[1] GRANTED ON 6/17/2014

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH Justice

PART 22

Index Number : 112288/2011
FARQUHARSON, KRISTLE
vs.
TENAJ CAB
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 MSJ - seriously (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

FILED
JUN 17 2014
NEW YORK COUNTY CLERK'S OFFICE

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

Dated: 6/13/14

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.: 112288/11
Motion Seq 04

Kristle Farquharson,

Plaintiff,

-against-

Tenaj Cab Corporation and Tofail Chowdhury,

Defendants.

DECISION/ORDER

HON. ARLENE P. BLUTH, JSC

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 granted only to the extent that her 90/180 day claim is dismissed, and otherwise denied.

In this action, plaintiff alleges that on September 19, 2011 she sustained personal injuries when she was involved in an accident with a vehicle owned and operated by defendants.

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 her verified bill of particulars, plaintiff claims she sustained left and right knee tears, right wrist carpal tunnel syndrome and tears, disc herniation at C7-T1, and bulges at C4-7 and L5-S1. Other injuries originally asserted in the bill were withdrawn at the September 12, 2012 compliance conference.

In support of their motion, defendants submits, inter alia, the affirmed reports of Dr. Eisenstadt, a radiologist, who interpreted 5 of plaintiff's MRI films taken within 3 weeks of the subject accident. Dr. Eisenstadt stated that the films showed a normal cervical and lumbar spine

and right wrist; she found no evidence of recent or post-traumatic changes in the right knee, and only minimal joint effusion in the left knee (a non-specific finding) and no definitive post-traumatic changes.

Defendants also submit the affirmed report of Dr. Montalbano, an orthopedist who examined plaintiff on June 1, 2012. Dr. Montalbano found that plaintiff had full range of motion in her cervical and lumbar spine, both wrists, and both knees. He stated that based on his review of plaintiff's medical records her left and right knee surgeries and cervical and lumbar herniations pre-dated the accident. He opined that her right wrist surgery was necessitated by a pre-existing condition of de Quervains Tenosynivitis, repetitive stress and overuse.

Additionally, defendants met their initial burden with respect to plaintiff's 90/180-day claim by submitting plaintiff's deposition testimony wherein she stated that she returned to work a few days after the subject accident (exh G at 53).

In opposition, plaintiff submits affirmed reports from two of her treating doctors, one who treated her knees and another who treated her left wrist.

Dr. Berkowitz, an orthopedist, first saw plaintiff on 12/12/11 (approximately 3 months after the accident), measured range of motion restrictions in both knees and found an effusion in the left knee. He performed arthroscopic surgery on plaintiff's left knee on 1/11/12, and noted that the "intre-operative (sic)" findings were "acute and trauma related and there were no degenerative findings". The following month he performed the same procedure on plaintiff's right knee. Again, he noted that the findings were "traumatic and not degenerative".

Plaintiff also submits Dr. Lenzo's narrative report; he states that he first saw plaintiff on 11/1/11 and performed surgery on her right wrist on 11/28/11. On 6/7/13 he re-examined plaintiff and found she was negative for de Quervain's signs. He opines that her right wrist

ligament tear was causally related to the subject accident.

Plaintiff has met her burden of raising an issue of fact as to whether or not her bilateral knee and right wrist conditions pre-dated the subject accident. The doctors disagree and it is up to the jury, not this Court, to evaluate the medical testimony and decide who and what to believe.

However, plaintiff failed to raise an issue of fact as to whether her claimed injuries prevented her from "performing substantially all of the material acts which constitute[d her] usual and customary daily activities" (Insurance Law § 5102 [d]; *Merrick v Lopez-Garcia*, 100 AD3d 456, 457 [1st Dept 2012]). Therefore, defendants are granted partial summary judgment dismissing plaintiff's 90/180-day claim only.

Accordingly, it is

ORDERED that 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 granted only to the extent that her 90/180 day claim is dismissed, and otherwise denied.

This is the Decision and Order of the Court.

Dated: June 13, 2014
New York, New York

HON. ARLENE P. BLUTH, JSC