[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN PART 21
Justice

GRISELDA SOLIS,

Plaintiff,

- v -

NEW YORK CITY TRANSIT AUTHORITY, MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY, JAMES B. TRONSCOSO, JR. and MARCIASERVICE CORP.,

Defendants.

INDEX NO. 106814/03

MOTION DATE 2/21/12

MOTION SEQ. NO. 005

The following papers, numbered 1 to 6 were read on this motion for summary judgment

Notice of Motion— Affirmation — Exhibits A-H	No(s). 1; 2
Notice of Cross Motion—Affirmation — Exhibit A	No(s). 3-4
Affirmation in Opposition — Exhibits A-D	No(s). 5
Reply Affirmation	No(s). 6

Upon the foregoing papers, it is ordered that the motion for summary judgment by defendant Marcia Service Corp. and the cross motion for summary judgment by defendant New York City Transit Authority are decided in accordance with the annexed memorandum decision and order.

HON. MICHAEL D. STALLMAN

Dated: 7/23/12
New York, New York

, J.S.C.

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

1. Check one: ..... ☐ CASE DISPOSED ■ NON-FINAL DISPOSITION
2. Check if 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 21

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GRISELDA SOLIS,

Plaintiff,

Index No. 106814/2003

- against -

NEW YORK CITY TRANSIT AUTHORITY, MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY, JAMES B. TRONCOSO, JR. and MARCIA SERVICE CORP.,

Decision and Order

Defendants.

----------X

HON. MICHAEL D. STALLMAN, J.:

In this action alleging personal injuries arising out a motor vehicle accident, defendant Marcia Service Corp. moves for summary judgment dismissing the complaint, arguing that plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102 (d). Defendant New York City Transit Authority (NYCTA) cross-moves for summary judgment on the same ground. Plaintiff opposes the motion and cross motion.

BACKGROUND

Plaintiff alleges that, on September 3, 2002, at approximately 12:30 p.m., she was injured when the M15 bus in which she was a passenger made contact with a motor vehicle allegedly owned by defendant Maria Service Corp. The accident allegedly occurred on Second Avenue, approximately 100 feet south of East 14th

Street in Manhattan. Plaintiff's bill of particulars alleges that plaintiff suffered, among other things, a medial and lateral meniscal tear in her right knee, disc bulging at L4-L5 and L5-S1, lumbar radiculopathy, lumbar sprain, lumbar myositis, cervical disc herniations, cervical radiculopathy, cervical sprain and cervical myositis, and internal derangement of both knees, sprains in both elbows, and whiplash syndrome. (Pogorzelski Affirm., Ex C [Verified Bill of Particulars].) Plaintiff alleges that she was "intermittently confined to bed and home, apart from visits to her health care providers, from September 3, 2002, the date of the accident to approximately February 5, 2003." (*Id.* ¶ 11 [a & b].)

DISCUSSION

In support of its motion, Marcia Service Corp. submits the affirmed reports from Dr. Robert Israel, an orthopedic surgeon, and Dr. Robert S. April, a neurologist, and Dr. Tantleff and Dr. Berkowitz, who both reviewed an MRI of plaintiff's right knee take on November 27, 2002. (Pogorzelski Affirm., Exs D, E, F.) NYCTA submits the affirmed report of Dr. Nason, an orthopedic surgeon. (Berkowitz Affirm., Ex A.)

Dr. Israel recorded normal ranges of motion (expressed in degrees and corresponding normal values) in plaintiff's cervical spine and lumbar spine, right shoulder, both elbows, and both knees. (Pogorzelski Affirm., Ex D.) Dr. Israel

affirmed that ranges of motion were "tested using visual scale and goniometer and utilizing AMA Guidelines." (*Id.*) Dr. Nason similarly recorded normal ranges of motion in plaintiff's cervical spine, both elbows, and both knees. Dr. Nason recorded normal ranges of motion in plaintiff's lumbar spine for flexion, extension, and lateral rotation. (Berkowitz Affirm., Ex A.) However, as to extension of the lumbar spine, Dr. Nason found a range of motion of 20°(30° normal). (*Id.*) Dr. Nason did not state the methods used to measure the plaintiff's ranges of motion.

Based on a review of the MRI taken of plaintiff's right knee, Dr. Tantleff stated, "Regional degenerative changes are identified exacerbated by the patient's body habitus; unrelated to the date of incident most pronounced in the patellofemoral and medial joint compartment. There is no evidence of a traumatic tear or rupture of the regional ligaments, tendons or menisci. The osseous alignment is anatomic." (Pogorzelski Affirm., Ex F.) Dr. Berkowitz stated, "There is no evidence of acute traumatic injury to the knee such as a fracture, bone marrow edema, meniscal or ligamentous tear." (*Id.*)

Dr. April concluded that "at the time of my examination on April 16, 2008, with reasonable medical certainty that the accident of record did not cause a neurological diagnosis or any of the symptoms which have been described in this report. The extensive medical diagnoses in her background are responsible for most

of her symptoms." (Pogorzelski Affirm., Ex E.)

Defendants have met their prima facie burden of demonstrating that plaintiff did not suffer a "permanent consequential limitation of use of a body organ or member" or a significant limitation of use of a body function or system," because they submitted expert medical reports "finding normal ranges of motion in the claimed affected body parts and no objective evidence that any limitations resulted from the accident." (*Vega v MTA Bus Co.*, 96 AD3d 506, 506 [1st Dept 2012].)

In opposition, plaintiff submits the affirmed report of Dr. Joyce Goldenberg, who examined plaintiff on February 1, 2012, and an unaffirmed report from Dr. Goldenberg dated October 3, 2002. (Ashman Opp. Affirm., Ex A.) Plaintiff also submits two MRI reports from Dr. Lichy and from Dr. Kolb. (Ashman Opp. Affirm., Exs C, D.) These submissions are sufficient to raise triable issues of fact as to whether plaintiff suffered a "serious injury" under the categories of "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system."

According to the October 3, 2002 report, Dr. Goldenberg recorded less than normal ranges of motion in plaintiff's cervical spine, lumbar spine, bilateral elbows and bilateral knees. (Ashman Opp. Affirm., Ex A.) The report also stated that the Spring sign, McMurray and Apley compression tests were positive bilaterally, and a

straight leg raising test was positive at 10 degrees bilaterally. (*Id.*)

In Dr. Goldenberg's affirmed report dated February 1, 2012, Dr. Goldenberg again measured less than normal ranges of motion in plaintiff's cervical spine, lumbar spine, and both knees. (*Id.*) Dr. Goldenberg stated that the active range of motion in both elbows was within normal limits. (*Id.*) The report noted that all measurements were performed with an inclinometer or goniometer. Dr. Goldenberg concluded,

> "In my opinion, stated with a reasonable degree of medical certainty and based upon the history, examination and testing, this patient sustained injuries which include a permanent partial loss of use of her cervical and lumbar spine and bilateral knees . . .
>
> Based upon the history, examination, diagnostic test results and findings in this case, the injuries-limitations and chronic symptoms sustained by Ms. Solis described above are the direct result of the accident in question and are causally connected."

(*Id.*)

According to his report, Dr. Lichy reviewed the MRI taken of plaintiff's right knee of November 27, 2002 and found "tears of both medial and lateral menisci." (Ashman Opp. Affirm., Ex C.) Dr. Kolb, who reviewed MRIs taken of plaintiff's cervical and lumbar spine on November 24, 2002, found "[d]isc herniations at C5-C6 and C6-C7" and disc bulges at L4-L5 and L5-S1. . ." (Ashman Opp. Affirm., ex D.) Both reports are neither sworn nor affirmed.

Dr. Lichy's findings–that plaintiff's right knee had tears of both medial and

lateral menisci–are apparently at odds with the findings of Dr. Tantleff and Dr. Berkowitz, who saw no evidence of tears of the menisci.

The Court cannot say that plaintiff may not rely upon Dr. Lichy's and Dr. Kolb's unsworn MRI reports, because the affirmed report of Dr. Nason, NYCTA's doctor, appears to have referenced MRI reports, which could be Dr. Lichy's and Dr. Kolb's MRI reports. (*Kearse v New York City Tr. Auth.*, 16 AD3d 45, 47 n 1 [2d Dept 2005]["this court has held that even a reference to the unsworn or unaffirmed reports in the moving papers is sufficient to permit the plaintiff to rely upon and submit these reports in opposition to the motion"]; *Fitzroy v Boothe*, 29 Misc 3d 130 (A), 2010 WL 4368377 [App Term, 1st Dept 2010].) In any event, hearsay may be considered to oppose summary judgment, so long as the hearsay is not the only proof submitted. (*Sumitomo Mitsui Banking Corp. v Credit Suisse*, 89 AD3d 561, 564 [1st Dept 2011].) Here, the MRI reports are not the only proof that plaintiff submitted to demonstrate the existence of a serious injury.

Marcia Service Corp. points out that the parties agreed in a so-ordered stipulation dated September 2, 2010 that "As to the lost MRI files of the neck and lower back, they shall be precluded unless they are located and disclosed with a CPLR 4532a notice at least 60 days prior to trial." (Pogorzelski Affirm., Ex G.) According to counsel, "the optical disc containing the films was corrupted and the

facility Lenox Hill Radiology was unable to duplicate same." (Pogorzelski Affirm. ¶ 20.) Marcia Service Corp. therefore argues that the MRI reports of Dr. Lichy and Dr. Kolb should not be considered.

This argument is unpersuasive. First, the so-ordered stipulation was a conditional order governing introduction of evidence at trial, not on a motion for summary judgment. Second, the motion and cross motion were fully submitted outside of the period contemplated in the stipulation, i.e., 60 days prior to trial. Because the condition in the agreed-upon preclusion had not come to pass at the time the motion and cross motion were fully submitted, the Court sees no reason to rely upon the conditional preclusion to bar plaintiff from offering the MRI reports of Dr. Lichy and Dr. Kolb in opposition to defendants' motions.

In reply, Marcia Service Corp. points out that plaintiff's opposition papers show "a gap in treatment" with Dr. Goldenberg of nine years. (Pogorzelski Reply Affirm. ¶ 15.) Dr. Goldenberg stated in her affirmed report dated February 1, 2012, "Ms. Solis was under my care and had treatments at my office until April 9, 2003." (Ashman Opp. Affirm., Ex A.) The records from Central Park Physical Medicine and Rehabilitation (which were not certified) reflects dates of treatment in January 2003. (Ashman Opp. Affirm., Ex B.)

"While a cessation of treatment is not dispositive—the law surely does not

require a record of needless treatment in order to survive summary judgment—a plaintiff who terminates therapeutic measures following the accident, while claiming 'serious injury,' must offer some reasonable explanation for having done so." (*Pommells v Perez*, 4 NY3d 566, 574 [2005]. Here, notwithstanding indications in plaintiff's apparent cessation of treatment, the Court may not rely on the gap-in-treatment argument, because Marcia Service Corp. only raised this argument for the first time in its reply papers. (*Tadesse v Degnich* 81 AD3d 570 [1st Dept 2011].)

Triable issues of fact arise as to whether plaintiff suffered a "serious injury" under the 90/180 day category. "[A]n injury must be 'medically determined' to qualify under the 90/180–days category, meaning that the condition must be substantiated by a physician. Additionally, the condition must be causally related to the accident." (*Damas v Valdes*, 84 AD3d 87, 93 [2d Dept 2011][internal citations omitted].) Here, Marcia Service Corp. argues that the affirmed MRI reports of Dr. Tantleff and Dr. Berkowitz, coupled with the purported lack of evidence of medical evidence from the plaintiff within the 180 day period, meets the prima facie burden under the 90/180 day category.

To the extent that defendants rely on the purported lack of evidence from the plaintiff, defendants "cannot obtain summary judgment by pointing to gaps in plaintiff['s] proof." (*Coastal Sheet Metal Corp. v Martin Assocs., Inc.*, 63 AD3d 617,

618 [1st Dept 2009], citing *Torres v Indus. Container*, 305 AD2d 136 [1st Dept 2003].)

Defendants have not met their prima facie burden for summary judgment under the 90/180 day category based on the MRI reports of Dr. Tantleff and Dr. Berkowitz, because those doctors reviewed MRIs only of plaintiff's right knee. Defendants do not offer any medical evidence concerning plaintiff's other alleged injuries during the first 180 days after the accident. Even if these MRI reports were sufficient to meet defendants' burden, the MRI report of Dr. Lichy appears to contradict the findings of Dr. Tantleff and Dr. Berkowitz. In addition, as discussed above, Dr. Kolb found cervical and lumbar herniations based on MRIs taken on November 27, 2002 of plaintiff's cervical and lumbar spine. Dr. Goldbenberg's examination of plaintiff on October 3, 2002 revealed limited ranges of motion, the findings of which were incorporated into her affirmed report dated February 1, 2012. Finally, the bill of particulars states that plaintiff was confined "intermittently confined to bed and home, apart from visits to her health care providers, from September 3, 2002, the date of the accident to approximately February 5, 2003." (Bill of Particulars ¶ 11 [a & b].)

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion for summary judgment by defendant Marcia

Service Corp. and the cross motion for summary judgment by defendant New York City Transit Authority are denied.

Dated: July 23, 2012
New York, New York

ENTER:

J.S.C.

HON. MICHAEL D. STALLMAN

FILED

AUG 01 2012

NEW YORK
COUNTY CLERK'S OFFICE