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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 : 114581/2010
ROSADO, MARISOL
vs.
WADOLOWSKI, C. J.
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to 4, were read on this motion to/for SJ - sev inj

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

Answering Affidavits — Exhibits Notice of X motion | No(s). 2 3

Replying Affidavits + cross-motion and | No(s). 4

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER

FILED

JAN 22 2014

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 1.17.14

HON. ARLENE P. BLUTH, J.S.C.

1. CHECK ONE: ..... X CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: X 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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Marisol Rosado,

Plaintiff,

-against-

C.J. Wadolowski, Krystian Banach, Elba Alicia and Efren Reyes,

Defendants.

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Motion Seq 03

Index No. 114581/10
DECISION AND ORDER

Hon. ARLENE P. BLUTH, JSC

The motion by defendants Wadolowski and Banach 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), and the cross-motion by defendants Alicia and Elba for the same relief (adopting the arguments set forth in the main motion), are both granted and the case is dismissed.

Plaintiff claims that she was injured on June 18, 2010 when she was a passenger in a car owned by Alicia and driven by Elba which was involved in a collision with a vehicle owned by Wadolowski and driven by Banach. In her bill of particulars, plaintiff claims that she sustained a herniated disc at L5-S1 and a right knee injury that required arthroscopic surgery.

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 the motion, defendants annex three affirmed medical reports. The first is from Dr. Israel, an orthopedist, who examined plaintiff on 10/10/12, and found normal range of motion in plaintiff's lumbar spine and both knees. He opined that plaintiff's sprains had resolved, her right knee had healed from the arthroscopy and that she had no orthopedic disability. The second is from Dr. April, a neurologist, who examined plaintiff on 8/13/12, and found normal ranges of motion in her back and knees. He opined that plaintiff had a normal neurological exam and that she had chronic tendinitis in both knees which pre-dated this accident. Defendants also submit the affirmed MRI report of Dr. Fisher, a radiologist, who reviewed films of plaintiff's lumbar spine taken approximately one month after the subject accident, and found evidence of degenerative disc disease.

As for any 90/180 claim, defendants cite to plaintiff's bill of particulars and her deposition testimony where plaintiff stated that after the accident she was confined to home/bed for 1-2 weeks.

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, plaintiff submits her affidavit and two reports of Dr. Scilaris. The earlier report, dated 8/18/11 (exh 3), is inadmissible because it is not affirmed by Dr. Scilaris and was not considered by the Court. Dr. Scilaris's 4/18/13 affirmed letter

report[1] (exh 2) is the only admissible medical record submitted here, but it does not raise a triable issue of fact. While Dr. Scilaris makes a passing reference to the fact that he "saw plaintiff" at the Clinton Medical Center, but does not say when this was, and does not provide any records from that exam or give any details about that visit. He simply goes on to say that he performed arthroscopic surgery on plaintiff on September 1, 2010[2]. This is very minimal evidence of a medical evaluation contemporaneous with the accident which is required to raise an issue of fact as to causation. Furthermore, Dr. Scilaris does not say that plaintiff was asymptomatic before the accident, or even that she *reported* that she was asymptomatic before the accident. He does not state that he reviewed any films which showed evidence of a traumatic injury. He does not annex his operative report. He does not address Dr. April's comment that plaintiff had pre-existing tendonitis in both knees. Because there is nothing in his affirmation to support his conclusory statement that plaintiff's knee condition was caused by the subject accident, it fails to raise a triable issue of fact sufficient to defeat this motion.

Finally, Dr. Scilaris did not say anything about plaintiff's back injuries, and his 4/18/13 report is the only medical report properly before the Court; therefore plaintiff has failed to raise any triable issue of fact concerning the alleged back injury. Dr. Scilaris does not state that he instructed plaintiff to remain housebound or gave her any

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[1]Dr. Scilaris states that his recent exam of plaintiff on 4/18/13, he found a mere 5 degree limitation in flexion of the right knee, a 3.7% range of motion deficit.

[2] There is nothing in Dr. Scilaris's affirmation which rules out the possibility that this procedure had been scheduled before the subject accident.

instructions regarding he inability to engage in her activities of daily living after the accident; therefore, Dr. Scilaris's comment that in the 6 months following the accident, "Ms. Rosado would not have been able to perform her normal and customary daily activities due to her injuries" is unsupported and speculative and it does not create a triable issue of fact as to the 90/180-day category.

For the foregoing reasons, plaintiff has failed to raise an issue of fact and summary judgment is granted to defendants. The complaint is dismissed.

Accordingly, it is

ORDERED that defendants' motion and cross-motion are granted. The case is dismissed.

This is the Decision and Order of the Court,

Dated: January 17, 2014
New York, New York

HON. ARLENE P. BLUTH, JSC