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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH **PART** 22

Justice

Index Number : 108269/2010
RICHARDSON, ZACHARY
vs
GARCIA, ISAIAS D.
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** Δs MSJ

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

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

Replying Affidavits _____ **No(s).** 3, 4

Supply

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER

FILED

AUG 28 2013

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 8/27/13

_____, J.S.C.

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: PART 22

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ZACHARY RICHARDSON,

Plaintiff,

-against-

ISAIAS D. GARCIA and CARLOS GARCIA,

Defendants.

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Index No. 108269/10

Mot. Seq. 001

Arlene P. Bluth, J.:

In this motor vehicle accident action, defendants move for summary judgment dismissing the complaint for plaintiff's alleged failure to establish serious injuries, as that term is defined in the New York Insurance Law and also to dismiss for lack of liability. Plaintiff, then a seventeen year old high school senior, was hit by defendants' car on September 19, 2007 when he stepped out between two parked cars to hail a cab. At the time plaintiff was hit, he was about a foot or two past the cars into the street in the middle of a block (not in the crosswalk) (plaintiff's deposition, page 17). For the following reasons, the motion is granted and the case is dismissed.

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]).

Serious Injury

Under Insurance Law § 5102, parties injured in motor vehicle accidents may only sue in court if they have sustained a "serious injury" as that term is defined in the statute. *Perl v Meher*, 18 NY3d 208 (2011). Insurance Law § 5102 (d) defines "serious injury," as applicable to the instant case, as:

> 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 and eighty days immediately following the occurrence of the injury or impairment.

Since no recovery can be had for an injury suffered in a motor vehicle accident unless the accident results in a serious injury under the Insurance Law, the matter of the severity of the plaintiff's injuries should be determined before the question of liability is addressed.

Plaintiff claims a permanent consequential limitation to his left knee as well as a 90/180 claim. As relevant here, in his bill of particulars (exh B to moving papers), plaintiff contends that he suffered pain in the left knee, reduced range of motion, loss of one month from school, inability to walk stairs and inability to partake in events in and out of school.

Defendants, in order to meet their burden on summary judgment, must provide "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).

In making their prima facie showing of entitlement to summary judgment as to plaintiff's

lack of a serious injury, defendants produce the affirmed report of Dr. Howard Baruch (exh. F) , an orthopedist who found normal range of motion in the knees, found plaintiff was able to squat to his toes without difficulty and reported that plaintiff complained only that he has some popping in his left knee on occasion (which apparently did not pop during Dr. Baruch's examination). Dr. Baruch reported that plaintiff was "on regular activity" and could continue his regular activities, and opined that plaintiff had no disability and did not sustain any permanent injury to his left knee as a result of the accident.

Regarding plaintiff's 90/180 claim, defendants point out that plaintiff stated in his deposition that no medical provider ever told him to curtail any of his activities. After the accident, he stayed out of school for about a month, but no doctor told him to stay out of school. (Deposition, page 24, line 25). Almost two months after the accident, plaintiff went to see Dr. Ehrlich, an orthopedic surgeon, who prescribed physical therapy, a leg brace and an MRI to determine the extent of the knee injury, but Dr. Ehrlich never told plaintiff to curtail any of his activities. The MRI showed bruising and a meniscal tear, and by the time plaintiff saw Dr. Ehrlich for a follow-up visit in January, the doctor determined that the knee injury was resolved. A diagnosis of a torn meniscus, without more, is not sufficient to meet the criteria of a serious injury. *McLoud v Reyes*, 82 AD3d 848 (2d Dept 2011).

As there was no medically determined injury which caused a doctor to tell plaintiff to curtail any of his activities, defendants have fulfilled their burden showing that plaintiff's 90/180 claim should be dismissed. As for the claim of permanent consequential limitation, defendant's proof that plaintiff has full range of motion in his left knee and has no restrictions, defendants have fulfilled their initial burden in seeking to dismiss this claim as well.

In opposition, plaintiff fails to raise an issue of fact on either ground. Dr. Ehrlich reexamined plaintiff on March 6, 2013 and reported that plaintiff had no pain or discomfort when walking, running or negotiating stairs. Dr. Ehrlich did, however, find a slight decreased range of motion (130/140 normal, or a 10 degree restriction), crepitus and that the plaintiff reported occasional clicking and popping sounds (apparently, like Dr. Baruch, Dr. Ehrlich did not witness the popping or clicking either). Based on this examination and history, Dr. Ehrlich concludes that there is a "possible left knee chondral injury" and the injuries are permanent. But what is permanent? A 10 degree restriction in range of motion, which in this case is *less than a 10%* restriction? That restriction may be permanent, but it is not "consequential" for Insurance Law purposes. See *Il Chung Lim v Chrabaszcz* 95 AD3d 950 (2nd Dept 2012) (13% restriction was "insignificant"); *McLoud v Reyes*, 82 AD3d 848 (2nd Dept 2011)(12% restriction "insignificant").

Plaintiff has also failed to raise an issue of fact regarding his 90/180 claim. Plaintiff has not shown that his injuries prevented him from performing substantially all of his usual and customary activities for 90 of the first 180 days after the accident. He was a high school senior and, after he stayed out for the month after the accident (when no doctor told him to do so), he returned to school and, perhaps because he was industrious, energetic and intelligent, he graduated on time. It was not his injury, but it was the fact that his school did not have an elevator which resulted in plaintiff missing chess club, video game club or other activities (which were held on a different floor and plaintiff could not climb the stairs with his crutches or leg brace). Certainly, missing gym class does not rise to the level of being prevented from performing "substantially all" his activities. Nor did going to 10 physical therapy sessions during the first 180 days after the accident prevent him from performing substantially all of his usual

and customary activities.

Although there is no doubt that plaintiff experienced pain and was inconvenienced by having to use crutches, a brace and then a cane, plaintiff has not shown that he had a medically determined injury that prevented him from performing substantially all of his usual and customary activities for 90 of the first 180 days after the accident.

Liability

Defendants also move for summary judgment on liability. Plaintiff admits that he stepped out between parked cars in the middle of the block to hail a cab. He was a foot or two past the parked cars when he was hit (plaintiff's deposition, page 17). Apparently, he was so close to defendant's car that he just froze and/or it was too late to retreat back into safety (transcript, p. 16, line 21, also p. 18, lines3-9). The defendant's car was about two car lengths away (transcript, p. 16, lines 17-18). The front middle of defendant's car hit plaintiff's left side (transcript, p. 18, lines 10-17).

As plaintiff stated that the front middle of the car hit him, the defendant obviously hit his brakes; if he did not, then he would have run plaintiff over as opposed to knocking him down. So although plaintiff testified that the car was too close for plaintiff to take a step or two back to retreat to safety, plaintiff's attorney argues that the driver should have been able to avoid the accident and done more than brake. While plaintiff's attorney's advocacy on behalf of his client is admirable, the mere speculation that the driver could have done more is insufficient to defeat summary judgment.

The fact is that plaintiff darted out between parked cars to hail a cab and, when he looked

in the direction of traffic, he froze, thus causing defendant to face an emergency situation not of his own making. "It is pure conjecture to assume that the collision ... would have been prevented [had the defendant spotted plaintiff earlier] and courts have repeatedly rejected, as a basis for imposing liability, speculation concerning possible accident-avoidance measures of a defendant faced with an emergency" *Caban v Vega*, 226 AD2d 109, 111 (1st Dept. 1996). Accordingly, there is no issue of fact for a jury to decide, and defendants are granted summary judgment on liability.

Accordingly, is it

ORDERED that defendants' motion for summary judgment is granted in its entirety, and the action is hereby dismissed.

Dated: New York, New York
August 27, 2013

ENTER:

J.S.C.