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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH
Justice

PART 22

Index Number : 112406/2009
HU, DANG YU
vs.
MORALES, ORLANDO S.
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to 3, were read on this motion to/for SJ

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

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

Dated: 3/14/13

_____, 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 NY
COUNTY OF NEW YORK: PART 22

Index No.: 112406/09
Mot. Seq. 001

Dang Yu Hu,

Plaintiff,

-against-

Orlando S. Morales,

Defendant.

DECISION/ORDER

HON. ARLENE P. BLUTH, JSC

Defendant's motion for summary judgment dismissing the complaint on the ground that plaintiff has failed to satisfy the serious injury threshold as defined by Insurance Law §5102(d) is denied.

In this action, plaintiff alleges that defendant's vehicle struck her as she was crossing the intersection of Fifth Avenue and 101st Street in Manhattan on May 15, 2008.

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 her bill of particulars, plaintiff alleges that she sustained a fracture of the lunate and the trapezium of her right wrist, as well as injuries to her knees, left shoulder, left wrist and back as a result of the subject motor vehicle accident (exh C to moving papers, para. 11).

In support of his motion, defendant submits the affirmed report of Dr. Emmanuel, an orthopedic surgeon (exh I) who examined plaintiff on 10/13/11, administered objective tests (Phalen's, Tinel's and Finkelstein) on plaintiff's wrists and determined the results were negative.

Dr. Emmanuel also stated that plaintiff showed negative objective testing and full ranges of motion of her lumbar spine, wrists, knees and left shoulder. Additionally, defendant submits the affirmed report of Dr. DeJesus, a neurologist (exh J) who examined plaintiff on 10/13/11. Dr. DeJesus found that plaintiff had full range of motion of her lumbar spine, that the alleged injury to her lumbar spine was resolved, and her neurological exam was normal.

Defendant also refers to the emergency room report from the day of the accident (exh E) wherein the doctor noted "no acute pathology noted at this time of the wrist...". Defendant submits the affirmed report of Dr. Tantleff (exh D), a radiologist who reviewed the MRI films of plaintiff's right wrist taken 15 days after the accident; he found a no evidence of acute injury (bone marrow edema, contusion or soft tissue swelling) but did find marked degeneration and fibrocystic erosive change of the lunate bone, and other degenerative changes. Additionally, Dr. Tantleff reviewed MRI films of (1) plaintiff's left knee taken 5 days after the accident, and (2) plaintiff's left shoulder taken 7 days after the accident, and found significant degenerative changes in both places. Defendant refers to the affirmed report of Dr. Botwinick, plaintiff's treating orthopedist (exh H), wherein he noted that plaintiff had "preexisting Kienbock disease"

Finally, defendant notes that in plaintiff's bill of particulars she stated that she was confined to bed/home and incapacitated from employment for 4-5 weeks following the accident, and submits plaintiff's deposition testimony (exh K) wherein she testified that she was not confined to her bed after the accident and was confined to home only for a few days (T. 70-71).

Based on the foregoing, defendant has satisfied his burden of establishing prima facie that plaintiff did not suffer a serious injury, and the burden shifts to plaintiff to raise a triable factual question as to whether she sustained a serious injury.

In opposition, plaintiff submits Dr. Botwinick's affirmation, along with reports of his exams of plaintiff on 7/9/08, 7/14/08, 7/23/08, 10/7/08 and 8/27/12 (exh B to opp). He states that in his opinion plaintiff had pre-existing Kienbock's disease with a new fracture through the lunate caused by the trauma of the accident, noting that "(t)hese fractures may be difficult to see on plain radiographs and MRIs" (para. 6). He supports his opinion that plaintiff's right wrist fracture was caused by the accident by stating that plaintiff was completely asymptomatic before the accident. *See Lopez v Abayev Tr. Corp.*, 2013 Slip Op 01511 (1st Dept 2013) (plaintiff's surgeon more than adequately addressed defendant's expert's opinion by noting the absence of any pre-accident history of symptoms in affected body parts). Additionally, Dr. Botwinick said that his opinion was based on his clinical findings and radiographic review.

In reply, defendant points out that no wrist fracture was found in the emergency room or by any other doctor plaintiff saw after the accident. It was only two months after the accident, when plaintiff saw Dr. Botwinick, that a fracture was even found. Even if there was a fracture, defendant questions how Dr. Botwinick can possibly conclude that the accident caused the fracture and not an intervening event, especially when plaintiff suffers from Kienbock's disease (which apparently makes her more prone to fractures). Defendant makes a good point in attacking Dr. Botwinick's credibility, but it is an argument to make to the jury. Without relevant case law to convince this Court that it must find the doctor's affirmation incredible as a matter of law, the affirmation is enough to raise a triable issue of fact and summary judgment must be denied. The trier of fact must determine whether plaintiff suffered a serious injury.

Accordingly, defendant's motion for summary judgment dismissing this action on the

grounds that plaintiff failed to satisfy the serious injury threshold as defined by Insurance Law §5102(d) is denied.

This is the Decision and Order of the Court.

Dated: March 14, 2013
New York, New York

HON. ARLENE P. BLUTH, JSC