

<b>Hochroth v Rollerson</b>
2013 NY Slip Op 32470(U)
October 8, 2013
Supreme Court, New York County
Docket Number: 106047/2010
Judge: Arlene P. Bluth
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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH  
*Justice*

PART 22

Index Number : 106047/2010  
HOCHROTH, DAVID  
VS.  
ROLLERSON, NOLAN  
SEQUENCE NUMBER : 002  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to 3, were read on this motion to/for serious injury  
Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). 1  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). 2  
Replying Affidavits \_\_\_\_\_ | No(s). 3

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION/ORDER

**FILED**  
OCT 16 2013  
NEW YORK  
COUNTY CLERKS OFFICE

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

Dated: 10/8/13

[Signature], J.S.C.

HON. ARLENE P. BLUTH

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
  - 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
  - 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

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

-----X  
David Hochroth,

Motion Seq 02

Plaintiff,

Index No. 106047/10

-against-

DECISION AND ORDER

Nolan Rollerson and Valorie Rollerson,

Hon. ARLENE P. BLUTH, JSC

Defendants.

**FILED**

OCT 16 2013

-----X  
NEW YORK COUNTY CLERKS OFFICE  
Defendants' motion for summary judgment dismissing the complaint on the grounds that plaintiff has not demonstrated that his injuries meet the serious injury threshold pursuant to Insurance Law § 5102(d) is granted, and the case is dismissed.

Plaintiff, self-represented, claims that he was injured in a motor vehicle accident involving defendants' vehicle on May 11, 2007 on the westbound service road of the Long Island Expressway. Plaintiff claims that he injured his back and neck<sup>1</sup>; he also claims that he was incapacitated from work for 3-4 months following the accident.

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*

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<sup>1</sup>Although the bill of particulars, which was verified by plaintiff's former attorney, claimed injuries to plaintiff's back, both shoulders, both wrists, neck, right knee and both hips, at his deposition, plaintiff testified only about neck and back injuries (exh D, T 63, 93-94).

*Catanzaro*, 1 AD3d 195, 197 [1<sup>st</sup> Dept 2003], quoting *Grossman v Wright*, 268 AD2d 79, 84 [1<sup>st</sup> 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 [1<sup>st</sup> 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 [1<sup>st</sup> 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 [1<sup>st</sup> Dept 2009]; *Style v Joseph*, 32 AD3d 212, 214 [1<sup>st</sup> Dept 2006]).

In support of their motion, defendants annex two affirmed medical reports. The first is from Dr. Israel, an orthopedist, who examined plaintiff on April 4, 2012, and found normal range of motion in plaintiff's cervical, thoracic and lumbar spine, both wrists and right knee. He opined that plaintiff's sprains had resolved and that he had no orthopedic disability. Defendants also submit the affirmed MRI reports of Dr. Lastig, a radiologist, who reviewed films of plaintiff's cervical and lumbar spine taken approximately two months after the subject accident, and found evidence of advanced multi-level degenerative disc disease in both areas. Dr. Lastig supported his conclusions by noting the presence of marginal end-plate osteophytes and unciniate osteophytes in the cervical spine, and disc desiccation and disc space narrowing in the lumbar spine.

As for any 90/180 claim, defendants note that plaintiff has not provided any medical evidence that which confirms that he was unable to engage in normal activities, including work during the relevant period.

Thus, defendants have met their prima facie burden of showing that plaintiff has not suffered a serious injury pursuant to the insurance law, and the burden shifts to plaintiff to raise a triable factual question sufficient to defeat the motion.

Plaintiff's opposition to the motion consists of an unsigned 6 page narrative (exh 1), and an unsigned document from a massage therapist (Kimberli Monk), along with her bills (exh 2). Neither of these documents is in admissible form and were not considered by the Court.

Plaintiff also submits the affirmed report of Dr. Delman dated November 1, 2007, an unaffirmed MRI report of plaintiff's lumbar spine from Stand -Up MRI of Manhattan, PC and page 1 of a letter (unsigned) from State Farm regarding a property damage claim (exh 3). Although Dr. Delman's report is in proper form to the extent that it is affirmed, it does not raise a triable factual question. The report is incomplete; only pages 1,2 and 5 were submitted (see numbering at the bottom of the pages). In this November 1, 2007 "follow-up evaluation", Dr. Delman makes a passing reference to the fact that he last saw plaintiff on May 29, 2007, 18 days after the accident, but he does not provide any records from that exam or give any details about that visit. Significantly, plaintiff has not submitted any report from any doctor who examined him shortly after the accident. "Absent admissible contemporaneous evidence of alleged limitations, plaintiff cannot raise an inference that his injuries were caused by the accident" *Shu Chi Lam v Wang Dong*, 84 AD3d 515, 922 NYS2d 381 (1st Dept 2011). Additionally, while Dr. Delman refers to the findings of MRI reports of plaintiff's cervical and lumbar spine, he does not say that he reviewed the films himself and the radiology reports submitted are not affirmed. Dr. Delman's recitation of the findings in the unaffirmed reports does not put the findings of those of inadmissible reports before the Court. *See Malupa v Oppong*, 106 AD3d 538, 966 NYS2d 9 (1st Dept 2013). There is nothing in his affirmation to establish that any of plaintiff's physical conditions were caused by the subject accident.

On the return date, plaintiff handed up two additional documents which were not attached to his opposition, without proof that these papers were served on defendants— a document signed by a chiropractor (Bruce Lambert) but not sworn to before a notary,

and an August 23, 2011 letter from Daniel Einhorn, vice-president of a company that employed plaintiff, in which Mr. Einhorn approximated the time that plaintiff missed from work as "three to four months", without stating specific dates. Neither of these documents is in admissible form, and neither was considered by the Court.

Finally, the Court notes that plaintiff has not raised a triable issue of fact as to significant limitation of use or permanent consequential limitation of use because he did not submit an affirmed report of a recent physical examination and therefore did not rebut the findings of defendants' doctors, who affirmed that any sprains were resolved (Dr. Israel), and that plaintiff has evidence of widespread degenerative disc disease (Dr. Lastig). Nor has plaintiff raised a triable question of fact on his 90/180-day claim because he did not submit proof that he was directed by a doctor to stayed home. See *Shu Chi Lam v Wang Dong*, 84 AD3d 515, 516, 922 NYS2d 381 (1<sup>st</sup> Dept 2011).

For the foregoing reasons, plaintiff has failed to raise an issue of fact and summary judgment is granted to defendants. The complaint is dismissed.

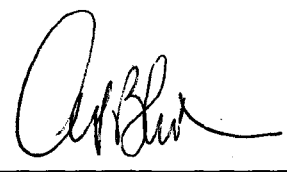
Accordingly, it is

ORDERED that defendants' motion is granted. The case is dismissed.

This is the Decision and Order of the Court; copies mailed to both sides.

Dated: October 8, 2013  
New York, New York

**FILED**  
OCT 16 2013  
NEW YORK  
COUNTY CLERKS OFFICE



ARLENE P. BLUTH, JSC