

**Feggins v Benjamin**

2019 NY Slip Op 34923(U)

March 27, 2019

Supreme Court, Kings County

Docket Number: Index No. 515111/2017

Judge: Carl J. Landicino

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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 27<sup>th</sup> day of March, 2019.

P R E S E N T:  
HON. CARL J. LANDICINO,

Justice.

-----X  
TYQUAN L. FEGGINS,

*Plaintiff,*

- against -

AYESHA BENJAMIN,

*Defendant.*

-----X

Index No.: 515111/2017

DECISION AND ORDER

Motions Sequence #1

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

	<u>Papers Numbered</u>
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed.....	1/2, _____
Opposing Affidavits (Affirmations).....	3, _____
Reply Affidavits (Affirmations).....	4 _____

Upon the foregoing papers, and after oral argument, the Court finds as follows:

This action concerns a motor vehicle incident that occurred on November 15, 2016. The Plaintiff Tyquan L. Feggins (hereinafter “the Plaintiff”) was operating her vehicle when it was allegedly involved in a collision with a vehicle owned and operated Defendant Ayesha Benjamin (hereinafter “the Defendant”) at or near the intersection of Rochester Avenue and Eastern Parkway, Brooklyn, New York. By way of a summons and verified complaint, the Plaintiff asserts a cause of action against the Defendant alleging the negligent operation of her vehicle. The Plaintiff claims in his Verified Bill of Particulars (Defendants’ Motion Exhibit C, Paragraphs 8-9), that he sustained a number of serious injuries, including but not limited to injuries to his head, cervical spine, lumbar spine, right knee, and right shoulder. The Plaintiff also alleges (Defendant’s Motion Exhibit C, Paragraph 21) that he was prevented from “performing substantially all the material acts which constitute such person’s usual and customary daily activities for not less than ninety days during the one hundred and eighty days immediately following the occurrence of the injury or impairment.”

The Defendant moves (motion sequence #1) for an order pursuant to CPLR 3212, granting summary judgment and dismissing the complaint of the Plaintiff on the ground that none of the injuries allegedly sustained by the Plaintiff meet the “serious injury” threshold requirement of Insurance Law § 5102(d).

It has long been established that “[s]ummary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it ‘should only be employed when there is no doubt as to the absence of triable issues of material fact.’” *Kolivas v. Kirchoff*, 14 AD3d 493 [2<sup>nd</sup> Dept, 2005], citing *Andre v. Pomeroy*, 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. See *Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2<sup>nd</sup> Dept, 2004], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2<sup>nd</sup> Dept, 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. See *Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 A.D.3d 518, 520, 824 N.Y.S.2d 166, 168 [2<sup>nd</sup> Dept, 2006]; see *Menzel v. Plotnick*, 202 A.D.2d 558, 558–559, 610 N.Y.S.2d 50 [2<sup>nd</sup> Dept, 1994].

Insurance Law § 5102(d)

The Defendant contends that the affirmed reports of Dr. Howard V. Katz, support her contention that Plaintiff did not suffer a serious injury as defined under Insurance Law § 5102(d).

In making a motion for summary judgment on threshold grounds a defendant has the initial burden of demonstrating that the Plaintiff did not sustain a “serious injury” as that term is defined by Insurance Law § 5102.

Dr. Howard V. Katz, conducted an orthopedic medical examination of Plaintiff on September 26, 2018. In his report, which was duly affirmed on that same day, Dr. Katz detailed his findings based upon his review of Plaintiff’s medical records, his personal observations and objective testing. Dr. Katz performed an orthopedic examination of the Plaintiffs cervical spine, lumbar spine, right shoulder, and right knee with the use of a hand held goniometer and found no limitation in the Plaintiff’s range of motion. Dr. Katz opined that any sprain/strain to the cervical spine, lumbar spine, right shoulder, and right knee had resolved and that there was no evidence of orthopedic disability. (See Defendant’s Motion, Exhibit E).

Turning to the merits of the motion for summary judgment, the Court is of the opinion that based upon the foregoing submissions, including the Defendant’s deposition (Defendant’s motion, Exhibit “D”) the Defendant has not met her initial burden of proof. Dr. Katz’s report did provide a range of motion and did “compare those findings to the normal range of motion...” *Manceri v. Bowe*, 19 A.D.3d 462, 463, 798 N.Y.S.2d 441, 442 [2<sup>nd</sup> Dept, 2005]. However, the Defendant did not address the Plaintiff’s “90/180” claim as discussed during his deposition relating to his alleged limitation. *See Faun Thai v. Butt*, 34 A.D.3d 447, 448, 824 N.Y.S.2d 131, 132 [2<sup>nd</sup> Dept, 2006]. Assuming, *arguendo*, that the Defendant has met her initial *prima facie* burden, the Plaintiff must prove that there are triable issues of fact as to whether the Plaintiff suffered serious injuries. *See Jackson v United Parcel Serv.*, 204 AD2d 605 [2<sup>nd</sup> Dept, 1994]; *Bryan v Brancato*, 213 AD2d 577 [2<sup>nd</sup> Dept, 1995]. In this regard, the Plaintiff must submit quantitative objective findings, as well as opinions relative to the significance of the Plaintiff’s injuries as defined by statute. *See*

*Shamsodeen v. Kibong*, 41 A.D.3d 577, 578, 839 N.Y.S.2d 765, 766 [2<sup>nd</sup> Dept, 2007]; *Grossman v Wright*, 268 AD2d 79 [2<sup>nd</sup> Dept, 2000].

In order to prove that the Plaintiff suffered a permanent consequential limitation of use of a body organ or member, and/or a significant limitation of use of a body function or system, the Plaintiff has the burden to show more than “a mild, minor or slight limitation of use.” The Plaintiff must provide objective medical evidence in addition to medical opinions of the extent or degree of the limitation alleged and its duration. *See Oberly v Bangs Ambulance, Inc.*, 96 NY2d 295 [2001]; *Candia v. Omonia Cab Corp.*, 6 A.D.3d 641, 642, 775 N.Y.S.2d 546, 547 [2<sup>nd</sup> Dept, 2004]; *Burnett v Miller*, 255 AD2d 541 [2<sup>nd</sup> Dept, 1998]; *Beckett v Conte*, 176 AD2d 774 [2<sup>nd</sup> Dept, 1991].

The issue of whether a serious injury was sustained involves a comparative determination of the degree or qualitative nature of an injury based upon the otherwise normal function, purpose and use of the body part. *See Toure v Avis Rent-a-Car Sys., Inc.*, 98 NY2d 345, 353 [2002]; *Walker v. Esses*, 72 A.D.3d 938, 939, 899 N.Y.S.2d 321, 322 [2<sup>nd</sup> Dept, 2010]. In the alternative, the Plaintiff must establish that she sustained a medically-determined injury or impairment which prevented her from conducting substantially all of the material acts which constituted her usual and customary daily activities for 90 out of the 180 days immediately following the accident. *See Licari v Elliott*, 57 NY2d 230 [1982].

Dr. Kamal A. Tadros, examined the Plaintiff on several occasions (starting as early as November 18, 2016) and conducted several tests on the Plaintiff. He states in his Affirmation that a range of motion examination was performed on December 4, 2018. In relation to the cervical spine, Dr. Tadros found a limited range of motion with flexion to 40 degrees (normal 45 degrees, constituting a 11% impairment); extension to 50 degrees (normal 55 degrees, consisting of 9% impairment); Right and Left Rotation to 60 degrees (normal 70 degrees, consisting of 14%

impairment); Right and Left Lateral Flexion to 30 degrees (normal 40 degrees, consisting of 25% impairment).” Dr. Tadros also found limited range of motion for the Plaintiff’s right knee including “[e]xtension to 10 degrees (normal 15 degrees, consisting of 33% impairment).” Dr. Tadros opined that the Plaintiff’s “current symptoms, complaints and limitations are causally related to the motor vehicle accident of November 15, 2016.” (See Affirmation in Opposition, Affidavit of Dr. Tadros, Attached as Exhibit E).

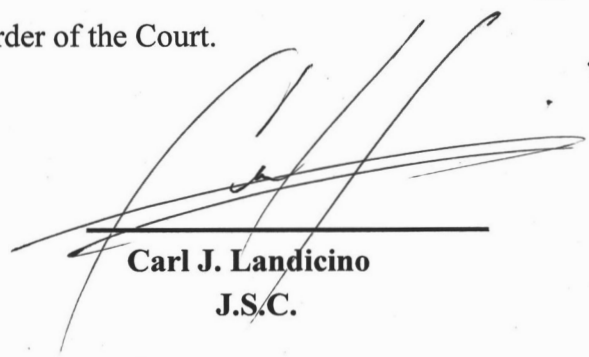
While the findings of the Defendant’s Doctor were arguably sufficient to meet the Defendant’s *prima facie* burden, Plaintiff’s evidence, namely the affirmed report of Dr. Tadros, raises triable issues of fact with regard to the Plaintiff’s claim that she sustained a serious injury. “An expert’s qualitative assessment of a plaintiff’s condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff’s limitations to the normal function, purpose and use of the affected body organ, member, function or system.” *Toure v Avis Rent A Car Systems Inc.*, 98 N.Y.2d 345, 774 N.E.2d 1197 [2002]; *see Castro v. Anthony*, 153 A.D.3d 655, 57 N.Y.S.3d 895 [2<sup>nd</sup> Dept, 2017]; *Dufel v. Green*, 84 N.Y.2d at 798, 622 N.Y.S.2d 900, 647 N.E.2d 105 [1995].

Based on the foregoing, it is hereby ORDERED as follows:

Defendant’s motion (motion sequence #1) is denied.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

  
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Carl J. Landicino  
J.S.C.

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