoulder and finding that the plaintiff had significant limitations in range of motion of the right shoulder both contemporaneous to the accident and in a recent examination, and concluding that the plaintiff's limitations were significant and permanent and resulted from trauma causally related to the accident (see Perl v Meher, 18 NY3d 208 [2011]; David v Caceres, 96 AD3d 990 [2d Dept. 2012]; Martin v Portexit Corp., 98 AD3d 63 [1<sup>st</sup> Dept. 2012]; Ortiz v Zorbas, 62 AD3d 770 [2d Dept. 2009]; Azor v Torado, 59 ADd 367 [2d Dept. 2009]). As such, the plaintiff raised a triable issue of fact as to whether she sustained a serious injury under the permanent consequential and/or the significant limitation of use categories of Insurance Law § 5102(d) as a result of the subject accident (see Khavosov v Castillo, 81 AD3d 903 [2d Dept. 2011]; Mahmood v Vicks, 81 AD3d 606 [2d Dept. 2011]; Compass v GAE Transp., Inc., 79 AD3d 1091 [2d Dept. 2010]; Evans v Pitt, 77 AD3d 611 [2d Dept. 2010]; Tai Ho Kang v Young Sun Cho, 74 AD3d 1328 743 [2d Dept. 2010]).

In addition, the plaintiff adequately explained the gap in treatment by submitting the affidavit of Dr. Weissberg stating that although the plaintiff is in need of further treatment it is impractical to start physical work up at this time due to her present physical condition.

Accordingly, for the reasons set forth above, it is hereby,

ORDERED, that the motion by defendants, Ejere and Umba Inc., and the cross-motion of defendant, Sandra M. Depercin, for an order granting summary judgment dismissing the complaint of plaintiff, Asha Raghunandan, are denied.

Dated: April 14, 2015  
Long Island City, N.Y.

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ROBERT J. MCDONALD, JSC.