

**Marrow v Torres**

2014 NY Slip Op 33797(U)

November 19, 2014

Supreme Court, Kings County

Docket Number: 23055/09

Judge: Larry D. Martin

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At an I.A.S. Trial Term, Part 41 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Borough of Brooklyn, City and State of New York, on the 19<sup>th</sup> day of November, 2014.

**P R E S E N T:**

Hon. LARRY D. MARTIN, J.S.C.

SHIVONNE MARROW,

Plaintiff,

Motion Sequence #2

-VS

INDEX No. 23055/09

DAMARIS TORRES,

Defendant.

The following papers numbered 1 to 4 read on this motion  
Notice of Motion - Order to Show Cause  
and Affidavits (Affirmations) Annexed \_\_\_\_\_

Papers Numbered \_\_\_\_\_

Answering Affidavit (Affirmation) \_\_\_\_\_

\_\_\_\_\_

Reply Affidavit (Affirmation) \_\_\_\_\_

\_\_\_\_\_

Other Papers \_\_\_\_\_

\_\_\_\_\_

Upon the foregoing papers, defendant Damaris Torres (“defendant”) moves<sup>1</sup> for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint of plaintiff Shivonne Marrow (“plaintiff”) on the grounds that plaintiff has not sustained a serious injury as defined under Insurance Law § 5102 (d)<sup>2</sup>.

<sup>1</sup> By short form order dated September 23, 2014, plaintiff’s motion (motion sequence #4) to vacate the December 16, 2013 short form order granting defendant’s motion (motion sequence #2) for summary judgment on threshold grounds on default was granted and motion sequence #2 was restored to the September 23, 2014 motion calendar and was taken on submission on that date. Motion sequence #2 is addressed herein.

<sup>2</sup> Insurance Law § 5102 (d) defines “serious injury” as “ a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially

Plaintiff commenced the instant action to recover damages for personal injuries she allegedly sustained on November 2, 2007, as a result of a motor vehicle accident involving a motor vehicle operated by defendant and a motor vehicle operated by plaintiff.

In her verified bill of particulars, plaintiff alleges that she sustained, among other things, lumbar and cervical radiculopathy, sprains of the lumbar and cervical paraspinal muscle ligaments and a left shoulder contusion. Additionally, plaintiff claims that she sustained injuries constituting a serious injury under the permanent loss of use, permanent consequential limitation of use, significant limitation of use and 90/180 days categories of the Threshold Law.

When considering a motion for summary judgment, the court should only grant the motion where there are no material and triable issues of fact (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 404 [1957]). The movant has the burden of demonstrating “a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 852 [1985]). Once the movant has made this showing, the burden of proof shifts to the opponent to produce admissible evidence that establishes the existence of material issues which require a trial (*see Toure v Avis Rent A Car Sys.*, 98 N.Y.2d 345, 352 [2002]; *Alvarez v Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]).

Based upon a review of the record submitted by the parties, the court finds that defendant has met her initial prima facie burden of showing that plaintiff did not sustain serious injuries as a result of the subject accident (*see Vislocky v Zupis Taxi, Inc.*, 961 NYS2d 591, 591 [2013]). In support of the motion, defendant proffers, among other things, the affirmed reports of Dr. Lisa Nason (“Dr.

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all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.”

Nason”), an orthopedic surgeon, and Dr. Daniel J. Feuer (“Dr. Feuer”), a neurologist, based upon objective tests conducted during independent medical examinations of plaintiff. In her report, Dr. Nason opines that plaintiff possesses full ranges of motion in his right knee, lumbar spine and cervical spine (*see Toure*, 98 N.Y.2d at 350]). Dr. Nason concludes that plaintiff demonstrates “no objective evidence of disability.” In addition, Dr. Feuer is of the opinion that plaintiff “does not demonstrate any objective neurological disability or neurological permanency, which is causally related” to the subject accident. In opposition to the motion<sup>3</sup>, the court finds that plaintiff has failed to submit sufficient evidence in admissible form to raise a triable issue of fact as to whether she sustained serious injuries as a result of the subject accident. Plaintiff proffers, among other things, the unsworn report of Andrew Chung, a physical therapist/doctor of physical therapy, of Downtown Sports and Hand Therapy, based upon an examination of plaintiff on December 28, 2012. Plaintiff’s physical therapist failed to compare his findings of the ranges of motion in plaintiff’s cervical spine, lumbar spine and left shoulder to the normal range of motion (*see Quintana v Arena Transport, Inc.*, 89 AD3d 1002, 1003 [2d Dept 2011]). As such, the physical therapist’s report failed to raise a triable issue of fact as to whether these alleged injuries constituted a serious injury under the permanent loss of use, a permanent consequential loss of use or a significant limitation of use categories of the Threshold Law (*see Quintana*, 89 AD3d at 1003). Additionally, the various unsworn medical reports and/or records submitted by plaintiff in opposition to the instant motion fail to demonstrate that she sustained serious injuries to her cervical spine, lumbar spine and left shoulder as a result of the subject accident (*see Gaddy v Eycler*, 79 NY2d 955 [1992]; *see also Pagano v Kingsbury*, 182 AD2d

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<sup>3</sup> To the extent that plaintiff relies upon the April 7, 2014 affirmed Final Narrative of Dr. Karl Latortue of SEL Medical Group, P.C., the court declines to consider said report in opposition to the instant motion. In any event, Dr. Latortue’s April 7, 2014 report was submitted for the first time as an exhibit in plaintiff’s reply papers to motion sequence #4 (*see CPLR 2214*; *see also Encarnacion v Smith*, 60 AD3d 628, 629 [2d Dept 2010]) which was decided by short form order dated September 23, 2014.

268 [2d Dept 1992]). Moreover, plaintiff's submissions are insufficient to demonstrate that she sustained a medically-determined injury of a nonpermanent nature which prevented her from performing his usual and customary activities for 90 of the 180 days following the subject accident (*Sorto v Morales*, 55 AD3d 718, 719-20 [2d Dept 2008]). Finally, plaintiff's self-serving affidavit is insufficient to raise a triable issue of fact as to whether she sustained serious injuries as a result of the subject accident (*Sorto*, 55 AD3d at 720).

Accordingly, defendant's motion for summary judgment on threshold grounds is granted.

The foregoing constitutes the decision, order and judgment of the court.

For Clerks use only

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Motion Seq. #

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(Disposed)

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HON. LARRY D. MARTIN, J.S.C.

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