Felix v Mackney
2012 NY Slip Op 30503(U)
February 21, 2012
Supreme Court, Nassau County
Docket Number: 2270-10
Judge: Steven M. Jaeger
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEVEN M. JAEGER,
Acting Supreme Court Justice

LESLY ST. FELIX, HARRY JEAN and MARYSE JEAN, Plaintiffs, -against- WAYNE MACKNEY and CARROL ALOYIUS BELT, Defendants.	TRIAL/IAS, PART 41 NASSAU COUNTY INDEX NO.: 2270-10 MOTION SUBMISSION DATE: 1-5-12 MOTION SEQUENCE NO. 2

The following papers read on this motion:

Notice of Motion, Affirmation, and Exhibits	X
Affirmation in Opposition and Exhibits	X
Reply Affirmation	X

Defendant, Wayne Mackney, moves pursuant to CPLR §3212 for an order granting summary judgment in his favor, dismissing Plaintiffs' complaint, alleging that the injuries sustained by Plaintiffs', Lesley St. Felix ("St. Felix") and Harry Jean ("Jean") do not satisfy the "serious injury" threshold requirement of Insurance Law §5102(d). The claim by Plaintiff, Maryse Jean, is derivative.

This action arises out of a motor vehicle accident that occurred on December 5, 2008. As a result of the accident, St. Felix allegedly sustained serious personal injuries, including but not limited to, cervical radiculopathy and lumbosacral radiculopathy. Jean also allegedly sustained serious personal injuries, including but not limited to, disc bulging at L2-3, L3-4, and L4-5; cervical radiculopathy; and lumbosacral radiculopathy.

In a motion for summary judgment the moving party bears the burden of making a prima facie showing that he or she is entitled to summary judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of a material issue of fact. *Sillman v. Twentieth Century Fox Film Corp.*, 3 NY2D 395 (1957); *Friends of Animals, Inc. v. Associates Fur Mfrs.*, 46 NY2d 1065 (1979); *Zuckerman v. City of New York*, 49 NY2d 5557 (1980); *Alvarez V. Prospect Hospital,* 68 NY2d 320 (1986).

The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *Winegard v. New York University Medical Center,* 64 NY2d 851 (1985). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. *Zuckerman v. City of New York, supra.* The primary purpose of a summary judgment motion is issue finding not issue determination, *Garcia v. J.C. Duggan, Inc.*, 180 AD2d 579 (1st Dept. 1992), and it should only be granted when there are no triable issues of fact. *Andre v. Pomeroy,* 35 NY2d 361 (1974).

Within the context of a summary judgment motion that seeks dismissal of a personal injury action resulting from a motor vehicle accident for the alleged failure of the plaintiff to sustain a "serious injury" within the meaning of Insurance Law §5102(d), the defendant bears the burden of establishing a prima facie case that the plaintiff's injuries do not meet the threshold requirements of the statute. *Gaddy v. Eyler*, 79 NY2d 955 (1992). Upon such a showing, it becomes incumbent on the plaintiff to come forward with sufficient evidence, in admissable form, to demonstrate the existence of a

question of fact on the issue. *Id.* The court must then decide whether the plaintiff has established a prima facie case of sustaining a "serious injury". *Licari v. Elliot*, 57 NY2d 230 (1983).

Insurance Law §5102(d) defines "serious injury" as a personal injury which results in: (1) death; (2) dismemberment; (3) significant disfigurement; (4) a fracture; (5) loss of fetus; (6) permanent loss of a body organ, member, function or system; (7) permanent consequential limitation of use of a body organ or member; (8) significant limitation of use of a body function or system; or (9) 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 (90) days during the one-hundred-eight (180) days immediately following the occurrence of the injury or impairment.

The defendant is not required to disprove any category of "serious injury" that has not been pled by the plaintiff. *Melino v. Lauster*, 82 NY2d 828 (1993). Whether the plaintiff can demonstrate the existence of a compensable "serious injury" depends upon the quality, quantity, and credibility of admissable evidence. *Manrique v. Warshaw Woolen Associates, Inc.*, 297 AD2d 519 (1st Dept. 2002).

Essentially, in order to satisfy the statutory "serious injury" threshold, objective proof of the plaintiff's injury is required. *In Toure v. Avis Rent-A-Car Systems,* 98 NY2d 345 (2002), the Court of Appeals held that a plaintiff's proof of injury must be supported by objective medical evidence, in admissible form, such as sworn MRI and CT scan tests. However, these sworn tests must be paired with the doctor's observations during

the physical examination of the plaintiff. Unsworn MRI reports can also constitute competent evidence if both the plaintiff and the defendant rely on those reports. *Gonzalez v. Vasquez,* 301 AD2d 438 (1st Dept. 2003).

Conversely, even where there is ample proof of a plaintiff's injury, certain factors may nonetheless override a plaintiff's objective medical proof of limitations and permit dismissal of a plaintiff's complaint. Specifically, additional contributing factors such as a gap in treatment, an intervening medical problem, or a pre-existing condition would interrupt the chain of causation between the accident and the claimed injury. *Pommels v. Perez*, 4 NY3d 566 (2005).

While a herniated or bulging disc, or the presence of radiculopathy may constitute a "serious injury" within the ambit of Insurance Law §5102(d), a plaintiff is required to provide, inter alia, objective medical evidence, which demonstrates the extent and degree of the alleged physical limitation resulting from the disc injury and its duration. *Perl v. Meher*, 18 NY3d 208 (2011); *cf., Felix v. New York City Tr. Auth.,* 32 AD3d 527 (2nd Dept. 2006); *Garcia v. Sobles,* 41 AD3d 426 (2nd Dept. 2007); *Bestman v. Seymour*, 41 AD3d 629 (2nd Dept. 2007).

When examining medical evidence offered by a plaintiff on a threshold motion, the court must ensure that the evidence is objective in nature and that a plaintiff's subjective claims as to pain or limitation of motion are sustained by verified objective medical findings. *Grossman v. Wright,* 268 AD2d 79 (2nd Dept. 2000). Further, the plaintiff must provide competent medical evidence containing verified objective findings based upon a recent examination wherein the expert must provide an opinion as to the

significance of the injury. *Perl v. Meher, supra; Kauderer v. Penta,* 261 AD2d 365 (2nd Dept. 1999).

To meet the threshold regarding significant limitation of use of a body function or system or permanent consequential limitation of a body function or system, the law requires that the limitation be more than minor, mild, or slight and that the claim be supported by medical proof based upon credible medical evidence of an objectively measured and quantified medical injury or condition. *Gaddy v. Eyler, supra; Licari v. Elliot, supra.* A minor, mild, or slight limitation will be deemed insignificant within the meaning of the statute. *Licari v. Elliot, supra.* A claim raised under the "permanent consequential limitation of use or a body organ or member" or "significant limitation of use of a body function or system" categories can be made by an expert's designation of a numeric percentage of a plaintiff's loss of motion in order to prove the extent or degree of the physical limitation. *Toure v. Avis, supra.* In addition, an expert's qualitative assessment of a plaintiff's condition is also probative, provided: (1) the evaluation has an objective basis; and (2) the evaluation compares the plaintiff's limitation to the normal function, purpose, and use of the affected body organ, member, function, or system. *Id.*

In applying the foregoing standards and principles to the instant matter the Court finds that Defendant has met his initial burden of establishing a prima facie case that Plaintiffs' injuries do not satisfy the threshold requirements of Insurance Law §5102(d). In response, Plaintiffs have failed to submit sufficient evidence to raise a triable question of fact on the issue. As such, summary judgment in favor of Defendant

against Plaintiffs is warranted.

In evaluating Plaintiffs' allegations contained in the verified bill of particulars it is apparent that Plaintiffs are not claiming that their injuries fall within categories "1", "2", "3", "4", "5", or "6" of Insurance Law §5102(d) as outlined hereinabove. Plaintiffs' claims of a "serious injury" fall within categories "7", "8", and "9". The Court will thus only address these three categories.

In addressing category "9", the Court finds that Plaintiffs' own testimony at their examinations before trial demonstrates that they have failed to sustain a "serious injury" under this category. St. Felix testified to having missed between seventy (70) and eighty-five (85) days from work as a result of the accident. He was never confined to his home, and is presently working full-time. Jean testified to having only missed two (2) to three (3) weeks from one of his jobs, but not missing any time from his other job. There is otherwise no objective medical evidence to support Plaintiffs' claims that they were unable to perform their daily activities for not less than ninety (90) of the first one hundred eighty (180) days subsequent to the accident. *Sainte-Aime v. Ho,* 274 AD2d 569 (2nd Dept. 2000)

Upon the submission of the affirmed reports of Frank Segreto, M.D., an orthopedist, and Salvatore Corso, M.D., an orthopedist, Defendant has met his initial burden of establishing a prima facie case that Plaintiffs have failed to meet the statutory threshold of a "serious injury" under categories "7" and "8".

According to Dr. Segreto's report, after reviewing St. Felix's medical records, he conducted a physical examination on February 1, 2011. His examination found normal

ranges of motion in the thoracolumbar spine, right hip, and right ankle. Dr. Segreto concluded that there was no evidence of an orthopedic disability.

According to Dr. Corso's report, after reviewing Jean's medical records, he conducted a physical examination on March 29, 2011. His examination found normal ranges of motion in the thoracolumbar spine, right knee, and left knee. Dr. Corso concluded that there was no evidence of a causally related orthopedic disability.

In opposition, Plaintiffs have submitted their own affidavits, affirmations from treating physicians, and medical reports. There is nothing contained in either Plaintiffs' affidavits that would demonstrate that they have sustained a "serious injury".

According to the affirmations submitted by Jean-Marie L. Francois, M.D., and the accompanying medical records, both Plaintiffs had a loss of range of motion in December 2008 that may be significant enough to raise a triable issue of fact. See *Nelms v. Khokhar*, 12 AD3d 426 (2nd Dept.). However, both Plaintiffs were more recently examined by Paul Lerner, M.D., presumably in order to oppose Defendant's motion.

According to Dr. Lerner's affirmation after examination of St. Felix on November 7, 2011, range of motion was found to be normal, other than a minor 20% loss of lumbar extension. His impression was that St. Felix has lumbar radiculitis, which is likely the source of his pain; and distal right leg/foot pain following contusion. These findings demonstrate that St. Felix's condition does not meet the "serious injury" threshold.

According to Dr. Lerner's affirmation after examination of Jean on November 7, 2011, range of motion was found to be normal, other than a minor 17% loss of lumbar

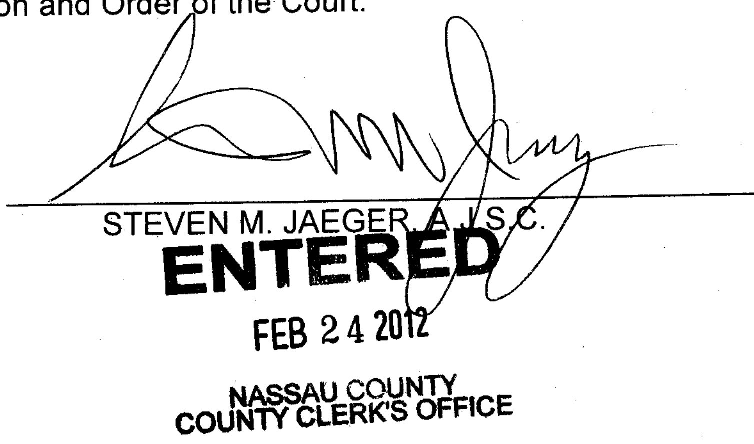
flexion and a 20% loss of lumbar extension. His impression was that Jean has a lumbar strain with disc bulges and right knee pain. These findings demonstrate that Jean's condition does not meet the "serious injury" threshold.

Based upon Dr. Lerner's findings, which confirm the findings of Dr. Segreto and Dr. Corso, it is apparent that there are no objective medical findings that would raise a triable issue of fact as to whether Plaintiffs have sustained a "serious injury" under categories "7" and "8". As such, Plaintiffs' claims of having suffered a "serious injury" under categories "7", "8", and "9" cannot be maintained.

Accordingly, Defendant's motion is GRANTED, and Plaintiffs' complaint is dismissed as to Defendant, Wayne Mackney.

This constitutes the Decision and Order of the Court.

Dated: February 21, 2012



STEVEN M. JAEGER, A.J.S.C.

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