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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

Index Number : 100713/2011
JACINTHE, YAMILEH
vs.
ROY, JUJIT KUMAR
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____ **, 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

OCT 02 2013

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 9/25/13

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**

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

----------x Index No.: 100713/2011

Yamileh Jacinthe, Motion Seq 003 and 004

Plaintiff,

-against-

Jujit Kumar Roy, Rockford Cab Corp. and Justin L. Camacho, DECISION/ORDER

Defendants.

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Hon. Marlene P. Bluth, JSC

Motion sequence numbers 003 (defendant Camacho's motion for summary judgment dismissing the action) and 004 (defendants Jujit Kumar Roy and Rockford Cab Corp.'s motion for the same relief) are consolidated for joint disposition.

For the following reasons, 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 § 5102(d) are granted.

In this action, plaintiff alleges that on September 7, 2009 she sustained personal injuries when she was an unbelted passenger in a cab driver by Ray and owned by Rockford, which was struck by Camacho's vehicle. In support of their motions, defendants claim 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, as required by Insurance Law § 5102 (d).

To prevail on a motion for summary judgment, in a serious injury case, the defendant has the initial burden to present competent evidence showing that the plaintiff has not suffered a "serious

injury" (*see Santos v Perez*, 107 AD3d 572, 573 [1st Dept 2013]). 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 [2nd 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, 818 [1st Dept 2010], citing *Pommells v Perez*, 4 NY3d 566, 572 [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*, 58 AD3d 434, 435 [1st Dept 2009]). 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 [the 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 organ or body system's use and purpose, or a quantitative assessment that assigns numeric percentage to plaintiff's loss of range of motion (*Perl v Meher,* 18 NY3d 208, 217 [2011], *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350-351 [2002]). However, if either the plaintiff's or defendant's expert relies upon range of motion

measurements to establish a limitation, the experts must specify "the objective tests they used to arrive at the measurements" (*Duran v Jeong Hoy*, 89 AD3d 541, 541 [1st Dept 2011]; *see also Simantov v Kipps Taxi, Inc.*, 68 AD3d 661, 661 [1st Dept 2009]; *Lopez v Abdul-Wahab*, 67 AD3d 598, 599 [1st Dept 2009]).

In her verified bill of particulars, plaintiff claims cervical disc bulges at C2-3, C3-4, C4-5 and C5-6, lumbar disc bulges at L4-5 and L5-S1, and right knee internal derangement and traumatic chondromalacia. Additionally, she claims she was confined to home for two weeks after the accident and was "totally disabled from work" for two weeks.

In support of their motion, defendants submit the affirmed medical reports of Dr. Feuer and Dr. Desrouleaux, both neurologists, and Dr. Lieberman and Dr. Israel, both orthopedists, who all examined plaintiff and concluded that any sprains that plaintiff may have incurred as a result of the subject accident were resolved, and that she did not demonstrate any neurologic or orthopedic disability. Defendants also submitted the affirmed report of Dr. Tantleff, a radiologist, who read plaintiff's cervical, lumbar and right knee MRI films taken approximately one month after the accident at Stand-Up MRI of Manhattan, and noted degenerative changes only in all three areas without evidence of traumatic injury. Finally, Dr. Feuer noted in his 3/26/12 report that plaintiff was not under the active care of Dr. Guy.

Based upon the foregoing, defendants have satisfied their burden of establishing prima facie that plaintiff did not suffer a serious injury. The burden, therefore, shifts to the plaintiff to show that there are factual issues (*Kone v Rodriguez*, 107 AD3d 537, 538 [1st Dept 2013]).

In opposition, plaintiff submits only one admissible medical report; the affirmed report of Dr. Ali Guy, a physical medicine and rehabilitation doctor, who opines that in addition to her

cervical , lumbar and right knee injuries, plaintiff has sustained permanent injury to her head/brain, including concussion, post traumatic stress disorder, panic and anxiety attacks and chronic headaches (p. 2). Dr. Guy's discussion of plaintiff's head/brain injuries, which injuries were not asserted by plaintiff in her verified bill of particulars, is irrelevant for purposes of this motion. Dr. Guy first examined plaintiff on 9/9/09, two days after the accident, on 10/19/09, 11/4/09, 7/14/10 and then not until 9/26/12, after these motions were served. He states without elaboration that he administered three trigger point injections to plaintiff on 3/22/10, 3/31/10 and 4/3/10. The MRI reports of Dr. Diamond are not affirmed, and thus are not admissible. In any event, Dr. Guy, who is not a radiologist, conclusorily states that he reviewed the three MRI films from Stand-Up MRI and saw no evidence of degeneration; significantly he does not say that he saw any evidence of traumatic injury in these films which were taken one month after the accident. Plaintiff's doctor failed to support his conclusory claim that plaintiff had no evidence of degenerative changes in the claimed areas. He saw disc bulges but gave no explanation as to the cause; of course, disc bulges do not in and of themselves constitute evidence of serious injury without competent objective evidence of the limitations and duration of the disc injury. *See Wetzel v Santana*, 89 AD3d 554 (1st Dept 2011).

In reply, defendant Camacho asserts that plaintiff failed to raise an issue of fact because there is an unexplained cessation of treatment after she saw Dr. Guy on 7/14/10. Defendant also points out that while Dr. Guy reported the results of complete range of motion testing on plaintiff's cervical and lumbar spine at the first visit on 9/9/09 (flexion, extension, SLR, lateral rotation and lateral flexion), he did not do so on the four subsequent exams, 10/19/09, 11/4/09, 7/14/10 and 9/26/12. At those exams he measured only cervical rotation and flexion, and lumbar extension and SLR measurements, which showed minimal restriction. Finally, defendant correctly notes that Dr. Guy

did not measure the range of motion of plaintiff's knee or perform any other tests on the knee during any of her exams.

Plaintiff stopped all treatment on 7/14/10 and as the moving papers showed (see Dr. Feuer's 3/26/12 affirmed report), plaintiff was not under Dr. Guy's care after that date. Yet Dr. Guy fails to address why plaintiff stopped treatment on 7/14/10. Because plaintiff did not even mention, and certainly did not adequately explain the cessation in treatment, Dr. Ali's opinion as to permanency, significance, and causation is speculative and insufficient to raise an issue of fact sufficient to defeat summary judgment. *See Frias v Son Tien Liu,* 107 AD3d 589, 967 NYS2d 382 (1st Dept 2013).

In summary, plaintiff has failed to present evidence in admissible form to raise an issue of fact as to plaintiff's alleged serious injury.

In accordance with the foregoing, it is

ORDERED that defendants' motions (seq. nos. 03 and 04) for summary judgment dismissing this action are granted, and the action is hereby dismissed.

This is the Decision and Order of the Court.

Dated: New York, NY
September 25, 2013

Hon. ARLENE P. BLUTH, JSC