[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE J.S.C. Justice PART 10

Index Number : 105044/2003

FONTEYNE, IGNE

vs.

HEBY TAXI

SEQUENCE NUMBER : 003

DISMISS

INDEX NO.

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

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

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

FILED
APR 16 2007
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 4/10/07

HON. JUDITH J. GISCHE J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ SCHEDULE APPEARANCE ☐ FIDUCIARY APPOINTMENT

☐ REFERENCE

FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

----------x

INGE FONTEYNE and MARK CATTANO,

Plaintiffs,

-against-

HEBY TAXI INC., HANSEL P. JOHNSON, ALISON ANDOOS, and JANE DOE,

Defendants.

----------x

Decision/Order
Index No.: 120145/03
Seq. No. : 002/003

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	
Motion Seq. No. 003	**Numbered**
Def's [HT & HPJ] motion [sj] w/BFM affirm in support, exhs	1
Def's [AV] cm [sj] w/ALV affirm in support, exhs	2
Pltf's affirm in opp to mt (MJK), w/ exhs	3
Pltf's affirm in opp to cm (RV)	4
Def's [HT & HPJ] reply aff (TMS) in further supp.	5
Motion Seq. No. 002	**Numbered**
Def's [AV] motion [sj] w/JAS affirm in support, exhs	1

Upon the foregoing papers, the decision and order of the court is as follows:

This is a personal injury action arising from a collision between a bicyclist and a motor vehicle.

The court has before it a motion (motion sequence 003) by defendants Heby Taxi Inc. ("Heby Taxi") and Hansel P. Johnson ("Johnson") for summary judgment against plaintiffs and for an order dismissing the Complaint. Defendant Alison Andoos ("Andoos") cross moves for summary judgment on the issue of damages and for an

003

order dismissing the Complaint. Plaintiffs Inge Fonteyne ("Fonteyne") and Mark Cattano ("Cattano") oppose in all respects.

Also before the court (motion sequence 002) is Andoos' motion for a bifurcated trial. For purposes of consideration and determination, these motions are hereby consolidated.

Issue has been joined and since the motions and cross motion were brought timely after the note of issue was filed, they will be considered on their merits. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004).

Background

The accident occurred on February 4, 2002 at the intersection of 12th Street and University Place in New York, New York ("the accident"). Fonteyne, while riding her bicycle, collided with the door of a taxi cab owned by Heby Taxi and operated by Johnson. Andoos, a passenger inside the taxi cab at the time of the accident, opened the door of the taxi cab which Fonteyne struck. Co-plaintiff Cattano, is Fonteyne's husband.

Defendants Heby Taxi and Johnson contend they are not liable for the injuries claimed by Fonteyne. Andoos takes no position on this aspect of the motion. Heby Taxi and Johnson argue there are "no issues of fact as to the liability of the defendants," there are several equally plausible explanations for the accident and there is no competent admissible proof of the plaintiffs' theory that the defendants were negligent.

Specifically, Heby Taxi and Johnson argue that a review of the deposition testimony of the Defendants and Fonteyne shows there is no evidence to support a

causal relationship between Johnson's action and Fonteyne's injuries. If anything, they argue, "it was the actions of the passenger in the taxicab that were negligent." The defendant-movants' account of the events is that Johnson "stopped his taxi at a red light on 12th street" and was unable to move closer to the curb "as there were parked cars on either side of his car and only one lane to drive." As Andoos exited the cab, Fonteyne struck the door and that "[i]t is clear... that at no time were [Johnson's] actions negligent nor were they in any way [causally] related to the plaintiff's accident."

Plaintiffs contend that the record sufficiently demonstrates the existence of material issues of fact as to the liability of the defendants. Plaintiffs point to discrepancies between Johnson and Andoos' testimony. Johnson stated during his deposition that the first indication he had that Andoos intended to exit the cab was when he "heard the door open" and Andoos simultaneously "put the money" in the cab's partition. Andoos testified, however, that the cab was stopped "[b]ecause [she] had *asked* to get out of the cab" (emphasis added).

Heby Taxi and Johnson also argue they are entitled to summary judgment because Fonteyne's injuries do not fall into any one of the categories identified in Insurance Law § 5012 (d) as being a "serious injury." Andoos adopts this argument, and cross moves for summary judgment on this basis.

Fonteyne alleged in her Verified Amended Bill of Particulars that the permanent injuries she sustained as a result of the accident include:

> "(1) torn anterior cruciate ligament ("ACL") in right leg; (2) surgery to reconstruct ACL; (3) graft using Achilles tendon from cadaver; (4) torn meniscus in right leg; (5) damage to femur of right leg; (6) damage to tibia of right leg; (7) scarring in leg (one scar is approximately 5 inches long and

there are approximately 3 other scars that are approximately 1/2 inch long ;" (8) pain; (9) swelling; and (10) loss of motion.

On February 11, 2002, Fonteyne underwent ACL revision reconstruction surgery, allegedly as a result of the accident.

Defendants contend Fonteyne's alleged injuries are not permanent or serious and that she should not be entitled to recovery from non-economic injury under New York's No-Fault law. Defendants also argue that, in any event, any injuries allegedly sustained by Fonteyne were an exacerbation of previous injuries to her knee which are not compensable in this action.

To support this argument, defendants rely upon the report of Dr. Israel, who conducted a physical examination of Fonteyne, on their behalf, on February 1, 2006. Dr. Israel opines that Fonteyne "has no evidence of disability or permanency," but "[i]f the history of the accident is correct, there was a cause and effect relationship between the original complaints and the reported accident." He reviewed the Bill of Particulars but no medical records.

Fonteyne testified at her deposition that she injured her right knee twice prior to February 4, 2002. In 1978, she underwent surgery to remove bone chips from her right knee, as a result of a slip and fall. In 1997 or 1998, she underwent a second surgery to replace her ACL ligament in her right knee, as a result of a trip and fall. In opposition, plaintiffs have provided a medical report from Dr. Feldman, dated April 20, 2006. Dr. Feldman was Fonteyne's treating physician after the accident and first saw her on February 5, 2002. On June 3, 2002, Dr. Feldman observed that Fonteyne's right leg exhibited atrophy, and noted that Fonteyne continued to treat her injuries with physical

therapy. In April 2006, Dr. Feldman conducted an orthopedic examination, in which he concluded that Fonteyne "will continue to need physical therapy" and may have pain for the rest of her life.

Dr. Feldman stated that Fonteyne's ACL revision reconstruction surgery from February 11, 2002 and subsequent pain are causally related to the accident. Dr. Feldman also states that while Fonteyne "had a previous anterior cruciate ligament reconstruction", she was "asymptomatic until this new injury" and her "past medical history is noncontributory" to the instant injury.

Fonteyne makes subjective complaints of pain, and also states that the injuries she sustained in the accident prevented her from performing her usual and customary daily activities for not less than 90 days during the 180 days following the accident. In the Verified Amended Bill of Particulars, Fonteyne stated she "was confined to her home and totally disabled for one month after the date of the incident" and thereafter "continued to be partially disabled," to date. Fonteyne also stated she is "unable to sit in certain positions" which she would be required to sit in as fashion stylist prior to the accident, and is "unable to drive a car for longer than one hour," which her job also frequently required. Fonteyne says she used to run several miles a day, but as a result of the accident, she "cannot engage in yoga, running or jogging" any more.

Discussion

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a *prima facie* case that would entitle it to judgment in its favor, without the need for a trial. CPLR § 3212; Winegrad v. NYU Medical Center, 64 N.Y.2d 851 (1985); Zuckerman v. City of New York, 49 N.Y.2d 557,

562 (1980). Only if it meets this burden, will it then shift to the party opposing summary judgment who must then establish the existence of material issues of fact, through evidentiary proof in admissible form, that would require a trial of this action. Zuckerman v. City of New York, *supra*. If the proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986); Ayotte v. Gervasio, 81 N.Y.2d 1062 (1993).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1977). The court's function on these motions is limited to "issue finding," not "issue determination." Sillman v. Twentieth Century Fox Film , 3 N.Y.2d 395 (1957).

Liability

Defendants Heby Taxi and Johnson move for summary judgment, arguing that Fonteyne is unable to establish a causal relationship between Johnson's actions and her alleged injuries. These defendants summarily state in their moving papers that "there is no evidence of the plaintiff's [*sic*] theory that [Heby Taxi and Johnson] were negligent" and that "[i]f anything, it was the actions of the passenger in the taxicab that were negligent."

This court finds, however, that there are material issues of fact on the issue of liability. There is at least a factual dispute as to whether the taxi cab's overhead light was on or off, which would indicate whether the taxi was occupied by a passenger. Plaintiffs contend that the overhead light was *on*, indicating that the taxi contained no

passengers and that it was safe to pass the taxi while it was stopped at the traffic light. Johnson claims that the overhead light was *off*, which would have indicated that his vehicle did contain a passenger. There are also disputed issues about whether Johnson knew Andoos was about to exit the cab while failing to position the cab so that Andoos could exit safely. Taken in the light most favorable to the plaintiffs, their theory, that Johnson was negligent in failing to turn the overhead light on when he had notice Andoos would exit the taxi cab, raises a triable issue of fact for the jury to conclude that Heby Taxi and Johnson are liable for Fonteyne's injuries.

Serious Injury

New York Courts have long recognized that the legislative intent underlying the No-Fault Law under Article 51 of the Insurance Law was to weed out frivolous claims and limit recovery to significant injuries. Toure v. Avis Rent A Car Systems, Inc., 98 N.Y.2d 345 (2002).

Ins. Law § 5104 provides that:

> "in any action by or on behalf of a covered person against another covered person for personal injuries arising out of negligence in the use or operation of a motor vehicle in this state, there shall be no right of recovery for non-economic loss, except in the case of a serious injury, or for basic economic loss."

Ins. Law § 5102(d) provides that a "Serious injury" is:

> "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 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" (emphasis added).

Fonteyne alleges she has sustained a "serious injury," which is the predicate to recovery for non-economic loss. Specifically, Fonteyne argues she has: (1) a "significant limitation of the use of a body function or system;" (2) a "significant disfigurement;" and (3) a non-permanent injury which prevented her from performing substantially all of the material acts constituting her usual and customary activities for at least ninety days during the one hundred eighty days immediately after the accident (a "90/180 Days" claim).

On this motion, defendants must establish the complete absence of a serious injury as its defense to plaintiffs' claims for damages. Friends of Animals v. Associated Fur Mfrs., 46 N.Y.2d 1065 (1979). This would shift the burden to plaintiffs to demonstrate, by admissible evidence, the existence of a factual issue requiring a trial on any one of the definitions of serious injury. Zuckerman v. City of New York, 49 N.Y.2d 557 (1980).

Defendants' contend that Fonteyne's two previous injuries were only exacerbated as a result of the February 4, 2002 accident, which exacerbation is not serious in itself. Fonteyne admits she has undergone two prior surgeries on her knee. However, she argues these surgeries completely resolved any of her symptoms, and in no way contributed to the injuries she sustained in the accident.

While it is true that a previous injury merely exacerbated by a later accident is

not a "serious injury" for purposes of the No-Fault law, Dr. Israel's affidavit is silent on these factual allegations, and therefore, is does not support defendants' motion for summary judgment on this basis. CPLR § 2106; Grasso v. Angerami, 79 N.Y.2d 813 (1991); Shinn v. Catanzaro, 1 A.D.3d 195 (1st Dept. 2003). Even if the court was to consider defendants' unsupported speculation that "it is evident that the plaintiff exacerbated her previous injury as a result of the alleged accident," the court's decision would not change. Dr. Feldman stated that "Fonteyne re-injured her knee in [the] accident after having previous surgery on her knee and complete resolution of her symptoms. She then required a revision surgery." Thus there are disputed facts as to whether the accident caused a new injury to Fonteyne's knee or only exacerbated a preexisting injury.

Defendants also argue that Dr. Feldman did not provide a "satisfactory explanation for the significant lapse in time between plaintiff's treatment and the most recent examination." While an unexplained gap in treatment is fatal to a claim of serious injury [Baez v. Rahamatali, 24 A.D.3d 256 (1 Dept. 2005)], plaintiffs have offered an explanation. Dr. Feldman stated Fonteyne began a physical therapy regimen after the February 11, 2002 ACL revision reconstruction. On June 3, 2002, Dr. Feldman concluded that the benefit of physical therapy had reached a plateau, and that Fonteyne still had not fully recovered. Fonteyne's cessation of treatment was explained sufficiently to raise and issue of fact and survive summary judgment. Pommells v. Perez, 4 N.Y.3d 566 (2005); Ramos v. Dekhtyar, 301 A.D.2d 428 (1st Dept. 2003).

Defendants also argue that Fonteyne's injuries do not rise to the level of "serious injury," as it is expressly defined under the Insurance Law. Defendants generally rely

on Dr. Israel's report to support this argument. The specific definitions that are involved in this action are separately discussed below.

Significant Limitation of Use

The Court of Appeals has held that whether a limitation of use or function is "significant" involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part. Dufel, 84 N.Y.2d at 798 (1995). In order to prove the extent or degree of physical limitation, an expert may designate a numeric percentage of the injured's loss of range of motion or may make a qualitative assessment of the injured's condition, provided that the latter evaluation has an objective basis and compares the injured's limitations to the normal use of the affected body system or function. Shinn, *supra.*

Dr. Israel's report concludes, upon examination, that Fonteyne had full range of motion of her knee. Defendants have proven the absence of a significant limitation of use of a body function or system. The evidence submitted by the plaintiffs, in response, is sufficient to raise a triable issue of fact. Dr. Feldman's affidavit states conclusively that Fonteyne has not fully recovered, will continue to need physical therapy and may have pain for life. Dr. Feldman concluded that Fonteyne has "continued biomechanical imbalance of the quadriceps and secondary chondromalacia." Plaintiffs have proffered a qualitative assessment of how the accident reduced the functioning of Fonteyne's knee below the level of function that existed immediately prior to the accident.

Significant Disfigurement

Defendants' medical expert, Dr. Israel, indicated that Fonteyne had a three and one-half inch scar in his medical report. However, defendants speculate that since

Fonteyne underwent prior ACL replacement surgery in 1997 or 1998, "any alleged scarring was the result of that prior surgery, and the Court should not consider plaintiff's [*sic*] allegations." Defendants offer no competent medical evidence in support of their contention that this was a preexisting scar. Therefore, defendants have not met their burden of proof on this motion.

Even were the court to assume *arguendo* that defendants' proof was sufficient to establish the absence of a significant disfigurement, the courts' decision would remain unchanged. Plaintiffs claim that Fonteyne has one five-inch long scar on her leg and three more scars that are each approximately one-half inch in length all resulting from this accident. The standard of determining significant disfigurement within the meaning of the Insurance Law is whether a reasonable person would view the condition "as unattractive, objectionable, or as the subject of pity or scorn" Manrique v. Warshaw Woolen Associates, Inc., 297 A.D.2d 519 (1 Dept. 2002).

The issue of whether the scaring is a significant disfigurement and/or whether the scarring resulted from this accident is for the jury to determine.

90/180 Days

Defendants argue that because Fonteyne returned to work a month after her surgery, she has not met the 90/180 Days definition of "serious injury". Dr. Israel's affidavit is silent as to whether Fonteyne's injuries prevented her from performing substantially all her daily tasks for 90 of the first 180 days after the accident. Further, Dr. Israel was never in possession of any medical records related to the accident and its aftermath, and Dr. Israel's affidavit is not probative with respect to the 90/180 Days claim since he examined Fonteyne more than four years after the accident. Webb v.

Johnson, 13 A.D.3d 54 (1st Dept. 2004); Uddin v. Cooper, 32 A.D.3d 270 (1st Dept. 2006). Defendants have therefore failed to submit proof in admissible form sufficient to meet their burden of establishing a prima facie entitlement to summary judgment.

Even if defendants satisfied their burden, plaintiffs have raised a triable issue of fact sufficient to defeat summary judgment. Fonteyne has detailed her daily activities which were impaired as a result of the injuries and resultant surgery. Webb, supra. Further, Fonteyne's depiction of her physical limitations are supported by Dr. Feldman's affidavit substantiating her limitations and relating them to the accident.

Bifurcation

Defendant Andoos has separately moved for bifurcation, directing separate trials with respect to liability and damages. This motion is unopposed by all other parties to this action. Andoos relies upon § 202.42(a) of the Uniform Rules for the Trial Courts (22 NYCRR), which provides that:

> "Judges are encouraged to order a bifurcated trial of the issues of liability and damages in any action for personal injury where it appears that bifurcation may assist in a clarification or simplification of issues and a fair and more expeditious resolution of the action."

Under this standard, it has been generally recognized that separate trials should be ordered in negligence actions unless the injuries are intertwined with the question of liability, that is, where the nature of injuries has an important bearing upon the issue of liability. Faber v. New York City Housing Authority, 227 A.D.2d 248 (1 Dept. 1996).

Fonteyne will not be prejudiced by ordering a bifurcated trial as the nature of her injuries are not such as to have an important bearing on liability. Therefore, bifurcation is proper. However, in the interest of conserving judicial resources, the respective trials

on the issues of liability and damages are to be addressed by one jury with the issues being tried one immediately after the other.

Accordingly, Andoos' motion for bifurcation is hereby granted to the extent that the liability and damages trials are to be tried separately, one immediately after the other, and before the same jury.

Conclusion

In accordance with the court's decision, it is hereby

ORDERED that defendants' motion and cross motion for summary judgment against plaintiffs is hereby denied in all respects; and it is further

ORDERED that the motion by Andoos for a bifurcated trial is hereby granted to the extent that the liability and damages trials are to be tried separately, one immediately after the other, and before the same jury.

This case is ready to be tried. Plaintiffs shall serve a copy of this decision/order on the Clerk in Trial Support so that it can be scheduled for jury selection.

Any requested relief not otherwise expressly granted herein is denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
April 10, 2007

So Ordered:

HON. JUDITH J. GISCHE, J.S.C.