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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN PART 21
Justice

Index Number : 400734/2009
YAKOBSON, MIKHAIL
vs.
SCHUBERT, WALDER R.
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. 400734/09
MOTION DATE 6/14/12
MOTION SEQ. NO. 002

The following papers, numbered 1 to 9 were read on this motion for summary judgment; cross motion for summary judgment

Notice of Motion; Affirmation — Exhibits A-H	No(s). 1; 2
Affirmation in Opposition — Exhibits A-B; Affirmation in Opposition–Affidavit — Exhibits A-B; Affidavit in Further Opposition–Affidavit of Custodian of Medical Records	No(s). 3; 4-5; 6-7
Notice of Cross Motion–Affirmation — Exhibits A-B	No(s). 8-9

Upon the foregoing papers, it is ordered that the motion for summary judgment by defendants New York City Transit Authority and Walder R. Schubert and the cross motion by defendant Bryan Chan are granted in part, and so much of the complaint that alleges that plaintiff suffered a serious injury under the 90/180 category is dismissed as against all defendants, and the motion and cross motion are otherwise denied, and it is further

ORDERED that the remainder of the action shall continue.

This action arose of out of an accident involving four motor vehicles that allegedly occurred on November 6, 2007, in southbound lanes of the FDR Drive, near an exit to South Street in Manhattan. The four vehicles involved were: (1) a 2004 Mercedes Benz bearing license plate number CWF5243, allegedly owned and operated by defendant Bryan Chan; (2) a 2005 Jeep Grand Cherokee Laredo bearing license plate number DBH9144, allegedly operated by defendant Carmela Abrahante and allegedly owned by defendant Royale Draperies, Inc; (3) a 2007 Lincoln Town Car bearing license plate number T489011C allegedly operated by defendant Ysnoc Bauduy and allegedly owned by defendant 349 Car Corp; and (4) a bus bearing license plate number K42037, allegedly operated by Walder R. Schubert and allegedly owned by defendant New York

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

City Transit Authority (NYCTA). Plaintiff Mikhail Yakobson was allegedly a passenger in Schubert's bus.

NYCTA and Schubert move for summary judgment dismissing the complaint and all cross claims as against them on the ground that Yakobson did not suffer a serious injury within the meaning of Insurance Law § 5102 (d). Chan also cross-moves for summary judgment, adopting and incorporating NYCTA and Schubert's arguments and exhibits.

The bill of particulars alleges that Yakobson suffered, among other injuries: "right knee–joint effusion; C5-C6 broad based posterior disc protrusion; loss of the lumbar lordosis above L5; L5 left radiculopathy; Cervical sprain/strain; Cervicalgia; Mus[c]le spasm; Hip pain; Wrist pain; Anxiety, tension, and stress related to pain; Post[-]traumatic headache." (Coffey Affirm, Ex D [Verified Bill of Particulars].) Yakobson also states that he "was confined to bed for one day and confined to home for approximately three months intermittently thereafter." (*Id.* ¶ 11.)

In support of its motion, NYCTA submits affirmed reports from Dr. Jacquelin Emmanuel, an orthopedic surgeon, and from Dr. Tuvia, a radiologist. (Coffey Affirm., Exs G, H.) Dr. Emmanuel examined Yakobson on November 6, 2007, and Dr. Tuvia reviewed MRIs of Yakobson's right knee, cervical spine, and lumbar spine.

To meet the prima facie burden of summary judgment of the serious injury threshold, a defendant must "submit[] 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, 507 [1st Dept 2012].)

Using a goniometer, Dr. Emmanuel measured normal ranges of motion (expressed in degrees and corresponding normal values) in Yakobson's cervical spine, right wrist and right hip. (Coffey Affirm., Ex G.) According to Dr. Emmanuel, the carpus of Yakobson's right wrist was "stress tested and noted to be normal. Grip and punch strength measures 5/5. Tinel sign is negative." (*Id.*) As to the MRI of Yakobson's cervical spine, Dr. Tuvia stated, "Degenerated, mildly bulging C5-C6 disc, otherwise normal study. The above

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findings are most consistent with degenerative spinal disease which is a pre-existing condition." (*Id.*) NYCTA has therefore met its prima facie burden of serious injury as to Yakobson's alleged cervical spinal injuries, wrist and hip injuries, based on Dr. Emmanuel's and Dr. Tuvia's report.

NYCTA has met also its prima facie burden of serious injury as to Yakobson's alleged lumbosacral spinal injuries. Dr. Emmanuel found normal ranges of motion in Yakobson's lumbar spine. (Coffey Affirm., Ex G.) Dr. Emmanuel stated the lordotic curve was normal, and "[s]itting lasegue testing is negative to 80 degrees. Straight leg raising is negative to 75 degrees in both the seated and supine positions." (*Id.*)

Yakobson's counsel argues that the normal range of motion for straight leg testing and Lasegue testing should have been 90 degrees and 92 degrees, respectively, but did not submit an affidavit or affirmation from an doctor. Given the normal ranges of motion that Dr. Emmanuel measured, coupled with Dr. Tuvia's findings of a "Degenerated L5-S1 disc, otherwise normal study" and "no findings to suggest acute trauma or sequela of such" (Coffey Affirm., Ex H), NYCTA has met its prima facie burden here. (*Bernabel v Perullo*, 300 AD2d 330 [2d Dept 2002]; *Espinal v Galicia*, 290 AD2d 528, 529 [2d Dept 2002].)

As to Yakobson's right knee, Dr. Emmanuel stated,

> "[r]ange of motion is 0-130 degrees with evidence of crepitus (0-140 degrees normal). There is no tenderness above the joint line or bony structures, medial or lateral joint lines. McMurray Test is negative. There is no ligamentous instability. There is no evidence of atrophy. Muscle tone and bulk are normal."

(Coffey Affirm., Ex G.) Dr. Tuvia's impression of the MRI of Yakobson right knee was "normal study of the right knee joint." (Coffey Affirm., Ex H.)

This is not sufficient to meet the prima facie burden of serious injury concerning Yakobson's right knee. Dr. Emmanuel measured less than normal range of motion in his right knee. (*Jean v New York City Tr. Auth.*, 85 AD3d 972, 974 [2d Dept 2011][orthopedic surgeon found range-of-motion restrictions

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in the injured plaintiff's left shoulder, documented less-than-normal findings in the numeric values he gave for each specific range of motion, but failed to address these losses of range of motion to the injured plaintiff's left shoulder]; *Shin Sook Jin v Kwon*, 42 AD3d 445, 447 [2d Dept 2007][report of the defendant's orthopedist "appeared to indicate that plaintiff's range of forward flexion was less than normal"].)

NYCTA correctly points out that "a minor, mild or slight limitation of use should be classified as insignificant within the meaning of the statute." (*Licari v Elliott*, 57 NY2d 230, 236 [1982].) A minor deficit in a single aspect of a plaintiff's range motion may be insignificant for purposes of Insurance Law § 5102 (d). (*Rosa-Diaz v Maria Auto Corp.*, 79 AD3d 463, 464 [1st Dept 2010].) NYCTA does not cite any appellate ruling that a 10 degree limitation in the range of motion of the knee was minor, mild or slight as a matter of law. NYCTA cites a case involving a 15% limitation of the cervical spine, but Dr. Emannuel did not render an opinion as to a percentage of limitation based on this measured range of motion.

Because NYCTA and Chan did not meet their prima facie burden of demonstrating, as a matter of law, that none of Yakobson's injuries meet the No Fault threshold, NYCTA's motion and Chan's cross motion are denied.

Notwithstanding the above, NYCTA and Chan are granted summary judgment dismissing so much of the complaint as alleges that Yakobson suffered a "serious injury" under the 90/180 day category.

> "[W]here evidence shows, for example, that the plaintiff actually returned to work within the first 90 days after the accident, it is proper to dismiss 90/180 claims, since the ability to return to work may be said to support a legitimate inference that the plaintiff must have been able to perform at least most of his usual and customary daily activities."

(*Correa v Saifuddin*, 95 AD3d 407, 409 [1st Dept 2012].) Here, when asked at his deposition, "You didn't miss any time from work as a result of this incident?", Yakobson answered, "No." (Coffey Affirm., Ex F [Yakobson EBT], at 39.)

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Although the other co-defendants did not move for summary judgment, dismissal of the complaint alleging serious injury under the 90/180-day category as against them is also warranted, because "if plaintiff cannot meet the threshold for serious injury against one defendant, she cannot meet it against the other." (*Williams v Horman*, 95 AD3d 650, 651 [1st Dept 2012].)

Dated: 9/31/12
New York, New York

_____, J.S.C.
HON. MICHAEL D. STALLMAN

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