

**Felix v Chowdhury**

2023 NY Slip Op 34866(U)

March 7, 2023

Supreme Court, Kings County

Docket Number: Index No. 516852/2019

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 7<sup>th</sup> day of March 2023.

PRESENT:

CARL J. LANDICINO, J.S.C.

-----X  
GASPARD G. FELIX and FREDERICA M. FELIX,

Index No.: 516852/2019

*Plaintiff,*

-against-

DECISION AND ORDER

MOHAMMED M. CHOWDHURY,

Motions Sequence #4

*Defendants.*

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

Papers Numbered (NYSCEF)

Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed.....	46-56,
Opposing Affidavits (Affirmations).....	61, 63-68,
Reply Affidavits (Affirmations).....	
Memorandum of Law.....	62

After a review of the papers and oral argument the Court finds as follows:

Plaintiff Gaspard Felix (“Gaspard”) and Frederica Felix (“Frederica”) (collectively the “Plaintiffs”) allege serious injuries as a consequence of a collision their vehicle purportedly had with a vehicle owned and operated by Defendant Mohammed M. Chowdhury (the “Defendant”). Defendant moves (motion sequence #4) for summary judgment pursuant to CPLR 3212 dismissing the complaint. Defendant contends that neither Plaintiff has sustained a serious injury as defined by Insurance Law 5102(a), as a result of the accident on March 18, 2019.

Gaspard alleges injuries, *inter alia*, lumbar disectomy at L4/5, L 5/S1, bulging discs at L3/4, L4/5, L5/S1, and annular tear at L5/S1. Frederica alleges injuries, *inter alia*, cervical

disectomy at C4/5, C5/6, herniated disks at C3/4, C4/5, C5/6, C6/7, and annular tear at C6/7. Both plaintiffs allege that they were confined to home for two weeks following the accident and that they suffered a disabling injury for a period in excess of 90 out of the first 180 days following this occurrence. (“90/180 claim”)

As to Gaspard, the Defendant proffers the medical report of Dr. Arnold Berman, orthopedic surgeon. Dr. Berman examined Gaspard on November 24, 2020, more than eighteen months after the accident on March 18, 2019. Gaspard conducted range of motion testing with a goniometer on Gaspard’s cervical and lumbar spines and found no limitation. Dr. Berman found that both areas resolved with no “permanent injury” and “no disability.”

Dr. Michael Setton, radiologist, reviewed the MRI of Gaspard’s cervical spine performed on August 12, 2019 (approximately five months post accident). He also reviewed the MRI of Gaspard’s and lumbar spine performed April 26, 2019 (approximately five to six weeks post accident). As to Gaspard’s cervical spine, Dr. Setton did find a degenerative condition and lack of trauma. Dr. Setton, for example, opined that “[t]here is evidence of minimal spinal cord impingement at C6/7, without evidence of spinal cord edema to suggest an acute traumatic disc herniation or any other spinal cord injury.” The doctor made similar findings as to Gaspard’s lumbar spine.

As to Frederica, Defendant proffers the medical report of Dr. Berman. Dr. Berman examined Frederica on November 24, 2020 (more than eighteen months post accident). Dr. Berman conducted range of motion testing of Frederica’s cervical and lumbar spines with the use of a goniometer. Dr. Berman found no reduction in range of motion in those areas. He determined that the cervical and lumbar spines resolved and found no “permanent injury” and “no disability.”

Dr. Setton reviewed the MRI of Frederica's cervical spine performed on April 26, 2019 (approximately five to six weeks post-accident). The doctor found, with specificity, a degenerative condition and no evidence of trauma.

When the Bill of Particulars contains conclusory allegations of a 90/180 claim and the Deposition and/or affidavit of Plaintiff does not support, or reflects that there is no such claim, the Defendant may utilize those factors in support of its motion for summary judgment. *See Master v. Boiakhtchion*, 122 AD3d 589, 590, 996 N.Y.S.2d 116, 117 [2d Dept 2014]; *Kuperberg v. Montalbano*, 72 AD3d 903, 904, 899 N.Y.S.2d 344, 345 [2d Dept 2010]; *Camacho v. Dwelle*, 54 AD3d 706, 863 N.Y.S.2d 754 [2d Dept 2008]. In this case, the Verified Bill of Particulars states that each Plaintiff was "was confined to bed and to home for a period of approximately 2 weeks to date, except for necessary and essential excursion for required purposes."

Assuming that the Defendant has made a *prima facie* showing that the Plaintiffs have not sustained a serious injury as defined by the statute, it therefore becomes incumbent upon the Plaintiffs to establish that there are triable issues of fact as to whether the Plaintiffs suffered serious injuries, in order to avoid the dismissal of his action. *See Jackson v United Parcel Serv.*, 204 AD2d 605 [2d Dept 1994]; *Bryan v Brancato*, 213 AD2d 577 [2d Dept 1995]. In this regard, the Plaintiffs must submit quantitative objective findings, in addition to opinions as to the significance of the Plaintiffs' injuries. *See Oberly v Bangs Ambulance, Inc.*, 96 NY2d 295 [2001]; *Candia v. Omonia Cab Corp.*, 6 AD3d 641, 642, 775 N.Y.S.2d 546, 547 [2d Dept 2004]; *Burnett v Miller*, 255 AD2d 541 [2d Dept 1998]; *Beckett v Conte*, 176 AD2d 774 [2d Dept 1991].

In opposition to the Defendant's showing, the Plaintiffs proffer the medical reports of Dr. Ronald Wagner, Radiologist, Dr. David Payne, Radiologist, Dr. Arden Kaisman, and Dr. Paul Lerner.

Dr. Wagner reviewed the MRI of Gaspard's cervical spine conducted on August 12, 2019, and found herniations at C3/C4, C4/C5 and C6/C7. However, Dr. Wagner does not address issues of causation or degeneration. Dr. Payne reviewed the MRI of Gaspard's lumbar spine performed on April 26, 2019, and found bulging discs at L2/3, L3/4, L4/5, and L5/S1. However, the doctor did not opine as to causation or degeneration. Dr. Kaisman opined that the injuries to Gaspard's cervical and lumbar spines in addition to the need for his lumbar spine disectomy (L4/5, L5/S1) surgery were causally related to the accident. Dr. Kaisman does not address degeneration. Dr. Lerner examined Gaspard on December 7, 2021. Dr. Lerner, with use of an inclinometer and arthrodiagonal protractor, performed range of motion testing of the cervical and lumbar spine and found limitations of twenty and twenty five percent in relation to the extensions of both the lumbar and cervical spines. He also found permanence. He addressed degeneration, rejected such findings by Defendant's doctors and causally related the injuries to the accident.

As to Frederica, Dr. Payne reviewed the MRI of Frederica's cervical spine performed on April 27, 2019, and found herniations at C2/3, C3/4, C4/5, C5/6 and C6/7. Dr. Payne does not opine on the issue of causation and degeneration. Dr. Kaisman opined that the injuries to Frederica's cervical and lumbar spines in addition to her need for cervical spine disectomy (C4/5 and C5/6) were causally related to the accident. However, the doctor does not opine in relation to degeneration. Dr. Lerner examined Frederica on December 7, 2021 and conducted range of motion testing of her cervical and lumbar spines with the use of an inclinometer and arthrodiagonal protractor. In addition to other limitations found, he found a twenty percent or greater limitation of range of motion for the extension of both the lumbar and cervical spines. Dr. Lerner found that the injuries were causally related to the accident and rejected any contention that there was a degenerative condition.

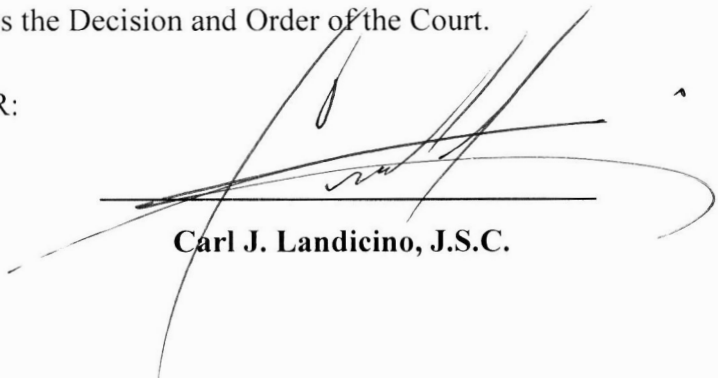
Although the Defendant did arguably meet his *prima facie* showing concerning the lack of serious injury as to both Plaintiffs, each of the Plaintiffs proffered sufficient evidence to raise an issue of fact as to whether each Plaintiff suffered serious injuries as defined by the statute, causally related to the accident on March 18, 2019.

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

The motion by the Defendant (motion sequence #4) is denied.

This constitutes the Decision and Order of the Court.

ENTER:



**Carl J. Landicino, J.S.C.**

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KINGS COUNTY CLERK  
FILED

