

**Shivprasad v Gubelman**

2022 NY Slip Op 34801(U)

April 13, 2022

Supreme Court, Queens County

Docket Number: Index No. 709613/2020

Judge: Ulysses B. Leverett

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF QUEENS

-----X  
LEANNIE SHIVPRASAD

Plaintiff,

-against-

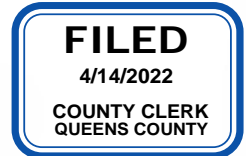
AUSTIN M. GUBELMAN, JOHN W. GUBELMAN,  
GLORIA J. LEE, OMAR A. AMAYA, SANDRA E.  
DIAZ, CATHERINE A. CHEEK, MASIEL PEREZ  
and HECTOR R. PEREZ,

Defendants.  
-----X

Index No.: 709613/2020

Motion Seq. No. 010

**Decision and Order**



Present: **HONORABLE ULYSSES B. LEVERET:**

Notice of Motion-Affirmation-Exhibits.....  
Affirmation In Opposition-Exhibits.....  
Reply Affirmation.....

Papers Numbered  
EF-79-85  
EF-116-125  
EF-113

Upon the foregoing papers, it is ordered that defendant Gloria Lee’s motion for an order pursuant to CPLR § 3212 granting defendant summary judgment and dismissing the plaintiff’s complaint on the ground that plaintiff Leannie Shivprasad did not sustain a serious injury as defined by Insurance Law § 5102 (d) is denied.

This action was brought to recover damages for serious personal injuries allegedly sustained by plaintiff Leannie Shivprasad as a result of an automobile accident that occurred on January 23, 2017 on the Meadowbrook State Parkway at or near its exit with Stewart Avenue, County of Nassau, State of New York.. Plaintiff states that at the time of the accident, she was lawfully traveling in the right lane of the Meadowbrook State Parkway when her vehicle was heavily rear ended and after stopping, she was struck again on her driver’s side. Plaintiff states that as a result of the impact, her body was jolted forward then backward into her seat. Plaintiff states that she has sustained permanent injuries to her left shoulder, neck and mid and lower back.

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 90 days during the 180 days immediately following the occurrence of the injury or impairment.”

In support of the motion, defendant asserts that plaintiff did not sustain a serious injury as defined in Insurance Law § 5102 (d). Defendant submitted a sworn report dated July 26, 2019 from Dr. Raymond A. Shebairo, a board certified orthopedic surgeon who performed an

orthopedic examination on plaintiff on 7/26/2019 and reviewed plaintiff's medical records. Dr. Shebairo states that plaintiff's cervical spine range of motion measurements taken with a hand held goniometer revealed flexion to 50 degrees (50 degrees normal), extension to 60 degrees (60 degrees normal), right/left rotation 80 degrees (normal 80 degrees). There is no muscle spasm or tenderness upon palpation of the paravertebral muscles.

The lumbar spine range of motion revealed flexion to 90 degrees (60 degrees normal), right/left lateral bending 35 degrees (normal 25 degrees). No muscle spasm upon palpation of the paralumbar muscles and no tenderness upon palpation of the paralumbar muscles.

The thoracic spine range of motion revealed flexion 45 degrees (normal 45 degrees), extension 0 degrees (normal 0 degrees), right/left lateral bending 45 degrees (normal 45 degrees), right/left rotation 30 degrees (normal 30 degrees). Dr. Shebairo states that his diagnosis is cervical spine/strain, resolved; lumbar spine strain/sprain, resolved. Dr. Shebairo states that he found no evidence of an orthopedic disability or permanency.

Defendant submitted a September 1, 2019 report from Dr. Jonathan Lerner who reviewed plaintiff's cervical spine MRI and found focal central disc bulge at C4-C5 with effacement of the ventral subarachnoid space and no evidence of central canal spinal stenosis or neural foraminal narrowing. There is a right paracentral disc protrusion at C5-C6 with effacement of the ventral subarachnoid space and moderate narrowing of the right lateral recess. There is a mild diffuse disc bulge at C6-C7 with effacement of the ventral subarachnoid space and no evidence of central canal spinal stenosis or neural foraminal narrowing. Dr. Lerner states that his findings are consistent with degenerative disc disease and suggestive of a chronic degenerative process as opposed to an acute traumatic event. Dr. Lerner states that he sees no causal relationship between the subject accident and his MRI findings.

Dr. Lerner's review of plaintiff's 1/26/2017 thoracic spine MRI revealed no evidence of fracture or subluxation, no evidence of disc herniation, central canal spinal stenosis or neural foraminal narrowing to suggest an acute traumatic event.

The lumbar spine 1/25/2017 MRI demonstrated shallow diffuse disc bulge at L4-L5 with effacement of the thecal sac and no evidence of central canal spinal stenosis or neural foraminal narrowing. Dr. Lerner states that his findings are seen in the setting of desiccation of the L4-L5 and L5-S1 intervertebral disc space levels, which is consistent with degenerative disc disease and suggestive of a chronic degenerative process as opposed to an acute traumatic event. Dr. Lerner found no causal relationship between the subject accident and his findings.

The proponent of a summary judgment motion has the initial burden of establishing entitlement to judgment as a matter of law, submitting evidence in admissible form demonstrating the absence of any triable issues of fact (see *Giuffrida v Citibank Corp.*, 100 NY 2d 72 (2003), see also *Alvarez v Prospect Hospital*, 68 NY 2d 320 (1980)). Only when the movant satisfies its prima facie burden will the burden shift to the opponent "to lay bare his or her proof and demonstrate the existence of triable issues of fact" (*Alvarez*, 68 NY 2d at 324; see also *Zuckerman v City of New York*, 49 NY2d 557 (1980)).

Plaintiff in opposition states that defendant has not demonstrated that plaintiff did not sustain a serious injury as defined by Insurance Law § 5102 (d) and that plaintiff has raised triable issues of fact that he did indeed sustain a serious injury. Plaintiff submitted an August 17, 2021 medical affidavit from Dr. Karl Latortue who performed a comprehensive re-evaluation of plaintiff on 8/3/2021 and reviewed plaintiff's medical records. Plaintiff's cervical spine range of motion evaluation revealed forward flexion to 35 degrees (45 degrees normal), backward extension to 40 degrees (55 degrees normal), right/left rotation 60 degrees (normal 70 degrees), right/left lateral flexion 25 degrees (normal 30 degrees)

Plaintiff's lumbar spine range of motion evaluation revealed extension to 20 degrees (30 degrees normal), right lateral flexion 25 degrees (normal 45 degrees).

Dr. Latortue states that based on his review of plaintiff's medical records, diagnostic tests, including his recent examination, it is his opinion that plaintiff's injuries as a result of the subject accident include posterior disc bulging at the C3-C4 level with the thecal sac impression, cervical and lumbar radiculopathy, restricted range of motion of the lumbar, cervical, and thoracic spine, L1-2 and L2-3 level subligamentous posterior disc bulges. Dr. Latortue states that to a reasonable degree of medical certainty, plaintiff has been left with a causally related limitation of range of motion of her cervical and lumbar spine.

Plaintiff submitted a July 19, 2021 affirmation from Dr. Carolyn Sofka, a radiologist who states that plaintiff's 6/1/2018 lumbar spine MRI demonstrated mild disc bulging at the L4-5 and L5-S1 motion segments effacing the extraforaminal left L4 and L5 nerve roots, respectively without central canal or foraminal stenosis.

Plaintiff submitted a July 28, 2021 affirmation from Dr. Steven Winter, a board certified radiologist who states that the MRI's of plaintiff's cervical spine taken on 1/25/2017 demonstrated inter alia C5-6 there is an extruded right posterolateral disc herniation and radial annular tear with cephalad migration that causes prominent right cord compression and severe compromise of the right anterior recess on the foramen causing severe right C6 nerve root impingement. The 1/25/2017 lumbar spine MRI revealed inter alia, L5-S1 posterior disc bulging eccentric to the left into the epidural space, L1-2 and L2-3 subligamentous posterior disc bulges and there is an abutment of the left and rear abutment of the right S1 nerve roots after they exit from the thecal sac.

Plaintiff submitted a July 15, 2021 affirmation from Dr. Douglas Mintz, a board certified radiologist who states that plaintiff's 5/30/2019 cervical spine MRI demonstrated developmental stenosis and spondylosis, C4-5 has a broad central and right sided protrusion with moderate canal stenosis and mild to moderate foraminal stenosis without nerve impingement, C5-6 has flattening of the cord and moderate canal stenosis and moderate to severe right foraminal stenosis effacing the right C6 nerve, C6-7 has a small central protrusion similar to the prior study without cord impingement. Plaintiff also submitted medical records from North Shore Hospital and Professional Physical Therapy.

It is well established that the proponent of summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to

demonstrate the absence of any material issue of fact. See *Zuckerman v City of New York*, 49 NY 2d 557 (1980). Here, the affirmed medical reports of the parties' doctors directly contradict each other. Where parties offer conflicting medical evidence on the existence of a serious injury, the existence of such injury is a matter for a jury's determination. See *Cracchiolo v Omerza*, 87 AD 3d 674 (2011).

The Court finds triable issues of fact as to the existence of serious injury. Accordingly, defendant Gloria Lee's motion for an order pursuant to CPLR § 3212 granting defendant summary judgment and dismissing the plaintiff's complaint on the ground that plaintiff Leannie Shivprasad did not sustain a serious injury as defined by Insurance Law § 5102 (d) is denied.

This is the decision and order of this Court.

Dated: April 13, 2022

  
Ulysses B. Leverett, JSC

