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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH Justice

PART 22

Index Number : 110519/2007
ZBOROVSKY, JULIA
VS.
VOIN TAXI
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 serious injury mtn

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER

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

Dated: 10/8/13

_____, 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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Julia Zborovsky,

Plaintiff,

-against-

Voin Taxi, Inc. and Tales Jamal Hossain,

Defendants.

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Motion Seq 01

Index No. 110519/07

DECISION AND ORDER

Hon. ARLENE P. BLUTH, JSC

Defendants' motion for summary judgment dismissing the complaint on the grounds that plaintiff has not demonstrated that her injuries meet the serious injury threshold pursuant to Insurance Law § 5102(d) is denied.

Plaintiff, a pedestrian crossing 6th Avenue, was hit by defendants on June 20, 2006. In her verified bill of particulars, plaintiff claims various injuries to her cervical, lumbar and thoracic spine, injuries to both legs and knees, both elbows and right wrist and hand and miscellaneous other injuries including anxiousness, nervousness and tension. She also claims a 90/180 injury (para. 15), although the specifics are unclear in her bill of particulars; response 9 seems to be addressing unspecified demands relating to confinement and 90/180.

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]).

Defendants' Showing

In support of their motions, defendants annex two affirmed medical reports; both are affirmed to be true under penalty of perjury. The first is from a neurologist, Daniel J. Feuer, MD. He conducted an IME of plaintiff and made his report on January 30, 2012; he concluded that the examination was normal and that plaintiff had no neurological disability or permanency. He did note slight reduced range of motion in the lumbar spine (flexion 50/60 and right and left lateral flexion 20/25) and specifically found that "the subjective tenderness in the lower back" did not appear to be neurological in origin.

The second report was affirmed under penalty of perjury on December 9, 2011 by Igor Rubinshteyn, MD, an orthopedic surgeon. He reports that plaintiff stopped treatment in 2008. His examination of range of motion in plaintiff's elbows, hips, knees and ankles were all normal. The thoracic spine was normal. Although there were deficits found in plaintiff's cervical spine (flexion 40/45, extension 35/45, right and left lateral flexion 40/45), these are not significant. With respect to plaintiff's lumbar spine range of motion, a significant deficit was found: flexion 50/90; the other deficits were not significant (extension 25/30, right and left lateral bending 25/30). Dr. Rubinshteyn diagnosed resolved strains and sprains. He concluded that there was suboptimal effort and no objective findings, no evidence of permanent injury and no disability.

As for any 90/180 claim, it is difficult for this Court to ascertain plaintiff's claims. The demand is not repeated in the bill, and the defendant does not provide the demand

to the Court. Therefore, all the Court sees is, in response to the unknown demand #9, the following: "(a) no significant confinement; (b) approximately three to five weeks, non-consecutively; (c) approximately three to five weeks, non-consecutively; (d) confined to Bellevue Hospital for one day; (e) approximately three weeks (f) since the accident to present." The only thing defendants' counsel states in his affirmation about a 90/180 claim is the completely unsupported conclusion that "Plaintiff missed only one to one and one-half months of work as a result of her injuries" (aff., para. 34). However, evidence is only the question and answer in context, and the demands/questions were not provided to the Court. Without knowing the questions/demands, the bill refers to thirteen weeks and something from the date of the accident to the present. Nor is this glaring omission of not providing the demands/questions addressed in the reply. (The Court notes that the opposition papers provide plaintiff's deposition transcript and defendant never refers to it in the reply, either).

Because defendants' moving papers do not sufficiently present plaintiff's 90/180 claim, they do not address or challenge this plaintiff's 90/180-day claim either. Therefore, defendants failed to meet their burden on this claim. *See Silverman v MTA Bus Co.*, 101 AD3d 515, 517, 955 NYS2d 597, 598 (1st Dept 2012) (defendants failed to meet their prima facie burden as to plaintiff's 90/180–day claim, since the bill of particulars alleged that plaintiff was confined to home for four months and they did not submit evidence contradicting her claimed disability during that period).

Because defendants have not made a prima facie showing of entitlement to summary judgment, the burden never shifted to plaintiff to rebut defendants' showing

and it is unnecessary to consider the sufficiency of plaintiff's evidence in opposition *(see Calcano v Rodriguez,* 103 AD2d 490, 962 NYS2d 37 [1st Dept 2013]).

Accordingly, it is ORDERED that 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: October 8, 2013
New York, New York

HON. ARLENE P. BLUTH, JSC