

**Laboy v Thompson**

2023 NY Slip Op 34050(U)

November 17, 2023

Supreme Court, New York County

Docket Number: Index No. 151561/2019

Judge: Denise M. Dominguez

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. DENISE M. DOMINGUEZ PART 21**

*Justice*

-----X

**INDEX NO. 151561/2019**

DENISE LABOY,

**MOTION DATE \_\_\_\_\_**

Plaintiff

**MOTION SEQ. NO. 004**

- v -

PHILLIP THOMPSON, NEW YORK CITY TRANSIT  
AUTHORITY, MANHATTAN AND BRONX SURFACE  
TRANSIT OPERATING AUTHORITY, METROPOLITAN  
TRANSPORTATION AUTHORITY and MTA BUS COMPANY,

**DECISION AND ORDER ON  
MOTION**

Defendants

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 004) 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124

were read on this motion to/for JUDGMENT – SUMMARY.

For the reasons that follow, Defendants’ motion for summary judgment on the basis that Plaintiff did not sustain a serious injury is denied.

This personal injury matter arises out of a collision between two automobiles. Plaintiff alleges that on September 29, 2018, at about 12:30 p.m., at or near the intersection of St. Nicholas Avenue and West 125<sup>th</sup> Street, in Manhattan, while working in her capacity as an EMT worker and while seated in the back of the ambulance with a patient, Defendants’ vehicle struck the ambulance causing her injuries. Plaintiff specifically alleges injuries to her left shoulder, and aggravation to pre-existing conditions to her lumbar spine, and cervical disc bulges.

During Plaintiff’s deposition she testified as to the following: Prior to this accident, Plaintiff suffered injuries while in a motor vehicle accident on July 7, 2015 and during a slip-and-fall accident in October 2017. After this instant accident on September 29, 2018, Plaintiff was

involved in several other accidents including an automobile accident on May 13, 2019, a work-related accident in June 2019, where she strained her neck and back while lifting a patient, and an accident in November 2019, where Plaintiff injured and aggravated her left shoulder. Based on her medical records, on January 4, 2020, Plaintiff was also involved in another accident.

Defendants, now post-note of issue, move for summary judgment pursuant to CPLR 3212 on the grounds that Plaintiff did not sustain a “serious injury” within the meaning of the Insurance Law. Plaintiff opposes.

In support, Defendants primarily rely on the IME medical report of an orthopedic doctor. According to the report, Dr. Bazos examined Plaintiff on December 3, 2020, on behalf of Defendants.

With respect to Plaintiff’s lumbar spine, upon examination and review of Plaintiff’s medical records, Dr. Bazos found that there was “nothing more than progression of preexisting pathology demonstrated of her prior MRI studies dated August 27, 2012, and November 22, 2010” He opined that these findings were the result of Plaintiff’s past history of trauma and not the incident in question.

With respect to Plaintiff’s left shoulder, Dr. Bazos opined that based on the MRI: “only demonstrated incidental findings that were completely unrelated to the subject work-related accident. There was no indication that Plaintiff sustained any direct or indirect trauma to the left shoulder as a result of the subject accident. [Further, Plaintiff’s] subjective complaints and clinical objective examination findings did not correlate with the findings demonstrated in the report. These findings were pre-existing and were the result of routine wear and tear and nothing more”

Regarding Plaintiff's left shoulder surgery after the accident, Dr. Bazos opined that the surgery only served to address the incidental and unrelated findings seen on the imaging. He noted that Plaintiff injured herself lifting boxes three weeks prior to the surgery. He concluded that the left shoulder surgery was not medically necessary as a result of the subject accident.

Upon examining Plaintiff's cervical spine, Dr. Bazos noted "normal flexion of 45 degrees and extension of 45 degrees. There was normal left and right rotation of 70 degrees respectively. There was no paraspinal tenderness or spasm noted. There was no midline bony tenderness or trapezial tenderness noted. The cervical spine demonstrated a normal lordotic curve."

Upon examination of Plaintiff's thoracolumbar spine, Dr. Bazos noted "normal flexion of 90 degrees. Extension was also normal at 30 degrees. There was no spasm noted and the lumbar spine demonstrated normal alignment. Nor midline bony tenderness. The claimant was able to heel, and toe walk without difficulty. A mini squat was also performed without difficulty. Straight leg raise was negative on both sides at 90 degrees there is a left and right paraspinal tenderness."

Upon examination of Plaintiff's shoulders, Dr. Bazos noted that "[b]oth shoulders demonstrated normal forward elevation of 180 degrees and abduction of 180 degrees. Internal rotation was normal bilaterally at 50 degrees and external rotation was normal bilaterally at 45 degrees. There were well-healed portals in the left shoulder."

Dr. Bazos opined that Plaintiff's alleged injuries are based solely on her history and subjective complaints. Due to the lack of any accident-related objective findings, it is his opinion that Plaintiff sustained "nothing more than minor, self-limited, soft tissue injuries to the cervical and lumbar spine and left shoulder. These types of soft tissue injuries are known to biologically resolve within a 4-to 6-week timeframe with a short course of anti-inflammatory medication and

physical therapy.” Dr. Bazos further opined that “any ongoing subjective complaints beyond the timeframe are completely unrelated to the incident in question.”

Upon review, it is undisputed that five of the nine categories of serious physical injuries are not applicable, death, dismemberment, significant disfigurement, loss of a fetus, and a fracture (*see* Insurance Law § 5102[d]). Defendants with the IME report and sworn statement of their orthopedic doctor establish their prima facia burden as to the remaining categories (*see id.*; CPLR 3212; *Alvarez v Prospect Hosp.*, 68 NY2d320 [1986]). Here, Defendants establish that Plaintiff did not sustain serious injuries to her cervical spine, lumbar spine, or left shoulder under the permeant loss of use, permanent consequential, significant limitation, and 90/180 day serious injury categories (*see e.g. Oberly v Bangs Ambulance*, 96 NY2d 295 [2001]; *Alverio v Martinez*, 160 AD3d 454 [1st Dept 2018]; *Depena v Sylla*, 63 AD3d 504 [1st Dept 2009]; *see also Antepara v Garcia*, 194 AD3d 513 [1st Dept 2021]; *Kone v Rodriguez*, 107 AD3d 537 [1st Dept 2013]; *Camilo v Villa Livery Corp.*, 118 AD3d 586, 586 [1st Dept 2014]; *Hazel v Colon*, 136 AD3d 483 [1st Dept 2016]).

In opposition, Plaintiff raises questions of fact (*see Alvarez*, 68 NY2d 320). Plaintiff alleges that Defendants have not met their burden as to the 90/180-day category as it was not addressed in the IME. Plaintiff also argues that issues of fact exist and rely on the sworn statements of Dr. Imran Ashraf and other doctors.

Dr. Ashraf’s affirms that Plaintiff has been under his care since February 25, 2019, approximately five months after the accident. Dr. Ashraf further attests that his report dated August 21, 2023, is based on his examinations of Plaintiff, the statements of Dr. Greene, Dr. Libfeld, Dr. Wilde, and Dr. Paruchuri, his review of MRI films, and medical records by Plaintiff’s first treating doctor after the accident, Dr. Chowdhury.

With respect to Plaintiff's left shoulder, Dr. Ashraf performed range-of-motion tests using a goniometer, on February 25, 2019, which revealed the following: flexion was limited to 130 degrees (with normal being 180 degrees); external rotation was limited to 40 degrees (with normal being 90 degrees), extensional rotation at 90 degree of abduction was limited to 70 degrees (with normal being at 90 degrees), and internal rotation at 90 degree of abduction was limited to 40 degrees (with normal being at 70 degrees). After his initial examination, Dr. Ashraf reexamined Plaintiff nine times over the course of two years and found significant limitations in range of motion to her left shoulder at each examination. Notably, Dr. Ashraf's report makes reference only to Plaintiff's post-accident of January 4, 2020 but the report is silent as to Plaintiff's injuries sustained in May 2019, June 2019, and November 2019.

With respect to Plaintiff's lumber spine, Dr. Ashraf first examined her on November 9, 2020, after Plaintiff's other injuries on May 2019, June 2019, and November 2019. At that time, he found significant limitations in ranges of motion, and positive tenderness to palpation at the midline and the right paraspinal region and a positive straight leg raise on the right. Pertaining to the left shoulder, Dr. Ashraf found at the November 9, 2020, examination that Plaintiff had reached maximum medical improvement and declared her permanently disabled at 20%. Dr. Ashraf reexamined Plaintiff on December 28, 2020, at which time he also found significant restrictions in range of motion to her lumbar spine.

In his medical opinion, the Sept. 2018 accident caused, aggravated, precipitated and/or exacerbated the injuries to Plaintiff's cervical spine, lumbar spine and left shoulder. He opined that as a result of the accident, Plaintiff sustained significant and permanent restrictions of motion of the lumbar spine and left shoulder, and that Plaintiff suffered from restrictions of motion of the left shoulder for approximately two years following the accident, leaving her permanently disabled

at 20 % Additionally, in his opinion, Plaintiff was prevented from engaging in substantially all of her normal daily activities for at least 90 out of the first 180 days following the accident.

Upon review, as to the category of significant limitation to Plaintiff's left shoulder, Plaintiff through the sworn report of Dr. Ashraf raises questions of fact (see *Licari v Elliott*, 57 NY2d 230 [1982]). Here Dr. Ashraf saw Plaintiff for the first time five months after the accident in February 2019, before Plaintiff's other injuries and before Defendants' doctor conducted the independent examination on December 3, 2020. Dr. Ashraf found on February 2019 and in April of 2019, after performing objective tests that Plaintiff's left shoulder range of motion had significantly decreased and found a causal connection with the accident date.

As to the 90/180 category in relation to Plaintiff's left shoulder, Plaintiff also raises a question of fact (see e.g. *Nelson v Distant*, 308 AD2d 338 [1st Dept 2003]). Plaintiff testified that she was instructed not work for four-teen weeks after the accident by her treating doctor, Dr. Chowdhury. Although Plaintiff does not submit an admissible sworn report by Dr. Chowdhury, the sworn report by Dr. Ashraf referencing to Dr. Chowdhury records coupled with Plaintiff's testimony is sufficient to raise a question of fact for trial.

However, as to serious injuries to Plaintiff's left's left shoulder based on the categories of permanent injury and permanent consequential limitation, Plaintiff does not raise material questions of fact requiring a trial (see *Oberly v Bangs Ambul*, 96 NY2d 295 [2001]; *Altman v Gassman*, 202 AD2d 265 [1st Dept 1994]). While Dr. Ashraf attests that Plaintiff's left shoulder is permanently disabled at 20%, he makes this finding after an examination on January 24, 2022, approximately three and one /half years after the accident, and after Plaintiff sustaining additional injuries from three separate accidents (see *Natera v Veloz Livery Rentals Inc.*, 206 AD3d 428 [1st

Dept 2022]; *Dellino v Puello*, 189 AD3d 430, 431 [1st Dept 2020]; *see also Bandoian v Bernstein*, 254 AD2d 205 [1st Dept 1998]).

Further, as to permanent injury, permanently consequential limitation, and significant limitation regarding Plaintiff's lumber and cervical spine, Plaintiff's evidence does not raise material questions of fact. The sworn statement by Dr. Green evaluating Plaintiff's MRI of her spine about a month of the accident, revealed only slight and mild changes and thus not sufficient to meet the above categories (see *Gaddy v Eyler*, 79 NY2d 956 [1992]; *Antepara v Garcia*, 194 AD3d 513 [1st Dept 2021]). The sworn statement of Dr. Libfeld attests that he reviewed Plaintiff's MRI regarding her cervical spine on December 2018. While he found bulges and made other findings, the report does not compare it to any pre-existing bulges that Plaintiff has admitted to in her bill of particulars and during her deposition (see *Antepara v Garcia*, 194 AD3d 513 [1st Dept 2021])

Accordingly, the motion is denied.

It is hereby

ORDERED that Defendants' motion seeking summary judgment is denied; and it if further

ORDERED that Defendants shall serve and file a note of entry within 30 days from the date of this order.

11/17/2023  
DATE

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

APPLICATION:

CHECK IF APPROPRIATE:

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER  
REFERENCE

  
HON. DENISE M. DOMINGUEZ  
J.S.C.