

Miranda v Chaudhary Gulfraz

2013 NY Slip Op 32439(U)

October 3, 2013

Sup Ct, New York County

Docket Number: 114079/10

Judge: Arlene P. Bluth

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. ARLENE P. BLUTH

PRESENT: _____
Justice

PART 22

Index Number : 114079/2010
MIRANDA, JOHN
vs
GULFRAZ, CHAUDHARY
Sequence Number : 002
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). 1

Answering Affidavits — Exhibits Cross-motion _____ No(s). 2

Replying Affidavits Opp. to answer, reply to answer, reply _____ No(s). 3, 4, 5, 6

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER

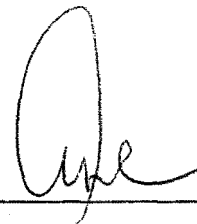
next cc: 11/25/13 9:30

*D's Motion denied
IT's cross-motion granted to extent.*

FILED

OCT 11 2013

COUNTY CLERK'S OFFICE
NEW YORK



Dated: _____

10/3/13

_____, 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

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

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

-----X

John Miranda, Karen Massaro and
Sandra Barna,

Motion Seq 02

Plaintiffs,

Index No. 114079/10

-against-

DECISION AND ORDER

Chaudhary Gulfraz and
Howsal Hacking Corp.,

Hon. ARLENE P. BLUTH, JSC

Defendants.

-----X

and third party action

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_____X

COUNTY CLERK'S OFFICE
NEW YORK

Defendants' motion for summary judgment dismissing the complaint on the grounds that plaintiff SANDRA BARNA has not demonstrated that her injuries meet the serious injury threshold pursuant to Insurance Law § 5102(d) is denied. Ms. Barna's cross-motion for summary judgment on liability is granted to the extent that she had no liability for the happening of the accident.

Plaintiff was an unrestrained passenger in a taxi that was involved in an accident on June 21, 2010. In her verified bill of particulars, plaintiff claims various injuries including concussion and post-concussion syndrome, head trauma, cervical spine problems, trauma to the left jaw and left shoulder and a 90/180 claim.

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 support of their motion, defendants annex two affirmed IME medical reports. The first is from neurologist Jean-Robert Desrouleaux, MD; he found full range of motion and a normal neurologic exam with no neurologic permanency or disability. The second is from Lisa Nason, MD, and orthopedic surgeon, who found full range of motion and concluded that any injuries to the cervical spine, lumbar spine or left shoulder were resolved.

With regard to the 90/180 claim, defendants point to Ms. Barna's deposition wherein she testified that she was out of work for a week and then returned half-time for three months thereafter (trans., p 33). This testimony negates the 90/180 claim.

However, defendants have completely failed to address plaintiff's claim of trauma to the left jaw. As such, the Court finds that because defendants have not met their prima facie burden on this motion, it is unnecessary to determine whether the papers submitted in opposition were sufficient to raise a triable issue of fact (although plaintiff does point out this omission in her opposition papers) and the motion is denied. See *Yanping Xu v Gold Coast Freightways, Inc.* 2013 WL 3034079, 1 (2d Dept 2013), citing *Bove v Zanelli*, 102 AD3d 644, 956 NYS2d 920 (2d Dept 2013).

Cross-motion

Plaintiff was a passenger in a taxi; she was in the middle of the back seat. Accordingly, because "plaintiff was an innocent rear-seat passenger who cannot be found at fault under any version of how the accident occurred" the plaintiff's motion is granted. *Mello v Narco Cab Corp.*, 2013 NY Slip Op 02818 (1st Dept April 25, 2013). See also *Garcia v Tri-County Ambulette Serv.*, 282 AD2d 206 (1st Dept 2001). Plaintiff SANDRA BARNA is granted summary judgment in that she had no fault in the happening of the accident.

Accordingly, it is

ORDERED that defendants' motion for summary judgment dismissing the claims of plaintiff SANDRA BARNA on the grounds that said plaintiff has not sustained a "serious injury" within the meaning of Insurance Law §5012(d) is denied, and it is further

ORDERED that plaintiff SANDRA BARNA'S cross-motion for summary judgment on liability is granted to the extent that said plaintiff has no liability for the happening of the accident.

The parties are reminded of the next DCM compliance conference scheduled for 11/25/13 at 9:30am.

This is the Decision and Order of the Court.

Dated: October 3, 2013
New York, NY

FILED

OCT 11 2013

COUNTY CLERK'S OFFICE
NEW YORK



HON. ARLENE P. BLUTH, JSC