[*1] SCANNED ON 9/18/2013

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH PART 32
Justice

Index Number : 104092/2009
MAIMOUNA, HAIDARA
vs
JEROME, JOSEPH
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 on Ser. Inj

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 consolidated for joint disposition with mot. seq. #S 03 and 04 and is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER

FILED
SEP 18 2013
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 9/13/13

_____, 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

[* 2]

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

Index No.: 104092/09
Motion Seq 02, 03 and 04

Haidara Maimouna,

Plaintiff,

-against-

Joseph Jerome,

Defendant.

DECISION/ORDER

HON. ARLENE P. BLUTH, JSC

Motions sequences 02, 03 and 04 are consolidated for joint disposition.

Defendant's motion for summary judgment dismissing this action (seq. 02) on the grounds that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law §5012(d) and on liability grounds is denied in its entirety. Plaintiff's motion for an extension of time to file the Note of Issue (seq. 03) and her motion for an order vacating defendant's 12/11/12 90-day notice to resume prosecution (seq 04) are both granted; plaintiff's time to file her Note of Issue is extended to November 1, 2013.

In this action, plaintiff alleges that on December 31, 2007 she sustained personal injuries when she was struck by defendant's vehicle while she was in the crosswalk at the intersection of Seventh Avenue and 127th Street in Manhattan.

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, inter alia, she suffered a torn medial meniscus and a partial tear of the anterior cruciate ligament of the right knee, and lumbar and sprain and strain (exh D to moving papers).

In support of the branch of their motion addressing whether plaintiff sustained a serious injury, defendant submits the 12/5/11 affirmed medical report of Dr. Nason (exh E), an orthopedist who states that she examined plaintiff and reviewed the orthopedic evaluations of plaintiff's doctors Liebman and Liebowitz. Dr. Nason performed various tests on plaintiff, including range of motion of her lumbar spine and right knee (normal) and stated as her assessment that plaintiff was "status post lumbar sprain/strain and right knee sprain/contusion". Also submitted is the affirmed report of Dr. Desrouleaux, a neurologist who examined plaintiff and reviewed the reports of Drs. Liebman and Liebowitz (exh F). Dr. Desrouleaux performed various tests on plaintiff, including range of motion of her cervical and lumbar spine; he stated as his diagnosis "resolved lumbar sprain/strain". Defendant also submits the affirmed report of Dr. Feit (exh G), a radiologist who reviewed an MRI of plaintiff's right knee taken on 6/1/08, 5 months after the accident. Dr. Feit concludes that he found no evidence of any meniscal tear, ligamentous injury or fracture; no significant posttraumatic changes and no abnormalities causally related to the accident of 12/31/07. Additionally, defendant met his initial burden with respect to plaintiff's 90/180-day claim by citing to plaintiff's deposition testimony that she returned to work 3 weeks after the accident (exh J at 82). Accordingly, the Court finds that defendant has met his prima facie burden on the serious injury branch of the motion, and the burden shifts to plaintiff to raise a triable factual question.

In opposition, plaintiff submits, inter alia, the affirmed report of Dr. Liebman, an orthopedist (exh 2) who examined plaintiff's right knee on February 18, 2008, approximately 6 weeks after the accident, and found, inter alia, an effusion, tenderness over the medial line joint line and restricted flexion and extension. Dr. Liebman refers to the June 1, 2008 MRI of plaintiff's right knee (the Lenox Hill MRI reviewed by defendant's radiologist Dr. Feit) and

states that it revealed an intrasubstance tear of the posterior horn of the medial meniscus and a partial tear of the anterior cruciate ligament. Dr. Liebman does not state whether he himself reviewed the MRI films, or if he reviewed a report; in any event, no affirmed report is annexed to the opposition papers. Dr. Liebman last examined plaintiff on March 18, 2009 and measured restrictions in the range of motion of plaintiff's lumbar spine and right knee, and opined that as a result of the subject accident she has a permanent disability of the lumbosacral spine and right knee, and requires arthroscopic surgery.

Additionally, plaintiff submits the affirmed report of Dr. Liebowitz (exh 1), an orthopedist who examined plaintiff on June 9, 2008, six months after the accident. He performed range of motion testing and found "120 degree in the right knee as compare to a 135 (normal) on the opposite side". He further states that "(p)lain x-ray films (from Harlem Hospital, right after the accident) are negative. An MRI previously done showed a torn medial meniscus". However, Dr. Liebowitz does not state whether he himself reviewed the MRI films, or if he reviewed a report; in any event, no affirmed report is annexed to the opposition papers. Nevertheless, he opined that as a result of the subject accident plaintiff sustained a medial meniscus tear of the right knee, and recommended arthroscopic surgery.

Plaintiff submits the affirmed report of a third orthopedist, Dr. Post (exh 3) who examined plaintiff on February 16, 2012, more than four years after the accident. He found limitations in the range of motion of plaintiff's back and knees and states "(i)t is my opinion, based on history and clinical findings, that this patient sustained a torn medial meniscus and partial tear anterior cruciate ligament right knee and lumbar and lumbosacral derangement with root irritation right as a result of the accident of 12/31/07 and "permanence is present".

In reply, defendant points out that none of plaintiff's doctors specifically address the

June 1, 2008 MRI of plaintiff's right knee, and Dr. Feit's finding that it was normal. As such, defendant asserts that plaintiff's doctors fail to identify the specific objective evidence that serves as a predicate for the opinion rendered, and accordingly their reports are speculative and insufficient to defeat summary judgment. This Court agrees; plaintiff's doctors have failed to raise a triable question of fact as to her right knee injury by not addressing Dr. Feit's finding, based on his reading of the 6/1/08 MRI film, that her right knee was normal.

As for lumbosacral injury, only Dr. Liebman and Dr. Post examined plaintiff's back. Dr. Liebman stated that his initial physical examination of plaintiff on February 18, 2008 revealed tenderness, spasm and restriction motion of the lumbar spine. Dr. Liebman last treated plaintiff on March 18, 2009, again found tenderness, spasm with restricted motion including forward flexion 70 degrees as compared to normal 90 degrees. He opined that in view of her complaints and physical findings, she sustained a permanent derangement of the lumbosacral spine. When Dr. Post examined her on February 16, 2012, he measured restricted range of motion including forward flexion at 30 degrees as compared to normal 90 degrees. Dr. Post opined that based on the history and clinical findings, that plaintiff sustained a lumbar and lumbosacral derangement with root irritation right as a result of the subject accident. Defendant's reply does not challenge or address Dr. Post's report. Therefore, through these affirmed doctor's reports, plaintiff raised a triable factual question sufficient to defeat summary judgment; this branch of defendants' motion is denied.

Turning to the second branch of defendant's motion which seeks summary judgment on the issue of liability, it is well-settled that in order to prevail on a 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]).

At the outset, the Court notes that it will consider the unsigned transcript of defendant's deposition testimony in support of the liability branch of his summary judgment motion; any objections put forth by plaintiff's counsel are without merit. Defendant's counsel has demonstrated that their office mailed a copy of the transcript to Mr. Joseph but that he failed to review it and sign it within 60 days; CPLR 3116(a) provides that it may now be used "as fully as though signed".

Because there are material differences between plaintiff's and defendant driver's version of how the accident happened, summary judgment must be denied on liability grounds. According to defendant, he had a green light and was proceeding north on Seventh Avenue past

its intersection with 127th Street when he suddenly saw a person crossing the street, and he although he braked, he hit her (exh H at 17-19). According to plaintiff, she was crossing in the crosswalk, with the walk sign, left the divider in the middle of Seventh Avenue, looked both ways, and was struck in her right hip by defendant's car (exh J at 41-44). In reply (exh N), defendant submits a certified copy of the police report of the accident which was witnessed by the reporting officer. In his report, the police officer noted that defendant had the green light.

With respect to liability, it is the Court's duty to determine whether there are issues of fact; it is up to the jurors to determine which witnesses they believe. Because there is an issue of fact as how the accident happened, that branch of defendant's motion for summary judgment on the issue of liability is denied. *See Odikpo v American Transit, Inc.*, 72 AD3d 568, 569, 899 NYS2d 219, 220 (1st Dept 2010) (the parties' testimony as to the manner in which each driver controlled his vehicle, the circumstances surrounding their collision, and the chain of events leading up to the collision involving plaintiff's vehicle raise questions of fact, which are best left for a jury to decide).

Finally, by stipulation dated 1/20/12, the parties certified that discovery was complete, and plaintiff was directed to file her note of issue on or before 2/17/12. Apparently, this was not timely done; plaintiff's time to file is extended to November 1, 2013. Defendant's service of a 90-day demand to resume prosecution of the case on December 11, 2012, while their summary judgment motions were in the submission part, was sharp; that demand is hereby vacated.

Accordingly, it is

ORDERED that defendant's motion for summary judgment dismissing this action (seq. 02) on the grounds that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law §5012(d) and on liability grounds is denied in its entirety; and it is further

ORDERED that plaintiff's motion for an extension of time to file the Note of Issue (seq. 03) and her motion for an order vacating defendant's 12/11/12 90-day notice to resume prosecution (seq 04) are both granted; plaintiff's time to file her Note of Issue is extended to November 1, 2013.

This is the Decision and Order of the Court.

Dated: September 13, 2013
New York, New York

HON. ARLENE P. BLUTH, JSC