

**Foster v Gayle**

2010 NY Slip Op 31735(U)

July 6, 2010

Sup Ct, Nassau County

Docket Number: 18508/08

Judge: Randy Sue Marber

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**  
**JUSTICE**

TRIAL/IAS PART 20

\_\_\_\_\_ X

SANGELA FOSTER,

Plaintiff,

Index No. 18508/08  
Motion Sequence...01, 02  
Motion Date... 04/06/10

-against-

**XXX**

KAREN GAYLE, MARGARET GAJDA and  
STANLEY GAJDA,

Defendants.

\_\_\_\_\_ X

Papers Submitted:

- Notice of Motion.....X
- Notice of Cross-Motion.....X
- Affirmation in Opposition.....X
- Reply Affirmation.....X

The Defendants, STANLEY GAYDA and MARGARET GAYDA (s/h/a STANLEY GAJDA and MARGARET GAJDA) seek an order granting summary judgment, pursuant to CPLR § 3212, dismissing the complaint of the Plaintiff on the grounds that the Plaintiff's injuries do not satisfy the "serious injury" threshold requirement of Insurance Law § 5102 (d) (Mot. Seq. 01). The co-Defendant, KAREN GAYLE, cross-moves for similar relief by adopting and incorporating the arguments set forth in the Defendants, GAYDA and GAYDA's motion papers (Mot. Seq. 02). The Defendants' motion and cross-motion are

determined as hereinafter provided.

This action arises out of a motor vehicle accident which occurred on February 15, 2008 on Long Beach Road, approximately 100 feet north of its intersection with West Windsor Parkway, in Oceanside, New York. The Plaintiff commenced this action by the filing of a Summons and Complaint on or about October 2, 2008. The Plaintiff seeks damages for alleged personal injuries sustained in the motor vehicle accident.

Pursuant to the Defendants' demand for a Bill of Particulars, the Plaintiff served a Verified Bill of Particulars on or about January 29, 2009, wherein the Plaintiff claimed she sustained serious injuries allegedly as a result of the motor vehicle accident.

Specifically, the Plaintiff claimed that she sustained the following injuries:

Left central disc herniation at the C5-6 level, flattening the ventral portion of the cervical cord; denervation on the paracervicals at C6-7, more on the right, as confirmed by EMG studies of the upper extremities; delayed right peroneal F-waves with denervation on the paraspinals at L4-L5, more on the right as confirmed by EMG studies of the lower extremities; thoracic spine derangement; lumbosacral radiculopathy; cervical radiculopathy; right shoulder impingement; post traumatic headaches and dizziness; traumatic cervical sprain; weakness of the right shoulder with muscle spasm; positive straight leg raising, bilaterally; decreased range of motion of the cervical spine; tenderness to palpation at the C5 level; bilateral shoulder spasming; decreased range of motion of the lumbosacral spine; straightening of the cervical spine with underlying muscle spasm.

*See* Plaintiff's Verified Bill of Particulars, dated January 29, 2009, attached to the Defendants' Motion as Exhibit "E".

The Plaintiff claims, in her Verified Bill of Particulars, that she sustained a serious injury which has prevented her from performing substantially all of the material acts which constituted such personal, usual, and customary daily activities for a period of ninety (90) days, during the one hundred eighty (180) days immediately following the date of the accident. *See* Plaintiff's Verified Bill of Particulars, dated January 29, 2009, attached to the Defendants' Motion as Exhibit "E". The Plaintiff further claims that she sustained a permanent and/or partial consequential limitation of use of a body organ and/or member and/or a permanent significant limitation of use of a body function and/or system, and/or pain which is expected to be permanent with accompanying pain which is expected to be permanent. *Id.*

In a personal injury action, a summary judgment motion seeking to dismiss the complaint requires that a defendant establish a prima facie case that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d). *Gaddy v. Eyster*, 79 N.Y.2d 955 (1992). Upon such a showing, it becomes incumbent on the plaintiff to come forward with sufficient evidence, in admissible form, to demonstrate the existence of a question of fact on the issue. *Id.* The court must then decide whether the plaintiff has established a prima facie case of sustaining a serious injury. *Licari v. Elliot*, 57 N.Y.2d 230 (1983).

In support of a claim that the plaintiff has not sustained a serious injury, the defendant may rely either on the sworn statements of the defendant's examining physicians

or the unsworn reports of the plaintiff's examining physicians. *See Pagano v. Kingsbury*, 182 A.D.2d 268 (2nd Dept. 1992). However, unlike the movant's proof, unsworn reports of the plaintiff's examining doctors or chiropractors are not sufficient to defeat a motion for summary judgment. *Grasso v. Angerami*, 79 N.Y.2d 813 (1991).

Essentially, in order to satisfy the statutory serious injury threshold requirement, the legislature requires objective proof of a plaintiff's injury. The Court of Appeals in *Toure v. Avis Rent-a-Car Systems*, 98 N.Y.2d 345 (2002), stated that a plaintiff's proof of injury must be supported by objective medical evidence, such as sworn MRI and CT scan tests. However, these sworn tests must be paired with the doctor's observations during the physical examination of the plaintiff. Unsworn MRI reports can also constitute competent evidence if both the plaintiff and the defendant rely on those reports. *See Gonzalez v. Vasquez*, 301 A.D.2d 438 (1st Dept. 2003).

Conversely, even where there is ample proof of a plaintiff's injury, certain factors may nonetheless override a plaintiff's objective medical proof of limitations and permit dismissal of a plaintiff's complaint. Specifically, additional contributing factors such as a gap in treatment, an intervening medical problem or a pre-existing condition would interrupt the chain of causation between the accident and the claimed injury. *Pommels v. Perez*, 4 N.Y.3d 566 (2005).

In support of their motion, the Defendants assert that the Plaintiff's own admissions at her Examination Before Trial establish that she did not sustain a "serious

injury” within the meaning of the seventh or eighth category specified in Insurance Law § 5102 (d). The Plaintiff testified that she did not seek immediate medical treatment following the accident. *See* transcript of Plaintiff’s EBT attached to the Defendants’ Motion as Exhibit “F” at pp. 38-39. The Plaintiff saw her primary care physician five days after the accident, at which time she complained of pain in her neck, shoulder, right arm and lower back. *Id.* at pp. 43-44. The Plaintiff’s primary care physician wrote her a prescription and referred her to a physical therapist in his office. *Id.* at pp. 46, 48.

In support of their prima facie case that the Plaintiff did not sustain a “serious injury”, the Defendants note the Plaintiff’s admissions as to her involvement in a prior automobile accident. The Plaintiff does not recall when the prior accident occurred. The Plaintiff instituted an action for personal injuries to her neck and back arising out of the prior accident. *Id.* at p.69. The Plaintiff testified that she could not remember where the accident was brought or whether or not there was a trial, but recalled receiving a sum of money from a settlement. *Id.* at pp. 70-74.

The Defendants also submitted the affirmed findings and opinions of Dr. Michael J. Katz, a board certified orthopedic surgeon, based on his examination of the Plaintiff and review of her medical records. Dr. Katz examined the Plaintiff on November 13, 2009. Dr. Katz performed quantified and comparative range of motion testing using a goniometer, as well as other clinical tests. Dr. Katz’ examination of the Plaintiff’s cervical spine revealed that there was no tenderness about the cervical spine, no paravertebral muscle

spasm and all ranges of motion of the cervical spine were normal. Dr. Katz' examination of the thoracolumbosacral spine revealed that the gait was normal without antalgic trendelenburg component. There was no paravertebral muscle spasm and all ranges of motion of the thoracolumbosacral spine were normal. Dr. Katz' examination of the right shoulder and right arm revealed that there was no swelling, erythema, or induration. There was no joint line tenderness, the deltoid was well-developed, sensation was intact, no dislocation, clicking or grating with movement and all range of motion was normal. Dr. Katz' examination of the left shoulder revealed that there was no swelling, erythema, or induration. There was no joint line tenderness, the deltoid was well-developed, sensation was intact in the Axillary nerve autonomous zone and there was no dislocation, clicking, or grating with movement. All range of motion of the left shoulder was normal.

Based on Dr. Katz' clinical findings, medical records review and examination of the Plaintiff, he concluded that the Plaintiff showed no signs or symptoms of permanence relative to the musculoskeletal system and relative to the accident which occurred on February 15, 2008. Dr. Katz further concluded that the Plaintiff is currently not disabled, is capable of gainful employment as a family service worker and is capable of doing her activities of daily living.

With respect to the ninth category of the "serious injury" threshold requirement, which requires the Plaintiff to establish that her injuries constituted "a medically determined injury or impairment of a non-permanent nature" which prevented her "from

performing substantially all of the material acts which constituted [her] usual and customary daily activities for not less than 90 days during the 180 days immediately following [the accident],” the Defendants cite the Plaintiff’s testimony in support of their position that the Plaintiff did not meet the threshold requirement under this category. Specifically, the Plaintiff testified that in the three months before the accident, her days were mostly spent searching for a job and doing household chores. The Plaintiff also testified that she used to exercise. The Plaintiff testified she would exercise to DVDs, do weight lifting, pilates, yoga, and work out on her exercise machine. *See* transcript of Plaintiff’s EBT attached to the Defendants’ Motion as Exhibit “E” at pp. 89-93. The Plaintiff testified that in the three months following the accident, she could not exercise at all and that she could only perform light household chores, such as washing dishes, cooking and dusting. The Plaintiff could no longer mop, vacuum or do laundry after the accident. *Id.* at pp. 93-95.

Based on the admissible evidence, the Court finds that the Defendant has established a prima facie case that the Plaintiff has not sustained a serious injury within the meaning of Insurance Law § 5102 (d), specifically, a significant limitation of use of a body function or system or permanent consequential limitation of a body function or system or 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 ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment. The

burden now shifts to the Plaintiff to raise an issue of fact with respect to whether she meets the serious injury threshold requirement.

In opposition to the Defendants' motion for summary judgment, the Plaintiff submitted her own affidavit (*see* Exhibit "A" attached to the Affirmation in Opposition), an affirmation of Michael D. Green, M.D., a radiologist who read the MRI films (*see* Exhibit "B" attached to the Affirmation in Opposition), and an affirmation of Deepika Bajaj, M.D., a neurologist who treated the Plaintiff from shortly after the accident to date (*see* Exhibit "C" attached to the Affirmation in Opposition).

The affirmation of Dr. Bajaj indicates that the Plaintiff sustained significant injuries to both shoulders, neck, right arm, upper back and lower back. Dr. Bajaj notes that since the accident, the Plaintiff has been complaining of headaches, dizziness, neck pain and tightness and there is radiation of pain into both shoulders which is more pronounced on the right side. Dr. Bajaj states in the Plaintiff's "past medical history" that there were no medical records available with respect to the Plaintiff's earlier motor vehicle accident from ten years ago. He opined that, in his opinion, based on the acute nature and extent of the injuries complained of, that they are of recent origin. Her examination of the Plaintiff's cervical spine revealed significant limited range of motion. Forward flexion was noted at 20 degrees (normal 50 degrees), extension 20 degrees (normal 60 degrees), right rotation 20 degrees (normal 45 degrees), left rotation 20 degrees (normal 45 degrees), right lateral flexion 10 degrees (normal 80 degrees) and left lateral flexion 10 degrees (normal 80

degrees). Dr. Bajaj noted that the loss of range of motion is medically significant and sufficient to prevent, or interfere with, the activities of daily living. Dr. Bajaj's examination of the Plaintiff's lumbosacral spine also revealed significant range of motion restrictions.

Dr. Bajaj failed to reference any objective range of motion testing that was utilized in order to medically determine the Plaintiff's limited range of motion. The findings, albeit significant, are merely conclusory findings without a basis upon which those findings were arrived. The failure of the Plaintiff's expert and/or treating physician to set forth the objective tests he/she performed to arrive at the conclusion that the Plaintiff sustained limitations in cervical spine range of motion is fatal to the Plaintiff's case. *Sapienza v. Ruggiero*, 57 A.D.3d 643 (2d Dept. 2008); *see also Budhram v. Ogunmoyin*, 53 A.D.3d 640, 641 (2d Dept. 2008); *Piperis v. Wan*, 49 A.D.3d 840, 841 (2d Dept. 2008); *Murray v. Hartford*, 23 A.D.3d 629 (2d Dept. 2005); *Nelson v. Amicizia*, 21 A.D.3d 1015, 1016 (2d Dept. 2005).

To meet the threshold regarding significant limitation of use of a body function or system or permanent consequential limitation of a body function or system, the law requires that the limitation be more than minor, mild or slight and that the claim be supported by medical proof based upon credible medical evidence of an objectively measured and quantified medical injury or condition. *Gaddy v. Eyles, supra*; *Licari v. Elliot*, 67 N.Y.2d 230 (1982). An expert's qualitative assessment of a plaintiff's condition is also probative, provided: (1) the evaluation has an objective basis and (2) the evaluation compares the

plaintiff's limitation to the normal function, purpose and use of the affected body organ, member, function or system. *Id.*

Whether a limitation of use or function is "significant" or "consequential" (i.e., important; see *Countermine v. Galka*, 189 A.D.2d 1043, 1045 (3rd Dept. 1993) relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part. *Robillard v. Robbins*, 168 A.D.2d 803 (3rd Dept. 1990); *affd.* 78 N.Y.2d 1105 (1991).

Applying the above well settled law to the case at bar, the Court finds that the Plaintiff has failed to meet her burden to rebut the Defendants' prima facie case that the Plaintiff does not meet the "serious injury" threshold requirement. In addition to the failure of Dr. Bajaj to reference any objective tests that were utilized to determine the Plaintiff's limited range of motion, the record is devoid of any other credible, admissible medical evidence that establishes the Plaintiff's limited range of motion. The only other medical reports submitted are the MRI findings of Dr. Green. See Exhibit "B" attached to Affirmation in Opposition. It is well settled that positive MRI findings and positive EMG findings alone are insufficient to establish a "serious injury" pursuant to the no-fault threshold law. *Perdomo v. Scott*, 50 A.D.3d 1115 (2nd Dept. 2008); *Francis v. Basic Metal, Inc.*, 144 A.D.2d 634 (2nd Dept. 1988). As discussed, *supra*, the Plaintiff must come forward with some objective evidence. *Toure, supra*. Additionally, the objective evidence must be based upon a recent examination of the Plaintiff. *Cornelius v. Cintas Corp.*, 50 A.D.3d 1085 (2nd

Dept. 2008).


For the above reasons, the Plaintiff failed to meet her burden to establish that there was a significant limitation of use of a body function or system as there is no objective evidence submitted that would tend to prove the Plaintiff's loss of motion. *See Toure v Avis, supra.*

Accordingly, based on the foregoing, it is hereby

**ORDERED**; that the Defendants, GAYDA and GAYDA's motion (Mot. Seq. 01) and the Defendant, GAYLE's cross-motion (Mot. Seq. 02) seeking an order granting summary judgment pursuant to CPLR §3212, dismissing the complaint on the grounds that the Plaintiff's injuries do not satisfy the "serious injury" threshold requirement of Insurance Law § 5102 (d), are **GRANTED**.

This constitutes the decision and order of the Court.

Dated: Mineola, New York  
July 6, 2010

  
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Hon. Randy Sue Marber, J.S.C.  
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**ENTERED**

JUL 07 2010

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