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SCANNED on 6/3/2013

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH **PART** 22
Justice

Index Number : 114992/2009
DUNCAN, KIM
vs.
ATUL, ROY P.
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 4 **, were read on this motion to/for** def's MSJ on seniority.

Notice of Motion/Order to Show Cause — Affidavits — Exhibits Notice of X motion **No(s).** 1, 2
Answering Affidavits — Exhibits **No(s).** 3
Replying Affidavits **No(s).** 4

Upon the foregoing papers, it is ordered that this motion is and cross-motion

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER

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

Dated: 5/29/13

_____, 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

Kim Duncan,

Plaintiff,

-against-

Roy P. Atul, Nagy Cab Corp., Boris Natanov and Smart Cab Corp.,

Defendants.

Index No.: 114992/09
Motion Seq 02
Motion and Cross-motion

DECISION/ORDER

HON. ARLENE P. BLUTH, JSC

Defendants Smart Cab and Natanov have moved for summary judgment dismissing this action against them on the grounds that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law §5012(d). Defendants Atul and Nagy have cross-moved for the same relief on the same grounds (their motion adopts the facts and legal arguments of the main motion). The motion and cross-motion are granted only to the extent of dismissing the portion of plaintiff's complaint relating to her 90/180 claim; otherwise, the motions are denied.

In this action, plaintiff alleges that on June 4, 2009 she sustained personal injuries when she was a passenger in a taxi owned by Smart Cab and operated by Natanov which collided with a taxi owned by Nagy and operated by Atul.

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]).

Plaintiff alleges in her verified bill of particulars that, as a result of the subject accident, she sustained cervical disc bulges and compression, cervical herniations, and right shoulder and

right hip contusions (exh B to moving papers, para. 11). Additionally, she claims that she was confined to bed and home for one week after the accident (exh B, para. 13).

In support of their motion, defendants submit the affirmed reports of their doctors who examined plaintiff on December 19, 2011: an orthopedist, Lisa Nason, MD (moving papers, exh C) and a neurologist, Jean-Robert Desrouleaux, MD (moving papers, exh D). In their reports, they set forth the objective tests they performed, and they recorded ranges of motion measured by a goniometer and expressed in numerical degrees and compared to the corresponding normal values. These tests provided support for their individual conclusions that the ranges of motion were normal and that plaintiff suffered no permanent injury or significant injury to her cervical spine, right shoulder or right hip as a result of the accident. Both Drs. Nason and Desrouleaux concluded that if any injuries were suffered, they were fully resolved as of the date of their examination.

Additionally, defendants submit the affirmed report of their neuroradiologist, Jeffrey Lang, MD (exh E); he viewed the MRI of plaintiff's cervical spine taken on December 21, 2010, a year and a half after the accident. Although he saw plaintiff's disc bulge at C6-7, he commented that said bulge was not a post-traumatic finding and it is unrelated to the subject accident; the Court notes, however, that Dr. Lang does not explain the basis of his conclusion that the bulge was unrelated to the accident.

Even without Dr. Lang's report, defendants have submitted affirmed medical reports "finding normal ranges of motion in the claimed affected body parts and no objective evidence that any limitations resulted from the accident"; as such, they have met their prima facie burden of demonstrating that plaintiff did not suffer a permanent loss of use of a body organ, member, function or system, a permanent consequential limitation of use of a body organ or member or a

significant limitation of use of a body function or system involving her cervical and lumbar spine or right shoulder (*Vega v MTA Bus Co.*, 96 AD3d at 506; *Spencer v Golden Eagle, Inc.*, 82 AD3d at 591). Additionally, defendants have cited to plaintiff's bill of particulars (para. 13) where she stated that she was confined to home and bed for a week after the accident. Thus, the burden shifts to plaintiff to show a triable issue of fact.

In opposition, plaintiff has submitted, *inter alia*, the affidavit of her chiropractor, Dr. Jeannette Anderson (exh F), and an affirmed report and affirmation of Dr. Hausknecht, her neurologist (exhs N, O). Dr. Anderson states that, on June 29, 2009 (less than a month after the accident), she examined plaintiff using a hand-held goniometer to test plaintiff's range of motion of her cervical spine. She states that the found restrictions of 65 degrees out of 80 degrees for cervical right rotation, 35 degrees out of 45 degrees for cervical extension, 25 degrees out of 45 degrees for cervical right lateral flexion and 35 degrees out of 45 degrees for cervical left lateral flexion (Anderson aff., ¶ 7). There was no measurement for cervical left rotation mentioned.

She also states that, on examination of plaintiff's right shoulder, she found restrictions of her range of motion on the right shoulder flexion to the right 120 degrees out of 150 degrees, right shoulder flexion to the left 140 degrees out of 150 degrees, right shoulder extension to the right 20 degrees out of 40 degrees, right shoulder extension to the left 35 degrees out of 40 degrees and right shoulder abduction 130 degrees out of 150 degrees (id., ¶ 8).

Dr. Anderson further states that she examined and tested plaintiff on April 18, 2012. In that examination, she found that plaintiff's cervical extension had been reduced to 30 degrees out of 45 degrees, cervical right rotation had been reduced to 55 degrees out of 80 degrees and the restrictions to the spine and shoulder remained the same (*id.*, ¶¶ 16-17). For some unknown reason, Dr. Anderson states that cervical left rotation was "reduced" to 50 degrees out of 80

degrees, even though there was no indication of a prior measurement. In any event, Dr. Anderson opines that plaintiff's condition was caused by her accident and that she has suffered significant and permanent limitation to the use of her cervical spine and right shoulder and she bases her opinion on her examination of plaintiff and her review of plaintiff's MRI studies (*id.*, ¶¶ 21-22).

Dr. Aric Hausknecht, a neurologist, reviewed various MRI reports (not the films) and examined plaintiff on October 25, 2011 (Hausknecht aff., ¶¶ 4, 6). He states that he tested her range of motion with a goniometer and conducted a Spurling's test and found restrictions in cervical left and right rotation and left and right flexion. He also seems to have treated her thereafter by sending her for other tests, prescribing exercises and an NSAID for pain. His opinion is also that plaintiff suffers a permanent consequential limitation of use of her cervical spine as a result of the accident (*id.*, ¶¶ 10-12).

The affirmed reports of Dr. Anderson and Dr. Hausknecht have sufficiently raised an issue of fact. Plaintiff's "contrary evidence ... [is] sufficient to raise an issue of fact" (*Perl v Meher*, 18 NY3d 208, 218-219 [2011])." The "recent quantified range of motion limitations, positive tests, and permanency provided the requisite proof of limitations and duration of the disc injuries" (*Pietropinto v Benjamin*, 104 AD3d 617, 617-618 [1st Dept 2013]).

However, while defendants met their burden on plaintiff's 90/180 claim by citing to her bill of particulars, plaintiff has not provided any evidence that she suffered a medically-determined injury that prevented her from performing her usual and customary activities for more than 90 out of the first 180 days after the accident, and that claim is dismissed.

Accordingly, it is

ORDERED that the portion of the defendants' motion and cross-motion seeking

summary judgment dismissing plaintiff's complaint for failure to meet the serious injury threshold of Insurance Law § 5102 is granted only to the extent of dismissing the portion of plaintiff's complaint relating to her 90/180 claim, and the motions are otherwise denied.

The parties are reminded of the May 31, 2013 compliance conference scheduled at 80 Centre Street, Room 103 at 9:30AM.

This is the Decision and Order of the Court.

Dated: May 29, 2013
New York, NY

HON. ARLENE P. BLUTH, JSC