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| Barrett v Edwards Trans Corp. |
| 2013 NY Slip Op 31148(U) |
| May 14, 2013 |
| Supreme Court, New York County |
| Docket Number: 102970/2010 |
| Judge: Arlene P. Bluth |
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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 : 102970/2010
BARRETT, GRACE M.
vs.
EDWARDS TRANS
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

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

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


DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER

FILED

MAY 28 2013

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5.14.13


_____, 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.: 102970/10
Seq No. 01

Grace M. Barrett,

Plaintiff,

-against-

Edwards Trans Corp. and Abdul Malik,

Defendants.

DECISION/ORDER

HON. ARLENE P. BLUTH, JSC

Defendants' motion for summary judgment dismissing the complaint against them on the grounds that plaintiff has not suffered a "serious injury" under Insurance Law §5102 is denied.

In this action, plaintiff alleges that as a result of a motor vehicle accident on November 14, 2009 in which she was a passenger in a taxi cab, she suffered personal injuries which resulted in a permanent consequential limitation of use of her cervical and lumbar spine.

FILED

MAY 28 2013

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 verified bill particulars (para. 9) and "second supplemental" bill of particulars (para. 9) (collectively annexed as exh C to moving papers), plaintiff alleges that she sustained the following injuries: lacerations to forehead, facial bruising and swelling, swollen nose, headaches, disc herniations and bulges, lumbar radiculopathy, cervical radiculitis, lumbar facet syndrome,

lumbago, intervertebral lumbar disc disorder, and thoracic or lumbosacral neuritis or radiculitis. Additionally, plaintiff states that she was confined to bed for three days and confined to home for four days as a result of her injuries (para. 10).

In support of their motion, defendants submit the affirmed report of Dr. Feuer, a neurologist, who examined plaintiff on behalf of defendants on September 26, 2011 (moving papers, exh D). Dr. Feuer found full range of motion in her cervical and lumbar spine using a goniometer and in accordance with AMA Guidelines and the NYS Office of Temporary and Disability Assistance range of motion chart. Additionally, he performed several tests (cranial nerves, motor, coordination), and concluded that her neurological exam was within normal limits. Specifically, he noted that there were "no objective clinical deficits to support a diagnosis of radiculitis or radiculopathy because plaintiff was able to tolerate EMG testing of the paraspinal muscles despite the reported findings of spasm and restricted range of motion within these same muscles". Dr. Feuer concluded that plaintiff did not demonstrate any objective neurological disability or neurological permanency causally related to the subject motor vehicle accident.

In further support of their motion, defendants submit the affirmed report of Dr. Kimmeleman, an otolaryngologist, who examined plaintiff on behalf of defendants on September 13, 2011 (moving papers, exh E). Dr. Kimmelman states that his impressions were well-healed abrasion of right frontal region (without esthetic compromise) and normal external and internal nasal anatomy. Finally, defendants submit the affirmed report of Dr. Goldstein, a plastic surgeon, who examined plaintiff on behalf of defendants on September 20, 2011 (moving papers, exh F), and found that her facial injuries were well healed and that no type of plastic surgical intervention was warranted.

Based on the foregoing, defendants have satisfied their 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 the affirmation of Dr. Goldenberg, a board certified physician in physical medicine and rehabilitation (opp., exh B). Dr. Goldenberg states that she first examined plaintiff on December 3, 2009 (19 days after the subject accident), and that her office examined/treated plaintiff approximately 58 times thereafter until September 19, 2011, when she determined that further treatment would be palliative only. Dr. Goldenberg sets forth her measurements of plaintiff's ranges of motion in her cervical and lumbar spine at the first visit on December 3, 2009 wherein she found restriction in her both areas of the spine. Additionally, Dr. Goldenberg includes range of motion testing results from May 26, 2010 and September 5, 2012 which show restrictions in cervical and lumbar motion which she refers to as "significant". Dr. Goldenberg states that she reviewed the MRI films and reports of plaintiff's cervical and lumbar spine taken at Lenox Hill Hospital, and agrees with the findings of posterior bulges at C3-4, C4-5 and C-6-7, each impinging on the thecal sac, and posterior disc herniations at L4-5 and L5-S1 impinging on the thecal sac and narrowing the foramina bilaterally. She further states that she performed EMG and nerve conduction studies on plaintiff which revealed bilateral C6-7 cervical radiculitis and bilateral L4-5 lumbar radiculopathy. Dr. Goldenberg noted that she referred plaintiff to a pain management specialist who administered epidural injections to plaintiff at L4-5, in addition to several diagnostic facet blocks at various location of plaintiff's lumbar spine. In paragraphs 19 through 32, Dr. Goldenberg sets forth her opinion that these restrictions in range of motion are permanent and causally related to the accident.

In reply, defendants assert that to the extent that Dr. Goldenberg relied on MRI reports/records which were not submitted here, her opinions and conclusions are based on hearsay and insufficient to raise an issue of fact. However, Dr. Goldenberg stated that she reviewed the MRI films (aff, para. 14); as such, her statements concerning the MRIs are not hearsay. Defendants correctly note that plaintiff did not raise any issue of fact with respect to her 90/180 claim; accordingly, it is hereby dismissed.

Based on the foregoing, the Court finds that plaintiff has provided evidence of contemporaneous and recent findings of limitation in her cervical and lumbar spine sufficient to raise an issue of fact as to a significant or permanent or consequential limitations, and to warrant denial of this motion. *See, e.g. Torres v Ndongo*, 105 AD3d 480, 963 NYS2d 95 (1st Dept 2013), citing *Perl v Meher*, 18 NY3d 208, 217-8, 936 NYS2d 655 (2011).

Accordingly, it is

ORDERED that the motion for summary judgment by defendants is granted in part, only to the extent of dismissing so much of the complaint that alleges that plaintiff suffered a serious injury within the meaning of Insurance Law § 5102(d) with respect to the 90/180 claim, and the motion is otherwise denied.

FILED

This is the Decision and Order of the Court.

MAY 28 2013

NEW YORK
COUNTY CLERK'S OFFICE
[Signature]

Dated: May 14, 2013
New York, New York

HON. ARLENE P. BLUTH, JSC