

**Fattal v Leye**

2014 NY Slip Op 31439(U)

May 30, 2014

Supreme Court, New York County

Docket Number: 104496/10

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH  
HON. ARLENE P. BLUTH  
*Justice*

PART 22

Index Number : 104496/2010  
FATTAL, TIFFANY  
vs.  
LEYE, ELHADJI C.  
SEQUENCE NUMBER : 003  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to 6, were read on this motion to/for Summary Jmt  
Notice of Motion/Order to Show Cause — Affidavits — Exhibits Mot + 2 x-mts | No(s). 1, 2, 3  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). 4, 5  
Replying Affidavits \_\_\_\_\_ | No(s). 6

Upon the foregoing papers, it is ordered that this motion and two cross-motions  
are resolved in the accompanying  
decision + order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

**FILED**  
JUN 04 2014  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 5/30/14

*Arlene P. Bluth* J.S.C.  
HON. ARLENE P. BLUTH

1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

**SUPREME COURT OF THE STATE OF NY  
COUNTY OF NEW YORK: PART 22**

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**FILED**

Index No.: 104496/10  
Motion Seq 03

JUN 04 2014

**Tiffany Fattal,**

*Plaintiff,*

*-against-*

**Elhadji C. Leye, Beck Cab Corporation, Fred  
Weingarten and Resham Varaitch,**

*Defendants.*

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COUNTY CLERK'S OFFICE  
NEW YORK

**DECISION/ORDER**

**HON. ARLENE P. BLUTH, JSC**

In this action, plaintiff alleges that on January 4, 2008 she sustained personal injuries in a motor vehicle accident when she was a passenger in defendant Leye's cab which was rear-ended by the co-defendants' cab at 8<sup>th</sup> Avenue and 42<sup>nd</sup> Street in Manhattan. Before the Court are two cross-motions and one motion. The Note of Issue was filed on April 2, 2013. All claims against defendant Weingarten were dismissed pursuant to a separate motion (seq 2) in May 2013.

The main motion, by defendant Varaitch, is to dismiss the complaint for lack of a serious injury. It was timely served on May 21, 2013, within the 60 days for the Note of Issue filing (as required by the Case Scheduling Order.) The other defendants served a "me too" related cross-motion for the same relief in July 2013. The plaintiff served an unrelated cross-motion for summary judgment on the issue of liability in August 2013, well past the 60 day deadline. For the following reasons, the motion is granted and the cross motions are therefore moot. This action is dismissed in its entirety against all remaining defendants.

To prevail on a motion for summary judgment, the defendant has the initial burden to present competent evidence showing that the plaintiff has not suffered a "serious injury" (*see*

*Rodriguez v Goldstein*, 182 AD2d 396 [1992]). Such evidence includes “affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff’s claim” (*Shinn v Catanzaro*, 1 AD3d 195, 197 [1<sup>st</sup> Dept 2003], quoting *Grossman v Wright*, 268 AD2d 79, 84 [1<sup>st</sup> Dept 2000]). Where there is objective proof of injury, the defendant may meet his or her burden upon the submission of expert affidavits indicating that plaintiff’s injury was caused by a pre-existing condition and not the accident (*Farrington v Go On Time Car Serv.*, 76 AD3d 818 [1<sup>st</sup> Dept 2010], citing *Pommells v Perez*, 4 NY3d 566 [2005]). In order to establish prima facie entitlement to summary judgment under the 90/180 category of the statute, a defendant must provide medical evidence of the absence of injury precluding 90 days of normal activity during the first 180 days following the accident (*Elias v Mahlah*, 2009 NY Slip Op 43 [1<sup>st</sup> Dept]). However, a defendant can establish prima facie entitlement to summary judgment on this category without medical evidence by citing other evidence, such as the plaintiff’s own deposition testimony or records demonstrating that plaintiff was not prevented from performing all of the substantial activities constituting customary daily activities for the prescribed period (*id.*).

Once the defendant meets his or her initial burden, the plaintiff must then demonstrate a triable issue of fact as to whether he or she sustained a serious injury (*see Shinn*, 1 AD3d at 197). A plaintiff’s expert may provide a qualitative assessment that has an objective basis and compares plaintiff’s limitations with normal function in the context of the limb or body system’s use and purpose, or a quantitative assessment that assigns a numeric percentage to plaintiff’s loss of range of motion (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350-351 [2002]). Further, where the defendant has established a pre-existing condition, the plaintiff’s expert must address

\* 4] causation (see *Valentin v Pomilla*, 59 AD3d 184 [1<sup>st</sup> Dept 2009]; *Style v Joseph*, 32 AD3d 212, 214 [1<sup>st</sup> Dept 2006]).

In her verified bill of particulars, Ms. Fattal claims to have injured, *inter alia*, her neck, back, both shoulders, both knees, right foot and ankle, head and also suffered ringing in the ears, headaches, dizziness and nausea carpal tunnel syndrome in both wrists. The bill of particulars did not assert a 90/180 claim but reserved the claim for a deposition. The supplemental Bill of Particulars alleges the exacerbation of tics from her previously diagnosed Tourette's Syndrome.

### **Defendant's showing**

Defendants have met their prima facie burden through the affirmed IME reports of Dr. Decter (orthopedist) who examined plaintiff in or about February 2012 and Dr, Singh (neurologist) who examined plaintiff in January 2013.

Dr. Decter looked at the 3/18/08 MRI films of plaintiff's cervical and thoracic spine and found degenerative changes. He called her physical exam "pristine". She had full range of motion and had no complaints about her knees or anything related to carpal tunnel syndrome; in fact, Dr. Decter stated she did not have carpal tunnel syndrome. The Court notes that Dr. Decter stated that there were no relevant preexisting conditions, but his exam was in February 2012 and the Bill of Particulars was supplemented to include exacerbation of Tourette's Syndrome in May 2012.

Dr. Singh examined plaintiff in January 2013, after the bill of particulars was supplemented. He acknowledged that plaintiff claimed the accident exacerbated her Tourette's syndrome, but he stated that her neurological exam was normal. Otherwise, he found full range of motion, that any spine injuries were resolved and that there was no indication of carpal tunnel

syndrome and no neurologic disability.

Defendant also provided the affirmed reports of Dr. Decker, a radiologist. He read the 3/18/08 MRI films of plaintiff's cervical and thoracic spine and found degenerative changes and specifically stated that the bulges, bony ridging and degeneration were not related to the accident.

Defendant refers to plaintiff's deposition transcript, where she testified that she missed ten days of work because of this accident and then returned to her full time job, which, as of the date of the deposition, she still held.

Finally, defendant annexes plaintiff's medical records and points out that those records show that by October, 2008, not even ten months after the accident, plaintiff had full range of motion in her cervical and lumbar spine. By showing normal ranges of motion, defendant made a prima facie showing that plaintiff did not sustain a permanent consequential or significant limitation of use of her spine, shoulders or knees. Defendant also showed that there was no evidence of exacerbation of Tourette's syndrome and that any MRI findings were degenerative and unrelated to the accident. Additionally, defendants met their initial burden with respect to plaintiff's 90/180-day claim by showing that she went back to work full time about ten days after the accident.

### **Plaintiff's showing**

In opposition, plaintiff submits the affirmation of Dr. Paul Green, a neurologist, who examined plaintiff once - on April 2, 2012, four years after the accident. He states that plaintiff told him that she was diagnosed with Tourette's in third grade and has been on several medications over the years. He also states that plaintiff told him that her Tourette's has worsened since the accident. Dr. Green states that there is medical literature describing "multiple cases of

tics that start or worsen after trauma.” In paragraph 8 of his affirmation, he states not once, but twice, that her self-reported worsening tics “MAY” be related to the accident. Obviously, that is not a typographical error - and the fact is that Dr. Green did not causally relate worsening tics to the accident. Of course, Dr. Green is not one of her treating doctors and there is no indication that he ever saw any of her records relating to her longstanding Tourette’s. Had plaintiff’s treating doctor submitted an affirmation stating that he was monitoring/treating her Tourette’s since before the accident and he noticed that her symptoms worsened and that in his opinion the worsening was due to the accident, then perhaps that would have presented an issue of fact. But instead plaintiff went to a brand new doctor - not for treatment but for an affirmation - who could only say that there is some literature of trauma-induced tics, and maybe plaintiff has that, too. Therefore, Dr. Green’s affirmation is conclusory and speculative and fails to raise an issue of fact sufficient to defeat summary judgment.

Plaintiff also submits the affirmation and records of Dr. Visough. While Dr. Visough is a New Jersey doctor and thus not authorized by the CPLR to submit an affirmation, defendant did annex many of his records to his motion (exhibit D pages 60-67) and so the Court will consider Dr. Visough’s records but not conclusions (unless the conclusions are in the records). Plaintiff did not see Dr. Visough until nine months after the accident. At the first visit, on October 14, 2008, he measured normal ranges of motion in all planes except flexion in the lumbar spine which was 70/90 being normal; two weeks later, on October 28<sup>th</sup>, flexion was normal (90/90) and two weeks after that, in December 2008, everything again was normal (see defendant’s exhibit J pages 60-67). And so even if this Court did consider Dr. Visough’s affirmation, he does not state the date of his last examination and so his conclusions would be as of the end of 2008, when he found her range of motion to be normal. Plaintiff failed to submit more recent

[\* 7]

examination results to rebut the defendant's experts' findings of full ranges of motion. *Shu Chi Lam v Wang Dong*, 84 AD3d 515, 516, 922 NYS2d 381 (1<sup>st</sup> Dept 2011).

Plaintiff's radiology reports submitted in opposition are inadmissible as they are not affirmed by the radiologist. Even if they were admissible, they do not state that any abnormalities found were traumatically caused by the accident. Besides, "bulging or herniated discs are not, in and of themselves, evidence of serious injury without competent objective evidence of the limitations and duration of the disc injury" *Wetzel v Santana*, 89 AD3d 554, 55 (1st Dept 2011).

### **Conclusion**

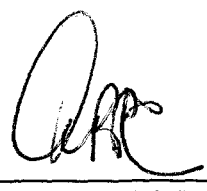
Plaintiff has not raised a triable issue of fact as to significant limitation of use or permanent consequential limitation of use because she did not submit an affirmed report of a recent physical examination and therefore did not rebut the findings of Drs. Decter or Singh, defendant's doctors, who affirmed full range of motions and that any issues were resolved. She has not addressed defendant's finding of degeneration (Decter and Decker). She has not raised an issue of fact regarding her claimed exacerbation of Tourette's because there is no indication that the doctor she saw reviewed a single record, had any objective assessment of her pre-accident Tourette's and only concluded that any increase in tics may be related to the accident - which is speculative and conclusory. She never alleged a 90/180 claim in her bill or particulars and in her deposition she admitted to missing only about ten days of work.

Accordingly, defendant's motion for summary judgment dismissing this action on the grounds that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law §5012(d) is granted, and the case is dismissed. Because plaintiff did not meet the serious injury

threshold, the complaint is dismissed as to all codefendants as well (*see Britton v Villa Auto Corp.*, 89 AD3d 556 [1st Dept 2011]).

This is the Decision and Order of the Court.

Dated: May 30, 2014  
New York, New York



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HON. ARLENE P. BLUTH, JSC

HON. ARLENE P. BLUTH

**FILED**

JUN 04 2014

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