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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 : 101367/2011
JACOBS, TAMOE
vs.
SINGH, AMANDEEP AND GUTMAN
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for defendants' MSJ - seeking sj.

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER

FILED
APR 18 2013
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 4.10.13

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

[* 2]

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

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TOMOE JACOBS,

Plaintiff,

-against-

Index No.: 101367/11
Motion Seq 001

AMANDEEP SINGH and GUTMAN & SONS CAB CORP.,

Defendants.

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As there are questions of fact which require a trial, defendants' motion for summary judgment is denied.

Plaintiff Tomoe Jacobs, a pedestrian, alleges personal injuries when, on July 1, 2010, she was hit by a taxi while crossing the intersection of Seventh Avenue and West 42nd Street in Manhattan. Defendants, the driver Amandeep Singh and owner Gutman & Sons Cab Corp., move to dismiss all claims against them. Defendants contend that plaintiff has not met the serious injury threshold as defined by section 5102 (d) of New York State's Insurance Law.

FACTUAL ALLEGATIONS

When plaintiff was hit by the taxi, she was knocked to the ground; she did not lose consciousness but her right knee was cut open. Although an ambulance arrived at the scene, plaintiff was not treated by the crew and did not go to the hospital.

Instead, five days after the accident, on July 6, 2010, plaintiff sought treatment with Dr. Aric Hausknecht, M.D. Dr. Hausknecht referred plaintiff to get x-rays of her right knee and recommended that she begin a course of physical therapy and chiropractic treatments. Plaintiff

testified that she saw Dr. Hausknecht once every few months, that she treated with a physical therapist two to three times a week for about eight to nine months following the accident, and that she did not take any prescribed medications as a result of the accident.

On February 3, 2011 plaintiff initiated this action in which she alleges personal injuries as a result of the accident. In her verified bill of particulars dated March 9, 2011, plaintiff's alleged injuries include lumbosacral derangement with L1-2 disc bulges, L5-S1 disc herniation, lumbar radiculopathy, lumbar lordotic curvature, cervical spine derangement, C3/4 and C4/5 posterior disc herniations, cervical radiculopathy extensions, a right knee sprain/strain with internal derangement, a torn ligament, contusion, and a left ankle sprain/strain.

On October 11, 2011, Dr. R. C. Krishna, M.D., performed a neurological medical examination of plaintiff at defendant's request (IME) (exhibit E to moving papers). After reviewing plaintiff's accident report and bill of particulars, he performed his own examination. Dr. Krishna found no neurological deficits which would constitute a disability or a permanent injury and noted that plaintiff has "no objective evidence of a disability from a neurological standpoint concerning the activities of daily living." His examination found plaintiff's sensory thresholds were within normal limits as were the range of motion of the lumbar and cervical spine. Dr. Krishna concluded that plaintiff's cervical strain injury is resolved, that the lumbar strain injury is resolved, and that the right knee complaints should be deferred to a specialist.

Defendants also submit the orthopedic medical evaluation (IME) of plaintiff which was conducted by Dr. S.W. Bleifer, M.D the same day (exhibit F to moving papers). Dr. Bleifer reviewed plaintiff's accident report, bill of particulars and response to discovery and inspection and he performed his own examination. Dr. Bleifer diagnosed plaintiff with a resolved post-

traumatic lumboscarcal sprain, a resolved contusion of the right knee, and a resolved right ankle strain. Dr. Bleifer observed that the plaintiff's range of motion of the lumbrosacral spine/back, the knees, and the ankle were normal. Dr. Bleifer concluded that all strains were resolved, no further treatment was necessary, that plaintiff did not suffer a disability, and that plaintiff may continue with her daily activities.

Defendants also submit a radiology report of Dr. Sheldon P. Feit, M.D., which is dated October 1, 2011 (exhibit G to moving papers). Dr. Feit conducted a review of plaintiff's lumbosacral and thoracic spine MRIs, both of which were taken less than two months after the date of the accident. With regard to the lumbosacral MRI, he found that it "reveals pre-existing degenerative change . . . [n]o post traumatic changes are identified and there are no abnormalities casually related to the injury of 7/1/10." With regard to the thoracic spine, he found "no discernible abnormalities" at all.

DISCUSSION

In order to prevail on its motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact. *Alvarez v Prospect Hospital,* 68 NY2d 320, 508 NYS2d 923 (1986). Once the movant demonstrates entitlement to judgment, the burden shifts to the opponent to rebut that prima facie showing. *Bethlehem Steel Corp. v Solow*, 51 NY2d 870, 872, 433 NYS2d 1015 (1980). In opposing such a motion, the party must lay bare its evidentiary proof. Conclusory allegations are insufficient to defeat the motion; the opponent must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact.

Zuckerman v City of New York, 49 NY2d 557 at 562, 427 NYS2d 595 (1980).

In deciding the motion, the court must draw all reasonable inferences in favor of the non-moving party and must not decide credibility issues. (*Dauman Displays, Inc. v Masturzo,* 168 AD2d 204, 562 NYS2d 89 [1st Dept 1990], *lv. denied* 77 NY2d 939, 569 NYS2d 612 [1991]). As summary judgment is a drastic remedy which deprives a party of being heard, it should not be granted where there is any doubt as to the existence of a triable issue of fact (*Chemical Bank v West 95th Street Development Corp.,* 161 AD2d 218, 554 NYS2d 604 [1st Dept 1990]), or where the issue is even arguable or debatable (*Stone v Goodson,* 8 NY2d 8, 200 NYS2d 627 [1960]).

Defendants' motion seeks to show that, pursuant to section 5102 (d) of the Insurance Law, plaintiff's injuries were not serious and do not meet the threshold st forth in the statute:

> "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."

Defendants contend that plaintiff's injuries do not fall within the statutory definition of serious injury. Through the affirmed reports of Drs. Krishna, Bleifer and Feit, defendants have offered the doctors' qualitative assessment of plaintiff stating that she has a normal range of motion, has no disability, and has no limitations or other indications of any residual loss of function and that the MRI reveals degeneration, not injury. As defendants have met their burden by producing the affirmations of Dr. Krishna, Dr. Bleifer, and Dr. Feit, the burden shifts to plaintiff to produce evidence to prove that she sustained a serious injury within the meaning of

the Insurance Law. *See Shinn v Catanzaro*, 1 AD3d 195, 197 (1st Dept 2003).

Whether a limitation of use or function is significant or consequential "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." *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 353 (2002) (citations and quotations omitted). In opposition to the motion, plaintiff submits the affirmation of Dr. Hausknecht, who disagrees with the conclusions of Drs. Krishna and Bleifer regarding plaintiff's range of motion and the permanency of the injuries. Therefore, there is an issue of fact as to whether plaintiff has suffered a serious injury under the Insurance Law.

Specifically, Dr. Hausknecht affirms under penalty of perjury and within a reasonable degree of medical certainty (exhibit B to opposition papers) that plaintiff "has sustained permanent consequential limitation of use of her lumbosacral spine" and "significant limitation of the function of her neurologic and musculoskeletal system and that she has a "permanent partial disability as a consequence of the injuries sustained on 7/1/10." He supports these conclusions noting that plaintiff has been symptomatic for over two years following the accident, and that she had no prior history of lower back problems. Dr. Hausknecht discusses how plaintiff was seen at his office twelve times from July 6, 2010 to July 24, 2012. At her last examination on July 24, 2012, plaintiff's range of motion was objectively measured using an arthrodial protractor and goniometer. Plaintiff's range of motion for her spine forward flexion was observed at 0-82 (0-90 normal); extension at 0-22 (0-25 normal); right lateral flexion at 0-20 (0-25 normal); left rotation at 0-25 (0-30 normal); and right rotation at 0-20 (0-30 normal).

Dr. Hausknecht also states that the MRI reveals objective evidence of structural pathology. He maintains that plaintiff has reached maximum medical improvement, that her

condition is poor, and that her condition is permanent in nature. He further maintains that plaintiff is in need of further treatment and evaluation; she should continue with home rehabilitation; and she should take anti-inflammatory and analgesic agents for pain on an as-needed basis. Dr. Hausknecht concludes that plaintiff is an appropriate candidate for lumbosacral epidural steroid injections.

Plaintiff also submits an affirmation from Dr. Robert Diamond, M.D. dated in August 2012 (opposition, exhibit D). Dr. Diamond, a radiologist, notes in his affirmation that from an August 2010 MRI he diagnosed that plaintiff has Levoconvex scoliosis; L1/2 disc hydration loss with posterior subligamentous disc bulge; L5/S1 disc hydration loss with posterior disc herniation; that flexion positional sequence demonstrates increasing lumbar lordotic curvature; and an extension positional sequence also demonstrates increasing lumbar lordotic curvature.

Therefore, based upon the conflicting findings of Dr. Hausknecht, Dr. Diamond, Dr. Krishna, Dr. Bleifer, and Dr. Feit, regarding both the permanency and the severity of plaintiff's alleged injuries, defendants' motion for summary judgment must be denied.

Plaintiff's bill of particulars dated March 9, 2011 claims that she has suffered an injury under the "90/180" category. Plaintiff testified that, as a result of the accident, she can not sit for long periods of time, that she has difficulty carrying heavy items at work, and that she has trouble running. However, plaintiff also testified that following the accident she did not miss any work, that she traveled to Japan, and that she presently goes to the gym a few times each week.

The Appellate Division, First Department, has held that "[w]hen construing the statutory definition of a 90/180-day claim, the words 'substantially all' should be construed to mean that the person has been prevented from performing his usual activities to a great extent, rather than

some slight curtailment." *Thompson v Abbasi*, 15 AD3d 95, 100-101 (1st Dept 2005); *see also Lugo v Adom Rental Transp., Inc.*, 102 AD3d 444, 446 (1st Dept 2013) (holding that plaintiffs did not sustain a 90/180 injury based upon the testimony that each plaintiff was confined to home for only a month following the accident).

Here, although some of plaintiff's activities have been affected as a result of the accident, there is no evidence that plaintiff has sustained injuries which have prevented her from performing substantially all of the material acts that constitute her usual and customary daily activities for at least 90 days during the 180 days immediately following the accident. Therefore, as plaintiff's injuries do not fall under the "90/180" category of serious injury as defined by the Insurance Law, defendants' motion for summary judgment must be granted as to any claim premised upon that category. However, as set forth above, the motion must otherwise be denied since plaintiff has met her burden of raising a triable issue of fact as to the "significant limitation of use of a body function or system" category of section 5012 (d) of the Insurance Law.

CONCLUSION and ORDER

Accordingly, it is hereby

ORDERED that defendant's motion for summary judgment to dismiss the complaint is denied.

This is the Decision and Order of the Court.

Dated: April 10, 2013
New York, New York

HON. ARLENE P. BLUTH, JSC