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# SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JAFFE BARBARA JAFFE J.S.C. PART 5

Index Number : 105821/2009

DE BELLO, ROSE M. MATIAS

INDEX NO. _____

VS

CITY OF NEW YORK

MOTION DATE _____

Sequence Number : 001

MOTION SEQ. NO. _____

SUMMARY JUDGMENT

CAL # 33

MOTION CAL. NO. _____

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

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | 1,2 |
| Answering Affidavits — Exhibits | 3 |
| Replying Affidavits | |

**Cross-Motion:** ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

FILED

OCT 17 2011

NEW YORK COUNTY CLERK'S OFFICE

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

Dated: 10/13/11

OCT 13 2011 OCT 13 2011

J.S.C.

BARBARA JAFFE

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

----------x

ROSE M. MATIAS DE BELLO,

Plaintiff,

-against-

THE CITY OF NEW YORK, THE NEW YORK CITY FIRE DEPARTMENT, GODFREY H. GLYTHC, YAQUE LUXURY TRANSPORTATION, INC. and DAHIANA O. CASTRO,

Defendants.

----------x

Index No. 105821/09

Motion Subm.: 8/2/11
Motion Seq. No.: 001

**DECISION & ORDER**

BARBARA JAFFE, JSC:



**For plaintiff:**
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Helen F. Dalton & Assocs., P.C.
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**For Yaque/Castro:**
Carol S. DiBari, Esq.
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By notice of motion dated March 2, 2011, defendants Yaque Luxury Transportation, Inc. (Yaque) and Castro (movants, collectively) move pursuant to CPLR 3212 for an order dismissing the complaint. Plaintiff opposes.

## I. BACKGROUND

On March 9, 2008, plaintiff was allegedly injured when the vehicle in which she was a passenger, which was owned by Yaque and operated by Castro, collided with a fire truck owned and operated by City and the New York City Fire Department. (Affirmation of Carol S. DiBari, Esq., dated Mar. 2, 2011 [DiBari Aff.], Exh. A). On or about April 20, 2009, plaintiff served defendants with her summons and complaint. (*Id.*). On or about September 16, 2009, movants served their answer. (*Id.*, Exh. B).

On or about September 25, 2009, plaintiff served her verified bill of particulars, in which she claimed the following injuries: suprapatellar effusion in the left knee; partial tear of the anterior cruciate ligament in the left knee requiring arthroscopic surgery; intrasubstance degeneration in the medial and lateral menisci; at C4-C5 and C5-C6, a broad bulging disc causing slight spinal stenosis; at L4-L5 and L5-S1, broad bulging discs; tension and a stress reaction to pain; cervical myalgia; cervical spine sprain/strain; cervical disc displacement; thoracic sprain/strain; lumbar myalgia; lumbrosacral spine sprain/strain; lumbar disc displacement; and arthroscopic surgery performed on the left knee with a post-operative diagnosis of a partial tear of the anterior cruciate ligament, extensive synovitis, medial and lateral compartments. Plaintiff also alleged that she had suffered serious injury as defined by Insurance Law § 5102(d). (*Id.*, Exh. E).

On May 14, 2010, plaintiff testified at an examination before trial, as pertinent here, that after the accident, she was confined to her home and bed for approximately a month and half and returned to work within two months. In the three months following the accident, she was able to care for herself and perform her usual activities but with some limitation and pain. (*Id.*, Exh. H).

On June 21, 2010, Dr. John H. Buckner performed an independent medical examination of plaintiff, and found that she had full, normal range of motion of her cervical, thoracic, and lumbar spine, that her right knee demonstrated full extension and flexion to 120 degrees and her left knee to 115 degrees, and that various objective tests yielded negative results. He thus concluded that plaintiff had "full, normal, range of motion about all joints except the knees without complaints of or indications of discomfort," but that "the documentation is insufficient to allow me to determine if there is a causal relationship between the knee condition requiring

surgery" and plaintiff's injury, although "the records provided do not indicate findings I would expect for an acute significant knee injury." (*Id.*, Exh. G).

On February 20, 2011, Dr. Mark J. Decker examined an MRI taken of plaintiff's left knee in March 2008, and although he observed that it showed mucoid degeneration of the anterior cruciate ligament, patella alta with lateral subluxation and thickened plica, and thickening of the medial collateral ligament at the insertion on the femur with no edema throughout the fibers, he concluded, without explanation, that none of these conditions was causally related to plaintiff's accident. (*Id.*, Exh. F).

On April 13, 2011, plaintiff was examined by Dr. Ida Tetro, who found that plaintiff suffered from below-normal range of motion in her lumbar spine and left knee, and stated that the injuries to the lumbar spine and left knee are causally related to the accident and permanent in nature. (Affirmation of Helen Dalton, Esq., dated May 16, 2011 [Dalton Aff.], Exh. F).

By affirmation dated May 18, 2011, Dr. Stuart Remer attested to the accuracy of his post-operative report, which reflects that plaintiff had suffered a partial tear of her anterior cruciate ligament in her left knee and extensive synovitis in her medial and lateral compartments, and opines that plaintiff's accident was causally related to her left knee injury. (Dalton Aff., Exh. E).

By affirmation dated May 19, 2011, Dr. Max Jean-Gilles attested that after examining plaintiff in March, April and June 2008, plaintiff's range of motion in her lumbar spine between April and August 2008 was below normal, that MRI examinations of plaintiff's lumbar and cervical spines and both knees reveal positive findings, and that plaintiff suffers from the injuries set forth in her bill of particulars. (Dalton Aff., Exh. C).

By affirmation dated May 20, 2011, Dr. Joseph Leadon attested that plaintiff's March and

April 2008 MRI exams reveal bulging discs in her cervical and lumbar spine. (*Id.*, Exh. D).

## II. CONTENTIONS

Movants argue that plaintiff did not suffer a serious injury, relying on Dr. Decker's opinion that her injuries were not causally related to the accident, Dr. Buckner's findings that plaintiff had full range of motion, the negative objective tests, and plaintiff's testimony which did not establish that she was confined at home or bed for a significant period of time or that her activities were significantly impacted. (DiBari Aff.).

Plaintiff alleges that her medical records demonstrate that she sustained a serious injury, and observes that the opinions of movants' physicians differ from those of her physicians, which difference should be resolved by a jury. She maintains that as movants submit no medical evidence showing that she had not suffered a serious injury that lasted for the first 90 days after the accident, they have not met their *prima facie* burden. (Dalton Aff.).

## III. ANALYSIS

A party seeking summary judgment must demonstrate, *prima facie,* entitlement to judgment as a matter of law by presenting sufficient evidence to negate any material issues of fact. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant meets this burden, the opponent must rebut the prima facie showing by submitting admissible evidence, demonstrating the existence of factual issues that require trial. (*Zuckerman v City of New York,* 49 NY2d 557, 562 [1980]; *Bethlehem Steel Corp. v Solow*, 51 NY2d 870, 872 [1980]). Otherwise, the motion must be denied, regardless of the sufficiency of the opposition. (*Winegrad,* 64 NY2d at 853).

Pursuant to section 5104(a) of the Insurance Law, a person injured in an automobile

accident caused by negligence may only recover non-economic loss if she sustained a serious injury. Pursuant to section 5102(d) of the Insurance Law, a serious injury is defined in pertinent part as:

> a personal injury which results in . . . permanent loss of use of a body member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

The movant seeking summary judgment based on a claim that a plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102(d) must therefore establish, *prima facie*, that the plaintiff did not suffer a permanent loss of use of a body organ, member, function or system, or a permanent consequential limitation of use of a body organ or member, or a significant limitation of use of a body function or system, or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment.

Here, while Dr. Buckner found that plaintiff had normal ranges of motion in her cervical, thoracic, and lumbar spines, he did not compare the ranges of motion in her knees to the normal ranges of motion, and in stating that plaintiff had full ranges of motion in all of her joints except her knees, he, in effect, found that she had no full range of motion in her knees. (*See Grisales v City of New York*, 85 AD3d 964 [2d Dept 2011] [defendant's physician specified findings for range of motion in plaintiff's knee but failed to compare findings to normal range]; *Cheour v*

*Pete & Sals Harborview Transp., Inc.*, 76 AD3d 989 [2d Dept 2010] [defendant did not meet *prima facie* burden as doctor did not compare findings to normal and observed that plaintiff had limited range of motion]; *Frasca-Nathans v Nugent*, 78 AD3d 651 [2d Dept 2010] [as defendant's physician failed to compare range of motion findings to normal, defendant failed to establish, *prima facie*, that plaintiff had not suffered serious injury]; *Bray v Rosas*, 29 AD3d 422 [1st Dept 2006] [defendants failed to make *prima facie* showing as their orthopedist did not compare range of motion findings to normal range]). He was also unable to determine whether there was a causal connection involving plaintiff's left knee condition. (*See Catana v Hussein*, 78 AD3d 639 [2d Dept 2010] [as defendant's doctor did not opine as to cause of injury, defendant failed to establish, *prima facie*, that plaintiff's injury was not caused by accident]).

Dr. Decker was similarly unhelpful to movants as his opinion that her left knee injury was not causally related to the accident is fatally conclusory. (*Compare McCree v Sam Trans Corp.*, 82 AD3d 601 [1st Dept 2011] [defendant did not satisfy *prima facie* burden as its medical expert's opinion that injuries were caused by degenerative or pre-existing condition lacked factual basis and was conclusory]; *Jean v New York City Tr. Auth.*, 85 AD3d 972 [2d Dept 2011] [doctor's conclusion that conditions were not causally related to accident lacked probative value as he failed to explain or substantiate basis of conclusion], *with Soho v Konate*, 85 AD3d 522 [1st Dept 2011] [orthopedist's opinion regarding causation neither conclusory not unsupported and thus sufficient to meet *prima facie* burden as orthopedist opined that medical conditions were not causally related to accident but result of plaintiff's weight and pre-existing degeneration]; *Feliz v Frangosa*, 85 AD3d 417 [1st Dept 2011] [physician's detailed, non-conclusory explanation for opinion that injuries were not caused by accident sufficient to shift burden on causation to

burden on causation to plaintiff]).

For all of these reasons, movants have failed to establish, *prima facie*, that plaintiff did not sustain a serious injury as defined by Insurance Law § 5102(d).

Even if movants had met their *prima facie* burden, plaintiff's physicians' findings that plaintiff sustained significant limitations in her range of motion immediately after the accident and three years thereafter, and their opinions that the injuries were caused by the accident, raise triable issues as to whether she suffered a permanent loss of use of a body organ, member, function or system, or a permanent consequential limitation of use of a body organ or member, or a significant limitation of use of a body function or system. (*See Pisang*, 82 AD3d at 597 [triable issues raised by plaintiff's doctors' determinations based on objective, quantitative tests that plaintiff had significant limitations in range of motion of cervical and lumbar spine and opinions that plaintiff's injuries were causally related to accident]; *Samos v Diaz*, 81 AD3d 546 [1st Dept 2011] [summary judgment properly denied as plaintiff submitted results of range of motion tests performed few days after accident and four years later, and plaintiff's physician's affirmation conflicted with defendants' physicians' opinions regarding extent, effects, and cause of injury]; *Jacobs v Orlon*, 76 AD3d 905 [1st Dept 2010] [plaintiff's physician found that plaintiff had significant range of motion limitations immediately after accident and three years later and that injuries were caused by accident and not degenerative in nature]).

However, as plaintiff was confined to home and bed for less than 90 days and as she missed less than 90 days of work within the first 180 days after the accident, and absent medical documentation supporting her claim that her everyday activities were substantially limited, she has failed to raise a triable issue of fact as to whether she sustained a medically determined injury

or impairment of a non-permanent nature which prevented her from performing substantially all of the material acts which constitute her usual and customary daily activities for not less than 90 days during the 180 days immediately following her accident. (*See Simpson v Montage*, 81 AD3d 547 [1st Dept 2011] [fact that plaintiffs missed more than 90 days of work not determinative]; *Pinkhasov v Weaver,* 57 AD3d 334 [1st Dept 2008] [plaintiff's subjective statements that he was unable to perform usual and customary activities for 90 days insufficient absent objective medical evidence]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants Yaque Luxury Transportation, Inc. and Dahiana O. Catro's motion for summary judgment is granted solely to the extent of dismissing plaintiff's 90/180 day serious injury claim.

ENTER:

FILED
OCT 17 2011
COUNTY CLERK'S OFFICE
NEW YORK

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: October 13, 2011
New York, New York

OCT 13 2011