

Cho v Munera

2013 NY Slip Op 32055(U)

August 27, 2013

Supreme Court, New York County

Docket Number: 150443/2011

Judge: Arlene P. Bluth

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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. ARLENE P. BLUTH
Justice

PART 22

Index Number : 150443/2011
CHO, ELIZABETH
vs.
MUNERA, NICOLAS
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 MST / serious injury
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
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**

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

Dated: 8/27/13

[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 NY
COUNTY OF NEW YORK: PART 22**

Index No.: 150443/11
Motion Seq 02

Elizabeth Cho,

Plaintiff,

-against-

Nicolas Munera a/k/a Nicholas Munera,

Defendant.

DECISION/ORDER

HON. ARLENE P. BLUTH, JSC

Defendant's 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 denied.

In this action, plaintiff alleges that on September 9, 2010 she sustained personal injuries after she was struck by defendant's car in the crosswalk at Lexington Avenue and 23rd Street in Manhattan.

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, plaintiff claims she incurred the following injuries: traumatic brain injury, post concussion syndrome, post-traumatic stress disorder, cervical disc desiccation, cervical radiculopathy, injury to thigh, right leg/knee/foot and to shoulder/arm/wrist, bulging disc at T6-7 (exh C, para.11), and a 90/180-day claim.

In support of their motions, defendants submit affirmations from an orthopedist, neurologist, psychologist and neuroradiologist.

Annexed as Exhibit E is the July 6, 2012 affirmed report of Dr. Baskies, an orthopedist,

who examined plaintiff's cervical and thoracic spine, both shoulders, both arms, wrists, thighs and right leg, leg and foot by performing range of motion testing and various other tests. Dr. Baskies concluded that plaintiff had no disability or permanence in any of the claims areas of injury.

Annexed as Exhibit F is the June 11, 2012 affirmed report of Dr. Singh, a neurologist, who examined plaintiff's head and cervical and thoracic spine by performing range of motion testing and various other tests. Dr. Singh concluded that plaintiff had no objective neurological findings.

Annexed as Exhibit G is the June 4, 2012 affidavit of Samuel Rock, Ph.D, a psychologist, who examined plaintiff on May 22, 2012 who gave plaintiff a mental status exam. Dr. Rock concluded that plaintiff did not suffer from a psychological disability stemming from the subject motor vehicle accident, but that she had significant pre-existing psychological problems that were exacerbated by the accident.

Annexed as Exhibit H is the February 12, 2012 affirmed report of Dr. Cohn, a neuroradiologist who reviewed the 10/7/10 MRI film of plaintiff's lumbosacral spine and concluded that it was normal, and showed no evidence of pathological or acute traumatic related injury.

Based on these four reports, defendants met their prima facie burden of showing that the plaintiff did not sustain a permanent consequential injury or significant limitation as a result of the subject accident. Additionally, defendants met their initial burden with respect to plaintiff's 90/180-day claim by asserting that although plaintiff alleges in her bill of particulars and her deposition testimony that she was confined to her home for 4-5 months after the accident,

plaintiff has not submitted a signed directive from a doctor ordering her to stay home for the claimed period as a result of the instant car accident.

In opposition, plaintiff submits the affirmed report of Dr. Brown, a neurologist who examined plaintiff on December 2 and 3, 2010, approximately three months after the subject accident. He performed a series of cognitive functioning tests, memory/attention tests, executive functions and visual perceptual tests; his report contains the quantitative assessment of her limitations, which include numerous deficits (affirmed report, pages 2-4) He states that plaintiff reported that she was involved in an April 23, 2010 motor vehicle accident; however because she stated that she did not experience any cognitive problems prior to the date of the subject accident, he concludes that her injuries, traumatic brain injury, post concussion syndrome and neuropsychological impairment secondary to cerebral dysfunction, were caused by the instant motor vehicle accident.

Plaintiff also submits the affirmed report of Dr. Gurtovy, a psychiatrist, who examined her on February 24, 2011, approximately 18 months after the accident. He states that he examined plaintiff's perceptual process, tested her comprehension and remote memory (normal), but that her recent memory is impaired. Dr. Gurtovy concludes that plaintiff had no disability from a psychiatric perspective but that her prognosis is guarded.

Finally, plaintiff submits the November 20, 2012 affirmation of Dr. Ambrose, who is certified in Physical Medicine and Pain Management. Dr. Ambrose stated that she has been treating plaintiff since January 20, 2012. She opined that plaintiff suffered a traumatic brain injury as a result of this car accident; she states that plaintiff reported no cognitive problems prior to the subject accident. Finally, Dr. Ambrose opines that plaintiff's injuries (impaired memory,

headaches, anxiety, flat affect) are permanent because they have persisted more than two months after the accident.

Plaintiff has raised a triable question of fact as to whether she suffered a permanent consequential injury and/or a significant limitation causally related to this motor vehicle accident by submitting Dr. Brown's affirmed report wherein he quantified plaintiff's psychological and cognitive losses and limitations, and provided a qualitative comparison of plaintiff's condition to normal function. *See Toure v Avis Rent A Car Sys.*, 98 NY2d at 350-351, 746 NYS2d 865 (2002).

Accordingly, it is

ORDERED that defendant's 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 denied.

This is the Decision and Order of the Court.

Dated: August 27, 2013
New York, New York



ARLENE P. BLUTH, JSC

ARLENE P. BLUTH
J.S.C.