

**Larkins v Moulrie**

2013 NY Slip Op 31290(U)

June 13, 2013

Supreme Court, New York County

Docket Number: 113438/09

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 : 113438/2009  
LARKINS, SHILA  
vs.  
DEVON J. MCCARTHY  
SEQUENCE NUMBER : 005  
MODIFY ORDER/JUDGMENT

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

The following papers, numbered 1 to 5, were read on this motion to/for MST on answers inj

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_  
*Notice of X-motion & papers*  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

No(s). 1  
2  
No(s). 3  
No(s). 4, 5

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):

## FILED

JUN 20 2013

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 6/13/13

  
\_\_\_\_\_  
HON. ARLENE P. BLUTH 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**

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Index No.: 113438/09  
Motion Seq 04 and 05

**Shila Larkins and Shakeera Taylor,**

*Plaintiffs,*

*-against-*

**Monalisa Moulrie, Devon J. McCarthy and  
Drusilla McCarthy,**

*Defendants.*

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**DECISION/ORDER**

HON. ARLENE P. BLUTH, JSC

**FILED**

**JUN 20 2013**

Motion sequences 04 and 05 are consolidated for joint disposition.

**COUNTY CLERK'S OFFICE  
NEW YORK**

The McCarthy defendants' motion for summary judgment dismissing plaintiff Larkins' claims on the grounds that she did not sustain a "serious injury" within the meaning of Insurance Law §5012(d) (seq 04), and their cross-motion dismissing plaintiff Taylor's claims on the same grounds (seq 05) are both granted, and plaintiff Taylor's motion (seq 04) to allow her an additional week to appear for her IME is denied as moot. This action is dismissed in its entirety against all defendants.

In this action, plaintiffs allege that on June 15, 2009 they sustained personal injuries in a motor vehicle accident when they were passengers in defendant Moulrie's car which was rear-ended by the McCarthy defendants' car at 12<sup>th</sup> Avenue and 24<sup>th</sup> 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 [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 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 [1<sup>st</sup> Dept 2009]; *Style v Joseph*, 32 AD3d 212, 214 [1<sup>st</sup> Dept 2006]).

Motion Seq 04: Serious Injury-Larkins

In her verified bill of particulars, Larkins claims, *inter alia*, disc herniation at C5-C6, cervical and lumbar radiculopathy<sup>1</sup>, strain/sprain to her left shoulder (exh C to moving papers, para. 6) and a 90/180-day claim (para. 18).

Defendants have met their prima facie burden through the February 22, 2012 and March 27, 2012 affirmed reports of Dr. Pitman, an orthopedist, concerning his February 22, 2012 examination of Ms. Larkins (exh H). During that examination, Dr. Pitman measured Ms. Larkins' cervical, lumbar and right and left shoulder ranges of motion with a goniometer; all measurements were within the normal range with the exception of flexion of the lumbar spine (40 degrees compared with 90 degrees normal). He concluded that Larkins had no orthopedic disability. In his supplemental March 27, 2012 report, Dr. Pitman explained that it was his opinion that Ms. Larkins' lumbar flexion was "subjectively self-limited", or in other words, that she pretended that she could not bend any further than 40 degrees. Dr. Pitman concluded that plaintiff probably had a cervical and lumbar sprain which has since resolved, and there was no pathology in either shoulder on the examination date.

Finally, defendants indicate that at her deposition, Ms. Larkins testified that she was confined to home for "like three months" (exh D, T at 64) but that she could not remember whether a doctor told her to stay home or if she decided to stay home on her own (T at 76), and in her bill of particulars she stated that she was confined to home for two months (exh C, paras.

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<sup>1</sup>In listing the injuries Larkins set forth in her bill of particulars, defendants' counsel, in the reply (para. 5), neglected to include lumbar radiculopathy.

8-9).

By showing normal ranges of motion (with the exception of a “faked” limited range on lumbar flexion) as of February 22, 2012, defendants made a prima facie showing that Larkins did not sustain a permanent consequential or significant limitation of use of her cervical or lumbar spine or her left shoulder. Additionally, defendants met their initial burden with respect to plaintiff’s 90/180-day claim by showing that if she did stay home for 90 days, it was not at a medical provider’s direction.

In opposition, the only medical evidence Ms. Larkins submits is the affirmed report of Dr. Bley, an orthopedist who examined Larkins on July 13, 2009, approximately one month after the accident<sup>2</sup> (opp., exh E). Therefore, Ms. Larkins has not raised a triable issue of fact as to significant limitation of use or permanent consequential limitation of use because she did not submit an affirmed report of a recent physical examination and therefore did not rebut the findings of Dr. Pittman, defendants’ doctor, who affirmed that any issues were resolved (or faked). Nor has she raised a triable question of fact on her 90/180-day claim because she did not submit proof that she stayed home at the direction of a medical provider. *See Shu Chi Lam v Wang Dong*, 84 AD3d 515, 516, 922 NYS2d 381 (1<sup>st</sup> Dept 2011).

Accordingly, defendants’ motion for summary judgment dismissing this action on the grounds that plaintiff Larkins did not sustain a “serious injury” within the meaning of Insurance Law §5012(d) (seq 04) is granted, and her claims are dismissed.

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<sup>2</sup>Although this document is not in admissible form, defendants waived this objection by not raising this defect in their reply. *See Dowling v Mosey*, 32 AD3d 1190, 821 NYS2d 326 (4<sup>th</sup> Dept 2006).

Motion Seq 05: Serious Injury-Taylor

Plaintiff Taylor's motion (seq 05) for an order allowing her an additional week to appear for her examination with Dr. Zimmerman is denied as moot. Taylor did in fact appear for her IME on April 5, 2012 (a few days later than originally agreed to); Dr. Zimmerman's report is submitted in support of defendants' cross-motion.

Defendants have met their prima facie burden on their cross-motion through the affirmed report of Dr. Zimmerman (exh L), an orthopedist who examined Ms. Taylor on April 5, 2012 and found normal ranges of motion in Ms. Taylor's cervical and lumbar spine and in both of her shoulders. He concluded that all sprains were resolved, and that there was no disability and no permanency to her alleged injuries.

Additionally, defendants indicate that in her bill of particulars (para. 9), Taylor stated that she was "confined to bed and home for two months and intermittently thereafter." At her deposition she testified that she was never instructed by any doctor that she needed to stay in bed for any length of time (moving papers, exh H, T at 70).

Therefore, through Dr. Zimmerman's affirmed report, defendants made a prima facie showing that Ms. Taylor did not sustain a permanent consequential or significant limitation to her cervical or lumbar spine or to either shoulder. By her bill of particulars and deposition testimony, defendants also met their initial burden with respect to plaintiff's 90/180-day claim.

In opposition, Ms. Taylor submits the affirmed report of Dr. Bley, an orthopedist who

examined Taylor on July 28, 2009, approximately six weeks after the accident<sup>3</sup> (opp., exh E). Because Ms. Taylor did not submit an affirmed report of a recent physical examination, she did not rebut the findings of defendants' doctor, Dr. Zimmerman, and therefore Ms. Taylor has not raised a triable issue of fact as to significant limitation of use or permanent consequential limitation of use as to her cervical or lumber spine or as to either shoulder. Nor has she submitted any evidence to raise a triable question of fact on her 90/180-day claim. *See Shu Chi Lam v Wang Dong*, 84 AD3d 515, 516, 922 NYS2d 381 (1<sup>st</sup> Dept 2011).

Accordingly, it is

ORDERED that defendants' motions for summary judgment (seq 04 and cross-motion on seq 05) dismissing the claims of plaintiffs Shila Larkins and Shakeera Taylor on the grounds that neither plaintiff sustained a "serious injury" within the meaning of Insurance Law §5012(d) is granted; Taylor's motion for an order modifying the parties' stipulation (seq 05) is denied as moot. The complaints are dismissed.

**FILED**

JUN 20 2013

COUNTY CLERK'S OFFICE  
NEW YORK

This is the Decision and Order of the Court.



**Dated: June 13, 2013**  
New York, New York

**HON. ARLENE P. BLUTH, JSC**

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<sup>3</sup>Although this document is not in admissible form, defendants waived this objection by not raising this defect in their reply. *See Dowling v Mosey*, 32 AD3d 1190, 821 NYS2d 326 (4<sup>th</sup> Dept 2006).