Fraser v Bauch
2019 NY Slip Op 34910(U)
August 22, 2019
Supreme Court, Kings County
Docket Number: Index No. 518651/2016
Judge: Paul Wooten
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
KINGS COUNTY

PRESENT: HON. PAUL WOOTEN **PART 97**
Justice

DAINA FRASER,

Plaintiff,

- against -

JONATHAN BAUCH, FONZIS CAB CORP. and SUKHBIR SINGH,

Defendants.

INDEX NO. 518651/2016

MOT. SEQ NO. 2

The following papers, numbered 1 to 6, were read on this motion by defendants for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	1, 2, 3
Answering Affidavits — Exhibits (Memo)	4
Replying Affidavits (Reply Memo)	5
Transcript	6

This is a personal injury action relating to a motor vehicle accident that occurred on December 15, 2014 at or near the intersections of East 79th Street and Lexington Avenue in New York, New York. According to the Verified Complaint, plaintiff Daina Fraser (plaintiff) was a pedestrian on the roadway at the time the motor vehicle owned and operated by Sukhbir Singh (Singh) came into contact with the motor vehicle owed by Fonzis Cab Corp. (Fonzis) and operated by Jonathan Bauch (Bauch). She alleges that both motor vehicles came into contact with her causing her to sustain serious bodily injuries, *inter alia*, to her right and left shoulders, cervical, thoracic and lumbar spine, and right hip.

Before the Court is a motion by Fonzis and Bauch (collectively, moving defendants), pursuant to CPLR 3212, for summary judgment dismissing the Verified Complaint against them

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. Plaintiff is in opposition to the 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 Eyler,* 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]; *Rubensccastro 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 their motion for summary judgment, Fonzis and Bauch submit, *inter alia*, a copy of the pleadings; a copy of plaintiff's Examination Before Trial (EBT) transcript; an affirmed report from orthopedic surgeon Dr. Howard V. Katz, dated March 22, 2018[1]; and an affirmed report from neurologist Dr. Chandra M. Sharma, dated February 14, 2018 (*see* Notice of Motion, exhibits A-H).

In opposition to the motion, plaintiff submits, *inter alia*, MRI records; a narrative report from orthopedic surgeon Gabriel L. Dassa, D.O., dated July 6, 2018; and the affirmation of chiropractor Scott Leist, D.C.

After reviewing the papers and hearing oral arguments on the record on October 29, 2018, the Court finds that Fonzis and Bauch 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 December 15, 2014 (*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 and lumbar regions 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 [extension at 20 degrees/60 degrees normal; rotation at 40 degrees/80 degrees normal]; flexion at 10 degrees/45 degrees

---

[1] The Court notes that although the report is dated 03/22/2018 at the top, Dr. Katz states that he examined the plaintiff on 02/22/2018.

normal] and lumbar spine [extension and flexion at 10 degrees/25 degrees normal] (*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. Katz's report wherein Dr. Katz found insignificant range of motion limitations to the cervical spine [flexion at 40 degrees/45 degrees normal] and found full range of motion to the lumbar spine. 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 and/or lumbar 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.

Moreover, the moving defendants failed to establish, prima facie, that during the 180–day period following the accident, the plaintiff did not have injuries or impairments which,

for more than 90 days, prevented her from performing substantially all of the material acts constituting her usual and customary daily activities (*see generally Derosa v Abeshouse,* 125 AD3d 593 [2d Dept 2015]). In addressing the plaintiff's claims that she sustained a serious injury under the 90/180–day category of Insurance Law § 5102(d), the moving defendants argued that the medical evidence and plaintiff's deposition testimony established that during the 180–day period following the accident, the plaintiff did not have injuries or impairments which, for more than 90 days, prevented her from performing substantially all of the material acts which constituted the plaintiff's usual and customary daily activities. However, contrary to moving defendants' assertion, plaintiff's deposition testimony is insufficient to establish the moving defendants' burden of proof that the plaintiff had no injury in the 90/180 category (*see Scinto v Hoyte,* 57 AD3d 646 [2d Dept 2008]). Plaintiff's deposition testimony actually demonstrates the existence of a triable issue of fact as to whether the plaintiff had such injuries or impairments (*see Hernandez v Sollo,* 120 AD3d 628 [2d Dept 2014]; *Katechis v Batista*, 91 AD3d 912 [2d Dept 2012]). Since the moving defendants did not sustain 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 Derosa*, 125 AD3d at 593).

CONCLUSION

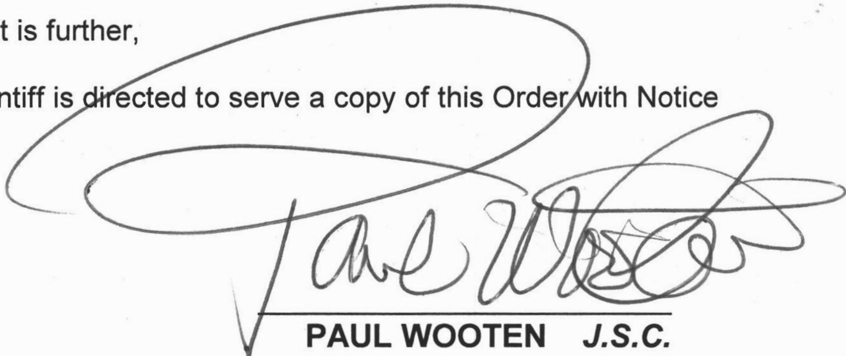
Accordingly it is hereby,

ORDERED that defendants Jonathan Bauch and Fonzis Cab Corp.'s motion 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 in its entirety; 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.

2019 SEP -9 AM 8:26
KINGS COUNTY CLERK
FILED

Dated: 8/22/19



PAUL WOOTEN *J.S.C.*