[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH
Justice

PART 22

Index Number : 116598/2010
VIDAL, JUAN
vs.
URENA, MAXIMO
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 2, were read on this motion to/for def's MSJ - serious injury

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1
Answering Affidavits — Exhibits _____ | No(s). 2
Replying Affidavits _____ | No(s). _____

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER

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

Dated: 5.23.13

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

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.: 116598/10
Motion Seq 01

Juan Vidal,

Plaintiff,

-against-

Maximo Urena and Mohamed S. Osman,

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 denied.

In this action, plaintiff alleges that on October 21, 2008 he sustained personal injuries as a result of a motor vehicle accident [illegible] intersection of East 79th Street and Park Avenue.

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 the verified bill of particulars plaintiff claimed he sustained injuries, inter alia, to his cervical and lumbar spine (exh. B to moving papers, para. 11). He further claimed that he was confined to home for 16 weeks after the accident and unable to go to work for approximately 9 months (para. 13-14).

In support of their motion, defendants made a prima facie showing that plaintiff did not suffer from a permanent or significant limitation as a result of the accident. They submitted the affirmed report of a neurologist who set forth the tests he performed and recorded ranges of motion expressed in numerical degrees and the corresponding normal values. The objective tests he performed provided support for his conclusions that the ranges of motion were normal and that plaintiff's injuries had resolved as of the date of the exam, June 4, 2012, and that he suffered no permanent injury to those parts as a result of the accident. Additionally, defendants submit the affirmed reports of their radiologist who reviewed the MRIs taken of plaintiff's cervical and lumbar spine, and concluded that the films showed degenerative changes only and no evidence of post-traumatic changes related to the accident.

In further support of their motion, defendants submit the deposition testimony of plaintiff wherein he testified (through a translator) that after the accident he was "was a week at home...." (exh E, p. 32, line 3-4).

In opposition, plaintiff submits the affirmation of his treating physician, Dr. Liebowitz, who states, inter alia, that in his opinion, plaintiff, a bus driver, was medically disabled for eight months after the accident and was advised not to perform his normal and customary job duties (opp, exh B, para. 3, p. 3). Additionally, plaintiff states in his affidavit (opp, exh A, para. 5) that Dr. Liebowitz advised him not to drive a school bus for eight months. As such plaintiff raised an issue of fact on his 90/180 claim sufficient to defeat this motion. *See Coley v DeLarosa,* 105 AD3d 527, 964 NYS2d 25 (1st Dept 2013) (plaintiff raised an issue of fact by submitting, inter alia, her affidavit stating that her doctors regarded her as unable to perform her job duties and an affirmation from her orthopedic surgeon that she was totally disabled).

The Court notes that defendants did not submit a reply.

Accordingly, because plaintiff raised a triable question of fact, 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 denied.

This is the Decision and Order of the Court.

Dated: May 23, 2013
New York, New York

HON. ARLENE P. BLUTH, JSC