

**Smith v Usman**

2019 NY Slip Op 33153(U)

October 8, 2019

Supreme Court, Kings County

Docket Number: 502073/2017

Judge: Paul Wooten

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**SUPREME COURT OF THE STATE OF NEW YORK  
KINGS COUNTY**

**PRESENT: HON. PAUL WOOTEN**  
*Justice*

**PART 97**

**SARAH SMITH,**

Plaintiff,

INDEX NO. 502073/2017

- against -

MOT. SEQ NO. 2,3

**MUHAMMAD USMAN, ANTWAN D.  
MAGNUM and CHARLIE BLACK CAR,  
INC.,**

Defendants.

In accordance with CPLR 2219(a), the following papers were read on this motion by defendants for summary judgment.

	PAPERS NUMBERED	
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____	1	4
Answering Affidavits — Exhibits (Memo) _____	2	5
Replying Affidavits (Reply Memo) _____	3	
Transcript _____		

Motion sequence numbers 2 and 3 are consolidated for disposition.

This is a personal injury action relating to a motor vehicle accident that occurred on July 14, 2016 at approximately 2:20 p.m. at or near the intersection of Fulton Street and Vermont Street in Kings County. According to the Verified Complaint, plaintiff Sarah Smith (plaintiff) was a passenger in the motor vehicle owned by defendant Charlie Black Car, Inc. (Charlie) and operated by defendant Muhammad Usman (Usman) when it came into contact with the motor vehicle owned and operated by defendant Antwan D. Magnum (Magnum) causing her to sustain serious bodily injuries, *inter alia*, to her cervical and lumbar spine, and left knee and left hip.

Before the Court is a motion by Usman, pursuant to CPLR 3212, for summary judgment dismissing the Verified Complaint against him on the ground that the injuries claimed do not satisfy the "serious injury" threshold requirement of the New York Insurance Law §§ 5102(d) and 5104 (motion sequence 2). Plaintiff is in opposition to the motion. Usman submits a reply. Also before the Court is a cross-motion by Magnum, pursuant to CPLR 3212, for summary judgment dismissing the Verified Complaint against him on the ground that the injuries claimed do not satisfy the "serious injury" threshold requirement of the New York Insurance Law §§ 5102(d) and 5104 (motion sequence 3). Plaintiff submits opposition to this motion.

#### SERIOUS INJURY THRESHOLD

A party seeking damages for pain and suffering arising out of a motor vehicle accident must establish that he or she has sustained at least one of the nine categories of "serious injury" as set forth in Insurance Law § 5102(d) (see *Licari v Elliott*, 57 NY2d 230 [1982]).

Insurance Law § 5102(d) defines "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 loss]; permanent consequential limitation of use of a body organ or member [permanent consequential limitation]; significant limitation of use of a body function or system [significant limitation]; 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 ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment [90/180].

The Court must determine whether, as a matter of law, plaintiff has sustained a "serious injury" under at least one of the claimed categories. "Serious injury" is a threshold issue, and thus, a necessary element of a plaintiff's prima facie case (*Licari*, 57 NY2d at 235; Insurance Law § 5104[a]). The serious injury requirement is in accord with the legislative intent underlying the No-Fault Law, which was enacted to "weed out frivolous claims and limit recovery to

significant injuries” (*Toure v Avis Rent A Car Sys., Inc.*, 98 NY2d 345, 350 [2002], quoting *Dufel v Green*, 84 NY2d 795, 798 [1995]). As such, to satisfy the statutory threshold, the plaintiff is required to submit competent objective medical proof of his or her injuries (*id.* at 350). Subjective complaints alone are insufficient to establish a prima facie case of a serious injury (*id.*).

#### BURDEN OF PROOF

The issue of whether a claimed injury falls within the statutory definition of “serious injury” is a question of law for the Court, which may be decided on a motion for summary judgment (*see Licari*, 57 NY2d at 237). Where a defendant is the movant, the defendant, bears the initial burden of establishing, by the submission of evidentiary proof in admissible form, a prima facie case that plaintiff has not suffered a “serious injury” as defined in section 5102(d) (*see Toure*, 98 NY2d at 352; *Gaddy v Eyer*, 79 NY2d 955, 956-57 [1992]). Once the defendant has made such a showing, the burden shifts to the plaintiff to submit prima facie evidence, in admissible form, rebutting the presumption that there is no issue of fact as to the threshold question (*see Franchini v Palmieri*, 1 NY3d 536, 537 [2003]; *Rubenscastro v Alfaro*, 29 AD3d 436, 437 [1st Dept 2006]).

“In cases such as the present one, a defendant can establish that the plaintiff’s injuries are not serious within the meaning of Insurance Law § 5102(d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff’s claim” (*Grossman v Wright*, 268 AD2d 79, 83-84 [2d Dept 2000]). “With this established, the burden shifts to the plaintiff to come forward with evidence to overcome the defendant’s submissions by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law” (*id.* at 84; *see Gaddy*, 79 NY2d at 957). The plaintiff must present objective evidence of the injury (*see Grossman*, 268 AD2d at 84). The mere parroting of language tailored to meet statutory requirements is insufficient

(see *id.*). Further, a plaintiff's subjective claim of pain and limitation of motion must be sustained by verified objective medical findings, which shall be based on a recent examination of the plaintiff (see *id.*; *Kauderer v Penta*, 261 AD2d 365 [2d Dept 1999]).

The 90/180 category requires a demonstration that plaintiff has been unable to perform substantially all of his or her usual and customary daily activities for not less than 90 days during the 180 days immediately following the injury (see *Licari*, 57 NY2d at 236). The words "substantially all" mean that the person has been "curtailed from performing his usual activities to a great extent rather than some slight curtailment" (*id.*).

#### DISCUSSION

In support of his motion for summary judgment, Usman submits, *inter alia*, a copy of the pleadings; a copy of plaintiff's Examination Before Trial (EBT) transcript; an affirmed report from orthopedic surgeon Dr. Alan J. Zimmerman, dated August 21, 2018; and an affirmed report from neurologist Dr. Chandra M. Sharma, dated August 7, 2018 (see Notice of Motion, exhibits A-F). In support of his cross-motion, Magnum relies on the evidence submitted by Usman.

In opposition to the motion, plaintiff submits, *inter alia*, MRI records and an affirmed report from orthopedic surgeon Dr. Jerry A. Lubliner dated November 28, 2018.

After reviewing the papers, the Court finds that Usman and Magnum fail to meet their prima facie burden of showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident on July 14, 2016 (see *Manton v Lape*, 173 AD3d 731 [2d Dept 2019]; *Rivas v Hill*, 162 AD3d 809 [2d Dept 2018]; *Gaddy*, 79 NY2d at 956–957). The moving defendants failed to submit competent medical evidence establishing, prima facie, that the injured plaintiff did not sustain a serious injury to the cervical region of her spine under either the permanent consequential limitation of use or significant limitation of use categories of Insurance Law § 5102(d), as moving defendants' expert,

neurologist Dr. Sharma, found significant range of motion limitations to plaintiff's cervical spine [extension at 10 degrees/60 degrees - 84% loss; flexion at 20 degrees/50 degrees - 60% loss; right and left rotation at 30 degrees/80 degrees - 62.5% loss), and fails to provide objective evidence for his finding that her cervical sprain was resolved (see *Manton*, 173 AD3d at 732; *Mangione v Bua*, 148 AD3d 799 [2d Dept 2017]; *Mercado v Mendoza*, 133 AD3d 833 [2d Dept 2015]; *Miller v Bratsilova*, 118 AD3d 761 [2d Dept 2014]).

Additionally, the Court notes that the aforementioned findings in Dr. Sharma's report conflict with those in Dr. Zimmerman's report wherein Dr. Zimmerman found only a range of motion limitation with cervical extension (extension at 50 degrees/60 degrees - 17% loss). The conflicting expert medical opinions submitted by the moving defendants requires denial of their motion for summary judgment (see *Johnson v Salaj*, 130 AD3d 502 [1st Dept 2015]).

Since the moving defendants failed to meet their *prima facie* burden, it is unnecessary to determine whether the papers submitted by the plaintiff in opposition were sufficient to raise a triable issue of fact (see *Mercado*, 133 AD3d at 834; *Che Hong Kim v Kossoff*, 90 AD3d 969 [2d Dept 2011]).

"By establishing that any one of several injuries sustained in an accident is a serious injury within the meaning of Insurance Law § 5102(d), a plaintiff is entitled to seek recovery for all injuries incurred as a result of the accident" (*Nussbaum v Chase*, 166 AD3d 638, 638-639 [2d Dept 2018]; *Rizzo v DeSimone*, 6 AD3d 600 [2d Dept 2004]; *Prieston v Massaro*, 107 AD2d 742 [2d Dept 1985]; Insurance Law § 5104[a]). In the event that plaintiff establishes at trial that she sustained a serious injury to her cervical spine as a result of the accident, she will be entitled to seek damages for all of the injuries she sustained as a result of the accident (see *Nussbaum*, 166 AD3d at 639; *Bebry v Farkas-Galindez*, 276 AD2d 656 [2d Dept 2000]). Thus, this Court need not determine at this time as to whether plaintiff's other claimed injuries meet the no-fault threshold.

In the absence of medical proof, a defendant can establish the nonexistence of a serious injury under the 90/180 category by citing to evidence, such as plaintiff's own testimony, demonstrating that plaintiff was not prevented from performing all of the substantial activities constituting his/her usual and customary daily activities for the prescribed period (see *Copeland v Kasalica*, 6 AD3d 253, 254 [1st Dept 2004]). Here, the Court finds that moving defendants submitted plaintiff's deposition testimony, which demonstrated that she did not sustain a serious injury under the 90/180 category (see generally *McFarlane v Klein*, 131 AD3d 1139 [2d Dept 2015]).

CONCLUSION

Accordingly it is hereby,

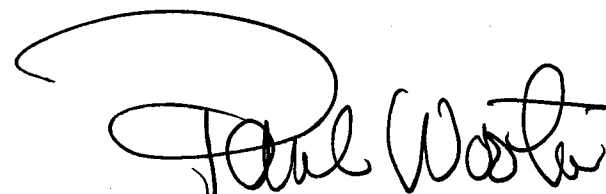
ORDERED that the motion by defendant Muhammad Usman for summary judgment dismissing the Verified Complaint on the ground that the injuries claimed do not satisfy the "serious injury" threshold requirement of the New York Insurance Law §§ 5102(d) and 5104 is denied, except as to plaintiff's claims under the 90/180 category of Insurance Law § 5102(d), which are dismissed (motion sequence 2); and, it is further,

ORDERED that the cross-motion by defendant Antwan D. Magnum for summary judgment dismissing the Verified Complaint on the ground that the injuries claimed do not satisfy the "serious injury" threshold requirement of the New York Insurance Law §§ 5102(d) and 5104 is denied, except as to plaintiff's claims under the 90/180 category of Insurance Law § 5102(d), which are dismissed (motion sequence 3); and, it is further,

ORDERED that counsel for plaintiff is directed to serve a copy of this Order with Notice of Entry upon the defendants.

This constitutes the Decision and Order of the Court.

Dated: 10/8/19

  
PAUL WOOTEN J.S.C.

2019 OCT 18 AM 8:19  
KINGS COUNTY CLERK  
FILED  
