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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 : 117656/2009
TAVERAS, ELIZABETH
vs
PEREZ, JUAN R.
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 SJ - seeking

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

NOV 04 2013

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 10/29/13

_____, 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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Elizabeth Taveras,

Plaintiff,

-against-

Juan R. Perez and Berrosa Auto Corp.,

Defendants.

Index No. 117656/09
Motion Seq 02

DECISION AND ORDER

Hon. ARLENE P. BLUTH, JSC

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Defendants' motion for summary judgment dismissing the complaint on the grounds that plaintiff has not demonstrated that her injuries meet the serious injury threshold pursuant to Insurance Law § 5102(d) is granted, and the case is dismissed.

Plaintiff claims that she was injured in a two-car motor vehicle accident involving defendants' vehicle on March 11, 2009 at the intersection of 180th Street and Broadway. Plaintiff claims that she injured her back, neck and both shoulders (Verified Bill of Particulars, exh C to moving papers, para. 5).

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 support of their motion, defendants annex two affirmed medical reports. The first (exh D) is from Dr. Eisenstadt, a radiologist, who reviewed films of plaintiff's

cervical and lumbar spine, and both shoulders, all taken approximately two months after the subject accident, and found evidence of degeneration in all areas. Dr. Eisenstadt supported her conclusions by specifically describing what she saw in each area (i.e. bony productive changes, retrolisthesis, bone islands). The second affirmed report (exh E) is from Dr. Decter, an orthopedist, who examined plaintiff on May 5, 2012, and found normal range of motion in plaintiff's cervical and lumbar spine, and both shoulders, noting "examination today is quite pristine with no evidence of mechanical or neurological findings" in four areas. He opined that plaintiff's soft tissue injuries had resolved and that she had no orthopedic disability.

As for any 90/180 claim, defendants note that in her bill of particulars, plaintiff stated that she was confined to bed for 3 weeks and to home for 3 weeks (exh C, para, 15), and that she testified to that effect at her deposition.

Thus, defendants have met their prima facie burden of showing that plaintiff has not suffered a serious injury pursuant to the insurance law, and the burden shifts to plaintiff to raise a triable factual question sufficient to defeat the motion.

In opposition, many of plaintiff's submissions (Exhibits A, D and E) are inadmissible. Exhibit A, a thick stack of medical records and test results from New York Medical Rehabilitation is not admissible. While the facility's office manager states that exhibit A contains "accurate versions" of plaintiff's file, records from a doctor's office are not admissible on a motion for summary judgment merely by submitting an office manager's certification. Only hospital records, and not physician office records, are admissible by certification. *See Bronstein-Becher v Becher*, 25 AD3d 796, 809 NYS2d 140 (2d Dept 2006), citing CPLR 4518 [c]; 2306 [a]; *Matter of Damon J.,* 144 AD2d 467

[1988]. For the same reason, the records of Manhattan's Physician Group (exh D) (certification from representative "S. Kapadia") are not admissible; nor are the records of Sugar Hill Medical (exh E) (certified by an illegible scribble on 4/3/13) admissible.

Dr. Kolb's MRI reports (exh B) which he affirmed (exh C) are admissible but do not address causation. Exhibit F is plaintiff's affidavit, which is insufficient to raise an issue of fact in response to defendants' doctors' affirmed reports.

Attached as exhibit G to the opposition is an affirmation[1] from Dr. David Capiola, a physician, in which he states in the first sentence that plaintiff was initially examined "at our office" on March 17, 2009; however, the name of the office is left a mystery. Because Dr. Capiola's name does not appear on any admissible (or inadmissible) records, we do not know to what office he refers when he states that plaintiff was examined "at our office". The Court did see office notes and results of a March 17, 2009 physical examination of plaintiff on the letterhead of Thomas Scilaris, MD and Stanley Liebowitz MD in Exhibit A; the doctor's signature at the end of that report appears to begin with T, likely Dr. Thomas Scilaris, but it is not affirmed. Dr. Scilaris did not submit an affirmed report in opposition to this motion.

The remainder of Dr. Capiola's affirmation (neither the pages nor the paragraphs are numbered) consists of the following: a verbatim repetition (including grammatical errors) of the results of a March 17, 2009 examination ("On 3/17/09, the patient's worse [sic] pain is in the above areas"), which was apparently performed by Dr. Scilaris; a recitation of the unaffirmed report of x-rays of plaintiff's shoulders, neck and back taken

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[1] While Dr. Capiola "affirms the following under the penalties of perjury", he does not affirm that the statements contained in that document are true and/or accurate.

on 3/24/09 at the Industrial Medical X-Rays, Inc. (Dr. Capiola does not say that he looked at the films); and the unaffirmed EMG/NMG reports of testing performed by a Dr. Krishna on 4/13/09. Dr. Capiola does say that he reviewed the 5/20/09 MRI films of plaintiff's shoulders and agreed with Dr. Kolb's radiological findings; however, as stated above, there are no findings regarding causation set forth therein.

For all these reasons, Dr. Capiola's statements that the accident of 3/11/09 is the competent producing cause of the patient's signs and symptoms, and that plaintiff remains symptomatic, are entirely conclusory, and are insufficient to raise an issue of fact. Although Dr. Capiola seems to have adopted Dr. Scilaris's grammatical errors as his own, he cannot adopt Dr. Scilaris's examination and medical findings as his own. Therefore, plaintiff has not submitted proof of a medical exam shortly after the accident. Contrary to the representations made by plaintiff's counsel in his affirmation (para. 27), Dr. Capiola does not claim that he treated plaintiff at any time. Except for reading the MRI films of plaintiff's shoulders, Dr. Capiola never says that he himself had anything to do with plaintiff's treatment or care.

Dr. Capiola further states that plaintiff "was subsequently seen on 4/21/09 and 2/28/13" (exh G, p. 1, para. 1); again, the passive voice is used and he does not state that he himself examined plaintiff on either of those dates. In fact, the three-line summary of a 4/21/09 visit is a word-for-word cut and paste of Dr. Scilaris's 4/21/09 unaffirmed report, which is inadmissible (see exh A). And while Dr. Capiola includes range of motion measurements dated 2/28/13, there is not one indication that he performed this examination. He never claims that he ever examined the plaintiff. As such, plaintiff has not raised a triable issue of fact as to significant limitation of use or

permanent consequential limitation of use because she did not submit an affirmed report of a recent physical examination and therefore did not rebut the findings of defendants' doctors, who affirmed that any sprains were resolved (Dr. Decter), and that plaintiff has evidence of degeneration in her neck, back and both shoulders (Dr. Eisenstadt).

Thus, plaintiff has not submitted an admissible report from any doctor who represents that he or she examined plaintiff at any time, not shortly after the accident, and not recently. "Absent admissible contemporaneous evidence of alleged limitations, plaintiff cannot raise an inference that his injuries were caused by the accident", *Shu Chi Lam v Wang Dong*, 84 AD3d 515, 922 NYS2d 381 (1st Dept 2011). Dr. Capiola's recitation of the findings of unaffirmed reports does not put the findings of those of inadmissible reports before the Court. *See Malupa v Oppong*, 106 AD3d 538, 966 NYS2d 9 (1st Dept 2013). There is nothing in his affirmation, or in any of the other admissible exhibits attached to plaintiff's opposition, which establishes that any of plaintiff's alleged physical conditions were caused by the subject accident.

Nor has plaintiff raised a triable question of fact on her 90/180-day claim because she did not submit admissible proof that she was directed by a doctor to stay at home for the statutory period. *See Shu Chi Lam v Wang Dong*, 84 AD3d 515, 516, 922 NYS2d 381 (1st Dept 2011).

For the foregoing reasons, plaintiff has failed to raise an issue of fact requiring denial of defendants' motion; summary judgment is granted to defendants.

Accordingly, it is

ORDERED that defendants' motion for summary judgment dismissing the complaint on the grounds that plaintiff has not demonstrated that her injuries meet the serious injury threshold pursuant to Insurance Law § 5102(d) is granted; and it is further

ORDERED that this case is dismissed.

This is the Decision and Order of the Court.

Dated: October 29, 2013
New York, New York

HON. ARLENE P. BLUTH, JSC