

Felix v Duane
2013 NY Slip Op 33863(U)
August 2, 2013
Sup Ct, Nassau County
Docket Number: 119/11
Judge: Margaret C. Reilly
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

TAMARA FELIX,

Plaintiffs,

-against-

JERRY DUANE and ALIYA DORNER,

Defendants.

**TRIAL/IAS PART 26
Index No.: 119/11
Motion Seq. No.: 003
Submit Date: 5/09/13**

**DECISION AND
ORDER**

PRESENT: HON. MARGARET C. REILLY, J.S.C.

The following papers having been read on defendants' motion:

Defendants' Notice of Motion, Affirmation in Support & Exhibits . .	1
Plaintiff's Affirmation in Opposition & Exhibits	2
Defendants' Reply Affirmation	3

Upon the foregoing papers, it is ordered that the defendants' motion is determined as follows:

The defendants move, pursuant to CPLR §3212, for an order granting summary judgment in favor of the defendants and dismissing the plaintiff's complaint on the grounds that the plaintiff did not suffer a "serious injury" as defined by Insurance Law §5102(d), and thus, plaintiff's claim for non-economic loss is barred by §5104(a) of the New York Insurance Law. Plaintiff submits opposition. The defendants submit a reply affirmation.

Plaintiff commenced an action to recover for personal injuries sustained as a result of an automobile accident which occurred on June 7, 2009. The plaintiff alleges injuries

including herniated discs at L4-55 and L5-S1, impinging on neural canal and focal bulges at C4-5 and C5-6 impinging on the neural canal.

On the threshold motion, the defendants submit an affirmed medical examination report of Dr. Jonathan D. Glassman, M.D., an orthopedist. Dr. Glassman conducted a physical examination of the plaintiff on August 13, 2012.

Plaintiff submits, in opposition, the affirmed report of Dr. Paul Learner, M.D. Dr. Lerner conducted a physical examination of the plaintiff on November 21, 2012.

“Serious Injury” is defined in Insurance Law §5102(d) as:

“...[A] personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member, significant limitation of use of a body function or system; 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 constituted each 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.”

“A defendant can establish that the plaintiff’s injuries are not serious within the meaning of the 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 [2d Dept 2000]). The courts have consistently held a “plaintiff’s subjective claim of pain and limitation of motion must be supported by verified objective medical findings” (*Id.*; *Kauderer v. Penta*, 261 AD2d 365 [2d Dept 1999]). The threshold question in determining a summary judgment motion on the issue of serious injury focuses on the sufficiency of the moving papers. Once the defendants submit evidence establishing that the plaintiffs did not suffer a serious injury within the meaning of Insurance Law §5102(d), the burden shifts to the plaintiff to produce evidence in admissible form demonstrating that existence of a triable issue of fact (*see Gaddy*

[* 3]

v. Eyler, 79 NY2d 955 [1992]). The proof shall be viewed in a light most favorable to the non-moving party (see *Cammarrer v. Villanova*, 166 AD2d 760 [3d Dept 1990]).

When a claim is raised under the “permanent consequential limitation of use of a body organ or member,” or “significant limitation of use of a body function or system,” 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 each person’s usual and customary daily activities for not less than ninety (90) days during the one hundred eighty (180) days immediately following the occurrence of the injury or impairment;” the extent or degree of physical limitation, an expert’s designation of a numeric percentage of a plaintiff’s loss of range of motion is acceptable (see *Toure v. Avis Rent A Car System, Inc.*, 98 NY2d 345 [2002]). An expert’s qualitative assessment of a plaintiff’s condition is also probative provided that the evaluation has an objective basis, and the evaluation compares the plaintiff’s limitation to the normal function, purpose and use of the affected body organ, member, function or system (*Id.*).

The defendants have met their burden of establishing that the plaintiff has not sustained a serious injury. The defendants’ examining orthopedist, Dr. Glassman, found that his physical examination of the plaintiff revealed that the plaintiff is orthopedically stable and neurologically intact and found no objective clinical signs of ongoing disability or functional impairment regarding the subject accident. As the defendants have met their initial burden of proof, the burden shifts to the plaintiff to provide evidence in admissible form to demonstrate the existence of a triable issue of fact (see *Gaddy v. Eyler*, 79 NY2d 995 [1992]).

The plaintiff, in its opposition, has submitted admissible evidence indicating the plaintiff sustained cervical strain with disc bulges and lumbar strain with disc herniations. The doctor’s conclusion is that the plaintiff’s conditions and associated impairments are considered permanent. Here, as in *Toure v. Avis*, 98 NY2d 345 [2002], we cannot say that the plaintiff’s claimed limitations are so ‘minor, mild, or slight’ as to be considered insignificant.

[* 4]

CONCLUSION

While the defendants have met their initial burden of establishing that the plaintiff has not sustained a serious injury as set forth in the insurance law, the plaintiff has submitted competent objective evidence for the purposes of overcoming the defendants' submission that there are no triable issues of fact in this case. Accordingly, the defendants' motion for summary judgment is **DENIED**.

The remainder of the defendants' requested relief, not specifically addressed herein, is hereby **DENIED**.

This constitutes the Decision and Order of this Court.

Dated: August 2, 2013
Mineola, New York

ENTER:



HON. MARGARET C. REILLY, J.S.C.

To: Harmon, Linder & Rogowsky
Attorneys for Plaintiff
42 Broadway, Suite 1227
New York, New York 10004

Martin, Fallon & Mulle
Attorneys for Defendants
100 East Carver Street
Huntington, New York 11743

ENTERED

AUG 12 2013

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