

**Chenault v Cruz**

2014 NY Slip Op 31440(U)

May 30, 2014

Supreme Court, New York County

Docket Number: 108354/09

Judge: Arlene P. Bluth

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**SUPREME COURT OF THE STATE OF NEW YORK**  
**HON. ARLENE P. BLUTH NEW YORK COUNTY**

Index Number : 108354/2009

CHENUALT, WANDRA

vs

CRUZ, WYANNIE

Sequence Number : 004

SUMMARY JUDGMENT

PART **22**

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to 5, were read on this motion to/for MST

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). 1

Notice of Cross Motion  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). 2

Replying Affidavits \_\_\_\_\_ | No(s). 3

\_\_\_\_\_ | No(s). 4, 5

Upon the foregoing papers, it is ordered that this motion is consolidated for  
joint disposition with seq 005 and

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION/ORDER**

**FILED**

JUN 04 2014

COUNTY CLERK'S OFFICE  
NEW YORK

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

Dated: 5/30/14



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  
Wandra Chenault,

*Plaintiff,*

-against-

Wyannie Cruz, Martha Suriel and Erika McDavid,  
*Defendants.*

and 3 other cases consolidated for joint trial

Motion Seq 04 and 05

Index No. 108354/09

DECISION AND ORDER

Hon. ARLENE P. BLUTH, JSC

**FILED**

JUN 04 2014

Motion sequence numbers 04 and 05 are consolidated for joint disposition. CLERK'S OFFICE  
NEW YORK

Defendant/third-party plaintiff McDavid's motion and second third-party

defendant Jamerson's cross-motion for summary judgment dismissing the complaint and all cross-claims on the grounds that plaintiff has not demonstrated that her injuries meet the serious injury threshold pursuant to Insurance Law § 5102(d) (seq 04) are both denied.

The branch of defendants/second third-party defendants Cruz and Suriel's motion for the same relief is also denied; the branch seeking to dismiss the claims against them on the grounds that plaintiff has not established that they were liable for this accident (seq 05) is granted without opposition, and the complaint and all cross claims are dismissed as against defendants Cruz and Suriel.

Plaintiff was involved in a motor vehicle accident on July 9, 2006. In her verified bill of particulars dated June 7, 2010, plaintiff claimed she sustained cervical and lumbar spine injuries as a result of this accident (exh J to moving papers-seq 04, para. 8). In her verified supplemental bill of particulars dated December 28, 2011, plaintiff

claimed additional injuries including aggravation/exacerbation of a prior injury to the lumbar spine, left shoulder and right hip (exh K to moving papers-seq 04).

### Serious Injury

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 [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 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, movants annex the affirmed report of Dr. April, a neurologist, who performed motor, cranial nerve, sensory and mechanical examination of plaintiff on February 8, 2012, and determined that she had a normal exam. Movants also submit the affirmed report of Dr. Toriello, an orthopedist, who examined plaintiff's cervical and lumbosacral spine, right and left shoulders, elbows, wrists and hands on February 15, 2012, and stated as his impression "evidence of a resolved low back sprain".

Significantly, neither of defendants' doctors' reports addressed plaintiff's claim of injury to her right hip set forth in her verified supplemental bill, and none of the defendants submitted any other doctor's report addressing this claimed injury. It is not disputed that the supplemental bill was served on December 28, 2011, weeks before both of defendants' doctors' exams. Both movants attach plaintiff's supplemental bill and refer to it in their moving affirmations as part of their discussion of serious injury (seq. 04-para. 14, seq 05, para. 8). The Court notes that in the conclusion of sequence 05 (para. 46), movants asserted that none of the injuries set forth in the original bill

qualify as serious injuries within the meaning of the Insurance Law, but did not mention any of the injuries set forth in the supplemental bill, specifically the right hip. Clearly movants were on notice of the plaintiff's claim regarding her right hip; nevertheless, this injury was not addressed in the moving papers.

Therefore, the Court finds that movants have not met their prima facie burden as to plaintiff's claim that she sustained an aggravation/exacerbation of a prior injury to the right hip as a result of this accident, and it is unnecessary to determine whether the papers plaintiff submitted in opposition were sufficient to raise a triable issue of fact. Thus, the motions and cross-motion for summary judgment dismissing the complaint and all cross-claims on the grounds that plaintiff has not demonstrated that his injuries meet the serious injury threshold pursuant to Insurance Law § 5102(d) are all denied. *See Singer v Gae Limo Corp.*, 91 AD3d 526, 937 NYS2d 39 (1st Dept 2012).

#### Liability

The branch of defendants/second third-party defendants Cruz and Suriel's motion for summary judgment dismissing the complaint and all cross-claims against them on the grounds that plaintiff has not established that they were liable for this accident (seq 05) is granted without opposition, and the complaint and all cross claims are dismissed as against Cruz and Suriel. None of the parties opposed this relief.

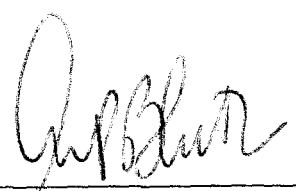
Accordingly, it is

**ORDERED** that the complaint and any cross-claims are dismissed as against Cruz and Suriel (seq 05); the motions and cross-motion seeking to dismiss the

complaint on the grounds that plaintiff did not sustain a serious injury are denied.

This is the Decision and Order of the Court.

Dated: May 30, 2014  
New York, NY



HON. ARLENE P. BLUTH, JSC

HON. ARLENE P. BLUTH

**FILED**

JUN 04 2014

COUNTY CLERK'S OFFICE  
NEW YORK