Frye v Martinez
2018 NY Slip Op 33382(U)
December 5, 2018
Supreme Court, Kings County
Docket Number: 518453/2016
Judge: Carl J. Landicino

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 5th day of December, 2018.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

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JEWEL FRYE AND STEPHEN FRYE,

Plaintiff,

- against -

LUIS MARTINEZ AND DELTA GOLF, INC.,

Defendants.

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Index No.: 518453/2016

DECISION AND ORDER

Motion Sequence #2

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

	Papers Numbered
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 January 6, 2016. The Plaintiff Jewel Frye (hereinafter "the Plaintiff") was a passenger in a taxi operated by Defendant Luis Martinez (hereinafter "Defendant Martinez") and owned by Defendant Delta Golf, Inc. (hereinafter "Defendant Delta Golf"). By way of a summons and verified complaint, the Plaintiff asserts causes of action against the Defendant alleging the negligent operation of the offending vehicle whereby the vehicle came to an unexpected abrupt stop. As a result of said incident, the Plaintiff Jewell Frye claims in her Verified Bill of Particulars (Defendants' Motion Exhibit B, Paragraph 11), that she sustained a number of serious injuries including but not limited to injuries to her left shoulder, head, neck and back. The Plaintiffs alleges (Defendant's Motion Exhibit B, Paragraph 20) that she 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 within occurrence."

The Defendants move (motion sequence #2) 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 [2nd 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 [2nd Dept, 2004], *citing Alvarez v. Prospect Hospital*, 68 N.Y.2d320, 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 [2nd 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 [2nd Dept, 2006]; *see Menzel v. Plotnick,* 202 A.D.2d 558, 558–559, 610 N.Y.S.2d 50 [2nd Dept, 1994].

Insurance Law § 5102(d)

The Defendants contend that the affirmed reports of Dr. Ronald A. Paynter, Dr. Shanker Krishnamurthy, Dr. Robert April, Dr. Robert Tantleff, support their contention that Plaintiff

Jewel Frye 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. Ronald A. Paynter did not conduct a medical examination but instead reviewed the Emergency Room (E.R.) treatment records dated January 5, 2015 and completed his report on June 24, 2017. As part of his summary Dr. Paynter opined that "[t]he ER records reviewed are inconsistent with the injuries alleged in the Bill of Particulars and show that the claimed injuries do not have an acute traumatic origin and so could not be causally related to the accident on 01/05/2015." (See Defendant's Motion, Examination of Dr. Ronald A. Paynter , Exhibit F).

Dr. Shanker Krishnamurthy, conducted an orthopediic medical examination of Plaintiff on March 28, 2018, more than three years after the alleged incident. In his report, which was duly affirmed that same day, Dr. Shanker Krishnamurthy detailed his findings based upon his review of Plaintiff's medical records, his personal observations and objective testing. In summary and conclusion, Dr. Shanker Krishnamurthy opines that "the changes that are seen in the cervical spine and lumbar spine are chronic and are not causally related. The MRI of the left should did not demonstrate any acute pathology." What is more, Dr. Krishnamurthy also stated that "it is my opinion that the claimant did not sustain any significant orthopedic injury as a result of the accident of record" (See Defendants' Motion, Examination of Dr. Shanker Krishnamurthy, Attached as Exhibit J).

Dr. Robert S. April, a neurologist, conducted an examination of the Plaintiff on February 22, 2018. Dr. April performed a neurological exam, a motor examination, a mechanical exam, and a sensory examination. Dr. April opined that "I have concluded with reasonable medical certainty that the accident of record did not produce a neurological diagnosis, disability,

limitation and did not aggravate any preexisting neurological conditions." (See Defendants' Motion, Examination of Dr. April, Attached as Exhibit K).

Turning to the merits of the motion for summary judgment, the Court is of the opinion that based upon the foregoing submissions, the Defendants have met their initial burden of proof. This is because the reports listed above provided 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 [2nd Dept, 2005]. Moreover the reports reflect that none of the injuries alleged were related to the incident. The Defendants have met their initial *prima facie* burden. In order to rebut that showing, 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 [2nd Dept, 1994]; *Bryan v Brancato*, 213 AD2d 577 [2nd 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 Shamsoodeen v. Kibong*, 41 A.D.3d 577, 578, 839 N.Y.S.2d 765, 766 [2nd Dept, 2007]; *Grossman v Wright*, 268 AD2d 79 [2nd 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 [2nd Dept, 2004]; *Burnett v Miller*, 255 AD2d 541 [2nd Dept, 1998]; *Beckett v Conte*, 176 AD2d 774 [2nd 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]; *Paul v. Allstar Rentals, Inc.*, 22 A.D.3d 476, 476, 802 N.Y.S.2d 185, 186 [2nd Dept, 2005]. 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. Laith Jazrawi, an orthopedic surgeon, examined the Plaintiff on several occasions and conducted a surgical operation of the Plaintiff Jewel Frye in December of 2015. He states in his Affirmation that the "the restrictions and other symptoms in Ms. Frye's shoulder are causally related to the car accident." Dr. Jazrawi also states that he bases his opinion on "Ms. Frye's description of the accident; her statements that she began feeling pain in her left shoulder immediately after the accident; her statements that she had not experienced symptoms in her shoulder during the several years before the accident; her consistent complaints of pain in her shoulder, from her first visit to my office after the accident through her last visit on July 11, 2018; and the substantial restrictions I detected in the ranage of motion of Ms. Frye's left shoulder."(See Affirmation in Opposition, Affidavit of Dr. Jazrawi, Attached as Exhibit A).

Dr. Yolander Bernard, examined the Plaintiff in March of 2015, May of 2015, and August of 2015 and August of 2018. Dr. Bernard stated that range of motion testing was measured with a goniometer during each examination. As part of the August 2018 examination Dr. Bernard noted that the Plaintiff was found to have in the lumbar spine "... 60 degrees of flexion (normal is 90 degrees); 20 degrees of extension (normal is 30 degrees); and 30 degrees of lateral bending to the left and right (normal is 40 degrees)." Dr. Bernard concluded that "the limitations I observed in the cervical and lumbar regions of Ms. Frye's spine were caused by the car accident on January 5, 2015." (See Affirmation in Opposition, Affirmation of Dr. Bernard, Attached as Exhibit C).

Dr. Matthew Dounel, conducted an examination of the Plaintiff on February 15, 2015. Dr. Dounel stated that range of motion testing was measured with a goniometer during each examination. In his report, Dr. Dounel found limited range of motion in the Plaintiff's Cervical and Lumbar Spine and opined that "there is a causal relationship between the patient's motor vehicle accident on January 5 and her above complaints." He also stated that Plaintiff was unable to work, and he represents that he provided her with a disability certificate (See Defendants' Motion, Examination of Dr. Dounel, Attached as Exhibit C).

While the affirmations of Drs. Paynter, Krishnamurthy, April and Tantleff were arguably sufficient to meet the Defendants' *prima facie* burden, Plaintiff's evidence, namely the affirmed reports of Drs. Jazrawi, Bernard and Dounel, raise 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 Dufel v. Green,* 84 N.Y.2d at 798, 622 N.Y.S.2d 900, 647 N.E.2d 105 [1995]. Accordingly, the motion by the Defendants is denied.

This constitutes the Decision and Order of the Court.

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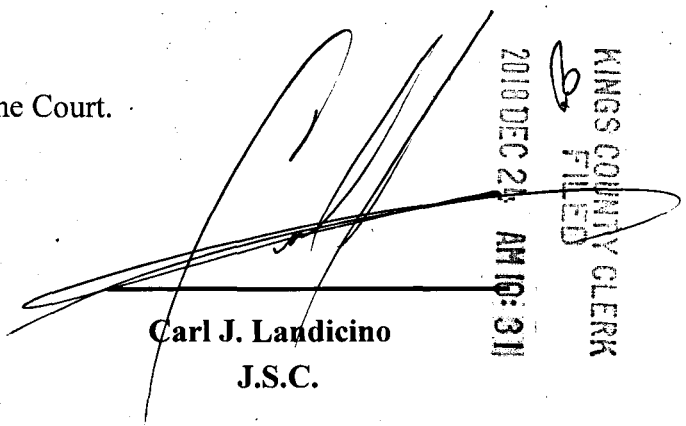

Carl J. Landicino
J.S.C.