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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 : 103189/2011
ALEXIS, NADEGE
vs.
LUCKY RIVER TRANSPORTATION
SEQUENCE NUMBER : 008
SUMMARY JUDGMENT

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

The following papers, numbered 1 to 5, were read on this motion to/for Π's MSJ for 90/180

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1

Answering Affidavits — Exhibits _____ | No(s). 2

Replying Affidavits _____ | No(s). 3

Supplemental Affdt. & Affrm.

Upon the foregoing papers, it is ordered that this motion is decided jointly with mot. seq. 009 and 9/5

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER

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

Dated: 7/11/13

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

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

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NADEGE ALEXIS,

Plaintiff,

-against-

Index No.: 103189/11

Motion Seq 08 and 09

LUCKY RIVER TRANSPORTATION CORP. AND QIN CHEN,

Defendants.

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ARLENE P. BLUTH, JUSTICE.

Motion sequences 08 and 09 are consolidated for joint disposition.

Plaintiff's motion for an order granting her summary judgment on the 90/180-day category of Insurance Law § 5102(d) is denied. (mot. seq. 08). Defendants move for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" (motion sequence no. 009); defendants' motion is granted and the case is dismissed.

In this action, plaintiff seeks to recover damages for personal injuries that she alleges she incurred when she was passenger on a bus traveling to Boston from New York that was involved in a collision on August 28, 2010.

In her bill of particulars (exh A to opp, para. 5a), plaintiff contends that she suffered a cervical spine disc bulge at C3/C4, measuring approximately one to two millimeters abutting the anterior margin of the thecal sac. Plaintiff alleges that she was totally disabled and incapacitated from employment as a supermarket cashier for over three months following the accident, partially disabled since then, and that her injuries are permanent. Although plaintiff states that

she was not confined to bed after the accident, she asserts that she was confined to her home, and incapacitated from unspecified activities, for more than three months, from August 28, 2010 to the end of December 2010, and, during this period, left her home only to see doctors and to obtain food and medicine, except for approximately one week of part-time work.

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's Motion (seq. 08)

Plaintiff moves for summary judgment on the 90/180-day category of Insurance Law § 5102(d), which provides that a "'Serious injury' means a personal injury which results in . . . 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." "In order for a plaintiff to establish a serious injury based [on this ground] she 'must present objective evidence of a medically determined injury or impairment of a non-permanent nature'" (*Coley v DeLarosa*, 105 AD3d 527, 2013 NY Slip Op 02498, *2 [1st Dept 2013], quoting *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 357 [2002]; *Uddin v Cooper*, 32 AD3d 270, 272 [1st Dept 2006]). In addition, a plaintiff must demonstrate, with objective medical evidence, that the injury or impairment caused

him or her to curtain his or her usual daily tasks "to a great extent rather than some slight curtailment" (*Licari v Elliott*, 57 NY2d 230, 236 [1982]; *see Valentin v Pomilla*, 59 AD3d 184, 186-187 [1st Dept 2009] [objective medical evidence required to demonstrate serious injury]).

In support of her motion, plaintiff submits an affidavit in which she avers that after the accident, she worked part-time, from September 8 until September 27, 2010, but, due to neck and back pain, increasing difficulty in standing and severe headaches, became unable to continue, and followed her doctor's advice to take a leave of absence from work. Plaintiff states that she was completely incapacitated from her supermarket cashier job from September 28 until December 26, 2010. Plaintiff also avers that for the six months following the accident, she could not, as she had done prior to the accident, make jewelry designs to sell, as she as unable to sit for long periods of time without headaches and neck and back pain. Plaintiff states that, prior to the accident, she took yoga classes and practiced yoga, but could not do so for at least six months following the accident. Contrary to her counsel's contentions, plaintiff's affidavit does not state that plaintiff could not attend craft fairs or visit her family in Boston during the 180 days after the accident.

In further support of her motion, plaintiff provides discharge instructions from the Faulkner Hospital emergency department in Boston, dated August 29, 2010, which reveal that plaintiff was diagnosed with neck injury/cervical strain and advised on the use of over-the-counter pain killers, ice packs and follow-up care (exh 4). Plaintiff also submits patient take-home instructions from St. Luke's emergency department, in New York, dated September 1, 2010 (exh 5). These records indicate that plaintiff was diagnosed with musculoskeletal injury, and specifically cervical or neck strain.

The bulk of plaintiff's submissions are the records of Dr. Xiao-ke Gao, a neurologist and acupuncturist, who treated plaintiff (exh 9). Dr. Gao affirms that on September 9, 2010 she found that plaintiff had symptoms consistent with cervical and lumbar strain/sprain and post-traumatic insomnia, was totally disabled as a result of her injuries and should not return to work until September 27, 2010. Dr. Gao states that, on September 30, 2010, she advised plaintiff that she should not return to work, and the records reflect that Dr. Gao also then issued a "doctor's note," indicating that plaintiff was totally disabled and that her return to work date would be November 1, 2010. Dr. Gao's affirmation and records reflect that plaintiff underwent acupuncture periodically, from September 2010 through February 2011.

Dr. Gao affirms that she also saw plaintiff on several occasions in October 2010 and, on October 21, 2010, recommended that plaintiff not return to work until December 1, 2010. The doctor's note Dr. Gao gave plaintiff on that date, does not, as do the two prior notes, indicate that plaintiff was disabled (exh G to Gao affirmation). Dr. Gao states that on October 28, 2010 and December 9, 2010 she "noted that Ms. Alexis was still not able to work" (Gao aff., ¶ 22). The record does not contain a December 9, 2010 doctor's note excusing plaintiff from work, and Dr. Gao does not state that she issued one.

Plaintiff also submits a copy of an MRI report, dated September 17, 2010, with the reporting radiologist's affirmation (exh 6, 7). The radiologist affirms that he reviewed plaintiff's September 16, 2010 cervical spine MRI films and that he will testify that, as stated in his report, they reveal a disc bulge at C3/4 measuring approximately 1 to 2 mm, that abutted the anterior margin of the thecal sac.

In opposition, defendants argue that plaintiff: (1) has not documented a disability lasting

90 out of 180 days with the doctor's notes she submits; (2) has not demonstrated a substantial curtailment of her daily tasks for 90 days; and (3) has not demonstrated that she has, or had, a disability with objective medical evidence.

Plaintiff has not met her burden on summary judgment because she has not submitted objective medical evidence demonstrating that she was prevented from performing substantially all of her material daily tasks for at least 90 days during the 180 days after the August 28, 2010 accident. Dr. Gao's affirmation and notes, and plaintiff's affidavit, reflect only that plaintiff was unable to work from September 28 through December 14, 2010, which is less than 90 days. Furthermore, the inability to work, alone, is not determinative of a 90/180–day injury (*see Uddin,* 32 AD3d at 272; *Bailey v Islam*, 99 AD3d 633, 634 [1st Dept 2012]; *Ortiz v Ash Leasing, Inc.*, 63 AD3d 556, 557 [1st Dept 2009]). Other than work, Dr. Gao's affirmation and treatment notes do not reflect that plaintiff was advised not to engage in other activities. Plaintiff provides no medical evidence of her inability to perform any daily task, including engaging in yoga practice, for at least a 90-day period (*see Pinkhasov v Weaver*, 57 AD3d 334, 334-335 [1st Dept 2008] [absent medical evidence, plaintiff's subjective statements that he was unable to perform usual and customary activities for 90 days was insufficient to defeat summary judgment or establish serious injury]).[1]

As the "substantially all" standard requires a showing that a plaintiff's daily activities have been restricted "to a great extent" (*Licari,* 57 NY2d at 236), assuming, arguendo, that

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[1]In contrast to Dr. Gao's September doctor's notes, her October doctor's note does not indicate that plaintiff was disabled. In any event, a medical provider's conclusory statement that a patient is "'totally disabled' [is] too general to raise an issue of fact" (*Ortiz,* 63 AD3d at 557). It logically follows that such an assertion also would not carry a plaintiff's moving burden.

plaintiff was medically unable to work at her cashier job or as a jewelry designer for the full statutory 90-day period, and also could not perform yoga, this level of activity curtailment is insufficient to demonstrate that plaintiff could not perform substantially all of her usual and customary daily activities (*see e.g. Merrick v Lopez-Garcia*, 100 AD3d 456, 457 [1st Dept 2012] [plaintiff's physician note three months after accident that plaintiff would be able to work after further improvement, coupled with plaintiff's testimony that he had been unable to perform house chores and lift things, was not sufficient to demonstrate the 90/180-day category]; *Blake v Portexit Corp.*, 69 AD3d 426, 427 [1st Dept 2010] ["Even if one reads plaintiff's affidavit to say that for the first six months after the accident, he could not play sports with his children and had difficulty walking, going up stairs, and getting into cars, it does not raise a triable issue of fact because plaintiff's statement is unsupported by medical evidence and because the activities listed therein do not constitute substantially all of his activities]" [citation omitted]; *Gibbs v Hee Hong*, 63 AD3d 559, 560 [1st Dept 2009] [statements of inability to run, go upstairs, or stand for very long did not constitute the loss of "substantially all" of plaintiff's usual activities]; *cf. Arenas v Guaman*, 98 AD3d 461, 461 [1st Dept 2012] [determining that defendants met their burden for summary judgment against plaintiff on the 90/180–day claim with plaintiff's testimony that she was unable to perform a few activities and confined to bed for a month or two]).

Plaintiff may not rely on her reply affirmation, in which she states that she worked only one day between September 8, 2010 and September 27, 2010, and Dr. Gao's reply affirmation stating that "plaintiff should not have returned to work" until at least January 2011, to meet her moving burden (*David v Bryon,* 56 AD3d 413, 414-415 [2nd Dept 2008] [movant may not rely on "evidence submitted for the first time in its reply papers to meet its prima facie burden"]; *Batista*

v Santiago, 25 AD3d 326, 326 [1st Dept 2006] [same]).

As plaintiff did not meet her burden, it is unnecessary to consider the sufficiency of the opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Accordingly, plaintiff's motion for summary judgment on her 90/180-day claim is denied.

Defendants' Serious Injury Motion

Defendants assert that plaintiff did not sustain a permanent consequential limitation of a body organ, member, function or system, a significant limitation of use of a body part or system, or a 90/180 curtailment of activities.

In support of their motion, defendant submits the affirmed report of Dr. Kulak (moving papers, exh D), an orthopedist who examined plaintiff on 4/19/12 and reviewed her medical records. Dr. Kulak performed, inter alia, range of motion testing on plaintiff's cervical spine and found that all measurements were within the normal range. Additionally, Dr. Kulak reviewed plaintiff's emergency room records and asked plaintiff about her emergency room treatment, which, he states, reveals that plaintiff was released without x-rays and with only pain medication. Dr. Kulak states that the September 2010 cervical spine MRI report indicated normal cervical spine alignment, without evidence of straightening reported, which he opines would exclude significant muscle spasm or tightness, without report of disc herniation, protrusion or canal or foaminal compromise, and that "the only positive finding was a disc bulge at C3-4 totally degenerative" (*id.* at 6). Dr. Kulak notes that the October 2010 lower back MRI was normal, without evidence of trauma or disc pathology, but remarkable for a congenital anomaly that, he opined, can give symptoms without injury, which, as well as her occupational duties, he opined,

might be contributing to plaintiff's current complaints of sacroiliac joint symptoms.

Significantly, in opposition, Dr. Gao failed to address the existence of pre-existing degenerative conditions, as raised by Dr. Kulak, as the cause of plaintiff's symptoms. Accordingly, because plaintiff failed to satisfactorily rebut this conclusion, neglected to even mention why she believed the injury was not due to degenerative change or her occupation, Dr. Gao's opinion was rendered speculative and insufficient to raise an issue of fact sufficient to defeat this motion on the permanent consequential limitation and significant limitation categories. *See Lopez v American United Transp., Inc.*, 66 AD3d 407, 886 NYS2d 157 (1st Dept 2009).

90/180 Category

Defendants also assert that they are entitled to summary judgment on plaintiff's 90/180 claim because: (1) plaintiff's records indicate that she was unable to work for only 77 days, from September 30, 2010 to no later than December 14, 2010; (2) plaintiff's claimed limitations, the inability to work at a part-time job, make jewelry and practice yoga, do not establish a serious injury claim; (3) plaintiff's medical records do not objectively substantiate a serious injury; and (4) plaintiff's injury was caused by a preexisting degenerative or congenital condition..

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.

In opposition, plaintiff successfully opposes this 90/180 calculation in her affidavit. She states that from September 8 to September 27, 2010 she worked only one day, September 27,

2010. It is undisputed that plaintiff worked on September 27, 2010; her employer's record reflects that she worked five hours that day. This work record and plaintiff's affidavit are the only evidence as to whether and when plaintiff worked between the dates of September 8, 2010 and September 27, 2010. The record also contains Dr. Gao's September 9, 2010 treatment note, which reflects that plaintiff could not then turn her head and includes a note excusing plaintiff from work, with a return to work date of September 27, 2010. Moreover, in her July 3, 2012 affirmation, Dr. Gao stated that on September 9, 2010 she advised plaintiff not to work until September 27, 2010.

Consequently, the opposition demonstrates that a finding that plaintiff was not advised to stay out of work from September 9 through September 26, 2010 is unwarranted. Including that period and using December 14, 2010 as an end date, plaintiff has demonstrated that she was out of work on the doctor's advice for 92 days-- September 9 through 26 and September 30 [18 days]; the month of October [31 days]; the month of November [30 days]; and December 1-13 [13 days].

In reply, defendants argue that plaintiff's averment that she worked only one day between September 8 and 27, 2010 contradicts her earlier statement that she was unable to work from September 28, 2010 on contradicts her employer's letter that she had not worked at the store since September 27, 2010; this Court disagrees. That plaintiff initially stated that she not work after, and was disabled from, September 27, 2010 on demonstrates nothing about what may have occurred before then – defendants do not show that plaintiff worked until September 27th. Likewise, her employer's representation that the last day of work was September 27th does not mean that she worked straight through until that date; it could mean that she was out, returned to

work that date, then resumed being out. Drawing reasonable inferences in plaintiff's favor, as required on this motion (*see Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]), plaintiff merely explains, but does not contradict, her earlier statement.

However, that plaintiff missed more than 90 days of work, even on doctor's orders, still is not determinative of the 90/180–day category (*see Uddin v Cooper,* 32 AD3d 270, 271, 820 NYS2d 44 [1st Dept 2006], *lv. denied* 8 NY3d 808, 834 NYS2d 89 [2007]). Even assuming that plaintiff's calculations about how many days Dr. Gao directed that she not go to work are correct, defendants argue that plaintiff has not demonstrated that her medically-qualified condition prevented her from performing "substantially all" of her usual daily tasks. In opposition, plaintiff provides her own affidavit, described above, which, as previously discussed, does not evidence the substantial curtailment of activities that would be required to demonstrate serious injury under the statute. Plaintiff has offered no evidence showing that she was restricted from performing substantially all of the material acts that constituted her usual and customary daily activities for 90 days during the 180 days following the accident, i.e. that she could not clean her home, cook, shower, sleep, care for family members, go food shopping, drive, walk, etc. Nor do either of Dr. Gao's affirmations, submitted in opposition, specifically mention any limitation on daily activities except work. Because plaintiff's showing in opposition is insufficient to raise a fact issue as to whether she sustained a serious injury under the 90/180 category, defendants' motion to dismiss the 90/180 ground is also granted.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment on the 90/180-day category (motion sequence no. 008) is denied; and it is further

ORDERED that defendants' motion for summary judgment (motion sequence no. 009) is granted, and the action is dismissed.

This is the Decision and Order of the Court.

Dated: July 11, 2013
New York, NY

HON. ARLENE P. BLUTH, J.S.C.