

**Siby v Singh**

2024 NY Slip Op 31878(U)

May 30, 2024

Supreme Court, New York County

Docket Number: Index No. 157444/2020

Judge: James G. Clynes

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. JAMES G. CLYNES PART 22M**

*Justice*

-----X

MOHAMED SIBY,

Plaintiff,

- v -

TARSEM SINGH, GURDEEP SINGH

Defendant.

-----X

INDEX NO. 157444/2020

MOTION DATE N/A

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 27, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents, the motion by Defendant TARSEM SINGH and GURDEEP SINGH for summary judgment on the grounds that Plaintiff's claimed injuries do not satisfy the serious injury threshold under Insurance Law 5102(d) are decided as follows:

Plaintiff seeks recovery for injuries allegedly sustained as a result of a July 11, 2019 motor vehicle accident. Plaintiff's Bill of Particulars alleges injures to his cervical spine, lumbar spine, right shoulder, and brain and that those injuries fall within the categories set forth under Insurance Law 5102(d).

The burden rests upon the movant to establish that the plaintiff has not sustained a serious injury (*Love v Bennett, 122 AD2d 728*[1<sup>st</sup> Dept 1986]). The burden shifts to the plaintiff to show he did sustain such injury or that there are questions of fact with objective proof of the injury to satisfy the statutory serious injury threshold (*see Martin v Schwartz, 308 AD2d 318* [1<sup>st</sup> Dept 2003]).

In support of their motion, Defendants rely on the affirmed independent examination report of Dr. Pierce Ferriter and Dr. Michael Setton who reported that Plaintiff's cervical spine strain,

lumbar spine and left knee were all resolved and that the cervical and lumbar spine disc desiccation were degenerative in nature and not caused by the accident on July 11, 2019.

Defendant relies on Dr. Michael Setton review of the cervical spine and right shoulder Magnetic Resonance Image (MRI) examination which was performed on July 30, 2019; lumbar spine and left knee Magnetic Resonance Image (MRI) examination performed on July 25, 2019, and Brain Magnetic Resonance Image (MRI) examination performed on August 8, 2019. Dr. Setton noted mild multilevel degenerative disc disease, disc bulge and broad-based central herniation at C5-6, C6-7, L4-5, L5-S1. He found that the multilevel bulging of the discs in the cervical spine were related to degeneration and not to trauma and that the central disc herniation in the lumbar spine were most likely chronic and degenerative in nature. He found there was no abnormality of the paraspinal soft tissue to suggest any recent traumatic injury to cervical or lumbar spine.

Dr. Setton noted moderate to marked medial compartment osteoarthritis in the left knee, mild to moderate supraspinatus and anterior infraspinatus tendinosis slap tear, mild hypertrophic acromioclavicular joint degeneration in the right shoulder. He found there was no abnormality of the para-articular or superficial soft tissue to suggest any recent traumatic injury to the left knee or right shoulder. He also found no abnormal white matter signal in the left frontal lobe with no evidence of intracranial hemorrhage in the brain and no evidence to suggest any type of recent traumatic head injury with the mucous retention cysts entirely unrelated to trauma.

Defendant also relies on Dr. Ferriter report dated May 12, 2023 after an orthopedic medical evaluation. Dr. Ferriter measured Plaintiff range of motion using a hand-held goniometer. He performed Spurling's test, shoulder shrug, Hoffman's, atrophy of scapula, compression, Jackson's Soto-Hall's and they were all negative for the cervical spine with normal range of motion. He

performed Fabere test, Soto Hall test, Kemp's, Minor's sign and Laseque's test which were all negative along with the sitting and supine straight leg raise which were negative with no radiculopathy with normal range of motion for the lumbar spine. Hawkins/Kennedy impingement, Neer impingement maneuver, cross arm adduction, empty can (Jobe's) test, scapular winging, drop arm, O'Brien, Painful arc, atrophy of deltoid tests were all negative with normal range of motion for the right shoulder. Lachman's, patella tracking, anterior drawer, posterior drawer, patella grind, McMurray's, bounce and pivot shift were all negative with normal range of motion. He found alleged cervical spine, alleged lumbar spine and alleged left knee sprain/strain resolved and status post right shoulder surgery healed. In his opinion a normal orthopedic examination on all objective testing was found, the Plaintiff is capable of returning to full duty work without restrictions, no objective clinical finding indicative of present disability that prevents Plaintiff from engaging in activities of daily living.

Defendants have met their initial burden of establishing that Plaintiff did not sustain serious injuries as a result of the accident under Insurance Law 5102(d) (*Perez v Rodriguez*, 25 AD3d 506 [1<sup>st</sup> Dept 2006]) and shifted the burden of whether the Plaintiff has sustained serious injury.

In opposition, Plaintiff relied on the treatment records of Dr. Albert Villafuerte, the affirmation and MRI report of Dr. Dov Berkowitz, a board certified orthopedic surgeon. Dr. Villafuerte specifically addressed Dr. Setton's findings of degenerative disease opining that the disc pathologies and nerve injuries, right shoulder tears and left knee internal derangement did not pre-exist the accident.

Dr. Villafuerte examined the Plaintiff on July 19, 2019 and found limited range of motion as to Plaintiff's right shoulder and cervical spine. There were also follow up evaluations of the Plaintiff on August 20, 2019, October 29, 2019, December 5, 2019, January 9, 2020, February 20,

2020, March 11, 2020, April 29, 2020, June 26, 2020, October 13, 2020, November 24, 2020 and November 16, 2023. Dr. Villafuerte measured Plaintiff's range of motion with a goniometer, normal ranges of motion are based on published values by the NYS Division of Disability Determination, NYS Workers Compensation Board and the Manual of Structural Kinesiology, 2012. Dr. Villafuerte notes that his findings that the Plaintiff's injuries were causally related to the accident of July 11, 2019, that the range of motion testing revealed consistent and significant limitations to the cervical and lumbar range of motion with cervical range of motion remaining restricted up to 25% and even with surgical intervention, right shoulder restricted range of motion of up to 28%. He also noted Plaintiff's disability was partial and permanent with the pathologies clinically correlated with the patient's symptomatology, examination findings and physical limitations. Dr. Villafuerte found range of motion on with respect to the cervical spine cervical flexion to be 40 degrees (normal 50 degrees), extension 45 degrees (normal 60 degrees), right rotation 60 degrees (normal 80 degrees), left rotation 60 degrees (normal 80 degrees), right lateral flexion 40 degrees (normal 50 degrees) and left lateral flexion 40 degrees (normal 50 degrees). Based on his evaluation, Dr. Villafuerte gave the Plaintiff 20% - 25%, percentage losses.

Dr. Berkowitz examined Plaintiff on August 9, 2019. Dr. Berkowitz found the MRI of the right shoulder was consistent with an intermediate grade tearing of the infraspinatus tendon and tearing of the posterior superior labrum and that the left knee was consistent with intermediate to high grade articular cartilage injury. Dr. Berkowitz subsequently performed surgery on November 2, 2019 and his postoperative diagnoses with regards to the right shoulder was rotator cuff tendon tearing, superior SLAP tear, extensive hypertrophic synovitis adhesions sub acromial compartment. Plaintiff was seen post-operative on December 13, 2019, March 3, 2020, April 20, 2020, June 2, 2020 and September 15, 2020. Dr. Berkowitz found that range of motion was

restricted for the right shoulder, pain was still present after the arthroscopic surgery raising issue of fact regarding the injury to the shoulder which precludes summary judgment (*see Paulino v Rodriguez, 91 AD3d 559 [1st Dept 2012]*). As Plaintiff has shown sufficient evidence of serious injury to his right shoulder and has been declared partially and permanent disabled, it is not necessary to determine the adequacy of the evidence as to cervical and lumbar spine injuries. He may be entitled to recover for all injuries causally related to the subject accident (*see Linton v. Nawaz, 14 NY3d 821 [2010]*; *Rubin v SMS Taxi Corp., 71 AD3d 548 [1st Dept 2010]*). Therefore, the Court need not determine whether Plaintiff's other injuries fall into one of the serious injury categories under Insurance Law 5102(d).

With respect to the 90/180 days category of serious injury, Dr. Villfuerte's reported permanency of Plaintiff's injury and limitation to some extent in activities of daily living is competent evidence that Plaintiff was unable to perform substantially all of his normal activities for at least 90 days of the first 180 days as a result of the accident. Plaintiff reported he had not returned to work at his follow up visit on November 16, 2023. Plaintiff's testimony in his examination before trial that he worked delivering Uber Eats before the accident but that he no longer works, he can no longer play soccer, do his laundry or cook in the same capacity as he used to and he is unable to perform as a delivery person, or sit or sleep for long periods helps establish a 90/180 days claim. Plaintiff also testifies that he never returned to his job and now sits in his brother's car when his brother works, to ensure his brother doesn't get a parking ticket. Plaintiff's testimony as to his restrictions in conjunction with Dr. Villafuerte's report has raised an issue of fact as to the 90/180 days category as well. Accordingly, it is,

**ORDERED** that the motion by Defendant TARSEM SINGH and GURDEEP SINGH for summary judgment on the grounds that Plaintiff's alleged injuries fail to satisfy the serious injury threshold under Insurance Law 5102(d) is denied; and it is further

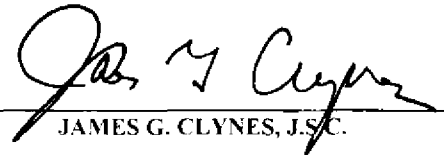
**ORDERED** that any requested relief not specifically addressed herein has nonetheless been considered; and it is further

**ORDERED** that within 30 days of entry, Plaintiffs shall serve a copy of this Decision and Order upon the Defendant with Notice of Entry.

This constitutes the Decision and Order of the Court.

May 30, 2024

DATE

  
JAMES G. CLYNES, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE