

**Obayda v Singh**

2023 NY Slip Op 30058(U)

January 5, 2023

Supreme Court, New York County

Docket Number: Index No. 158670/2018

Judge: James G. Clynnes

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. JAMES G. CLYNES PART 22M

*Justice*

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CAROLINE OBAYDA,

Plaintiff,

- v -

BHUPINDER SINGH, BEN BELLA TRANSPORTATION  
CORP.

Defendant.

-----X

INDEX NO. 158670/2018

MOTION DATE 12/06/2021

MOTION SEQ. NO. 003

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 64, 65, 66, 67, 68, 69, 70, 71

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents and following oral argument, it is ordered that the motion by defendants, Bhupinder Singh and Ben Bella Transportation Corp (Defendants), for summary judgment dismissing Plaintiff's complaint on the grounds that Plaintiff fails to meet the serious injury threshold requirement mandated by Insurance Law 5102 (d) is denied, except as to the 90/180 category.

Plaintiff commenced this action alleging that she sustained serious injuries within the meaning of Insurance Law 5102 (d), as a result of a January 12, 2017 motor vehicle accident between Plaintiff's vehicle and a vehicle owned by Defendant Ben Bella Transportation Corp and operated by Defendant Bhupinder Singh.

Plaintiff's Bill of Particulars alleges she sustained injuries to her cervical, lumbar, and thoracic spine, neck, and right and left knee that meet the following serious injury categories under Insurance Law 5102 (d): permanent loss of use of a body organ, member, function, system; a scar; a fracture of a bone; a significant limitation of use of a body function or system; a permanent consequential limitation of use of a body function or system; and 90/180-day.

Movant bears the initial burden to establish that the plaintiff has not sustained a serious injury (*Lowe v Bennett*, 122 AD2d 728 [1st Dept 1986]). When the movant has made such a

showing, the burden shifts to the plaintiff to produce prima facie evidence to support the claim of serious injury (*see Licari, supra*, and *Lopez v Senatore*, 65 NY2d 1017 [1985]).

Here, Defendants have established that Plaintiff did not sustain a serious injury under the Insurance Law 5102 (d) categories of permanent loss of use of a body organ, member, function, system; a scar; a fracture of a bone; a significant limitation of use of a body function or system; a permanent consequential limitation of use of a body function or system; and 90/180-day. Defendants' submission relies on the affirmed reports of Dr. Jeffrey Guttman, orthopedist, and Dr. Scott Springer, radiologist. In opposition, Plaintiff contends that Defendants' medical expert reports are deficient because the reports did not state that the doctors reached their conclusions "with a degree of medical certainty" and because the experts specifically state that they only reviewed Plaintiff's Bill of Particulars, but no medical records. It is well settled that an expert affidavit must be in admissible form (*Zuckerman v New York*, 49 NY2d 557 [1980]). In addition, the expert must reach conclusions with a "reasonable degree of medical certainty," though that exact language need not be used for the affidavit to be admissible (*Matott v Ward*, 48 NY2d 455 [1979]; *Nurik v Ollstein*, 231 AD2d 458 [1st Dept 1996]). Here, although the exact language "with a degree of medical certainty" was not included in the expert reports, there is no evidence that Defendants' experts deviated from accepted medical standards in their evaluations. Furthermore, based on the affirmations as well as the stated objective medical tests used to reach their findings, this Court finds that the experts reached their conclusions with a reasonable degree of medical certainty.

As to Plaintiff's second contention, the First Department in *Clemmer v Drah Cab Corp.*, 74 AD3d 660 (1st Dept 2010), specifically found that "[t]he failure of defendants' medical experts to discuss plaintiff's medical records...does not require denial of defendants' motion," where "defendants' [expert] detailed the specific objective tests he used in his personal examination of plaintiff." Here, Dr. Guttman's report set forth similar data on the physical examinations that he conducted on Plaintiff. The Court finds that this is sufficient to defeat Plaintiff's opposition argument and to meet Defendants' initial burden of proof. The Court also notes that Defendants' other expert, Dr. Springer, did review the MRI reports that were generated at the time of Plaintiff's accident. This, too, has been held to be sufficient to meet a defendant's burden of proof (*see e.g. DeJesus v Paulino*, 61 AD3d 605 [1st Dept 2009]). The Court, therefore, rejects Plaintiff's initial opposition argument, and turns its attention to Defendants' various serious injury arguments.

Dr. Jeffrey Guttman examined Plaintiff on July 23, 2021. In preparation for the examination, Dr. Guttman reviewed only Plaintiff's Bill of Particulars. He noted that no legally authenticated medical records were available for review. Dr. Guttman reported that Plaintiff's alleged injuries to the cervical, thoracic, and thoracic spine, and right and left shoulders and knees were resolved. After conducting range of motion tests with a goniometer, pursuant to the AMA Guidelines, Dr. Guttman reported the following: as to cervical spine, range of motion reveals forward flexion to 45 degrees (50 degrees normal), extension to 50 degrees (60 degrees normal), right and left rotation to 75 degrees (80 degrees normal), and right and left lateral flexion to 40 degrees (45 degrees normal), with mild pain; as to thoracic spine, range of motion reveals flexion to 45 degrees (45 degrees normal), extension to 0 degrees (0 degrees normal), right and left rotation to 30 degrees (30 degrees normal), and right and left lateral flexion to 45 degrees (45 degrees normal), without pain; as to lumbosacral spine, range of motion reveals flexion to 45 degrees (90 degrees normal), extension to 15 degrees (25 degrees normal), and right and left rotation to 20 degrees (25 degrees normal), with pain; as to the right shoulder, range of motion reveals forward elevation to 180 degrees (180 degrees normal), extension to 60 degrees (40 degrees normal; claimant exceeds normal value), abduction to 180 degrees (180 degrees normal), adduction to 30 degrees (30 degrees normal), external rotation to 90 degrees (90 degrees normal) and internal rotation to 70 degrees (80 degrees normal), without pain; as to left shoulder, range of motion reveals forward elevation to 180 degrees (180 degrees normal), extension to 60 degrees (40 degrees normal; claimant exceeds normal value), abduction to 180 degrees (180 degrees normal), adduction to 30 degrees (30 degrees normal), external rotation to 90 degrees (90 degrees normal) and internal rotation to 70 degrees (80 degrees normal), without pain; as to right knee, range of motion is flexion to 140 degrees (150 degrees normal) and extension to 0 degrees (0 degrees normal), without pain but also noted crepitus with range of motion indicating degenerative osteoarthritis; and as to left knee, range of motion is flexion to 120 degrees (150 degrees normal) and extension to 0 degrees (0 degrees normal), without pain but also noted crepitus with range of motion indicating degenerative osteoarthritis. Dr. Guttman noted that any "decreased range of motion is clinically insignificant, as it is on a voluntary basis likely due to claimant guarding, unsupported by objective examination findings" (NYSCEF DOC NO 58). Dr. Guttman concluded that "there is no evidence of disability or permanent injury" (*id.*).

Dr. Scott A. Springer undertook an independent review of the MRIs of Plaintiff's injuries. Dr. Springer reviewed two MRIs of Plaintiff's cervical spine taken on March 17, 2017 and October 28, 2019 and reported no fracture, subluxation or prevertebral soft tissue swelling, no disc bulging or disc herniation, and evidence of degenerative disc disease. Dr. Springer also reported that "with the exception of the slightly increased degenerative change and anterior osteophytes now also extending to the C4-C5 level," the two MRIs show similar findings (NYSCEF DOC NO 59).

In his review of the two MRIs of Plaintiff's lumbar spine taken on March 17, 2017 and October 28, 2019, Dr. Springer reported no fracture, subluxation or prevertebral soft tissue swelling, the intervertebral discs maintain normal heights and signals, and no disc bulge or disc herniation, with the exception of L4-L5, which demonstrates a mild disc bulge with a subligamentous component, Dr. Springer explained that it is degenerative in origin, related to ligamentous laxity and weakening of the outer ligamentous fibers. In his report, Dr. Springer observed that in addition to the mild bulge at L4-L5, the October 28, 2019 MRI also showed a mild resultant narrowing of the bilateral neuroforamen without mass effect on the exiting nerve roots, L5-S1 now demonstrates a focal subligamentous disc bulge without mass effect on the anterior thecal sac, which he noted are degenerative in origin, as well as mild-to-moderate paraspinal musculature atrophy greater in the lower than upper lumbar spine, which is compatible with disuse.

Dr. Springer reviewed two MRIs taken of Plaintiff's left knee on March 15, 2017 and September 12, 2018. Dr. Springer reported no fracture or dislocation, no soft tissue swelling, mild generalized chondromalacia, myxoid degenerative change and linear degenerative signal in the posterior horn of the medial meniscus, which he found unrelated to trauma, and a tiny popliteal cyst, which is degenerative and not related to trauma.

Defendants have also met their prima facie burden demonstrating that Plaintiff's injuries failed to meet the serious injury threshold under the 90/180 category of Insurance Law 5102 (d) by annexing Plaintiff's deposition testimony wherein she states that the reason she is not going back to work has to do with her "mental status," and that she did not seek emergency medical treatment immediately after the accident, but only one week later (NYSCEF DOC NO 60). Further, although she responded to the question "[h]ow long were you confined to your home?" with "[a] good year," Plaintiff is able to visit New Jersey weekly to see her mother. In her testimony, Plaintiff did note difficulty sitting for long periods of time as result of her depression

and limitations, and that she is unable to perform certain activities such as cleaning her home, however, these are insufficient to create an issue of fact (*Reyes v Park*, 127 AD3d 459, 461 [1<sup>st</sup> Dept 2015] [holding in part that plaintiff's "claimed limitations, such as his inability to clean his house or play dominoes, were not "substantially all" of his usual and customary daily activities"]).

In opposition, Plaintiff relies on the affidavit and treatment notes of physical therapist, Christopher Wojton, who treated Plaintiff since December of 2019 and re-evaluated Plaintiff's range of motion on October 5, 2021 using a goniometer. Plaintiff's thoraco-lumbar range of motion measured flexion 45 degrees (90 degrees normal) with pain; extension 15 degrees (30 degrees normal) with pain; left lateral flexion 20 degrees (35 normal) with pain; right lateral flexion 20 degrees (35 normal) with pain. Plaintiff's cervical spine range of motion measured flexion 35 degrees (60 normal) with pain; extension 30 degrees (55 normal) with pain; left lateral flexion 20 degrees (40 normal) with pain; right lateral flexion 20 degrees (40 normal) with pain; left rotation 65 degrees (80 normal) with pain; right rotation 65 degrees (80 normal) with pain. Plaintiff's right ankle range of motion measured dorsiflexion 10 degrees (20 normal) with pain and with stiffness 4/5; plantar flexion 35 degrees (45 normal) with pain and with stiffness 3+/5; inversion 30 degrees (35 normal) with pain and with stiffness 4-/5; eversion 10 degrees (15 normal) with pain and with stiffness 3+/5. Plaintiff's right knee range of motion measured flexion 130 degrees (130 normal) with pain and with stiffness 4-/5; hyperextension 0/0 to 15 degrees without pain, stiffness or radiation 4-/5; gluteus medius 4-/5; gluteus maximus 4-/5. Wojton found that the range of motion deficits observed "are real and not attributable to guarding by the patient," concluding that they are "clinically moderate to significant and interfere with her activities of daily living" (NYSCEF DOC NO 69). Wojton concluded that Plaintiff's "sustained a serious injury as a result of an accident on January 12, 2017" (*Id.*).

Plaintiff also relies on the affirmation of Dr. Timothy Canty, who has been treating Plaintiff since October 2019. Dr. Canty notes consistent range of motion deficits in Plaintiff's cervical and lumbar spine over the course of her treatment. Dr. Canty measured Plaintiff's range of motion at each visit. At the most recent visit, on November 8, 2021, Dr. Canty measured Plaintiff's lumbar range of motion at 40 degrees flexion (60 normal); 10 degrees extension (25 normal); 10 degrees L Rotation (25 normal); 10 degrees R Rotation (25 normal). Plaintiff's cervical range of motion measured 40 degrees flexion (50 normal); 40 degrees extension (60 normal); 50 degrees L Rotation (80 normal); 50 degrees R Rotation (80 normal). Plaintiff's left shoulder measured flexion 0-150

(0-180 normal); extension 0-40 (0-60 normal); Abd 0-130 (0-180 normal); Int. Rot 0-50 (0-70 normal); Ext. Rot 0-60 (0-90 normal). Plaintiff's right knee range of motion measured flexion-0-130 (0-135 normal); extension- 130-0 (135-0 normal). Plaintiff's left knee range of motion measured flexion- 0-120 (0-135 normal); extension- 120-0 (135-0 normal) with pain (NYSCEF DOC NO 70). Dr. Canty also noted that Plaintiff underwent epidurals and steroid injections with anesthesia and left knee ablations and platelet-rich plasma injections at the November 8, 2021 visit in order to control the persistent pain. Dr. Canty concluded that Plaintiff's injuries "are causally related to her accident of January 12, 2017" and interfere with her daily living (*Id.*).

By relating Plaintiff's injuries to the accident, Plaintiff's treating physical therapist and physician raise triable issues of fact as to the permanent loss of use of a body organ, member, function, system, a scar; a fracture of a bone, a significant limitation of use of a body function or system, and a permanent consequential limitation of use of a body function or system categories of Insurance Law 5102 (d) (*Williams v Perez*, 92 AD3d 528, 529 [1st Dept 2012]; *Perl v Meher*, 18 NY3d 208 [2011]; *Elias v Mahlah*, 58 AD3d 434 [1st Dept 2009]).

However, with respect to the 90/180 days category of serious injury, Plaintiff supplies the Court with no competent medical evidence demonstrating that Plaintiff was unable to perform substantially all of her normal activities for at least 90 of the first 180 days as a result of the accident (*Elias v Mahlah*, 58 AD3d 434, 435 [1st Dept 2009]). Specifically, neither Plaintiff's treating physician nor her treating physical therapist can attest to Plaintiff's medical abilities during the first 90 out of 180 days since neither of them saw Plaintiff until over a year after the accident, nor does the affidavit of Leticia Cruz, licensed clinical social worker, and Plaintiff's treating therapist, attribute Plaintiff's inability to perform her normal activities within the first 90 days to a physical serious injury. Plaintiff's subjective complaints of pain and limitation, without more, do not rise to the level of a "serious injury" within this category of Insurance Law 5102 (d).

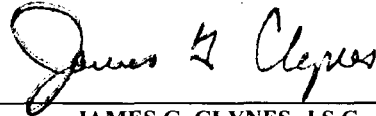
Accordingly, it is

**ORDERED** that Defendants' summary judgment motion is DENIED as to Plaintiff's claim of serious injury under the significant disfigurement, permanent consequential limitation, and significant limitation of use categories of Insurance Law § 5102 (d); and it is further

**ORDERED** that Defendants' summary judgment motion is GRANTED as to Plaintiff's claim of serious injury under the 90/180-day category of Insurance Law § 5102 (d); and it is further

**ORDERED** that within 30 days of entry, Movant shall serve a copy of this Decision and Order upon Plaintiff with notice of entry.

This constitutes the Decision and Order of the Court.



JAMES G. CLYNES, J.S.C.

1/5/2023  
DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	