SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH Justice

PART 22

Index Number : 112324/2010
FEIGENBAUM, JOY
vs.
MANDEL, LAWRENCE M.
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to 3, were read on this motion to/for msj / serious injury

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

FILED
AUG 27 2013
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 8/20/13

_____, 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.: 112324/10
Motion Seq 02 and 03

Joy Feigenbaum

Plaintiff,

-against-

Lawrence M. Mandel, Anthony M. Nunn and Hilti, Inc.,

Defendants.

DECISION/ORDER

HON. ARLENE P. BLUTH, JSC

Motion sequence numbers 02 (by defendant Mandel) and 03 (by defendants Hilti and Ninn) are consolidated for joint disposition.

Defendants' motions for summary judgment dismissing this action on the grounds that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law §5012(d) are both granted, and the action is hereby dismissed.

In this action, plaintiff alleges that on September 28, 2007 she sustained personal injuries when she was a passenger in a taxi owned and operated by defendant Mandel which came into contact with a vehicle owned by defendant Hilti, Inc. ("Hilti") and operated by defendant Nunn.

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 of particulars, plaintiff claims she sustained injuries to her chin, head, left knee and leg, jaw and teeth (exh B to both sets of moving papers, para.11), and a 90/180 claim.

In support of their motions, defendants submit the September 7, 2011 affirmed report of

Dr. Israel, an orthopedist (exh D) and the September 14, 2011 affirmed report of Dr. Seinuk, a dentist (exh E) who both examined plaintiff at defendants' request. Dr. Israel examined plaintiff's left knee and leg, measured these ranges of motion with a goniometer and stated that plaintiff's orthopedic evaluation was within normal limits. Dr. Seinuk found that plaintiff had no current dental condition and specifically no temporomandibular condition, and set forth the objective evidence which he used to reach this conclusion. Defendant Mandel also submits (exh C) the August 17, 2011 affirmed report of Dr. Tantleff, a radiologist, who reviewed the 1/11/08 MRI of plaintiff's left knee, and found evidence of a contusion, but no fracture or traumatic tear. Based on these affirmed reports, defendants met their prima facie burden of showing that the plaintiff did not sustain a permanent consequential injury or significant limitation as a result of the subject accident.

Additionally, defendants met their initial burden with respect to plaintiff's 90/180-day claim by submitting plaintiff's bill of particulars wherein she stated that she missed only 3 days of work as a result of the accident, and her deposition testimony (T. at 72) that she missed about five full days of work.

In opposition, plaintiff submits the certified admission record from New York Downtown Hospital from the date of the accident (exh 1) that includes reports of CT scans of plaintiff's head and brain, which did not contain any positive findings. The Court notes that these records specifically note "no dental injury" (p. 6, physical exam- ENT). The hospital records are admissible by certification.

Exhibit 2 contains unaffirmed office records of plaintiff's treatment at Advanced Periodontics & Implant Dentistry; these records are inadmissable. Exhibit 3 contains two

unaffirmed MRI reports from East River Medical Imaging, P.C. – a 1/11/08 MRI of plaintiff's left knee and a 5/29/08 brain MRI; neither of these reports is admissible. Exhibit 4 contains the unaffirmed office records of Manhattan Orthopedics & Sports Medicine which includes the unaffirmed letter report of Dr. Klion; these records are not admissible. Exhibit 5, the unaffirmed office records of ENT and Allergy Associates, LLP and Exhibit 6, the unaffirmed office records of Dr. Jane Levitt, presumably plaintiff's gynecologist, are likewise inadmissible.

As the Appellate Division, First Department stated in *Lazu v Harlem Group, Inc.*, 89 AD3d 435, 436, 931 NYS2d 608 (1st Dept 2011):

> Statements and reports by the injured party's examining and treating physicians that are unsworn or not affirmed to be true under penalty of perjury do not meet the test of competent, admissible medical evidence sufficient to defeat a motion for summary judgment (citation omitted).

Finally, plaintiff submits an October 2010 affirmation from Dr. Murphy, a dentist (exh 7); although in admissible form, this affirmation fails to create a triable factual question. Significantly, Dr. Murphy ***never*** examined plaintiff; he states that he reviewed the Emergency Room record (which noted no dental injuries) and records of Dr. Sacks and Dr. Kratenstein, which were not attached to his affirmation and presumably not affirmed. Without ever having met plaintiff or looked into her mouth, Dr. Murphy states that plaintiff's injuries will continue to affect her "qualitative life experience" (para. 12). This affirmation, written more than three years after the accident and without the benefit of an actual examination, cannot be used as proof of a dental exam contemporaneous with the accident; nor does it create a triable question of fact as to whether plaintiff sustained any significant limitation of a body part or system or a permanent consequential limitation causally related to the subject accident. Thus, plaintiff failed to raise a triable issue of fact under either the "permanent consequential limitation" or "significant

limitation" category sufficient to defeat summary judgment. Finally, plaintiff did not submit any admissible medical proof to dispute Dr. Israel's findings in connection with her claimed orthopedic injuries (left knee and leg), and did not oppose the branch of defendants' motions seeking dismissal of her 90/180-day claim.

Accordingly, it is

ORDERED that defendants' motions for summary judgment dismissing this action on the grounds that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law §5012(d) (seq. nos. 02 and 03) are both granted, and the action is hereby dismissed.

This is the Decision and Order of the Court.

Dated: August 20, 2013
New York, New York

ARLENE P. BLUTH, JSC