

**Sitaram v Fernandez**

2021 NY Slip Op 33963(U)

November 17, 2021

Supreme Court, Queens County

Docket Number: Index No. 705387/2019

Judge: Chereé A. Buggs

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Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS**

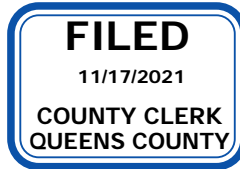
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**Justice**

Index No.: 705387/2019

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DAMWATTIE SITARAM,

Plaintiff,



Motion  
Date: November 3, 2021

-against-

Motion Cal. No.: 14

Motion Sequence No.: 1

RUVEL FERNANDEZ, JUIENE FERNANDEZ,  
S.T.V. TRANSPORTATION CORP., ANTONIO  
SILVERIO,

Defendants.

-----X

The following efile papers numbered 16-37 submitted and considered on this motion by Defendants S.T.V. Transportation Corp. and Antonio Silverio (hereinafter “S.T.V.”, “Silverio” or collectively “Defendants”) seeking an Order pursuant to Civil Practice Law and Rules (CPLR) 3212 granting Defendants summary judgment and dismissing Plaintiff Damwattie Sitaram (hereinafter “Sitaram”) complaint inasmuch as Sitaram fails to meet the serious injury threshold requirement mandated by Insurance Law § 5102 (d) and granting such other further relief as the Court deems just and proper.

	<u>Papers Numbered</u>
Notice of Motion-Affidavits-Exhibits.....	EF 16-25
Affirmation in Opposition-Affidavits-Exhibits.....	EF 26-37

Sitaram commenced this action with the filing of a summons and verified complaint on March 27, 2019 to recover damages for serious injuries that she alleged that she sustained in an accident which occurred on April 6, 2018 on the Van Wyck Expressway and Linden Boulevard, County of Queens and State of New York. Sitaram was a passenger in the S.T.V. vehicle which Silverio was operating at the time of the occurrence. As a result of the collision Sitaram sued S.T.V., Silverio and co-defendants Ruvel Fernandez and Juiene Fernandez (hereinafter collectively referred to as “Fernandez”), who filed and served a verified answer to the verified complaint with affirmative defenses and cross-claims against S.T.V. and Silverio on May 3, 2019. S.T.V. and Silverio appeared in the action with the filing of a verified answer with affirmative defenses and cross-claims on July

26, 2019. A Stipulation of Discontinuance with Prejudice against Fernandez on May 25, 2021.

Discovery is now complete. Damwattie filed a Note of Issue on May 27, 2021. S.T.V. and Silverio now move for summary judgment pursuant to CPLR 3212 granting Defendants summary judgment and dismissing Sitaram's complaint on the basis that she does not meet the serious injury threshold requirement mandated by Insurance Law § 5102 (d). In support of the motion, Defendants submitted the affirmation of Dr. Thomas P. Nipper dated November 4, 2020; the affirmation of Dr. Darren Fitzpatrick dated January 19, 2020; pleadings; Statement of Material Facts; Sitaram's verified bill of particulars dated August 1, 2019; and, the affirmation of Katherine Stanger, Esq. dated June 10, 2021.

### **Sitaram's Verified Bill of Particulars**

Sitaram alleged, *inter alia*, that as a result of the accident, she sustained injuries which were either caused, aggravated or exacerbated by Defendants' negligence including to her left shoulder requiring surgery, and resultant permanent scarring and permanent restricted range of motion; left knee; laceration of the lip; oral pain; and, facial contusion. She alleged that following the accident she was confined to home for approximately five months except for necessary medical visits, and, she was confined to home for one month following left shoulder surgery on September 6, 2018. She alleged that she sustained a serious injury as defined by section 5102(d) including, but not limited to: significant disfigurement; a fracture; 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.

### **Sitaram's Deposition Testimony**

Sitaram gave sworn testimony in this matter on November 13, 2019. She was a passenger in the Defendants' vehicle, and testified as to how the accident occurred. She claimed that the accident occurred on April 6, 2018, at the time of the accident she was not employed, and, had not been since the time of the accident. As a result of the accident she sustained injuries to her left knee, left shoulder, and was bleeding from her lip or mouth. She was taken from the accident scene by ambulance and treated at a hospital and discharged the same day. She later received acupuncture and physical therapy. She alleged that she presented to the medical facilities with complaints of pain in her face, left shoulder and left knee, and was treating about three times a week for four months. She returned to physical therapy after her left shoulder surgery, treating with physical therapy two or three times a week. Sitaram recalled undergoing a MRI of her left shoulder and left knee at some point, and claimed that due to the accident she has scarring to her left knee. Sitaram alleged that she was confined to her home for two and a half months following the accident. She was involved in a prior accident wherein she injured her right knee, back, and right shoulder. Sitaram testified that she had never sustained injuries to her left knee, face or left shoulder prior to the accident. She

stopped treating for the accident when the insurance ceased.

### **Independent Medical Examination Report of Dr. Thomas P. Nipper**

Dr. Thomas P. Nipper, Diplomate American Board of Orthopedic Surgery performed an independent medical examination on Sitaram on September 29, 2020 and rendered his report on November 4, 2020. The doctor reviewed the verified bill of particulars and various medical records. According to Dr. Nipper, Sitaram was a homemaker. Range of motion was measured with the use of a goniometer and normal ranges of motion were as stated in the A.M.A. "Guides to the Evaluation of Permanent Impairment, fifth edition" and were the following:

**Shoulders**-flexion 180 degrees (180 degrees normal); abduction 180 degrees (180 degrees normal); adduction 30 degrees (30 degrees normal); external rotation 90 degrees (90 degrees normal); internal rotation to L1 (described as normal). Impingement sign, apprehension testing and Speed's test were all negative.

**Knees**-flexion 130 degrees (130 degrees normal); extension 0 degrees (0 degrees normal). Portal scarring was seen on the left.

Dr. Nipper's impression was "status post left shoulder arthroscopy, resolved, unrelated to the motor vehicle accident" and "left knee sprain resolved."

### **Independent Medical Report of Dr. Darren Fitzpatrick**

Dr. Darren Fitzpatrick, Board Certified Radiologist, performed an independent radiological review of Sitaram's left shoulder MRI performed at Citi Med on April 30, 2018 and rendered his report on January 19, 2020. His impression were findings of subacromial impingement, no traumatic injury related to the accident. He stated "[s]ubacromial impingement is an acquired degenerative condition with no traumatic basis."

### **Discussion**

It is well settled that here, the Defendants bear the initial burden of submitting sufficient evidence to demonstrate their entitlement to judgment as a matter of law that Sitaram did not suffer a serious injury as defined under Insurance Law § 5102 (d) (*Zuckerman v City of New York*, 49 NY2d 557 [1980].) If the Defendants meet their burden, then Sitaram must then come forward with sufficient admissible evidence to raise a triable issue of fact. (*See Alvarez v Prospect Hospital*, 68 NY2d 320 [1986].) Pursuant to Insurance Law §5102(d) a "serious injury" is "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.”

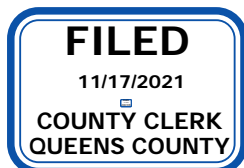
Here, S.T.V. and Silverio failed to establish their entitlement to judgment as a matter of law as their documentary submissions failed to demonstrate that Sitaram did not sustain a serious injury under the permanent consequential limitation of use a body organ or member, significant limitation of use of a body function or system or the 90/180 day categories of Insurance Law § 5102 (d) (*see Toure v Avis Rent A Car Sys, Inc.*, 98 NY2d 345 [2002]; *Gaddy v Eyler* 79 NY2d 955 [1992]); *Licari v Elliott*, 57 NY2d 230 [1982]; *Reddick v Hickey*, 197 AD3d 581 [2d Dept 2021]). Defendants' expert Dr. Nipper stated that he relied upon normal range of motion as stated in the American Medical Association “Guidelines in the Evaluation of Permanent Impairment Fifth Edition,” of which the Court takes Judicial Notice of the testing therein to be performed on various parts of the body and the normal ranges of motion as noted in the aforementioned medical literature. According to Dr. Nipper, Sitaram's range of motion in her knees on flexion was 130 degrees which he asserted was normal, however normal range of motion on flexion in the knees is 150 degrees according to American Medical Association “Guidelines in the Evaluation of Permanent Impairment Fifth Edition”. Also, no range of motion was stated by Dr. Nipper for extension in Sitaram's shoulders. (*See generally Volpetti v Yoon Kap*, 28 AD3d 750 [2d Dept 2006].) Further, defendants failed to adequately address Sitaram's claims of serious injury under the 90/180 day category. (*See Gonzalez v Krumholz*, 192 AD3d 1086 [2d Dept 2021]; *Owens-Stephens v PTM Mgmt. Corp.*, 191 AD3d 691 [2d Dept 2021]; *Che Hong Kim v Kossoff*, 90 AD3d 969 [2d Dept 2011]; *Volpetti v Yoon Kap*, 28 AD3d 750 [2d Dept 2006].)


Although the Court need not address the sufficiency of Sitaram's opposing papers (*see Tudy v Sandoval*, 97 AD3d 739 [2d Dept 2012]; *Kraska v Puleo*, 299 AD2d 397 [2d Dept 2002]; *Coscia v 938 Trading Corp.*, 283 AD2d 538 [2d Dept 2001], the Court finds that in opposition, Sitaram's opposing submissions sufficiently demonstrated triable issues of fact as to whether she sustained a serious injury under Insurance Law §5102(d) (*see Perl v Meher*, 18 NY3d 208 [2011]; *Perez v Vollaro*, 186 AD3d 762 [2d Dept 2020]; *Gobin v Singh*, 176 AD3d 1034 [2d Dept 2019]; *Sinfelt v Helm's Bros. Inc.*, 62 AD3d 983 [2d Dept 2009]).

Therefore, Defendants' motion is denied.

This constitutes the decision and Order of this Court.

Dated: November 17, 2021



  
 Hon. Chereé A. Buggs, JSC