

**Paliswoda v Thapa**

2024 NY Slip Op 34777(U)

October 2, 2024

Supreme Court, Queens County

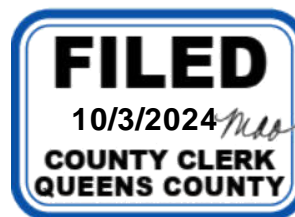
Docket Number: Index No. 715438/2018

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  
STANISLAW PALISWODA and MARIANNA  
PALIWODA,

Plaintiffs,

Index No.: 715438/2018  
Motion Seq. No.:3

-against-

**DECISION and ORDER**

GOPAL THAPA,

Defendant.

-----X  
Present: **HONORABLE ULYSSES B. LEVERETT**

Notice of Motion-Affirmation-Statement of Material Facts-Exhibits  
Affirmation in Opposition-Exhibits

Papers Numbered  
EF 54-63  
EF 66-73

Upon the foregoing papers and after oral argument, it is ordered that defendant Gopal Thapa’s motion for an order pursuant to CPLR §3212 granting Defendant 0summary judgment and dismissing Plaintiffs’ Complaint pursuant to Insurance Law §5104(a) in that Plaintiffs did not sustain a serious injury as defined under Insurance Law §5102(d) is decided as follows:

This action was brought to recover damages for serious personal injuries allegedly sustained by plaintiffs as a result of a motor vehicle accident on July 13, 2018 in the vicinity of Queens Boulevard at or near the intersection of 70<sup>th</sup> Avenue, City and County of Queens, State of New York.

Plaintiffs allege that a vehicle owned and operated by Defendant Gopal Thapa came into contact with the vehicle in which Plaintiff Stainslaw Paliwoda was operating and Plaintiff Marianna Paliwoda was a passenger. Plaintiff Stainslaw Paliwoda states that as a result of the accident, he sustained injuries to his lumbar and cervical spine and left shoulder. Plaintiff Marianna Paliwoda alleges injuries to the cervical, thoracic and lumbar spine.

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.” Plaintiffs argue that the only category they are arguing on is significant limitation of use of a body function or system.

“[T]o prove the extent or degree of physical limitation, an expert’s designation of a numeric percentage of a plaintiff’s loss of range of motion can be used to substantiate a claim of serious injury... An expert’s qualitative assessment of a plaintiff’s condition may also suffice, provided that the evaluation has an objective basis and compares the plaintiff’s limitations to the normal function, purpose and use of the affected body organ, member, function or system” See *Toure v Avis Rent A Car Systems, Inc.*, 98 N.Y.2d 345, 350 (2002).

Stanislaw Paliwoda

In support of the motion, defendants assert that Plaintiff Stanislaw Paliwoda did not sustain a serious injury that resulted in permanency or significant limitation as defined in Insurance Law §5102(d). Defendants submitted an orthopedic independent medical examination dated November 22, 2023 by Dr. Stuart Springer.

The report notes that plaintiff was a restrained driver in a rear end collision. He reported that there were no fractures, lacerations or surgeries as a result of the accident but that he had complaints of neck, low back and left shoulder pain.

Following the accident, the Plaintiff went under the care of numerous physicians and received treatment including physical therapy 5 times a week and epidural steroid injections.

The examination of the cervical spine done with a goniometer revealed no spasms nor was there tenderness. The range of motion of the cervical spine revealed flexion to 45 degrees (50 normal), extension 50 degrees (normal 60 degrees) right and left lateral flexion 35 degrees (normal 45 degrees), right and left rotation to 70 degrees (normal 80). The plaintiff has 5/5 muscle strength and no sensory deficits in the upper extremities.

There was no tenderness or spasms noted over the paraspinal musculature on palpation to the lumbar spine. There was range of motion of the lumbar spine to 60 degrees flexion (normal 60 degrees), right and left lateral bending to 25 degrees (normal 25) and 25 degrees extension (normal 25 degrees). Sensory examination of the lower extremities was normal, there was no atrophy noted in the intrinsic muscles of the lower extremities and straight leg raising was negative.

The left shoulder revealed no tenderness upon palpation nor was there effusion or crepitus noted. Range of motion revealed abduction to 180 degrees (normal 180), forward flexion to 180 degrees (normal 180), internal rotation to 80 degrees (normal 80 and external rotation to 90 degrees (normal 90).

Dr. Springer’s impression of the exam was that the alleged cervical spine strain/sprain, alleged lumbar spine sprain/strain and alleged left shoulder sprain/strain were all resolved. He opined that the Plaintiff did not sustain any significant or permanent injury as a result of the July 13, 2018 motor vehicle accident. The Defendant argues that Dr. Springers findings that there were no objective clinical findings indicative of a present disability, and functional impairment, which would prevent the Plaintiff from engaging in usual activities is supported by the Plaintiff’s

testimony that he had no back pain 3 month prior to the deposition and was able to do to continue his work as a handyman though it was not as precise.

Plaintiff in opposition to the motion state that defendant have not demonstrated that plaintiff did not sustain a serious injury as defined by Insurance Law §5102 (d) and that Plaintiff sustained a permanent consequential limitation of use and signification limitation of use of his left shoulder and cervical and lumbar spine.

Plaintiff submitted a physician's affirmation from Leon Reyfman, M.D. based upon the examination of Plaintiff on April 29, 2024. Dr. Reyfman stated that Plaintiff complained of pain to the lower back, neck and left shoulder that was exacerbated by mechanical type activities.

Upon examination of the lumbar spine, tenderness on palpation over L3-4, L4-5 and L5-S1 was revealed. Range of motion examination revealed flexion to 70 degrees (normal 90) extension to 15 degrees (normal 30), right lateral flexion to 20 degrees (normal 25), left lateral flexion to 20 degrees (25 degrees), right rotation to 20 degrees (normal 30) and left rotation to 20 degrees (normal 30).

The examination of the cervical spine revealed tenderness at the upper trapezius muscle and periscapular region. Dr. Reyfman stated that the examination of the cervical spine revealed painful and decreased range of motion via a handheld goniometer. Range of motion was flexion to 45 degrees (normal 60), extension to 40 degrees (normal 45), right rotation to 70 degrees (normal 80) and left rotation to 70 degrees (80 degrees).

Range of motion of the left shoulder revealed flexion to 140 (normal 180 degrees), extension to 45 degrees (normal 60), abduction to 145 degrees (normal 180), adduction to 25 degrees (normal 30), internal rotation to 60 degrees (normal 70) and external rotation to 75 degrees (normal 90).

His final diagnosis was of a herniated disc of the lumbar and cervical spines and left shoulder derangement. Based upon Dr. Reyfman's professional medical opinion that Stanislaw Paliwoda sustained a significant permanent partial and quantifiable loss of use and functions to his neck, lower back and left shoulder as a result of the July 13, 2018 accident and that his complaints required additional physical therapy and pain management visits.

Plaintiff argues that Dr. Springer's normal values are different than those provided by treating physicians and though Dr. Springer used his normal ranges of motion measurements, he affirmed in his report as being the measurements that constitute "normal" accordingly to the same standards by AMA "Guides to the Evaluation of Permanent Impairment" (5th Edition). Plaintiff argues that Stainslaw Paliwoda would then not exhibit normal ranges of motion, but reduced range of motion.

Marianna Paliwoda

Defendant also asserts that Plaintiff Marianna Paliwoda did not sustain a serious injury as defined in Insurance Law §5102(d). Defendant submitted an orthopedic independent medical examination dated November 22, 2023 by Stuart Springer, M.D.

The report notes that Plaintiff was a restrained front-seat passenger in a rear end collision. He reported that there were no fractures, lacerations or surgeries as a result of the accident but that he had complaints of neck, low back and left shoulder, right shoulder and left knee pain. Plaintiff reported that she was under the care of various physicians, and received physical therapy 4 times a week. At the time of the exam, the Plaintiff was no longer receiving therapy, she had no restrictions, had no home exercise program and had not received any injections.

The examination of the cervical spine done with a goniometer revealed no tenderness to palpation of the paraspinal musculature. Range of motion revealed flexion 45 degrees (normal 50 degrees), right and left lateral rotation 60 degrees (normal 80 degrees), extension 50 degrees (normal 60 degrees), and right and left lateral bending at 35 degrees (normal 45 degrees). The plaintiff had 5/5 motor strength in all muscle groups and no sensory deficits in the upper extremities.

There was no tenderness to palpation over the thoracic paraspinal musculature. Range of motion of the thoracic spine revealed right lateral bending 45 degrees (45 degrees normal), left lateral bending 45 degrees (45 degrees normal), right rotation 30 degrees (30 degrees normal) and left rotation 30 degrees (30 degrees normal).

There was no spasm or tenderness noted over the lumbar paraspinal musculature on palpation. Range of motion of the lumbar spine revealed flexion 60 degrees (60 degrees normal), extension 25 degrees (25 degrees normal), right lateral bending 25 degrees (25 degrees normal) and left lateral bending 25 degrees (25 degrees normal). Muscle Strength was graded at 5/5 bilaterally. Sensory examination of the lower extremities was normal and there was no atrophy noted in the intrinsic muscles of the lower extremities.

Dr. Springer concluded the examination with reports that the alleged injured body parts were fully resolved. He opined that the Plaintiff did not sustain any significant or permanent injury as a result of the motor vehicle accident. He found that there were no objective clinical findings indicative of a present disability nor functional impairment which would prevent the Plaintiff from engaging in usual activities.

Plaintiff in opposition to the motion state that defendant has not demonstrated that plaintiff did not sustain a serious injury as defined by Insurance Law §5102 (d).

Plaintiff submitted a physician's affirmation from Leon Reyfman, M.D. based upon the examination of Plaintiff on April 29, 2024. Dr. Reyfman stated that Plaintiff complained of pain to the lower back and neck that was exacerbated by mechanical type activities.

Upon examination of the lumbar spine, tenderness on palpation over L3-4, L4-5 and L5-S1 was revealed. Range of motion taken via handheld goniometer revealed flexion to 75 degrees (normal 90), extension to 25 degrees (normal 30), right lateral flexion to 15 degrees (normal 25), left lateral flexion to 15 degrees (25 degrees), right rotation to 20 degrees (normal 30) and left rotation to 20 degrees (normal 30).

The examination of the cervical spine revealed tenderness at the upper trapezius muscle and periscapular region and paravertebral over the right and left C2-3, C3-4, C4-5, C5-6 and C6-7 cervical facet joints. Dr. Reyfman stated the examination of the cervical spine revealed painful and decreased range of motion via a handheld goniometer. Range of motion was flexion to 45 degrees (normal 60), extension to 35 degrees (normal 45), right rotation to 60 degrees (normal 80) and left rotation to 60 degrees (80 degrees).

His final diagnosis was of a herniated disc of the lumbar and cervical spines and muscle spasm. Based upon Dr. Reyfman’s professional medical opinion that Marianna Paliwoda sustained injuries that are permanent in nature and that they are significant and serious as she has lost the function capacity of her neck and lower back due to the July 13, 2018 motor vehicle accident.

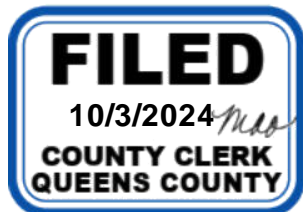
It is well established that the proponent of summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact. See *Zuckerman v City of New York*, 49 NY 2d 557 (1980). Here, the 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).

Accordingly, it is hereby

ORDERED, that defendant Gopal Thapa’s motion for an order pursuant to CPLR § 3212 granting defendant summary judgment and dismissing the complaint of Plaintiffs Stanislaw and Marianna Paliwoda on the grounds that there are no triable issues of fact, in that plaintiffs cannot meet the serious threshold requirement mandated by Insurance Law §5102 (d) is denied.

This is the decision and order of the Court.

Dated: October 2, 2024



*Ulysses B. Leverett*  
Hon. Ulysses B. Leverett, J.S.C.

**HON. ULYSSES B. LEVERETT**