SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH PART 22
Justice

Index Number : 150176/2009
GUZMAN, DAVID
vs
PAULIN, ARNOUS
Sequence Number : 001
SUMMARY JUDGMENT

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

The following papers, numbered 1 to 4, were read on this motion to/for SJ

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1
Notice of X-motion 2
Answering Affidavits — Exhibits _____ | No(s). 3
Replying Affidavits _____ | No(s). 4

Upon the foregoing papers, it is ordered that this motion is and cross-motion are consolidated for joint disposition with seq. 02 and

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER

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

Dated: 7/9/13

_____, 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 NEW YORK
COUNTY OF NEW YORK: IAS PART 22

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DAVID GUZMAN,

Plaintiff,

Index No. 150176/09

-against-

DECISION AND ORDER

ARNOUS PAULIN, SADREDDIN MOTIA, KOVE BROTHERS, INC., and RODDY CHINGA,

HON. ARLENE P. BLUTH, JSC

Defendants.

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Motion sequence numbers 001 and 002 are consolidated for joint disposition.

Defendants Kove and Chinga's motion for summary judgment dismissing the action against them on the grounds that plaintiff's accident was solely caused by co-defendants Paulin and Motia's taxi is denied (seq 001).

Defendants Paulin and Motia's motion for summary judgment dismissing the complaint on the grounds that (1) plaintiff has not demonstrated that his injuries meet the serious injury threshold pursuant to Insurance Law § 5102(d), and (2) the accident was entirely plaintiff's fault is denied (seq 002). Plaintiff's cross-motion for summary judgment on the issue of liability as against defendants Paulin and Motia (seq 02) is also denied.

This accident involves two impacts. On June 4, 2009, at around 5:00 p.m., Guzman was riding his bicycle west on West 51st (between Fifth Avenue and Avenue of the Americas) in Manhattan. Paulin, the driver of a cab owned by Motia, was stopped in the parking lane on the right side of that street. Someone in the cab opened the door

on the left side of the cab just as Guzman was bicycling past in the right lane (Paulin says the passenger opened the door; plaintiff says that the cab driver opened the door). As Guzman's bicycle struck the open taxi door, he was thrown off his bicycle and was struck by Kove's van, which Chinga was driving.

Guzman claims the following injuries, inter alia, in his bill of particulars (exh D to moving papers, para. 7): torn rear ligament of right knee, which required surgery; torn front ligament of right knee; torn meniscus of right knee; tear of right shoulder and post concussion syndrome.

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]).

Motia and Paulin move for summary judgment on the grounds that: (1) Guzman caused the accident in that he did not comply with the Vehicle and Traffic Law to the extent that he did not ride his bicycle safely, and (2) Guzman's injuries do not meet the serious injury threshold pursuant to Insurance Law § 5102(d).

Serious Injury

In support of this branch of their motion, defendants[1] annex two IME reports to

[1]Kove and Chinga joined in the argument set forth by Paulin and Motia regarding the assertion that Guzman did not sustain a serious injury in this accident.

their moving papers. The first is from Dr. Krishna, a neurologist, who examined Guzman on March 8, 2011 (moving papers, exh I). Dr. Krishna found that Guzman's volume, tone, strength and range of motion of all muscles were normal, and that the range of motion of Guzman's cervical and thoracolumbar spine were normal as measured with an inclinometer. His post-examination "impression" is: "(1) cervical spine injury-normal; (2) lumbosacral spine injury-normal; (3) right shoulder injury-defer to appropriate specialist; (4) right knee surgery-defer to appropriate specialist; (5) right hip injury-defer to appropriate specialist; (6) post concussion syndrome-resolved; and (7) labyrinth concussion-resolved". Dr. Krishna concluded in his report: "Treatments: There is no neurological indication of a disability or contraindication from obtaining or continuing a gainful employment status. There are no neurological deficits identifiable on examination that would constitute a disability or permanency".

The second report is from Dr. Bleifer, a board-certified orthopedist who examined Guzman on January 25, 2011 (moving papers, exh J). Dr. Bleifer measured the range of motion of plaintiff's right knee, shoulders and hip with a goniometer, determined that all were normal (when compared to measurements set forth in AMA guidelines), and concluded that Guzman's right shoulder sprain, right hip sprain and post-surgery status right knee PCL reconstruction had all resolved. He further stated that "[b]ased on the orthopedic clinical evaluation, the claimant revealed no functional disability at the present time. The claimant may continue with activities of daily living. He may seek gainful employment at this time".

Because both defendants' doctors found plaintiff to be fine, defendants have met their prima facie burden of demonstrating that plaintiff did not suffer a permanent loss of use of a body organ, member, function or system, a permanent consequential limitation of use of a body organ or member or a significant limitation of use of a body function or system, specifically, his right knee, shoulder or hip (*Vega v MTA Bus Co.*, 96 AD3d at 506; *Spencer v Golden Eagle, Inc.*, 82 AD3d at 591). Additionally, defendants point out that while plaintiff claims in his bill of particulars that he was confined to home for approximately four months, plaintiff has not demonstrated that such confinement was at the direction of a doctor (moving aff., para. 36, 38). Thus, the burden shifts to plaintiff to show a triable issue of fact.

In opposition, plaintiff submits the affirmation of Dr. Silver, plaintiff's treating orthopedic surgeon (exh B to plaintiff's cross-motion). Dr. Silver first examined plaintiff four days after his accident, and performed surgical reconstruction on plaintiff's right knee on July 23, 2009, approximately six weeks later. In his affirmation, Dr. Silver stated that plaintiff had a ruptured posterior cruciate ligament, a torn medial cruciate ligament and a meniscal tear, and causally related these injuries to the accident. Additionally, Dr. Silver opined that because plaintiff continues to exhibit limitations in the range of motion his knee (and shoulder) three years after surgery and after a continuous course of physical therapy, his injuries are significant and permanent.

In their reply, defendants point out that Dr. Silver does not indicate what, if any, objective test(s) he performed to calculate Guzman's range of motion in either his shoulder or his knee.

Defendants are correct that Dr. Silver, by not stating at the recent exam of

plaintiff on June 18, 2012 (almost three years after the surgery) how he measured plaintiff's range of motion (whether with a goniomenter or inclinometer), failed to raise an issue of fact as to the "permanent injury" category. However, even if Dr. Silver had not performed a recent exam, plaintiff still raised an issue of fact as to the significant limitation category; the Appellate Division, First Department has held that no recent exam is necessary to raise an issue of fact as to the "significant limitation" category, which plaintiff claims here. *See Vasquez v Almanzar,* 2013 WL 2988587, 1-2 (1st Dept 2013).

Because Dr. Silver, plaintiff's treating orthopedic surgeon, found tears in plaintiff's knee which required surgery, and casually related these findings to the accident, he has raised a triable question of fact as to the significant limitation category. Accordingly, defendants' motion for summary judgment dismissing the action on this ground is denied. *See In re Abreu ex rel. Castillo,* 2013 WL 2631146, 1 (1st Dept 2013). Based on the foregoing, the Court need not address whether plaintiff's proof with respect to other alleged injuries would have been sufficient to withstand defendants' motion for summary judgment (*see Linton v Nawaz*, 14 NY3d 821, 900 NYS2d 239 [2010]).

Liability

The deposition testimony submitted by the parties presents issues of fact as to how the two impacts occurred, including but not limited to the following: Who opened the door? Paulin said it was the female passenger in the back seat of his cab; plaintiff said he ran into the driver's open door. Was plaintiff riding his bicycle in a safe manner

under the existing conditions and did he see what there was to be seen (a taxi with an open door in his path)? Was plaintiff in the roadway long enough for Chinga to avoid striking him (as plaintiff testified) or was plaintiff propelled into the van, and the impact was instantaneous (as Chinga testified)? Is the eyewitness Vargas credible in light of his conflicting reports (his statement, deposition testimony and affidavit on this motion)? Was Chinga operating the van in a safe manner, and did he see what there was to be seen?

Because the parties have presented different versions of the circumstances surrounding the impacts, the motions and cross-motion for summary judgment on the issue of liability are denied. *See Odikpo v American Transit, Inc.*, 72 AD3d 568, 569, 899 NYS2d 219, 220 (1st Dept 2010) (the parties' testimony as to the manner in which each driver controlled his vehicle, the circumstances surrounding their collision, and the chain of events leading up to the collision involving plaintiff's vehicle raise questions of fact, which are best left for a jury to decide).

Accordingly, it is

ORDERED that defendants Kove and Chinga's motion for summary judgment is denied (seq 001); and it is further

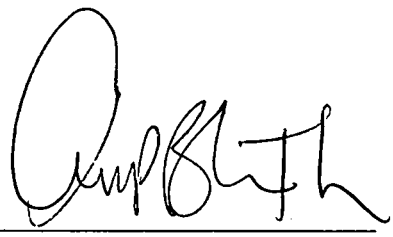
ORDERED that defendants Paulin and Motia's motion for summary judgment is denied (seq 002); and it is further

ORDERED that plaintiff's cross-motion for summary judgment on the issue of

liability (seq 02) is denied.

This is the Decision and Order of the Court.

Dated: July 8, 2013
New York, NY



HON. ARLENE P. BLUTH, JSC