Kester v Sendoya
2013 NY Slip Op 32077(U)
August 29, 2013
Supreme Court, New York County
Docket Number: 101807/11
Judge: Arlene Bluth

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BLUTH Justice

PART 22

KESTER, KATHRYN

- v -

LUIS SENDOYA, ET AL.

INDEX NO. 101807/11

MOTION DATE

MOTION SEQ. NO. 02

MOTION CAL. NO.

The following papers, numbered 1 to 3 were read on this motion to/for MSJ / Serious injury

	PAPERS NUMBERED
~~Notice of Motion~~/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION/ORDER

FILED

SEP 06 2013

NEW YORK COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 8/29/13

HON. ARLENE P. BLUTH

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NY
COUNTY OF NEW YORK: PART 22

Index No.:101807/11
Motion Seq 02

Kathryn Kester,

Plaintiff,

-against-

Luis Sendoya and George Cubas,

Defendant.

DECISION/ORDER

HON. ARLENE P. BLUTH, JSC

Defendants' motion for summary judgment dismissing this action on the grounds that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law §5012(d) is granted, and the action is dismissed.

In this action, plaintiff alleges that on February 2, 2010 she sustained personal injuries when defendants' taxi struck her vehicle. Defendants' original motion for summary judgment was denied by Justice Silver on January 17, 2013 with leave to renew upon submission of a missing page from a doctor's report; additionally, the Court denied plaintiff's cross-motion for summary judgment on liability as untimely. Defendants now submit the missing page of Dr. Robbins' report, explaining that the reason it took their office until July 2013 to do so is that the two attorneys previously assigned to this case both left the firm. Accordingly, the Court will now address the serious injury motion on the merits.

To prevail on a motion for summary judgment, the defendant has the initial burden to present competent evidence showing that the plaintiff has not suffered a "serious injury" (*see Rodriguez v Goldstein*, 182 AD2d 396 [1992]). Such evidence includes "affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (*Shinn v Catanzaro*, 1 AD3d 195, 197 [1st Dept

2003], *quoting Grossman v Wright*, 268 AD2d 79, 84 [1st Dept 2000]). Where there is objective proof of injury, the defendant may meet his or her burden upon the submission of expert affidavits indicating that plaintiff's injury was caused by a pre-existing condition and not the accident (*Farrington v Go On Time Car Serv.*, 76 AD3d 818 [1st Dept 2010], *citing Pommells v Perez*, 4 NY3d 566 [2005]). In order to establish prima facie entitlement to summary judgment under the 90/180 category of the statute, a defendant must provide medical evidence of the absence of injury precluding 90 days of normal activity during the first 180 days following the accident (*Elias v Mahlah*, 2009 NY Slip Op 43 [1st Dept]). However, a defendant can establish prima facie entitlement to summary judgment on this category without medical evidence by citing other evidence, such as the plaintiff's own deposition testimony or records demonstrating that plaintiff was not prevented from performing all of the substantial activities constituting customary daily activities for the prescribed period (*id.*).

Once the defendant meets his or her initial burden, the plaintiff must then demonstrate a triable issue of fact as to whether he or she sustained a serious injury (*see Shinn*, 1 AD3d at 197). A plaintiff's expert may provide a qualitative assessment that has an objective basis and compares plaintiff's limitations with normal function in the context of the limb or body system's use and purpose, or a quantitative assessment that assigns a numeric percentage to plaintiff's loss of range of motion (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350-351 [2002]). Further, where the defendant has established a pre-existing condition, the plaintiff's expert must address causation (*see Valentin v Pomilla*, 59 AD3d 184 [1st Dept 2009]; *Style v Joseph*, 32 AD3d 212, 214 [1st Dept 2006]).

In her verified bill of particulars (exh. D to moving papers), plaintiff claims she sustained

injuries to her cervical spine including the aggravation of pre-existing asymptomatic changes to C4-5, C5-6 and C6-7; carpal tunnel syndrome and a right rotator cuff tear which was surgically repaired on March 4, 2011.

Defendants met their prima facie burden by submitting the affirmed reports of Dr. Fisher, a radiologist, who reviewed the MRI films of plaintiff's cervical spine taken three months after the accident and saw degenerative changes most pronounced at C5-6 and C6-7 but no evidence of trauma (exh E), and Dr. Robbins, an orthopedist, who found that plaintiff may have sustained a cervical soft tissue injury that has since resolved, and stated that her right shoulder surgery was necessitated by a pre-existing shoulder condition (exh F). Additionally, defendants cite to plaintiff's deposition testimony wherein she testified that she was not confined to her bed or home after the accident (exh H, T at 59-60).

Based on the foregoing, defendants have satisfied their burden of establishing prima facie that plaintiff did not suffer a serious injury, and the burden shifts to plaintiff to raise a triable factual question as to whether she sustained a serious injury.

In opposition, plaintiff submits, inter alia, various certified records from treating providers' offices. Exhibit C contains records from Downtown Primary Care and exhibit D contains records from NYU Medical Center. To the extent that the medical opinions contained in exhibits are not affirmed, they were not considered. Even if these records had been submitted in admissible form, there is nothing to document that plaintiff ever told any medical provider that she injured her right shoulder in this accident.

The only admissible medical evidence submitted by plaintiff is the affirmed report of Dr. Rose (exh E), an orthopedic surgeon who first examined plaintiff on 2/28/11, more than one year after the accident, and performed arthroscopic surgery on plaintiff's shoulder on 3/4/11. Thus,

plaintiff has failed to present any admissible proof that she saw a medical provider for any evaluation of the shoulder injury she claims in her bill of particulars until one year after the accident. While the Court of Appeals in Perl "reject[ed] a rule that would make contemporaneous quantitative measurements a prerequisite to recovery" (18 NY3d at 218), it confirmed the necessity of some type of contemporaneous treatment to establish that a plaintiff's injuries were causally related to the incident in question. *See Rosa v Mejia,* 95 AD3d 402, 943 NYS2d 470 (1st Dept 2012). Dr. Rose's conclusory speculation that plaintiff's torn rotator cuff was a traumatically induced injury directly related to the subject motor vehicle accident does not demonstrate causation, and is insufficient to defeat defendants' motion. Nor has plaintiff submitted any medical evidence to raise a triable issue of fact regarding plaintiff's claimed cervical spine injury or carpal tunnel syndrome.

Accordingly, it is

ORDERED that defendants' motion for summary judgment is granted, and this action is dismissed.

This is the Decision and Order of the Court.

Dated: August 29, 2013
New York, New York

HON. ARLENE P. BLUTH, JSC

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COUNTY CLERK'S OFFICE