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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 : 111996/2009
TURNER, CLARENCE
vs.
THOMPSON, JUDITH
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

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

The following papers, numbered 1 to _____, **were read on this motion to/for** Summary J/ serious 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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER

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

Dated: 10/11/13

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 NY
COUNTY OF NEW YORK: PART 22

Index No.:111990/09
Motion Seq 04

Clarence Turner,

Plaintiff,

-against-

Judith Thompson, Dwight C. Wolf, Ducon Technologies, Inc. and Saagar Govil,

Defendants.

DECISION/ORDER

HON. ARLENE P. BLUTH, JSC

In this action, plaintiff alleges that on March 7, 2009 he sustained personal injuries when he was in a motor vehicle accident with defendants. Defendants Thompson and Wolf now move 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). The motion is denied.

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 his verified bill of particulars (exh. D to moving papers), plaintiff claims he sustained, among other things, injuries to his left shoulder (rotator cuff tear), to his left knee (which required surgery), L5-S1 disc bulge, cervical and lumbosacral radiculopathy and a 90/180 claim. The 90/180 claim alleges that he was confined to be for 15 weeks and home for 20 weeks and incapacitated from employment for three months. The Court notes that plaintiff had been in a separate motor vehicle accident on June 8, 2008, nine months before this accident, wherein he also alleged neck and back injuries.

Defendants' showing

Defendant met his prima facie burden by submitting the affirmed reports of Drs. Carter and Berman, orthopedic surgeons, Dr. Feuer, a neurologist, and Dr. Tantleff, a radiologist. Dr. Tantleff reviewed MRIs of the left shoulder, right knee and lumbar spine; all three were taken between five and seven weeks after the accident. He affirms that each show degeneration and that none show any evidence of recent trauma. Specifically regarding the knee, for which plaintiff had surgery, Dr. Tantleff states that there were no tears in the ACL, despite what the plaintiff's MRI report indicated (the ACL was found intact during knee surgery).

The defendants' orthopedist, Dr. Carter, examined plaintiff and reviewed records from this accident and the prior accident nine months earlier. He states that neck and back complaints were the same; "Up to the day before the accident in question here [,] Dr. Goldenberg [who plaintiff saw right after the prior accident until shortly before this accident] was reporting similar complaints with respect to the neck and back ... the complaints continued unchanged with respect to the neck and back." Dr. Carter states that the tissue sample's pathology report from the knee surgery indicates degeneration. Dr. Carter states that plaintiff is in pre-accident condition and not disabled. Because plaintiff's subjective responses to various tests makes no anatomical sense and cannot be present in someone who is functioning and holding down a job, Dr. Carter also opines that there is much falseness in plaintiff's subjective responses.

The defendants' other orthopedist, Dr. Berman, and their neurologist, Dr. Feuer, found full range of motion (except Dr. Feuer noted a slight restriction on one plane of the lumbar spine and a wrist problem reported as long-standing and not related to the accident) and opined that plaintiff's strains and sprains were resolved and that plaintiff suffered no neurologic or orthopedic disability, no neuropathy or radiculopathy, and that plaintiff is not disabled.

Although argued in the moving papers, defendants' claim that plaintiff stopped all treatment in 2009 is unsupported. Although defendants annex plaintiff's entire deposition transcript, they fail to cite to any particular page to support this claim – "see exhibit E" is simply not good enough. The affirmed physician reports, however, do make the prima facie case.

Plaintiff's showing

In opposition, plaintiff submits the affirmation of Dr. Leadon, the radiologist who initially read various MRIs and made the reports; his affirmation incorporates the reports, thus making them affirmed reports. None of those reports indicate that any findings are traumatic or degenerative - the reports just indicate what he found, not what caused the findings. In his affirmation, he does not address Dr. Tantleff's findings that the MRIs indicate degeneration. Inasmuch as Dr. Tantleff claims that the knee had no tear and the (now affirmed) report claims there is a tear, this still does not create an issue of fact, as there is no indication that the tear, even if there was one, was traumatic in origin.

Plaintiff also submits the affirmations of Dr. Graziosa, the doctor who operated on plaintiff's left knee (there is no indication that Dr. Graziosa has a board certification in anything), and which incorporates Dr. Graziosa's records and operative report. Although Dr. Graziosa discusses more than plaintiff's knee injury, the Court focuses only on the knee injury at this time. In paragraph 8 of his affirmation, Dr. Graziosa contradicts the findings of Dr. Tantleff (degeneration) and states: "I disagree with Dr. Tantleff. In my opinion, Mr. Turner's tears of his left knee [observed during the surgery he performed on 8/5/09] are causally related to his accident of 3/7/09 and not due to degeneration".

Defendants do not address this clear issue of fact in their reply. Instead, they focus on the fact that Dr. Graziosa did not continue to treat plaintiff's injuries. Other than post-knee

surgery follow up visits, what do defendants expect? Again, the Court is only focusing on the clear issue of fact regarding the knee. There are no gaps in treatment for a surgeon - other than pre- and post-surgery visits, there is no ongoing "treatment".

Moreover, in Dr. Graziosa's latest exam, in October 30, 2011 (twenty six months after the knee surgery), plaintiff reported continued pain. Dr. Graziosa found limitation in knee flexion (120 when 160-180 is normal)(25-33% reduction), that it continues to "give". And in his medical narrative dated December 15, 2012, Dr. Graziosa affirms that plaintiff has "suffered a permanent partial disability secondary to the accident stated above [the subject accident]".

Conclusion

Plaintiff has demonstrated that there are issues of fact which require a jury to decide. Quite simply, just with respect to plaintiff's left knee, doctors disagree about causation (accident or degeneration), range of motion (restricted or full) and whether plaintiff is disabled in any way. It is up to the jurors, not this Court, to evaluate the medical testimony and decide who and what to believe.

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment dismissing the complaint on the ground that plaintiff has not met the serious injury threshold as defined by Insurance Law §5102[d] is denied.

This is the Decision and Order of the Court.

Dated: October 1, 2013
New York, New York

HON. ARLENE P. BLUTH, JSC