

Singh v Afzal
2023 NY Slip Op 35176(U)
June 5, 2023
Supreme Court, Queens County
Docket Number: Index No. 721383/2021
Judge: Chereé A. Buggs
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Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS**
Justice

IAS PART 30

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ASHA SINGH,

Index No. 721383/2021

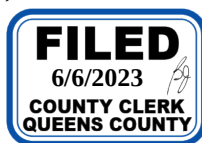
Plaintiff,

Motion

-against-

Date: May 24, 2023

AZEEZ AFZAL,



Motion Cal. No. 7

Defendant.

Motion Sequence No. 2

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The following efile papers numbered 29-36, 38-41 submitted and considered on this motion by defendant Azeez Afzal (hereinafter “Afzal”) seeking an order pursuant to Civil Practice Law and Rules (“CPLR”) 3212 for summary judgment against plaintiff Asha Singh (hereinafter “Singh”) on the basis that the defendant prove prima facie that the plaintiff did not sustain a “serious injury” under New York Insurance Law Section 5102(d).

Papers
Numbered

Notice of Motion-Affidavits-Exhibits.....	EF 29-36
Affirmation in Opposition-Affidavits-Exhibits....	EF 38-41

On September 27, 2021, Singh commenced this action against Afzal to recover damages for serious injuries which she claimed she sustained in a motor vehicle accident which occurred on September 21, 2020, at or near the intersection of Lefferts Boulevard and 101st Avenue, in the County of Queens, City and State of New York. Afzal filed and served a verified answer with affirmative defenses on November 1, 2021 essentially denying Singh’s allegations. Afzal now seeks an Order pursuant to CPLR 3212 for summary judgment against Singh on the grounds that she did not sustain a serious injury under New York Insurance Law Section 5102(d).

In support of the motion, Afzal’s documentary evidence included the pleadings; Singh’s verified bill of particulars; Singh’s deposition transcript; the Independent Medical Examination (“IME”) report medical of Dr. Regina Hillman; and, a Magnetic Resonance Imaging (“MRI”) film review report of Dr. Jeffrey Warhit.

Singh's Verified Bill of Particulars

In her verified bill of particulars, Singh claimed that as a result of the accident she sustained serious injuries to her left knee, lumbar spine, cervical spine, hips and shoulders. She claimed that she sustained a serious injury under all of the categories of Insurance Law 5102(d).

Plaintiff's Deposition Testimony

Singh provided sworn testimony on the July 12, 2022. She testified that the accident occurred on September 21, 2020 at the intersection of Lefferts Boulevard and 101st Avenue, County of Queens, State of New York. She was a passenger in a vehicle which was driven by her husband. At the time of the accident she was a homemaker. She alleged that as a result of the accident she sustained severe injuries to her back, neck, and left knee. Following the accident, both she and her young child were transported by ambulance to Jamaica Hospital, where she received a variety of treatments, including injections, medications, and she underwent a back X-ray. Later that same day, she was discharged from the hospital. She did not lose consciousness. Two days post-accident, on the advice of a friend, she visited a physical therapist and treated for pain in her neck, back, and left knee. She recalled undergoing chiropractic and acupuncture procedures, as well as several additional visits to a physician for pain-relieving injections on her back. She mentioned having another doctor, Dr. McCulloch, specifically for her knee, that she visited three times per week. She related that after undergoing a MRI of her left knee, Dr. McCulloch advised her that in his opinion, left knee surgery was required if she wanted to further improve the condition of her left knee. She did eventually undergo the left knee surgery. She did not have any prior or subsequent injuries to those areas of her body which she claimed were injured in this accident.

Singh testified that while she was not bedridden following the accident, she was unable to cook or do laundry, lift her children or participate in activities with her children such as going to the park, beach, or hiking. She also conveyed that she can no longer perform household chores, including cooking, cleaning, doing laundry, and grocery shopping as she used to do prior to the accident.

Independent Medical Examination of Dr. Regina O. Hillsman

Dr. Regina O. Hillsman, a Board Certified Orthopedic Surgeon, performed an independent medical examination on Singh on September 12, 2022. Dr. Hillsman noted in her report that Singh denied any prior history of similar injuries. The doctor reviewed available records and performed an examination. The examination shows that Singh was able to sit comfortably and move her head, neck and body freely. She could get on the examination table unassisted and turn side to side on the table freely. Range of motion was measured with a goniometer and compared to the normal active range of motion values to the "Guidelines to Evaluation of Permanent Impairment" 5th and 6th editions, published by the American Medical Association, and were as follows:

Cervical Spine-forward flexion 50 degrees (50 degrees normal); extension 60 degrees (60 degrees normal); right rotation 80 degrees (80 degrees normal); left rotation 80 degrees (80 degrees normal); right lateral bending 45 degrees (45 degrees normal); left lateral bending 45 degrees (45 degrees normal);

Lumbar Spine-forward flexion 60 degrees (60 degrees normal); extension 25 degrees (25 degrees normal); right lateral bending 25 degrees (25 degrees normal); left lateral bending 25 degrees (25 degrees normal). Straight leg raising in the seated position was negative bilaterally (normal 70-90 degrees);

Thoracic Spine-flexion 45 degrees (45 degrees normal); extension 0 degrees (0 degrees normal); right lateral bending 45 degrees (45 degrees normal); left lateral bending 45 degrees (45 degrees normal); right rotation 30 degrees (30 degrees normal); left rotation 30 degrees (30 degrees normal);

Right Shoulder- forward flexion 180 degrees (180 degrees normal); extension 40 degrees (40 degrees normal); abduction 180 degrees (180 degrees normal); adduction 30 degrees (30 degrees normal); Internal rotation 80 degrees (80 degrees normal); external rotation 90 degrees (90 degrees normal);

Left Shoulder- forward flexion 180 degrees (180 degrees normal); extension 40 degrees (40 degrees normal); abduction 180 degrees (180 degrees normal); adduction 30 degrees (30 degrees normal); Internal rotation 80 degrees (80 degrees normal); External rotation 90 degrees (90 degrees normal);

Right Hip - forward flexion 100 degrees (100 degrees normal); extension 30 degrees (30 degrees normal); abduction 40 degrees (40 degrees normal); adduction 20 degrees (20 degrees normal); external rotation 50 degrees (50 degrees normal); internal rotation 40 degrees (40 degrees normal);

Left Hip - forward flexion 100 degrees (100 degrees normal); extension 30 degrees (30 degrees normal); abduction 40 degrees (40 degrees normal); adduction 20 degrees (20 degrees normal); external rotation 50 degrees (50 degrees normal); internal rotation 40 degrees (40 degrees normal);

Right Knee - extension 0 degrees (0 degrees normal); flexion 150 degrees (150 degrees normal);

Left Knee - extension 0 degrees (0 degrees normal); flexion 150 degrees (150 degrees normal).

In Dr. Hillsman's opinion, Singh sustained sprain/ strain of the cervical spine; strain of the lumbar spine; strain and internal derangement of the bilateral shoulders; strain and internal derangement of bilateral hips; and post surgery status of the left knee; and, in the doctor's expert opinion, all of the aforementioned injuries were resolved.

Dr. Jeffrey Warhit's MRI Review

On November 14, 2022 Dr. Jeffrey Warhit reviewed the MRI of Singh's left knee taken on July 26, 2021. While noting some sprain at the origin of the medial head of the gastrocnemius with a contiguous septated ganglion cyst, Dr. Warhit opined that the changes appears to be degenerative. No fracture, ligamentous or tendinous or muscular tear was seen. Dr. Warhit stated that in view of the degenerative changes, the linear tear associated with the body of the medial meniscus appeared to be degenerative.

Analysis

It is well-settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law by tendering admissible evidence to eliminate any material issues of fact from the case. (*Winegrad v New York Univeristy Medical Center*, 64 NY2d 851 [1985].) Once the proponent has met its burden, the opponent must produce competent evidence in admissible form to establish the existence of a triable issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). Summary judgment, which is a drastic remedy, will not be granted by the Court if there is any doubt as to the existence of a triable issue of fact. (*Andre v Pomeroy*, 32 NY2d 361 [1974]; *Kwong on Bank, Ltd., v Montrose Knitwear Corp.*, 74 AD2d 768 [2d Dept 1980].)

The Court finds that Afzal failed to establish his entitlement to judgment as a matter of law by demonstrating that Singh did not sustain a serious injury within the meaning of Insurance Law §5102(d) (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyler*, 79 NY2d 955 [1992]). Although Dr. Hillsman stated that Singh's range of motion on straight leg raising was negative, the doctor failed to state what the range of motion value was in comparison to the normal range of motion (*see Shirman v Lawal*, 69 AD3d 838 [2d Dept 2010]).

Moreover, even assuming that Afzal had established his *prima facie* case, in opposition, Singh raised a triable issue of fact that she sustained a serious injury to her left knee. Singh provided competent evidence in admissible form: Dr. Kenneth McCulloch's affidavit; the MRI report of Lenox Hill Radiology of Dr. Narayan B. Paruchuri; and Singh's affidavit.

While Dr. Hillsman's report concluded that all injuries were resolved and all range of motion has returned to normal compared to the 5th and 6th edition of the AMA guidelines, Singh, in opposition, tried to establish credibility issues in Dr. Hillsman's report. Her argument included, among other things, that Dr. Hillsman failed to compare her straight leg test findings to normal range; that despite Dr. Hillsman claiming she uses both the 5th and 6th edition of the AMA guidelines, some of the results would be different if Dr. Hillsman uses the newer 6th edition of the AMA guidelines instead of the older 5th edition standard. For the MRI review by Dr. Warhit, Singh pointed out that the report was unclear about how much of the MRI photos were actually reviewed by the doctor.

Dr. Kenneth McCulloch's Affidavit

Dr. Kenneth McCulloch, in his affidavit, contended that he conducted an initial examination for Singh on October 16, 2020. His findings revealed a distinct bias in Ms. Singh's walking pattern towards her left side and he noted her reliance on Tylenol for pain management. Utilizing a goniometer, he evaluated the range of motion of her left knee, finding it to be 0 to 130 degrees, a deviation from the normal range of 0 to 150 degrees. This measurement was compared to the standards outlined in the 5th edition of the "Guidelines to Evaluation of Permanent Impairment" published by the American Medical Association. A positive result from a McMurray's test on Ms. Singh's left knee necessitated an MRI. Dr. McCulloch concluded that the injuries, including contusion, swelling, and meniscal damage, led to a significant loss of range of motion. He stated that these injuries were consistent with the trauma associated with an automobile accident.

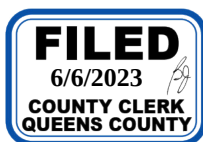
Dr. McCulloch reassessed Ms. Singh on August 13, 2021. Reporting no improvement, Ms. Singh was found to have a further decrease in the range of motion of her left knee to 0 to 125 degrees. Dr. McCulloch reasoned that her injury would limit her ability to perform tasks such as squatting or kneeling to engage with her children, as well as interfere with walking while carrying children. The MRI results from July 26, 2021, confirmed a longitudinal undersurface tear in the body of her left knee's medial meniscus and patellofemoral chondral damage. He emphasized that the non-fragmented nature of the cartilage tears indicated they were not degenerative but rather trauma-induced. Dr. McCulloch also opined that physical therapy failed Ms. Singh, and upon disclosing and considering the risks and benefits, Ms. Singh elected to undergo surgery, which Dr. McCulloch performed on September 20, 2021.

In her consultation with Dr. McCulloch on April 7, 2023, Ms. Singh reported a significant decrease in pain but continued daily discomfort and interference with everyday activities due to her left knee. Dr. McCulloch noted a further reduction in the range of motion in her left knee from 0 to 120 degrees and a decline in her quadriceps. He concluded that Ms. Singh had reached her maximum medical improvement and would continue to endure a moderate permanent partial disability due to the 30 degree restriction in her left knee. The suspension of physical therapy several months post-surgery, he argued, was standard procedure and did not undermine the severity or permanence of the injury. Dr. McCulloch reiterated his belief that the injuries were trauma-induced rather than degenerative, citing the localized knee injury, the specific areas of cartilage damage, and the lack of a habitus associated with her altered gait as indicators.

Based upon the papers presented herein, the Court finds that the conflicting medical opinions on the etiology of Singh's left knee injuries presents a triable issue of fact that cannot be resolved on summary judgment (*see Scully v Stephens*, 214 AD3d 834, 835 [2d Dept 2023]; *Wilcoxon v. Palladino*, 122 AD3d 727, 728 [2d Dept 2014]; *Gaviria v. Alvarado*, 65 AD3d 567, 568, 569 [2d Dept 2009]; *Cariddi v. Hassan*, 45 AD3d 516, 517 [2d Dept 2007]). The conflicting medical reports of the parties' respective experts raised triable issues of fact as to whether Singh sustained a serious injury to her left knee under the permanent consequential limitation of use and/or significant limitation of use categories of Insurance Law § 5102 (d) (*see Francovig v Senekis Cab Corp.*, 41 AD3d 643 [2d Dept 2007]; *Garcia v. Long Island MTA*, 2 AD3d 675 [2d Dept 2003]; *Kraemer v Henning*, 237 AD2d 492 [2d Dept 1997]).

Therefore, Defendant Azeez Afzal's motion seeking summary judgment pursuant to CPLR 3212 against Plaintiff Asha Singh on the basis that Plaintiff Asha Singh did not sustain a "serious injury" under New York Insurance Law Section 5102(d) is denied.

This constitutes the Decision and Order of the Court.



Dated: June 5, 2023

A handwritten signature in black ink, appearing to read "Chereé A. Buggs".

Hon. Chereé A. Buggs, JSC