

**Steele v Arias**

2021 NY Slip Op 34217(U)

March 17, 2021

Supreme Court, Kings County

Docket Number: Index No. 508897/2019

Judge: Lara J. Genovesi

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 34 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 17<sup>th</sup> day of March 2021.

P R E S E N T:

HON. LARA J. GENOVESI,  
J.S.C.

-----X  
EVELYN STEELE

Index No.: 508897/2019

Plaintiff,

DECISION & ORDER

-against-

LEONARDO ARIAS

Defendant.

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Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

	<u>NYSCEF Doc. No.:</u>
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed_____	8-16
Opposing Affidavits (Affirmations)_____	22-31
Reply Affidavits (Affirmations)_____	_____

Defendant, Leonardo Arias, moves by notice of motion, sequence number one, for summary judgment on the grounds that (1) plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d); and (2) the injuries were not causally related to the accident.

Plaintiff commenced this action for personal injuries as the result of a motor vehicle accident on January 7, 2019. In the bill of particulars, plaintiff alleged that she sustained

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injuries to her shoulders, cervical spine, lumbar spine, neck, lower back, arms, wrist, hands, hip, knee, ankle, and foot. She underwent surgery to her right shoulder on May 8, 2019 (*see* NYSCEF Doc. # 12 at ¶ 5).<sup>1</sup> Plaintiff further alleges that the injuries sustained meet the following categories of Insurance Law § 5102: (1) permanent loss of body function/system, (2) permanent consequential limitation, (3) a significant limitation, and (4) a non-permanent medically determined injury which prevented him from his usual and customary activities for 90 out of the first 180 days following the accident (*see id.* at ¶ 7). She claims aggravation of a pre-existing back condition (*see id.* at ¶ 9).

Defendant provided the sworn medical report of Neurologist Dr. Chandra M. Sharma, who examined plaintiff on February 25, 2020 and measured range of motion in plaintiff's cervical spine and lumbar spine and found loss in range of motion up to 50% in cervical spine extension and rotation, and up to 60% loss in lumbar spine extension and lateral flexion. The doctor opined that "on examination there are no causally related neurological problems" and "there will be no permanent neurological problems of a causally related nature" (*see* NYSCEF Doc. # 14). The report states that "there is no prior history of injury. She has high blood pressure" (*id.*).

Defendant further provided the sworn medical report of Orthopedist Dr. Thomas P. Nipper, who examined plaintiff on February 21, 2020 (*see* NYSCEF Doc. # 15). The report notes a past medical history of COPD, and a surgical history of hernia repair, repair of a tendon in the left thumb and a partial amputation of her right long finger. It further notes

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<sup>1</sup> In opposition, plaintiff stated that she underwent a discectomy/interbody fusion surgery on November 30, 2020.

that she “is on disability for reasons other than the motor vehicle accident” (*id.*). Dr. Nipper measured plaintiff’s range of motion in her cervical spine, thoracic spine, lumbar spine, bilateral shoulders, elbows, wrists, hands, hips, knees and ankles/feet. Range of motion was normal in all but her right shoulder, which measured 11.11% loss in flexion and abduction (*see id.*). Dr. Nipper opined that “based on the examination findings, no causally related disability is found” but then stated “If the history as given by the claimant is true and correct, there is a cause and effect relationship between the claimant’s original complaints and the aforementioned accident” (*id.*).

Defendant provided the transcript of plaintiff’s examination before trial, which took place on December 17, 2019 (*see* NYSCEF Doc. # 13). She testified that she has difficulty doing anything with lifting or pushing, such as lifting heavy objects, “like my grocery shopping, pushing the shopping cart”, household chores, putting dishes away, washing her back, putting up curtains and “maybe like doing jumping-jacks, I can’t lift my arm” (*id.* at 12-13). She can no longer exercise “like a jumping-jack” and lift her hand all the way above her head (*id.* at 13).

In the instant case, defendant failed to meet his burden and establish that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d), and that the injury was not causally related to the accident. Defendant failed to eliminate triable issues of fact, as the two medical reports provided herein contain conflicting measurements of range of motion in plaintiff’s cervical and lumbar spine. Both reports also offer conflicting information as to plaintiff’s medical history. Neither mentions right shoulder surgery on May 8, 2019.

In addition, "[t]he papers submitted by the defendant failed to eliminate triable issues of fact regarding the plaintiff's claim, set forth in the bill of particulars, that he sustained a serious injury under the 90/180-day category of Insurance Law § 5102(d)" (*Reid v. Edwards- Grant*, 186 A.D.3d 1741, 129 N.Y.S.3d 798 [2 Dept., 2020]). Plaintiff's deposition transcript "failed to identify the plaintiff's usual and customary daily activities during the specific relevant time frame, and did not compare the plaintiff's pre-accident and post-accident activities during that relevant time frame" (*id.*). Further, in the medical reports provided, the physicians failed to relate their findings to the 90/180 category for the period of time immediately following the accident (*see Rouach v. Betts*, 71 A.D.3d 977, 897 N.Y.S.2d 242 [2 Dept., 2010]; *Pearsall v. Cha*, 114 N.Y.S.3d 176 [App. Term, 2019]).

As defendant did not meet his burden, this Court need not examine the sufficiency of plaintiff's opposition papers. Accordingly, defendants' motion for summary judgment (sequence number one) pursuant to Insurance Law § 5102(d) is denied.

ENTER:

  
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Hon. Lara J. Genovesi  
J.S.C.

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KINGS COUNTY CLERK  
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