

**Mena v Lee**

2012 NY Slip Op 31908(U)

July 17, 2012

Sup Ct, Queens County

Docket Number: 5507/2010

Judge: Robert J. McDonald

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK  
CIVIL TERM - IAS PART 34 - QUEENS COUNTY  
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD  
**Justice**

- - - - - x

YOLANDA MENA, Index No.: 5507/2010  
Plaintiff, Motion Date: 05/31/12  
- against - Motion No.: 32  
Motion Seq.: 1

MARGARET LEE and JAMES LEE,  
Defendants.

- - - - - x

The following papers numbered 1 to 14 were read on this motion by defendants, MARGARET LEE and JAMES LEE, for an order pursuant to CPLR 3212, granting defendant summary judgment and dismissing the plaintiff's complaint on the ground that the plaintiff did not sustain a serious injury within the meaning of Insurance Law §§ 5102 and 5104:

	<u>Papers Numbered</u>
Notice of Motion-Affidavits-Exhibits.....	1 - 6
Affirmation in Opposition-Affidavits-Exhibits.....	7 - 11
Reply Affirmation.....	12 - 14

This is a personal injury action in which the plaintiff, YOLANDA MENA, seeks to recover damages for injuries she sustained as a result of a motor vehicle accident that occurred on September 24, 2009, at or near the intersection of Union Avenue and 29<sup>th</sup> Street, Queens County, New York.

At the time of the accident, plaintiff Yolanda Mena, was employed as a taxi driver and was operating a Lincoln Town Car. She had finished working for the day and was driving on Union Street in the direction of her home. When she reached the intersection of 29<sup>th</sup> Avenue she observed that there was no traffic control device in her direction but traffic proceeding on 29<sup>th</sup> Avenue was controlled by a stop sign. As she entered the

intersection her vehicle struck the vehicle operated by defendant James Lee and owned by defendant Margaret Lee. Plaintiff allegedly sustained physical injuries as a result of the accident.

In her verified Bill of Particulars, the plaintiff states that as a result of the accident she sustained, inter alia, a partial tear of the supraspinatus tendon of the left shoulder, disc herniations at C3-4, C4-5, C5-6, C7-T1, a disc bulge at C6-7 and exacerbation of prior injuries to her cervical and lumbar spines.

The plaintiff contends that she sustained a serious injury as defined in Insurance Law § 5102(d) in that she sustained a permanent loss of use of a body organ, member function or system; a permanent consequential limitation or use of a body organ or member; a significant limitation of use of a body function or system; and a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff from performing substantially all of the material acts which constitute her usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

Defendant now moves for an order pursuant to CPLR 3212(b), granting summary judgment dismissing the plaintiff's complaint on the ground that plaintiff did not suffer a serious injury as defined by Insurance Law § 5102.

In support of the motion, defendant submits an affirmation from counsel, Joseph G. Gallo, Esq; a copy of the pleadings; plaintiff's verified bill of particulars; the affirmed medical report of Dr. Isaac Cohen; radiological reports of Dr. John Himelfarb and a copy of the transcript of the plaintiff's examination before trial.

Dr. Isaac Cohen, a board certified orthopedic surgeon, retained by the defendant, examined plaintiff on September 20, 2011. At the time of the examination she was 52 years old. Plaintiff told Dr. Isaac that as a result of this accident she sustained injuries to her right shoulder and lumbosacral spine. She related that she had prior spinal fusion surgery in 2004. In addition she was involved in a prior motor vehicle accident in 2008 where she injured both shoulders, her left knee and lumbosacral spine. She told Dr. Cohen that she was out of work 3 - 4 weeks following the accident. On the day of the examination she presented with persistent pain in the lower back and left shoulder as well as the left hip area. Dr. Cohen reviewed the

medical reports regarding the plaintiff's treatment including her prior spinal fusion surgery in 2004 and treatment for a prior automobile accident in 2008. As part of his physical examination Dr. Cohen performed objective and comparative range of motion testing. He found a 17 per cent limitation of range of motion in the cervical spine. However, there were no significant limitations of range of motion in the bilateral shoulders and thoracolumbar spine. His diagnosis was lumbar spine strain, resolved, superimposed on prior lumbar fusion surgery and cervical and thoracic spine strains, resolved. He states that the plaintiff demonstrated only pre-existent degenerative changes with no evidence of acute posttraumatic changes. He states that there was no evidence of any permanent conditions as a result of the accident.

In her examination before trial, taken on August 15, 2011, plaintiff, testified that following the accident she was driven by her husband to Flushing Hospital where she was treated and released the same day. The following day she began treatments at New York Spine Physical Therapy, P.C. She continued treating there for five - six months, 2 - 3 times per week. She testified that she had previously injured her right shoulder in a prior automobile accident on November 23, 2008. She also stated that she had spinal surgery in 2005 due to a medical condition. She testified that returned to work after four days

Defendant's counsel contends that the medical report of Dr. Cohen as well as the transcript of the plaintiff's examination before trial in which she states that she returned to work four days post-accident are sufficient to establish, prima facie, that the plaintiff has not sustained a permanent consequential limitation or use of a body organ or member; a significant limitation of use of a body function or system; or a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff from performing substantially all of the material acts which constitute her usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

In opposition, plaintiff's attorney, Francesco Pomara, Esq., submits his own affirmation as well as the affirmation of Dr. Steven Salvati; the affidavit of chiropractor, Dr. Richard Grosso, the affirmations of radiologists John Himelfarb and Dr. Richard Rizzuti, and the affidavit of plaintiff dated April 17, 2012.

Dr. Salvati, who is board certified in internal medicine examined the plaintiff on September 24, 2009, the date of the accident. He stated that he was aware that prior to the instant accident the plaintiff had sustained multiple herniated discs at C3-4, C4-5, C5-6 and C7-T1. She also suffered from tendinitis of the left shoulder prior to the accident. She told Dr. Salvati that the subject accident amplified her pain that had significantly decreased since the prior accident. His examination indicated significant limitations of range of motion of the cervical spine, lumbar spine, and both shoulders. He states that she treated at his facility until May 4, 2010 when her no-fault benefits were terminated and she could not afford to pay out-of-pocket and that as the injuries were chronic no further treatment would be necessary. He stated that the subject accident exacerbated her prior injuries and resulted in a permanent partial disability. He states that she returned for a follow-up re-examination on March 22, 2012 at which time he performed objective and comparative range of motion tests and found that the plaintiff had significant limitations of range of motion of the cervical spine, lumbar spine, and bilateral shoulders. His expert opinion was that the range of motion limitations were causally related to the accident of September 24, 2009 in that the subject accident exacerbated the plaintiff's prior cervical, lumbar and shoulder injuries. In Dr. Salvati's opinion, plaintiff sustained a permanent - partial disability causally related to the subject accident.

Dr. Grosso, plaintiff's chiropractor, submits an affidavit stating that he first examined Ms. Mena on October 13, 2009 with regards to her September 2009 accident. His range of motion testing showed significant limitations of the cervical spine. He stated that she was treated at his facility for her prior accident and that she was largely pain free before the subject accident. He opined that the injuries sustained in the subject accident exacerbated her cervical, lumbar and left shoulder injuries as well as causing her right shoulder injuries. He stated that he was aware of plaintiff's prior spinal surgery and her prior accident and that her present injuries were causally related to the subject accident and were permanent in nature. He stated that the plaintiff sustained a partial permanent disability as a result of the subject accident. Dr. Grosso re-evaluated Ms. Mena on March 22, 2012 and found that she was still suffering from significant limitations of range of motion of the cervical spine and that is suffering from a permanent condition.

Dr. Himelfarb, a radiologist submits an affirmed report dated January 27, 2012 stating that he reviewed the plaintiff's MRI of the cervical spine which showed herniations at C3-3, C4-5 C5-6, C7-T1 and disc bulge at C7. He also reviewed the MRI study of the plaintiffs left shoulder which showed a partial intrasubstance tear of the supraspinatus tendon.

In her affidavit, Ms. Mena states that as she entered the intersection at Union Street and 29<sup>th</sup> Road, the defendant failed to appropriately stop at the stop sign and the front of her vehicle impacted the driver's side of the defendant's vehicle. She injured her left shoulder as a result of the impact. She states that as a result of a prior automobile accident in November 2008, she had injured her left shoulder and sustained multiple disc herniations as well as a bulging disc. She states that as a result of the instant accident the pain in her lower back, neck and shoulders increased dramatically. She states that after the accident she received physical therapy treatments at Main Street Med Care PC through May 4, 2010. She stopped treating because her no-fault benefits were cut off and she did not have the funds to pay for treatment out-of-pocket. Additionally, plaintiff was advised that as her injuries were chronic in nature no further treatment would be necessary. The accident also exacerbated the pain that she had in her lower back as a result of her spinal fusion in 2004 and car accident of 2008. She states that even though she had back surgery and sustained injuries in a prior accident, she had only minimal pain until this accident caused the pain to return significantly.

On a motion for summary judgment, where the issue is whether the plaintiff has sustained a serious injury under the no-fault law, it is defendant's initial obligation to demonstrate that the plaintiff has not sustained a "serious injury" by submitting affidavits or affirmations of its medical experts who have examined the litigant and have found no objective medical findings which support the plaintiff's claim (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]). Where defendants' motion for summary judgment properly raises an issue as to whether a serious injury has been sustained, it is incumbent upon the plaintiff to produce evidentiary proof in admissible form in support of his or her allegations. The burden, in other words, shifts to the plaintiff to come forward with sufficient evidence to demonstrate the existence of an issue of fact as to whether he or she suffered a serious injury

(see Gaddy v. Eyler, 79 NY2d 955 [1992]; Zuckerman v. City of New York, 49 NY2d 557[1980]; Grossman v. Wright, 268 AD2d 79 [2d Dept 2000]).

Here, the proof submitted by the defendant, including the affirmed medical report of Dr. Cohen and the plaintiff's examination before trial in which she stated that she returned to work four days following the accident, were sufficient to meet their prima facie burden by demonstrating that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]). Although Dr. Cohen did find limitations of range of motion in the plaintiff's cervical spine, he fully explained that the limitations were not causally connected to the accident in question but rather, were the result of degenerative and pre-existing injuries (see Schultz v Penske Truck Leasing Co., L.P., 59AD3d 1119 [4<sup>th</sup> Dept. 2009]; Passaretti v. Ping Kwok Yung, 39 AD3d 517 [2d Dept. 2007]; Fryar v First Student, Inc., 21 AD3d 525 [2d Dept. 2005]; cf. Burns v Stranger, 31 AD3d 360 [2d Dept. 2006]).

However, this Court finds that the plaintiff raised triable issues of fact by submitting the affirmed medical reports of Drs. Grosso and Salvati attesting to the fact that after a qualitative examination the plaintiff had substantiated injuries contemporaneous to the accident and had significant limitations in range of motion at a recent examination, and concluding that the plaintiff's limitations were significant and permanent and resulted from trauma causally related to the accident. Although the plaintiff's physicians were aware of the plaintiff's prior accident and her prior spinal fusion they both opined that the subject accident exacerbated the plaintiff's pre-existing cervical, lumbar and shoulder injuries (see Perl v Meher, 18 NY3d 208 [2011]; Austin v Rent A Ctr. E., Inc., 90 AD3d 1542 [4<sup>th</sup> Dept. 2011]; Ortiz v Zorbas, 62 AD3d 770 [2d Dept. 2009]; Azor v Torado, 59 AD3d 367 [2d Dept. 2009]). As such, the plaintiff raised a triable issue of fact as to whether she sustained a serious injury under the permanent consequential and/or the significant limitation of use categories of Insurance Law § 5102(d) as a result of the subject accident (see Khavosov v Castillo, 81 AD3d 903[2d Dept. 2011]; Mahmood v Vicks, 81 ADd 606 [2d Dept. 2011]; Compass v GAE Transp., Inc., 79 AD3d 1091[2d Dept. 2010]; Evans v Pitt, 77 AD3d 611 [2d Dept. 2010]; Tai Ho Kang v Young Sun Cho, 74 AD3d 1328 743 [2d Dept. 2010]).

In addition, Drs. Grosso and Salvati adequately explained the gap in the plaintiff's treatment by stating that her no fault benefits were terminated and in addition, the plaintiff reached the point of maximum medical improvement (see Abdelaziz v Fazel, 78 AD3d 1086 [2d Dept. 2010]; Tai Ho Kang v Young Sun Cho, 74 AD3d 1328 [2d Dept. 2010]; Gaviria v Alvarado, 65 AD3d 567 [2d Dept. 2009]; Bonilla v Tortori, 62 AD3d 637 [2d Dept. 2009]).

Accordingly, for the reasons set forth above, it is hereby,

ORDERED, that the defendant's motion for an order granting summary judgment dismissing the plaintiff's complaint is denied.

Dated: July 17, 2012  
Long Island City, N.Y.

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**ROBERT J. MCDONALD, J.S.C.**