SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH
Justice

PART 22

Ramon Rondon and Floralba Rondon

-v-

Walter Gutierrez; Skanska, et al.

INDEX NO. 104470/11

MOTION DATE

MOTION SEQ. NO. 02

The following papers, numbered 1 to 4, were read on this motion to/for SJ (serious injury)

Notice of Motion/Order to Show Cause — Affidavits — Exhibits | No(s). 1

Answering Affidavits — Exhibits | No(s). 2, 3

Replying Affidavits | No(s). 4

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: 12/16/13

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.:101470/2011
Motion Seq 02

Ramon Rondon and Floralba Rondon,

Plaintiffs,

-against-

Walter Gutierrez, Stericycle, Inc., Raymond Schneeberg and Ann M. Donohue,

Defendants.

DECISION/ORDER

HON. ARLENE P. BLUTH, JSC

This motion by defendants Walter Gutierrez and Stericycle, Inc. ("movants") 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) is denied.

In this action, plaintiff Ramon Rondon alleges that on May 27, 2010, he sustained personal injuries when his vehicle was hit in the rear by a tractor trailer driven by movant Gutierrez and owned by movant Stericycle. The force of that collision propelled plaintiff's vehicle into the car in front of him operated by defendant Schneeberg and owned by defendant Donohue. Plaintiff Floralba Rondon asserts a derivative claim only.

In support of their motion, movants claims 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, or any of the other categories enumerated as serious physical injury under Insurance Law Section 5102(d).

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 818,819 [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*, 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 [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 (exhibit F to moving papers, para. 13), plaintiff alleges that he sustained injuries to his right shoulder, lumbar and cervical spine, and wrist.

In support of their motion, defendants submit, *inter alia,* (exh Q), the affirmed report of Dr. Howard A. Kiernan, M.D., an orthopedic surgeon, who examined plaintiff on August 24, 2010, approximately 90 days after the accident, and measured range of motion in his cervical and lumbar spine and shoulders (but did not compare these measurements to normal). He opined that plaintiff had a sprained right shoulder and sprained back. Defendants also submit the affirmed report of a chiropractor, Richard Sollazzo (exh R) but because a chiropractor may not affirm, this report was not considered by the Court. Additionally, defendants submit the affirmed report of a neurologist, Dr. Feuer (exh S) who examined plaintiff on June 4, 2012 and measured normal ranges of motion in his cervical and lumbar spine, and found that plaintiff did not demonstrate any objective neurological disability causally related to the subject accident.

Defendants also submit (exh T) the affirmed report of Dr. Allen J. Zimmerman, an orthopedist who examined plaintiff on June 7, 2012, and concluded that plaintiff's cervical and lumbar sprain and right shoulder sprain has resolved, and diagnostic findings of abnormalities were pre-existing, degenerative and not causally related to the accident.

Finally, defendants' counsel asserts that because plaintiff has not demonstrated that substantially all of his activities were curtailed for at least 90 days within the relevant 6 month period following the accident, (aff. in supp., paras. 145-147), plaintiff has not met the 90/180-day

category.

Based on the foregoing, defendants have satisfied their burden of establishing prima facie that plaintiff did not suffer a serious injury, and the burden shifts to plaintiff to raise a triable factual question as to whether he sustained a serious injury.

In opposition, plaintiff submits, inter alia, the 11-page affirmation of Dr. Jerry Lubliner, (exh D to opp.), an orthopedic surgeon, who examined plaintiff on August 7, 2012 and reviewed various records (some of which were annexed to the moving papers). Dr. Lubliner measured the range of motion of plaintiff's cervical and lumbar spine and right shoulder, and found restrictions ranging from 10%-33%. Additionally, Dr. Lubliner performed other diagnostic tests and noted that plaintiff told him that he was asymptomatic before the May 27, 2010 accident. Dr. Lubliner articulated the basis of his disagreement with (1) Dr. Zimmerman's opinion that the tear in plaintiff's right shoulder was degenerative, pre-existing and not caused by the accident, and (2) Dr. Feuer's opinion regarding the role played by diabetic peripheral neuropathy in plaintiff's condition. Dr. Lubliner concluded that the subject accident caused plaintiff's disc bulges at L4-5 and L5-S1, the tear of the labrum of plaintiff's right shoulder and the subsequent surgical repair, and plaintiff's other injuries. Dr. Lubliner opined that because plaintiff's condition has improved only slightly since the date of the accident despite undergoing surgery and physical therapy, plaintiff's injuries are permanent.

In reply, movants' counsel challenges Dr. Lubliner's "veracity and truthfulness" (para. 13), refers to Dr. Lubliner's "questionable finding of permanency" (para. 14), and asserts that Dr. Lubliner's findings "are contrary to the weight of the evidence and to the finding (sic) of six other doctors" (para. 15). Plaintiffs have met their burden, through their submissions, of demonstrating a triable question of fact. It is up to the jury to decide which doctors to believe.

Accordingly, defendants' motion 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) is denied.

This is the Decision and Order of the Court.

Dated: December 16, 2013
New York, New York

HON. ARLENE P. BLUTH, JSC