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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. ARLENE P. BLUTH

PRESENT: _____ **PART** 22

Justice

Index Number : 115972/2009
SMALLS, DARLENE V.
vs.
GALLAYE, SEYE
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MSJ 1

The following papers, numbered 1 to 3 **, were read on this motion to/for** Serious injury

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** 1

Answering Affidavits — Exhibits _____ **No(s).** 2

Replying Affidavits _____ **No(s).** 3

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

jointly with mot. seq. 04

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER

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

FILED

AUG 12 2013

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 8/1/13

_____, **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.: 115972/09
Motion Seq. 03 and 04

Darlene V. Smalls,

Plaintiff,

-against-

Gallaye Seye, Cory J. Wilson and Monique Daniels,

Defendants.

DECISION/ORDER

HON. ARLENE P. BLUTH, JSC

Motion sequence numbers 03 and 04 are consolidated for joint disposition.

Defendant Seye's 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. Defendants Wilson and Daniels's motion for summary judgment dismissing the action on the ground that they were not liable for the happening of the accident is also denied.

Plaintiff alleges that on January 18, 2009 she sustained personal injuries when she was a passenger in a vehicle owned and operated by defendant Seye which collided with a vehicle owned by defendant Wilson and operated by defendant Daniels at the intersection of Madison Avenue and 119th Street in Manhattan.

Serious Injury

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 initial burden, the plaintiff must 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 her verified bill of particulars, plaintiff claims that this accident aggravated various cervical and lumbar disc herniations and bulges, right shoulder injuries and caused head trauma and post-concussion syndrome (exh B to moving papers, para. 11). Additionally, plaintiff states

that she had arthroscopic shoulder surgery on 11/13/09, approximately 10 months after the accident.

In support of his motion, defendant submitted the affirmed report of Dr. Desrouleaux, defendant's neurologist (exh K), who examined plaintiff's lumbar and cervical spine on March 12, 2012, measured her range of motion with a goniometer and compared her results to a stated normal. He found no restrictions in any plane and concluded that any alleged injury to cervical or lumbar spine had resolved. Dr. Crystal, defendant's orthopedist who examined plaintiff's right shoulder and her cervical and lumbar spine on September 1, 2011 and reviewed various medical records, concluded that there was no basis to causally relate the injuries she claimed in her bill of particulars to the subject accident (exh D). Finally, defendant submits the January 6, 2012 affirmed reports of Dr. Fisher, defendant's radiologist, (exh C) who reviewed plaintiff's right shoulder MRIs taken on 3/10/09 and 10/21/09, her cervical MRI taken on 3/3/09 and her lumbar MRIs taken on 3/17/09 and 5/6/10, in addition to a 3/12/09 brain MRI. He described degenerative changes in plaintiff's right shoulder, lumbar and cervical spine, but found no evidence or traumatic or injury casually related to a motor vehicle accident. Dr. Fisher stated that plaintiff's brain scan showed no radiographic evidence of traumatic or causally related injury to the brain.

Finally, movant indicates that plaintiff was not incapacitated from her customary daily activities for at least 90 days during the 180 days following the accident by citing to her deposition testimony (exh M, T at 58) wherein she stated that she was confined to her bed for only three days after the accident, and to defendant's doctors reports, including Dr. Fisher's reports, which were based on films taken in the first 90 days after the accident wherein he stated that he saw no evidence of trauma.

Based on the foregoing, defendant has satisfied his burden of establishing prima facie that plaintiff did not suffer a serious injury, and the burden shifts to plaintiff to rebut this showing.

In opposition (exh A), plaintiff submits the July 19, 2012 affirmed report of Dr. D'Angelo, her orthopedic surgeon, who first examined plaintiff on July 16, 2009 and performed surgery on her right shoulder on November 13, 2009. Dr. D'Angelo further states that he reviewed plaintiff's cervical spine MRIs and saw disc bulges and a herniation as well as degenerative changes, thus addressing Dr. Fisher's findings. Dr. D'Angelo again examined plaintiff on July 20, 2012 and found restrictions in the range of motion of plaintiff's right shoulder and restrictions in her cervical spine, specifically flexion - 30 degrees (40-45 normal) and extension - 15 degrees (40-45 normal). Dr. D'Angelo concluded that the subject accident either caused or severely aggravated plaintiff's cervical disc bulging and herniation, and caused disruption of the AC joint and impingement necessitating shoulder surgery.

Additionally, plaintiff has raised an issue of fact regarding her 90/180-day claim through her deposition testimony that she was confined to home for four months and incapacitated from employment as a flight attendant for at least one year after the accident, and that she received no-fault payments for her lost wages. This is not disputed in defendant's reply. Accordingly, defendant Seye's motion for summary judgment dismissing this action is denied.

Motion for Summary Judgment on Liability

In support, defendants Wilson and Daniels submit that Seye alone is liable for the accident because he failed to keep a proper lookout for oncoming traffic while making a left turn from Madison on to East 119th Street. Defendants refer to Daniels' testimony that she was proceeding straight on Madison in the left lane just before the accident when defendant Seye

made a left turn in front of Daniels's vehicle from the center lane (exh E to moving papers, T. at 26, 27, 28). Defendants also refer to Seye's testimony where he states that he never saw Daniels's vehicle at any time before the impact.

In opposition, plaintiff refers to Seye's deposition testimony wherein he stated that he was traveling in the left lane of Madison Avenue since the intersection with 117th Street, and that he did not move into the left lane from the middle lane just prior to the accident (exh F to moving papers, T. 55-56).

The parties have presented two versions of the circumstances surrounding their accident. Here, at a minimum the jury will have to decide whether they believe Ms. Daniels, who states that Mr. Seye cut into her lane to make a left turn or Mr. Seye, who claims that he was already in the left lane of Madison Avenue and had been for the two blocks before the accident. On this motion, it is the Court's duty to determine whether there are issues of fact; it is up to the jury to determine which witnesses they believe. Because there is an issue of fact as how the accident happened, defendants' motion for summary judgment on liability is 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 hereby ORDERED that both motions for summary judgment are denied

This is the Decision and Order of the Court.

Dated: August 1, 2013
New York, New York

HON. ARLENE P. BLUTH, JSC