

**Smith v Grajales**

2018 NY Slip Op 33453(U)

November 29, 2018

Supreme Court, Queens County

Docket Number: 1689/16

Judge: Leslie J. Purificacion

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FILED  
 DEC 04 2018  
 COUNTY CLERK  
 QUEENS COUNTY

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF QUEENS

Part 39

-----X  
 ANN T. SMITH,

Plaintiff,

--against--

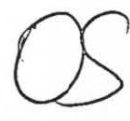
JONATHAN GRAJALES and REINALDO  
 LLANES,

Defendants,

-----X

Index Number 1689/16

DECISION/ORDER



Motion Sequence No. 5

The following papers numbered 1 to 9 read on defendants' motion pursuant to CPLR §3212 dismissing the complaint of the plaintiff on the grounds that plaintiff's alleged injuries fail to meet the serious injury threshold requirement of Insurance Law §5102(d).

Papers  
Numbered

N.M., Aff., Exhibits and Service.....	1-4
Answering Aff., Exhibits and Service.....	5-7
Reply and Service.....	8-9

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

In this personal injury action, plaintiff Ann T. Smith seeks to recover damages for injuries allegedly sustained as a result of a motor vehicle accident that occurred on January 12, 2014 on 69<sup>th</sup> Street at or near its intersection of Calamus Avenue in Queens County, New York. In her verified bill of particulars, plaintiff alleges injuries to her right shoulder, cervical spine and lumbar spine. Plaintiff asserts that as a result of the accident she suffered: "a permanent loss of use of a body organ, member, function or system"; "a permanent consequential limitation of use of a body organ or member; a significant limitation of use of a body function or system; significant disfigurement; and "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 90 days during the 180 days immediately following the occurrence of the injury or impairment" (Insurance Law §5102[d]). Defendants assert that plaintiff's alleged injuries do not meet the threshold requirement of Insurance Law §5102(d), and therefore summary judgment dismissing plaintiff's complaint is warranted.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact, (see CPLR §3212[b]; Alvarez v Prospect Hosp., 68 N.Y.2d 320; Winegrad v New York Univ. Med. Ctr., 64 N.Y.2d 851; Zuckerman v City of New York, 49 N.Y.2d 557). The question of whether plaintiff sustained a "serious injury" as defined by Insurance Law §5102(d) is one of law that can be disposed of by summary judgment and defendant in seeking same has the burden to show that plaintiff's injuries do not rise to the level of those set forth in the statute (see Gaddy v Eycler, 79 N.Y.2d 955; Licari v Elliot, 57 N.Y.2d 230). This may be accomplished through submission of plaintiff's deposition testimony and/or affidavits, affirmations or sworn reports of medical experts who examine the plaintiff and conclude that no objective medical findings support the plaintiff's claim (see Grossman v Wright, 268 A.D.2d 79; Toure v Avis Rent A Car Sys., 98 N.Y.2d 345).

In support of their application, defendants submit the properly affirmed report of orthopedist Elizabeth Morrison, M.D. F.A.A.O.S., M.P.T, plaintiff's verified bill of particulars and plaintiff's examination before trial testimony.

On August 18, 2017, Dr. Elizabeth Morrison performed an orthopedic examination of the plaintiff. In her report, Dr. Morrison indicates the medical records she reviewed and the means by which certain tests were performed including objective quantified range of motion testing by use of a goniometer. Dr. Morrison found that range of motion of the lumbar spine and cervical spine were all within normal ranges. Dr. Morrison also performed range of motion testing on the right shoulder and found plaintiff exhibited normal range of motion with the exception of flexion 170 degrees (180 degrees normal) and abduction 170 degrees (180 degrees normal). Dr. Morrison also found plaintiff's right shoulder tested positive for impingement sign. All other objective testing was negative. Dr. Morrison opined that plaintiff's cervical spine sprain/strain, lumbar spine sprain/strain and right shoulder sprain/contusion were resolved. She further stated that there was no objective evidence of disability.

The court finds that the defendants have failed to meet their prima face burden of eliminating all triable issues of fact with respect to plaintiff's right shoulder. The defendants' orthopedist found limitations in plaintiff's right shoulder and plaintiff tested positive for impingement sign. Dr. Morrison does not address these findings but conclusively states that the right shoulder injury has resolved. Without an explanation for these finding, the court cannot conclude that the plaintiff's right shoulder injuries have resolved. The court further finds that the defendants have met their prima facie burden with respect to the cervical and lumbar spine in all alleged categories. Thus, the burden shifts to the plaintiff to raise a triable issue of fact.

In opposition, plaintiff submits the properly affirmed radiology reports of William A. Weiner, D.O., the properly notarized affidavit of treating chiropractor Richard E.



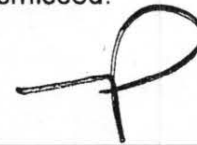
Amato wherein he incorporates his treatment records, the properly affirmed report of treating doctor Nickhil Gupta, D.O. wherein he incorporates his treatment records, the properly affirmed report of orthopedist Donald I. Goldman, M.D., FAADEP, and affidavit of plaintiff. The court finds that the reports of plaintiff's treating doctors, chiropractor and radiologist are sufficient to raise a triable issue of fact with respect to whether plaintiff has sustained a permanent loss of use of a body organ, member, function or system, a permanent consequential limitation of use of a body organ or member and a significant limitation of use of a body function or system to her cervical and lumbar spine.

However, the court further finds that plaintiff has failed to raise a triable issue of fact with respect to whether she suffered a "significant disfigurement" and "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 90 days during the 180 days immediately following the occurrence of the injury or impairment".

Accordingly, defendants' motion is granted to the extent that the portion of plaintiff's complaint asserting "significant disfigurement" and "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 90 days during the 180 days immediately following the occurrence of the injury or impairment" is dismissed.

This is the decision and order of the court.

Date:



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Hon. Leslie J. Purificacion, J.S.C.

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