

**Francis v Bowes**

2019 NY Slip Op 34537(U)

December 9, 2019

Supreme Court, Rockland County

Docket Number: Index No. 030548/2018

Judge: Sherri L. Eisenpress

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ROCKLAND

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ANGIE FRANCIS,

Plaintiff,

-against -

REBECCA BOWES,

Defendant.

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HON. SHERRI L. EISENPRESS, A.J.S.C.

**DECISION/ORDER**

Index No. 030548/2018

(Motion #2)

The following papers, numbered 1- 4, were read in connection with Defendant Rebecca Bowes' ("Defendant") motion for summary judgment and dismissal of the Complaint on the ground that there are no triable issues of fact, in that the plaintiff cannot meet the serious injury threshold requirement as mandated by Insurance Law Sections 5104(a) and 5102(d):

<u>PAPERS</u>	<u>NUMBERED</u>
NOTICE OF MOTION/AFFIRMATION IN SUPPORT/EXHIBITS A-G	1-2
AFFIRMATION IN OPPOSITION/EXHIBITS A-J	3
REPLY AFFIRMATION	4

Plaintiff commenced the instant matter to recover damages for personal injuries arising out of an automobile accident which occurred on July 12, 2017, on the northbound lanes of the Tappan Zee Bridge, when the rear of her vehicle was struck by Defendant's vehicle. Defendant has conceded liability in this action. Plaintiff, 27 years old at the time of the accident, alleges that as a result of the accident she sustained a tear of the anterior clinoid labrum end of her right shoulder which required arthroscopic right shoulder surgery; cervical disc bulge at C5-6; and cervical and lumbar radiculopathy. Defendant moves for summary judgment and dismissal of the Complaint on the ground that there are no triable issues of fact, in that the plaintiff cannot meet the serious injury threshold requirement as mandated by Insurance Law Sections 5104(a) and 5102(d).

In support of her summary judgment motion, Defendant annexes the Plaintiff's examination before trial transcript and the affirmed medical report of Kenneth Austin, M.D.,

Defendant's examining orthopedist. Upon examination, Dr. Austin finds Plaintiff's cervical and lumbar examination to be unremarkable, with all measurements performed with a goniometer to be within normal ranges. He notes that Plaintiff's right shoulder demonstrated some keloid about two of the three arthroscopic portals but found that she had full range of motion, no impingement and excellent strength throughout. Additionally, Defendant argues that Plaintiff's 90/180 day category claim must be dismissed because Plaintiff's proof fails to show that she was medically prevented from performing "substantially all" of her usual and customary activities for the requisite period and the time.

As an initial matter, Plaintiff argues that Defendant's motion is untimely, as the Court ordered summary judgment motions to be filed by June 22, 2019 and the instant motion was filed on June 24, 2019. In substantive opposition to the instant motion, Plaintiff submits her medical records, which show contemporaneous range of motion findings, and the affirmed report of Dr. Gabriel L. Dassa, an orthopedic surgeon. Dr. Dassa finds decreased motion in Plaintiff's right shoulder, including flexion of 155 degrees (normal 170); abduction of 155 degrees (normal 170); internal rotation of 45 degrees (normal 60); external rotation of 75 degrees (normal 90); extension of 15 degrees (normal 30) and abduction of 25 degrees (normal 40). Dr. Dassa also finds significant decreased range of motion in Plaintiff's cervical spine including a finding of 40 degrees extension (normal 75); lateral bending of 25 degrees (normal 45) and lateral rotation of 10 degrees (normal 80). Likewise, he notes limitations of range of motion in Plaintiff's lumbosacral spine including a finding of 55 degrees flexion (normal 90) and 20 degrees lateral bending (normal 40). Dr. Dassa diagnoses Plaintiff with right shoulder labrum tear, synovitis and impingement; residual adhesive capsulitis to the right shoulder and C5-C6 disk bulge with cervical and lumbar radiculopathy, causally related to the subject accident and permanent in nature.

Plaintiff argues that Defendant has not met its burden upon summary judgment as Dr. Austin failed to review any MRI films including the MRI of the right shoulder. With regard

to the 90/180 day category, Plaintiff argues that while Plaintiff missed work from October 2017 through March 2018, he fails to opine or comment on what portion of time that was due to her injuries from the subject accident, and in doing so failed to opine of the 90/180 day category. In the event that the Court finds she met her burden, Plaintiff argues that there are triable issues of fact which require denial of the summary judgment motion, including contemporaneous and recent findings with respect to her limited range of motion.

The proponent of a summary judgment motion must establish his or her claim or defense sufficient to warrant a Court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact. Giuffrida v Citibank Corp., et al., 100 N.Y.2d 72 (2003) (citing Alvarez v Prospect Hosp., 68 N.Y.2d 320 (1986)). The failure to do so requires a denial of the motion without regard to the sufficiency of the opposing papers. Lacagnino v Gonzalez, 306 A.D.2d 250 (2d Dept 2003). However, once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial. Gonzalez v. 98 Mag Leasing Corp., 95 N.Y.2d 124 (2000). Mere conclusions or unsubstantiated allegations unsupported by competent evidence are insufficient to raise a triable issue. Gilbert Frank Corp. v. Federal Ins. Co., 70 N.Y.2d 966 (1988); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980).

As an initial matter, the Court will decide the instant summary judgment motion on the merits. While motions were required to be filed by June 22, 2019, which was a Saturday, the motion was filed after the weekend on Monday, June 24, 2019. In order to be entitled to summary judgment it is incumbent upon the defendant to demonstrate that plaintiff did not suffer from any condition defined in Insurance Law §5102(d) as a serious injury. Healea v Andriani, 158 A.D.2d 587, 551 N.Y.S.2d 554 (2d Dept 1990). In the instant matter, Defendants' examining physicians found full range of motion in Plaintiff's cervical and lumbar spine. As such, Defendants have met their burden on summary judgment with respect to the



categories of significant limitation of use and permanent consequential limitation of use and the burden shifts to Plaintiff to demonstrate a triable issue of fact.

A plaintiff must come forward with sufficient evidentiary proof in admissible form to raise a triable issue of fact as to whether the plaintiff, suffered a "serious injury" within the meaning of the Insurance Law. Zoldas v St. Louis Cab Corp., 108 A.D.2d 378, 489 N.Y.S.2d 468 (1st Dept 1985); Dwyer v Tracey, 105 AD2d 476, 480 N.Y.S.2d 781 (3d Dept. 1984). One way to substantiate a claim of serious injury is through an expert's designation of a numeric percentage of a plaintiff's loss of range of motion, i.e., quantitatively. McEachin v. City of New York, 137 A.D.3d 753, 756, 25 N.Y.S.3d 672 (2d Dept. 2016). However, 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. Id. By establishing that any one of several injuries sustained in an accident is a serious injury within the meaning of Insurance Law §5102(d), a plaintiff is entitled to seek recovery for all injuries incurred as a result of the accident. Bonner v Hill, 302 AD2d 544, 756 N.Y.S.2d 82 (2d Dept 2003); O'Neill v O'Neill, 261 AD2d 459, 690 N.Y.S.2d 277 (2d Dept 1999).

In the instant matter, Plaintiff has demonstrated a triable issue of fact requiring denial of the summary judgment motion based upon her medical records documenting contemporaneous limitation of motion and limitation of motion presently in her right shoulder, cervical and lumbar spine. Where conflicting medical evidence is offered on the issue as to whether the plaintiff's injuries are permanent or significant, and varying inferences may be drawn, the question is one for the jury. Martinez v Pioneer Transportation Corp., 48 A.D.3d 306, 851 N.Y.S.2d 194 (1st Dept 2008). Further, when discrepancies between the competing reports of the physicians create issues of credibility, those issues of fact should not be resolved on summary judgment and require a trial. Francis v Basic Metal, Inc., 144 AD2d 634 (2d Dept 1981); Cassagnol v Williamsburg Plaza Taxi, 234 AD2d 208, 651 N.Y.S.2d 518 (1st Dept

1996). As such, the triable issues of fact require denial of Defendants' summary judgment motion with respect to the categories of significant limitation of use and permanent consequential limitation of use.

However, Defendant is entitled to summary judgment with respect to the 90/180 day category. Defendant submits Plaintiff's examination before trial transcript which demonstrates that Plaintiff had some restrictions with regard to her work and/or everyday activities but not that she was prevented from performing all of her usual activities for 90 out of the 180 days following the occurrence, as she continued to work until she gave birth in October, 2018. This, coupled with Plaintiff's failure to submit medical evidence which documents that she was prevented from performing "substantially all" of her usual and customary activities for the requisite period, requires the grant of summary judgment with respect to this category. See Rubin v. SMS Taxi Corp.,

Accordingly, it is hereby

**ORDERED** that Defendant Rebecca Bowes' motion for summary judgment, pursuant to CPLR § 3212, is DENIED, except with respect to Plaintiff's claim based upon the 90/180 no-fault category, which is dismissed; and it is further

**ORDERED** that this matter is scheduled for an appearance in the Trial Readiness Part on **WEDNESDAY, JANUARY 8, 2020, at 9:30 a.m.**

The foregoing constitutes the Opinion, Decision & Order of the Court on Motion #2.

Dated: New City, New York  
December 9, 2019

  
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**HON. SHERRI L. EISENPRESS, A.J.S.C.**

TO:  
All Parties (by e-file)