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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 : 104177/2010
REMILIEN, MICHELANGE
vs.
REINOSE, RODRIGUEZ
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 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

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

Dated: 1/7/14

_____, 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

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

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MICHELANGE REMILIEN,

Plaintiff,

-against-

RODRIGUEZ REINOSE and HARVARD CAB CORP.,

Defendants.

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DECISION AND ORDER
Mot. Seq. 02

Index No. 104177/10

ARLENE P. BLUTH, J. :

Defendants Rodriguez Reinose and Harvard Cab Corp. move for summary judgment dismissing the complaint on the ground that plaintiff has failed to sustain a serious injury pursuant to Insurance Law Section 5102(d). For the following reasons, the motion is granted and the case is dismissed.

Plaintiff alleges that on December 5, 2008, she was injured was struck by defendants' vehicle while crossing 35th Street at the intersection of 7th Avenue in Manhattan. In her verified bill of particulars, plaintiff alleges injuries that include the following: (a) disc bulges at C4/C5, C6/C7 causing impingement on the neural canal; (b) disc bulges at L4/5 and L5/S1; (c) tear of the medial lateral meniscus of the left knee; and (d) partial tear of the medial collateral ligament of the left knee.

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]).

Defendants' showing

In support, defendants submit plaintiff's deposition testimony, which shows that she was taken from the scene to Bellevue Hospital by ambulance; she complained about pain in her left leg and left ribs. She was given pain medication and had x-rays taken of her left side including her ribs, head, lower back, shoulder and knee and was discharged with a prescription for pain medication. Five days later (on December 10, 2008), she went to Jamaica Hospital because she was still experiencing pain. There she was given prescription medication and had x rays taken of her left ribs and left knee; she was discharged without any prescriptions or assistive devices.

Two days later, on December 12, 2008, plaintiff saw Dr. David Hsu at Hollis Medical Center. There, she was prescribed a course of daily physical therapy, chiropractic treatments three times per week, and acupuncture three times per week from December 2008 until April 2009. Plaintiff was given a left knee MRI and was told of a partial tear which required surgery; she never underwent surgery. Plaintiff has not received any medical treatment since April 2009. She has not taken prescription medicine since March 2010 and has not taken over-the-counter medication since July 2011.

In further support of their motion, defendants submit the affirmed medical reports of Dr. Ayman Hadhoud, a specialist in rehabilitation medicine, Dr. Charles Totero, an orthopedic surgeon and Dr. Jessica Berkowitz, a radiologist.

Prior to the commencement of this action, plaintiff appeared for a no-fault examination with Dr. Hadhoud on April 29, 2009. In his affirmed report, Dr. Hadhoud asserted that after examining plaintiff, he concluded that her cervical sprain/strain, lumber sprain/strain and left knee sprain were fully resolved, and that there was no evidence of any structural myopathic,

radiculopathic or neuropathic dysfunction resulting from the December 5, 2008 accident. He also affirmed that the musculoskeletal and neurological findings made in previous medical examinations were based upon totally subjective responses and that he found no objective findings to substantiate plaintiff's subjective complaints.

Dr. Totero, defendants' orthopedist, examined plaintiff on January 16, 2012. In his affirmed report dated January 23, 2012, he noted that she was morbidly obese, and slight decreases in her ranges of motion, specifically lumbar forward flexion and extension were normal "for this patient considering body habitus" (p. 2). He found that the ranges of motion of plaintiff's cervical spine were normal in two planes and only 5 degrees less than normal in two planes. Dr. Totero found that there was no instability about the knee, measured the range of motion in plaintiff's left knee, and determined that the range was normal in light of her "significant obesity around the knee" (p. 3). In the section of his report entitled "impressions", Dr. Totero opined that the loss of flexion of plaintiff's knee was "secondary to obesity". He also reviewed MRI reports; but he does not state that he reviewed the films themselves. While Dr. Totero acknowledged that the MRI findings of the left knee reported a partial medial tear, he stated that there were no objective findings of instability in his examination and concluded that the ligament had healed appropriately with rest and physical therapy and needed no further treatment. He did not observe any objective orthopedic findings and stated that the MRI findings of bulging discs in plaintiff's lumbar spine and cervical spine were consistent with normal physical examination. Moreover, he stated that, as plaintiff was no longer on medication or undergoing treatment, she could carry on normal daily and work activities.

In her affirmed report, Dr. Berkowitz described the results of her radiological review of

the MRI films of plaintiff's lumbar spine dated February 10, 2009 and her cervical spine dated January 15, 2009. Acknowledging that her conclusions differed from the (unaffirmed) reports of plaintiff's radiologists, Dr. Berkowitz reports an unremarkable MRI of the lumbar spine, not finding any disc bulges or herniations present or any evidence of acute traumatic injury to the lumbar spine. Her review of the MRI of the cervical spine revealed a slight reversal of the normal cervical lordosis, but no disc bulges, herniations or evidence of acute traumatic injury.

Finally, defendants assert that plaintiff has not demonstrated that any of her alleged restrictions during the statutory 90/180-day period were medically indicated or that these activities constituted a significant portion of plaintiff's daily activities (aff. in supp., para 53).

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 which warrant denial of the motion. *See Kone v Rodriguez*, 107 AD3d 537, 538 (1st Dept 2013).

Plaintiff's showing

Only some of the documents submitted in opposition to the motion are admissible. The uncertified and unaffirmed medical reports submitted by plaintiff cannot be used to raise an issue of fact (*Luetto v Abreu*, 105 AD3d 558, 963 NYS2d 112 [1st Dept 2013]). Therefore, the only item from Exhibit 5 of the opposition that is admissible is Dr. Hsu's affirmation. The balance of the documents contained in exhibit 5 were inadmissible and were not considered by the Court: Excel Imaging MRI reports for the left knee, cervical spine and lumbar spine, Hollis Medical Care notes, test results and billing records, Huo Acupuncture, P.C. notes and billing records.

Exhibit 6 consists of uncertified hospital records from Jamaica Hospital and Bellevue - as they are uncertified, they were not admissible and were not considered. Contrary to defendants' assertions, hospital records do not need to be affirmed; hospital records are admissible by certification (see CPLR 4518 [c]). However, these records were not certified.

That leaves Dr. Hsu's affirmation (the beginning of exhibit 5), Dr. Delman's affirmation (exhibit 7) and plaintiff's affidavit (exhibit 8) as the only admissible evidence in opposition to the motion.

Dr. Hsu's affirmation is dated March 30, 2009. Dr. Hsu is affiliated with Hollis Medical Care, P.C. He never states that he ever examined the plaintiff and has not demonstrated any personal knowledge of her condition. This is most obvious in the treatment plan portion of his affirmation (p. 4) where he affirms "Patient was prescribed... She was recommended... Based on the doctors' opinions[,] the patient has received maximum medical improvement..." From his use of the passive voice, this Court cannot assume that Dr. Hsu prescribed anything, that he recommended anything or that in his opinion, plaintiff had achieved maximum medical improvement.

Additionally, while Dr. Hsu's affirmation sets forth results of MRIs (pp. 2-3), he never states that he reviewed the actual films. "While the affirmation of plaintiff's treating physician recites the findings in the unaffirmed reports, the affirmation may not be used to "bootstrap" the unaffirmed reports" *Malupa v Oppong*, 106 AD3d 538, 966 NYS2d 9 (1st Dept 2013). Here, because the radiology reports are unaffirmed, Dr. Hsu's recitation of their findings have no weight and do not raise an issue of fact to contradict Dr. Berkowitz's affirmed reports.

Moreover, while Dr. Hsu's affirmation refers to decreased range of motion, nowhere does

he state when or how those measurements were taken. If they were taken on the day she first presented to Hollis Medical, about a week after the accident, that shows a contemporaneous exam, but not permanency. In any event, the admissible part of his final diagnosis is strains and sprains. Tears in the knee and disc bulges based on inadmissible MRIs will not be given any weight.

Finally, nowhere in Dr. Hsu's report is there any indication whatsoever that he ever told plaintiff to stay home from work.

Plaintiff also submits the affirmation of Dr. Delman, an ER doctor and internist; he is not an orthopedist as was defendants' Dr. Totero. Dr. Delman examined plaintiff on May 1, 2013, approximately 16 months after Dr. Totero's exam. Like Dr. Hsu, Dr. Delman never states that he personally reviewed the MRI films; to the extent that he repeats a radiologist's unaffirmed findings, that portion of the affirmation is accorded no weight. The Court notes that Dr. Delman does not even state that he read the reports – his entire history seems to be based upon what plaintiff reported to him. In fact, in the section headed "Causality", Dr. Delman qualifies his conclusion: "If the above history is correct" then the current finding are related to the subject accident.

As stated above, Dr. Hsu's affirmation established an examination contemporaneous with the accident, but not much more. The date Dr. Hsu's facility reportedly measured plaintiff's range of motion is unknown; it could have been at her first visit, before any strains and sprains resolved. In addition, Dr. Hsu does not explain the method used to measure range of motion. Dr. Delman's affirmation establishes only that when he examined the plaintiff, she exhibited some restricted ranges of motion. The only link he can make those restrictions to the accident are

qualified by "if what plaintiff says is true". He cannot rely on MRIs, or any medical provider's records in the past four years because she hasn't seen a doctor for her neck, back or knee in the last four years.

Finally, while Dr. Delman noted in his report that plaintiff was overweight, he failed to address Dr. Totero's finding that her range of motion restrictions were due to her weight. Therefore, Dr. Delman's opinion as to causation is conclusory and insufficient to defeat summary judgment. *See Amamedi v Archibala*, 70 AD3d 449, 895 NYS2d 42 (1st Dept 2010) (where defendant's doctor affirmed that plaintiff's condition was consistent with the fact that she was overweight, this warranted, at the very least, some kind of rebuttal on plaintiff's behalf).

Accordingly, it is

ORDERED that defendants' motion for summary judgment dismissing the complaint on the ground that plaintiff has failed to demonstrate that she sustained a serious injury pursuant to Insurance Law section 5102(d) is granted, and the action is hereby dismissed.

Dated: New York, NY
January 7, 2014

HON. ARLENE P. BLUTH, JSC