

**Sylvester v Jiminez**

2014 NY Slip Op 31835(U)

July 9, 2014

Supreme Court, New York County

Docket Number: 111180/11

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 : 111180/2011

SYLVESTER, WILLIAM

vs

JIMINEZ, EURY J.

Sequence Number : 001

DISMISS

PART 22

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

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

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

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for genous injury - summary judgment

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**  
 JUL 16 2014  
 NEW YORK  
 COUNTY CLERK'S OFFICE

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

Dated: 7/9/14

  
 \_\_\_\_\_, 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  
WILLIAM SYLVESTER and THURMAN TURNER,

Plaintiffs,

-against-

Index No.

EURY J. JIMINEZ,

111180/11

Defendant.  
-----X

**FILED**

ARLENE BLUTH, J. :

JUL 16 2014

In this personal injury action, plaintiffs were allegedly injured in an automobile accident that occurred on July 19, 2009, on the West Side Highway near 72<sup>nd</sup> Street, New York, New York. Plaintiff William Sylvester (Sylvester) was the owner and operator of a vehicle in which plaintiff Thurman Turner (Turner) was a passenger. Sylvester's vehicle collided with another vehicle, owned and operated by Jiminez. Plaintiffs bring this action against Jiminez, claiming negligence.

NEW YORK  
COUNTY CLERK'S OFFICE

Defendant Eury J. Jiminez (Jiminez) moves for summary judgment dismissing the complaint, arguing each plaintiff has failed to show that he sustained a "serious injury" under section 5102 (d) of the New York Insurance Law, New York's no-fault insurance law. The motion is denied in its entirety.

In the verified bill of particulars dated January 18, 2012, Sylvester claimed various injuries, including headaches; Turner also claimed various injuries, including headaches and dizziness.

### 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, movant annexes the affirmed reports of Dr. Crane, an orthopedic surgeon, who examined each of the plaintiffs and performed many orthopedic tests and measured ranges of motion. Dr. Crane determined each plaintiff had a normal orthopedic exam. Defendant also submitted affirmed reports of Dr. Sheldon Feit, a radiologist, who reviewed MRI films.

Significantly, neither of defendant's doctors' reports addressed any complaints of headaches (which both defendants asserted) or dizziness (which Turner asserted) which were contained in the bill of particulars. There was no report of a neurologist to evaluate claims of headaches and/or dizziness as a result of this accident and Dr. Crane, defendant's examining orthopedist, did not address those alleged injuries. Accordingly, defendant did not meet his prima facie burden of demonstrating that plaintiffs failed to

sustain a serious injury, and the burden never shifted to plaintiffs to oppose the motion. The motion is denied without regard to the sufficiency of the papers submitted by the plaintiffs in opposition and the motion is denied. *See Caracciolo v Elmont Fire Dist.*, 94 AD3d 799, 799-800 (2d Dept 2012).

Thus, defendant Eury J. Jiminez's motion for summary judgment dismissing the complaint on the grounds that plaintiffs have not demonstrated that their injuries meet the serious injury threshold pursuant to Insurance Law § 5102(d) is denied. *See Singer v Gae Limo Corp.*, 91 AD3d 526, 937 NYS2d 39 (1st Dept 2012).

DATED: <sup>July 9</sup> ~~June 27~~ 2014  
New York, New York



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**FILED**  
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