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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 : 112979/2011
RANDOLPH, TASHANA
vs.
RODRIGUEZ, MARY
SEQUENCE NUMBER : 002
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 and cross-motion **No(s).** 1
Answering Affidavits — Exhibits Notice of x-motion **No(s).** 2
Replying Affidavits **No(s).** 3

Upon the foregoing papers, it is ordered that this motion and cross-motion

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER

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

Dated: 10/15/13

ARLENE P. BLUTH
J.S.C.
_____, 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: IAS PART 22

---------- X

TASHANA RANDOLPH,

Plaintiff,

Index No. 112979/11

- against-

MARY RODRIGUEZ and ARIELLE M. SENQUIZ, Mot. Seq. 002

Defendants.

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ARLENE P. BLUTH, J.:

This is an action to recover damages for personal injuries suffered by plaintiff Tashana Randolph when she was a seat-belted passenger in a vehicle stopped at a red light, which was struck in the rear by a vehicle owned by Mary Rodriguez and driven by Arielle Senquiz on August 2, 2011. Randolph was taken by ambulance from the scene to the hospital, where she was treated and released.

The plaintiff moves for an order granting summary judgment as to liability. The defendants cross-move to dismiss for lack of serious injury. For the reasons that follow, the motion is granted and the cross-motion is denied.

Liability

In support of her motion for summary judgment, Randolph argues that a rear-end collision with a stopped vehicle creates a prima facie case of liability on the part of the operator of the rear vehicle. In opposition to Randolph's motion for summary judgment on liability, Senquiz alleges

that despite applying the brakes, the vehicle would only slow down, and would not come to a complete stop. In support of their cross motion, the defendants argue that Randolph fails to meet the serious injury threshold required by Insurance Law § 5102 (d).

It is well settled that a rear-end collision with a stopped vehicle creates a presumption that the operator of the moving vehicle was negligent (*Corrigan v Porter Cab Corp.*, 101 AD3d 471, 955 NYS2d 336 [1st Dept 2012], *Agramonte v City of New York*, 288 AD2d 75, 732 NYS2d 414 [1st Dept 2001]). As there is no doubt that plaintiff's stopped vehicle was rear-ended by defendant, the burden shifts to defendants to establish an adequate non-negligent explanation for the collision (*Johnson v Phillips*, 261 AD2d 269, 271 [1st Dept 1999]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to raise a triable issue of fact (*Alvord & Swift v Muller Constr. Corp.*, 46 NY2d 276, 281-282 [1978]).

Senquiz testified at her deposition that she saw plaintiff's stopped car at least a full block away, that she applied her brakes, but that her car would not stop. "Where, as here, ... defendant intend[s] 'to lay the blame for the accident on brake failure, it [is] incumbent upon [her] to show that the problem with the brakes was unanticipated, and that [she] had exercised reasonable care to keep them in good working order' " (*Suitor v. Boivin*, 219 AD2d 799, 800, 631 NYS2d 960; *Hubert v. Tripaldi*, 307 AD2d 692, 694, 763 NYS2d 165; *Schuster v. Amboy Bus Co.*, 267 AD2d 448, 448–449, 700 NYS2d 484). No such evidence is offered by either of the defendants here - not the owner nor the driver. No one submits a mechanic's report, repair bill or any evidence - admissible or otherwise - to substantiate a claim of brake failure. Conclusory testimony that the

brakes failed for an entire block, without the driver even attempting to use the emergency brake for that entire block, does not raise a triable issue of fact and does not rebut the presumption of negligence of the rear driver.[1]

Serious Injury

Turning to the threshold issue of serious injury, defendants' cross motion for summary judgment dismissing this action on the ground that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5012 (d) is granted in part, and denied in part.

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 [1st Dept 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 [2d Dept 2000]). 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

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[1] Senquiz also testified that after the accident, she got back into the car with her two passengers and drove that same car home. Who would get back into that car if the brakes had just failed for an entire block? Nobody.

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 then demonstrate a triable issue of fact as to whether he 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 qualitative 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]).

In the verified bill of particulars (exhibit D to cross motion, ¶ 13), plaintiff claims both a biceps tear and a labrum tear requiring arthroscopic surgery. In addition, she claims a lumbar disc herniation at L4-5, lumbar radiculopathy at L4-L5, and lumbar myofascial pain syndrome/muscle spasms. She also claims reduced range of motion, pain, tenderness, presence of a Hawkins sign, clicking, and weakness. She also makes a 90/180 day claim (exhibit D to cross motion, ¶ 13-14).

Defendants' showing

Defendants make a prima facie showing that Randolph did not sustain a permanent consequential or significant limitation to her spine and left shoulder, by offering the affirmed report dated June 26, 2012, of defendants' neurologist Dr. Marianna Golden who notes normal ranges of motion in Randolph's spine and no neurologic disability or impairment. Defendants also offer the affirmed report dated July 2, 2012, of their orthopedist, Dr. Lisa Nason, who found normal ranges

of motion in Randolph's spine, hip and shoulder and diagnosed resolved strains, sprains and contusions. Defendants also offer the affirmed report dated August 2, 2012, of their radiologist Dr. Audrey Eisenstadt who reviewed the MRI scan of the left shoulder done on October 4, 2011 (two months after the accident); she found no evidence of trauma and no abnormality. Additionally, defendants met their initial burden with respect to plaintiff's 90/180-day claim by submitting plaintiff's testimony that she returned to full time work three days after the accident and that her daily activities were not significantly impaired by her alleged injuries.

Plaintiff's showing

In opposition, Randolph raises an issue of fact with respect to her claimed lumbar and cervical spinal injury, and her left shoulder injury, by submitting the affirmed report of her treating physician, Dr. Joyce Goldenberg. Plaintiff treated with Dr. Goldenberg from eight days after the accident for three months, until November 2011, when she was discharged because Dr. Goldenberg determined she had reached maximum medical improvement. When Dr. Goldenberg re-evaluated plaintiff she found, on October 26, 2012, continuing significant deficits in range of motion, which she concluded were caused by the accident. Dr. Goldenberg noted reduced range of motion in the neck ranging from 18-30% and in the lumbar spine from 22-56% and opines that plaintiff has limited use of the injured areas that prevent her from performing her activities of daily living and that the loss of mobility and pain are permanent and causally related to the subject accident.

Conclusion

The affirmation of plaintiff's treating physician, Dr. Goldenberg, presents issues of fact and contradicts defendants' IME doctors. Dr. Goldenberg affirmed that plaintiff suffers from continuing, quantified range of motion limitations, and permanency; this provides the requisite proof of limitations (*Pietropinto v Benjamin*, 104 AD3d 617, 617-618 [1st Dept 2013]). It is up to the jurors, not this Court, to evaluate the medical testimony and determine who and how much to believe.

However, plaintiff failed to raise an issue of fact as to whether her claimed injuries prevented her from "performing substantially all of the material acts which constitute[d his] usual and customary daily activities" (Insurance Law § 5102 [d]; *Merrick v Lopez-Garcia*, 100 AD3d 456, 457 [1st Dept 2012]). Randolph's testimony that she was briefly confined to home, but returned to work as a café manager, defeats her 90/180-day claim (*Martin v Portexit Corp.*, 98 AD3d 63, 68 [1st Dept 2012]). Although Randolph claims interference with her quality of life, that Randolph was able to return to work, albeit on a limited basis, requires dismissal of her 90/180-day claim (*Thomas v City of New York*, 99 AD3d 580, 582 [1st Dept 2012]). Therefore, defendants are granted partial summary judgment dismissing plaintiff's 90/180-day claim (*Colon v Torres*, 106 AD3d 458, 965 NYS2d 90 [1st Dept 2013], *Martin v Portexit Corp.*, 98 AD3d 63 [1st Dept 2012]).

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment on liability is granted, as defendants did not rebut plaintiff's prima facie showing; and it is further

ORDERED that defendants' cross-motion for summary judgment on the issue of serious injury is granted only to the extent that defendants are granted partial summary judgment dismissing plaintiff's 90/180-day claim and is otherwise denied.

This is the decision and order of the court.

Dated: New York, New York
October 15 2013

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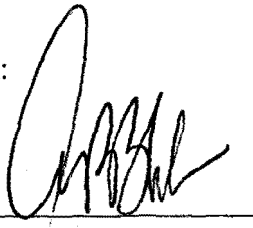

Arlene P. Bluth, J.S.C.