[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH
Justice

PART 22

Index Number : 108031/2010
STEVENS-GONZALEZ, KIM
vs.
RANGAN, KRISHNA
SEQUENCE NUMBER : 005
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for def's MSJ on Serious injury

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

(MS 004 + 005 Consolidated)

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

Dated: 4/25/13

_____, 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

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

Index No.: 108031/10
Motion Seq 004 and 005

Kim Stevens-Gonzalez,

Plaintiff,

-against-

Krishna Rangan and Krishna K. Rangan,

Defendants.

DECISION/ORDER

HON. ARLENE P. BLUTH, JSC

Motion sequence numbers 004 and 005 are consolidated for joint disposition.

Defendants' motion (seq 004) to vacate this court's (Silver, J.) October 7, 2012 decision and order which granted plaintiff's motion for summary judgment on liability on default is denied. Defendants' motion for summary judgment dismissing the complaint on the grounds that plaintiff has not demonstrated that she suffered a serious injury (seq 005) is also denied.

In this action, plaintiff alleges that on September 6, 2009 she sustained personal injuries when she was a passenger in a vehicle which was rear-ended by a defendants' vehicle. Her mother, the driver of her car, has a separate case under a different index number.

Motion to vacate

In order to vacate its default pursuant to CPLR §5015, a defendant must demonstrate both a reasonable excuse for the failure to appear and a meritorious defense. *See Youni Gems Corp. v Bassco Creations Inc.*, 70 AD3d 454, 455, 896 NYS2d 315, 317 (1st Dept 2010), *lv. denied* 15 NY3d 863, 909 NYS2d 693 (2010).

Under these circumstances, where defendants' counsel inadvertently confused motions of two cases involving the same accident and therefore failed to timely submit written opposition to

the motion for summary judgment on liability in this case, the Court determines the default was due to excusable law office failure. *See Polir Construction, Inc. v Etingin*, 297 AD2d 509, 513, 747 NYS2d 20, 23 (1st Dept 2002).

Defendants, however, fail to set forth a meritorious defense to this innocent passenger motion for summary judgment on liability. In the underlying motion, plaintiff submits her affidavit. Her affidavit states that she was a passenger in line at the toll booths at the RFK Bridge (her mother was driving), there was traffic and her car was stopped (for almost four minutes) when it was rear-ended by defendants' car. Although she also annexed a police report, the Court has not considered it.

In an attempt to prove a meritorious defense, defendants' counsel refers the Court to the affirmation in opposition that defendants submitted after the motion had been submitted on default (exh G to moving papers). In that affirmation, counsel stated that (1) the uncertified police report was inadmissable and (2) the car that plaintiff was traveling in stopped short and as such plaintiff is contributorily negligent and not entitled to summary judgment on liability. Defendant also submits an affidavit of the defendant driver which was prepared for the other case, *Mary L. Stevens v Krishna K. Rangan*, (Supreme Court, New York County, Index No. 107838/10) (where plaintiff's mother, as driver of the front car, also moved for summary judgment on liability). Defendant driver claimed that the mother stopped short, thus causing the accident. Because Justice Silver found an issue of fact in the case between the two drivers, defendant argues that the same result is compelled here.

Defendant is mistaken and has failed to show a meritorious defense. As an innocent passenger, plaintiff Kim Stephens-Gonzalez is entitled to summary judgment declaring her free

from liability in the happening of the accident. The right of an innocent passenger to summary judgment is not in any way restricted by potential issues of comparative negligence as between the drivers of the two vehicles (*Johnson v Phillips*, 261 AD2d 269 [1st Dept 1999], *Petty v Dumont*, 77 AD3d 466 [1st Dept 2010]) and she is entitled to summary judgment (*Garcia v Tri County Ambulette Serv.*, 282 AD2d 206 [1st Dept 2001]). Accordingly, defendant has failed to shown a meritorious defense against this defendant and the motion to vacate the default is denied.

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 [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 submit the affirmed reports of Dr. Coyne, a radiologist, who reviewed plaintiff's thoracic, cervical and lumbosacral MRIs taken before this accident and noted degenerative changes, and Dr. Nason, an orthopedist who examined plaintiff in April 2012 and found no evidence of a disability. Additionally, defendants indicate that at her deposition, plaintiff testified that she returned to work three months after the subject accident, and that she was never told by a physician that she could not go back to work. As such, defendants satisfied their burden of establishing prima facie that plaintiff did not suffer a serious injury, and the burden shifted to plaintiff to raise a triable factual question as to whether she sustained a serious injury.

In opposition, plaintiff submits, inter alia, the affidavit of her chiropractor Dr. Mark Heyligers (exh C to opp) who states that he treated plaintiff for headaches, neck pain, back pain and bilateral shoulder pain from September 11, 2009 until January 2010 for a total of 39 session. He examined plaintiff again on June 20, 2012, and found restricted range of motion in her cervical spine. By his letters dated 10/2/09, 10/28/09, 11/30/09 and 1/13/10 (exh F), Dr. Heyligers placed plaintiff on total disability due to the nature of her injuries for the period October 2, 2009 through February 3, 2010.

In reply, defendants claim that Dr. Heyligers's affidavit is defective for the following reasons: (1) it is not affirmed as true under the penalties of perjury, (2) plaintiff failed to present any affirmed medical reports from a medical doctor confirming Dr. Heyligers's findings, (3) "plaintiff's affidavits do not speak to how Dr. Heyligers's diagnosis puts any constraints on plaintiff's daily activities" and "fail to establish the duration of the alleged limitation of plaintiff". None of these points have merit.

First, the statements in Dr. Heyligers's affidavit were sworn to before a notary public; it was unnecessary for him to affirm that his statements were true pursuant to the penalties of perjury. Second, Dr. Heyligers's affidavit and letters (in which he determined that plaintiff could not return to work for four out of the six months after the accident) constitute objective medical evidence sufficient to raise a triable factual question on plaintiff's 90/180-day injury claim, even though he is a chiropractor; defendants have not presented any precedent or basis to ignore Dr. Heyliger's evidence just because he is not an "MD".

Accordingly, it is hereby

ORDERED that defendants' motion (seq 004) to vacate this court's (Silver, J.) October 7, 2012 decision and order which granted plaintiff's motion for summary judgment on liability on default to this innocent passenger is denied and it is further

ORDERED that defendants' motion for summary judgment dismissing the complaint on the grounds that plaintiff has not demonstrated that she suffered a serious injury (seq 005) is also denied.

This is the Decision and Order of the Court.

Dated: April 25, 2013
New York, New York

HON. ARLENE P. BLUTH, JSC