

**Ventura v Martinez**

2018 NY Slip Op 30020(U)

January 8, 2018

Supreme Court, New York County

Docket Number: 151387/2015

Judge: Paul A. Goetz

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ
J.S.C.
Justice

PART 22

VENTURA, MILDRED
-v-
MARTINEZ, ABEL A.

INDEX NO. 151387/2015
MOTION DATE
MOTION SEQ. NO. 001

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

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

Defendants Abel A. Martinez and Camry Leasing, Inc.'s ("Defendants") motion for summary judgment pursuant to CPLR 3212 on the grounds that the injuries allegedly sustained by Plaintiff Mildred Ventura as a result of the January 26, 2014, motor vehicle accident fail to establish serious injury thresholds as defined by Insurance Law § 5102 (d) is decided as follows:

Plaintiff's bill of particulars alleges she sustained injuries to cervical and lumbar spine and right knee. Plaintiff avers that her injuries meet the following Insurance Law § 5102 (d) criteria: significant disfigurement; a fracture; permanent consequential limitation of use; significant limitation of use; and 90/180-day.

Defendants' neurologist, Dr. Naunihal Sachdev Singh examined Plaintiff on February 22, 2016, and found normal ranges of motion for Plaintiff's cervical and lumbar spine, and conducted other objective tests that were negative/normal. Dr Singh concludes that Plaintiff's alleged injuries to her cervical and lumbar spine are resolved.

Defendants' orthopedist, Dr. Arnold T. Berman, examined Plaintiff on March 10, 2016, and found normal ranges of motion for Plaintiff's cervical and lumbar spine and right knee and conducted other objective tests that were negative/normal. Dr. Berman concludes that Plaintiff's alleged injuries to her cervical and lumbar spine and right knee are all resolved with no residuals.

Defendants' radiologist, Dr. Audrey Eisenstadt, reviewed MRI's of Plaintiff's cervical and lumbar spine (both taken on February 19, 2014) on July 1, 2016. Concerning Plaintiff's cervical spine Dr. Eisenstadt found an incidental hemangioma at C5 (an accumulation of blood vessels with no

Dated: JAN 08 2018

1074

\_\_\_\_\_, J.S.C.

- 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

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

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ J.S.C. Justice

PART 22

INDEX NO.
MOTION DATE
MOTION SEQ. NO.

-v-

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traumatic origin), disc desiccation (drying out of discs with no traumatic etiology), bulging discs indicating disc disease and no disc herniations or annular tears; in short, Dr. Eisenstadt perceived no posttraumatic changes. Regarding Plaintiff's lumbar spine Dr. Eisenstadt found early degenerative changes and no evidence of an osseous contusion or fracture, disc herniation or an annular tear to indicate a recent traumatic injury or one causally related to the accident.

Defendants' submissions fail to eliminate triable issues of fact as to whether Plaintiff sustained serious injuries to her cervical and lumbar spine. Dr. Singh and Dr. Berman conclude that Plaintiff's injuries to her cervical and lumbar spine are resolved but Dr. Eisenstadt concludes that Plaintiff's injuries to her cervical and lumbar spine are the result of degeneration. These contradictory findings concerning Plaintiff's cervical and lumbar spine raise triable issues of fact for the jury to resolve (Karounos v Doulalas, 153 AD3d 1166 [1st Dept 2017]; Johnson v Salaj, 130 AD3d 502 [1st Dept 2015]; Martinez v Pioneer Transp. Corp., 48 AD3d 306 [1st Dept 2008]) and therefore, the burden does not shift to Plaintiff to submit evidence sufficient to raise an issue of fact (Jackson v Leung, 99 AD3d 489 [1st Dept 2012]).

As to Plaintiff's 90/180-day claim, Defendants merely argue that this category requires proof that Plaintiff was medically prevented from performing substantially all of her usual and customary activities for the requisite period without providing any proof that she was able to do so. Plaintiff's bill of particulars alleges she was confined to her bed for approximately three months and her home for approximately eight months and Defendants provide no evidence to the contrary. Therefore, Defendants also failed to meet their burden as to Plaintiff's 90/180-day claim.

Dated: JAN 08 2018

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J.S.C.

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

- 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 NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ  
J.S.C.  
*Justice*

PART 22

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

-v-

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

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

Defendants met their prima facie burden that Plaintiff did not sustain a serious injury to her right knee through the affirmed report of Dr. Berman who found normal ranges of motion and negative/normal test results and concluded that her alleged injury right knee was resolved (*Cattouse v Smith*, 146 AD3d 670 [1<sup>st</sup> Dept 2017]). In opposition Plaintiff failed to raise an issue of fact as to whether Plaintiff sustained a serious injury to her right knee. The only medical evidence submitted by Plaintiff in admissible form are the reports by Defendants doctors. Plaintiff's hospital records may not be considered because they are not certified (CPLR 2306 [a] & 4518 [c]). The medical records may not be considered because they are "certified" and "only hospital records, and not physician office records, are admissible by certification" (*Bronstein-Becher v Becher*, 25 AD3d 796, 797 [2<sup>nd</sup> Dept 2006]) and the MRI reports are not affirmed (CPLR 2106 [a]). Nevertheless, if Plaintiff establishes she sustained a serious injury to either her cervical or lumbar spine, she will be entitled to recover for all her injuries, including to her right knee (*Karounos v Doulalas*, 2017 NY Slip Op 06602 [1<sup>st</sup> Dept Sept. 26, 2017] [holding "[i]f plaintiff establishes a serious injury to her cervical or lumbar spine at trial, she will be entitled to recover damages for any other injuries caused by the accident, even those that do not meet the serious injury threshold."]).

Nothing in Plaintiff's bill of particular or the parties submissions suggest that Plaintiff suffered a disfigurement that "a reasonable person would view as unattractive, objectionable, or as the subject of pity or scorn" (*Sidibe v Cordero*, 79 AD3d 536 [1<sup>st</sup> dept 2010]) or a fracture (*Perez Hernandez v M. Marte Auto Corp.*, 104 AD3d 489 [1<sup>st</sup> Dept 2013] [holding contemporaneous hospital records establish fracture]) therefore, Plaintiff may proceed under the permanent consequential and significant

Dated: JAN 08 2018

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\_\_\_\_\_, J.S.C.

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- 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 NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ  
J.S.C.  
*Justice*

PART 22

Index Number : 151387/2015  
VENTURA, MILDRED  
vs  
MARTINEZ, ABEL A  
Sequence Number : 001  
SUMMARY JUDGMENT

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

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). _____
Answering Affidavits — Exhibits _____	No(s). _____
Replying Affidavits _____	No(s). _____

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

limitation of use categories as well as under her 90/180-day claim.

Accordingly, based on the foregoing it is hereby

**ORDERED** that Defendants' summary judgment motion is GRANTED as to Plaintiff's claim of serious injury to her right knee and claims under the significant disfigurement and fracture categories; and it is further

**ORDERED** that Defendants' summary judgment motion is DENIED as to Plaintiff's claim of serious injury to her cervical and lumbar spine and under the 90/180-day category; and it is further

**ORDERED** that the parties are directed to appear for a settlement conference in Part 22, 80 Centre Street, Room 136 on February 20, 2018 at 9:30 AM.

This constitutes the Decision and Order of the Court.

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

Dated: 1/8/18  
JAN 08 2018

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[Signature], J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
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