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SCANNED ON 10/11/2013

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

Index Number : 104278/2011
STEELE, ROBERTINA
vs.
SANTANA, CASTILLO D.
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

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

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

FILED
OCT 11 2013
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10/3/13

_____, 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

COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 22

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Robertina Steele,

Plaintiff,

-against-

Castillo D. Santana and Jose Aquino,

Defendants.

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Index No.: 104278/11
Motion Seq. 001

Hon. Arlene P. Bluth, JSC

DECISION/ORDER

For the following reasons, 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 § 5102(d) is granted, and the action is dismissed.

In this action, plaintiff alleges that on August 17, 2010 she sustained personal injuries when she was struck by a vehicle driven by defendant Santana and owned by defendant Aquino while she was riding her bicycle. In support of their motion, defendants claim that plaintiff did not sustain a permanent consequential limitation of a body, organ, member, function or system, a significant limitation of use of a body part or system, or a 90/180 curtailment of activities, as required by Insurance Law § 5102(d).

To prevail on a motion for summary judgment, in a serious injury case, the defendant has the initial burden to present competent evidence showing that the plaintiff has not suffered a "serious injury" (*see Santos v Perez*, 107 AD3d 572, 573 [1st Dept 2013]). 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 [2nd 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, 818 [1st Dept 2010], citing *Pommells v Perez*, 4 NY3d 566, 572 [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*, 58 AD3d 434, 435 [1st Dept 2009]). 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 [the 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 organ or body system's use and purpose, or a quantitative assessment that assigns numeric percentage to plaintiff's loss of range of motion (*Perl v Meher,* 18 NY3d 208, 217 [2011], *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350-351 [2002]). However, if either the plaintiff's or defendant's expert relies upon range of motion measurements to establish a limitation, the experts must specify "the objective tests they used to arrive at the measurements" (*Duran v Jeong Hoy*, 89 AD3d 541, 541 [1st Dept 2011]; *see also Simantov v Kipps Taxi, Inc.*, 68 AD3d 661, 661 [1st Dept 2009]; *Lopez v Abdul-Wahab*, 67 AD3d 598, 599 [1st Dept 2009]).

In her verified bill of particulars, plaintiff claims she sustained, inter alia, torn tendons in her

right shoulder which required surgery, cervical disc herniations and a concussion. Additionally, she claims she was confined to bed for three weeks after the accident, confined to home for two months after the accident, and was "incapacitated from employment" for four months (exh D to moving papers).

In support of their motion, defendants submit the affirmed medical reports of Dr. Feuer, a neurologist, who examined plaintiff concluded that plaintiff's neurological exam was within normal limits, and Dr. Baskies, an orthopedist, who examined plaintiff and concluded that any sprains, strains and/or contusions that plaintiff may have incurred as a result of the subject accident were resolved, and that she did not demonstrate any orthopedic disability or permanent impairment. Defendants also submitted the affirmed report of Dr. Berkowitz, a radiologist, who read plaintiff's cervical spine and right shoulder MRI films taken at Alpha Imaging several weeks after the accident. Dr. Berkowitz noted only chronic and degenerative changes in the films of plaintiff's cervical spine and right shoulder, and specifically indicated that she saw no evidence of recent trauma in either area. Finally, defendants assert that plaintiff has not provided any proof that she was incapacitated from work for four months.

Based upon the foregoing, defendants have satisfied their burden of establishing prima facie that plaintiff did not suffer a serious injury. The burden, therefore, shifts to the plaintiff to show that there are factual issues (*Kone v Rodriguez*, 107 AD3d 537, 538 [1st Dept 2013]).

In opposition, plaintiff submits the certified records of plaintiff's visit to the emergency room at North Shore LIJ/Lenox Hill Hospital (exh C) which show that her chief complaints were right leg and right shoulder pain; the record specifically states that she "had no cervical spine trauma" (p. 1).

Plaintiff also submits a certification from Dr. Fleischer that the attached medical records (exh D) are true copies of the billing and medical records in plaintiff's file, yet Dr. Fleischer does not affirm that the statements contained therein are true pursuant to the penalties of perjury. Plaintiff also submits an unsworn statement of a chiropractor, Dr. Fernandez, that the attached billing and medical records are true copies of the plaintiff's file (exh E), and Dr. Hussman's unaffirmed reports of plaintiff's MRIs taken at Alpha Imaging (exh F). Because none of these records is in admissible form, they were not considered by the Court.

The affidavit of Dr. McMahon, the orthopedic surgeon who performed arthroscopic surgery on plaintiff's right shoulder on October 19, 2010 is in admissible form, but it fails to create a triable factual question sufficient to defeat summary judgment. Paragraphs 6 through 67 and 100 through 103 of Dr. McMahon's affidavit summarize the reports of Dr. Fleischer, Dr. Fernandez and the Alpha Imaging MRI reports The affidavit of plaintiff's treating physician which recites the findings in the unaffirmed (and in the case of the chiropractor, unsworn) reports may not properly put the inadmissible reports before the Court. *See Malupa v Oppong*, 106 AD3d 538, 966 NYS2d 9 (1st Dept 2013).

In paragraph 68, Dr. McMahon states that he first examined plaintiff on October 6, 2011; his attached office notes indicate that the date was actually October 6, 2010, and that he subsequently made notes on 10/29/10 and 11/8/12. Paragraphs 75 through 80 are a verbatim repetition of paragraphs 68 through 74; this was apparently not caught when Dr. McMahon reviewed the document before he signed it. Although Dr. McMahon opines that plaintiff's right shoulder surgery was proximately caused by the subject accident (para. 86), he does not address Dr. Berkowitz's finding in her affirmed report that plaintiff had chronic and degenerative changes in her right

shoulder. Instead, he simply states that he visualized a tear in plaintiff's supraspinatus and subscapularis tendon, that there was inflamed bursal tissue as well as fibrotic material and inflamed synovial tissue, that his diagnosis was tendon tear with impingement, bursitis, synovitis and fibrosis (paras. 87-88). Accordingly, because Dr. McMahon has not set forth a basis for his conclusion that plaintiff's conditions were caused by the subject accident, his affidavit is conclusory and fails to raise a triable factual question. *See Soho v Konate*, 85 AD3d 522, 523, 925 NYS2d 456, 457 (1st Dept 2011).

Dr. McMahon states that on October 29, 2012 "post operatively", he re-examined plaintiff, and found significant range of motion restrictions in her right shoulder which show her restrictions are permanent (para. 89-91). However, in the very next paragraph (92), he states that on October 29, ***2010*** he recorded that plaintiff felt pain in her shoulder. There are notes of a 10/29/10 visit attached to his affidavit, but not of a 10/29/12 visit; thus Dr. McMahon stated the date incorrectly in paragraphs 89 and 90. This also means that Dr. McMahon declared plaintiff's shoulder injury permanent based on range of motion testing performed only 10 days after the surgery.

As for Dr. McMahon's report of his most recent exam of plaintiff on November 8, 2012, he noted limitations of only 5-15 degrees on plaintiff's cervical spine; this is not compares to normal so the percentage cannot be ascertained.

Finally, in her bill of particulars, plaintiff claims that she sustained, inter alia, torn tendons in her right shoulder, cervical disc herniations and a concussion. Nevertheless, Dr. McMahon refers to permanent injuries of plaintiff's ***left*** shoulder and cervical and lumbar spine in para. 99, and that "he" sustained injuries to her right shoulder, cervical ***and lumbar spine, and right hand*** in paras. 100-101.

It is not up to this Court to assume that the numerous and significant errors in Dr. McMahon's affidavit are simply typographical; it is just as likely that all or portions of his report, including the range of motion measurements, are in error too.

In summary, plaintiff has not come forward with any proof in her opposition that she was directed by a doctor not to return to work for four months after the accident, and has failed to present evidence in admissible form to raise an issue of fact as to her alleged serious injury.

In accordance with the foregoing, it is

ORDERED that defendants' motion for summary judgment dismissing this action is granted, and the case is hereby dismissed.

This is the Decision and Order of the Court.

Dated: New York, NY
October 3, 2013

Hon. ARLENE P. BLUTH, JSC