[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH
Justice

PART 22

Jacqueline M. Balfour et al.
-v-
Elise Tran Inc et al

INDEX NO. 111013/10

MOTION DATE

MOTION SEQ. NO. 02

The following papers, numbered 1 to _____, were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

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

decided in accordance with accompanying decision/order

FILED
DEC 20 2013
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 12/17/13

Arlene P. Bluth, 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

[* 2]

SUPREME COURT OF THE STATE OF NY
COUNTY OF NEW YORK: PART 22

Index No.: 111013/10
Motion Seq 02

Jacqueline M. Balfour and Marc Balfour,

Plaintiffs,

-against-

Elise Trans Inc., Gaston Sanchez and "John Doe". Owner of the medallion of the taxicab operated by Gaston Sanchez,

Defendants.

DECISION/ORDER

HON. ARLENE P. BLUTH, JSC

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 granted, and the action is dismissed.

In this action, plaintiff Jacqueline Balfour alleges that on October 3, 2008 she sustained personal injuries when she was struck by defendants' vehicle when she crossed the street at East 55th Street and Second Avenue. Plaintiff Marc Balfour asserts a derivative claim.

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]).

In her verified bill of particulars, plaintiff claims various injuries including a left shoulder tear with an April 7, 2010 surgical repair and cervical sprain (exh B to moving papers, para. 6), and a 90/180 claim. On September 7, 2011 plaintiff underwent right shoulder arthroscopic repair.

In support of their motion, defendants submit the affirmed reports of Dr. Lang, a

neuroradiologist (exh C) who read a 9/21/10 x-ray of plaintiff's cervical spine and a 2/11/2009 MRI of plaintiff's left shoulder and stated that these films showed only chronic and degenerative changes in both areas which not related to the subject accident.

Defendants also submit the affirmed report of their orthopedic surgeon Dr. Crystal (exh D) who examined plaintiff in August 2011 and found that she had range of motion limitations in her left shoulder which he attributed to degeneration and not this accident. Dr. Crystal found normal range of motion in plaintiff's cervical spine. In his report, Dr Crystal photocopied portions of the October 3, 2008 emergency room record from New York-Presbyterian and noted that plaintiff complained only of pain to her right lower calf and made no shoulder complaints (pgs. 4-5,7). He also photocopied notes of plaintiff's office visit to Dr. Wahib on October 6, 2008 and pointed out that plaintiff did not make any shoulder complaints (p. 8) and that a December 2, 2008 x-ray of plaintiff's left shoulder that was "unremarkable", and a December 2, 2008 MRI was "limited by patient motion artifact" (p. 8). Included in Dr. Crystal's report are the September 15, 2009 office notes of Dr. Rosen (almost a year after the accident) wherein Dr. Rosen noted that plaintiff "has had some symptoms in the shoulder for many years" (p. 10) and made a diagnosis of "chronic impingement syndrome" (p. 10). Finally, Dr. Crystal included Dr. Rosen's April 7, 2010 operative report and several post-operative reports, and pointed out that Dr. Rosen wrote that plaintiff reported a "new complaint of right shoulder pain" on December 30, 2010, which was more than two years after the accident. Dr. Crystal, relying on these records and his examination of plaintiff (cervical spine had normal ranges of motion) concluded that plaintiff's alleged injuries were not causally related to the subject accident.

Additionally, defendants met their initial burden with respect to plaintiff's 90/180-day

claim by referring to the bill of particulars wherein plaintiff indicated that her confinement consisted of "partial days at home" from October 3, 2008 until an unspecified date in December 2008, which do not meet the statutory standard.

Based on the foregoing, defendants have satisfied their burden of establishing prima facie that plaintiff did not suffer a serious injury, and the burden shifts to plaintiff to raise a triable factual question as to whether she sustained a serious injury.

In opposition, plaintiff submits exhibits A through J. The Court finds that only exhibits B and J are admissible, but they do not raise a triable question of fact sufficient to defeat this motion.

Exhibit A is an uncertified copy of the police accident report which is inadmissible hearsay. *See Rosario v Vasquez*, 93 AD3d 509, 940 NYS2d 249 (1st Dept 2012). Even if this report had been certified, it would not be relevant to the show the extent of plaintiff's injuries.

Exhibit B are the uncertified New York Presbyterian Hospital emergency room records. Because Dr. Crystal, defendants' doctor, relied on these records, the Court will consider them even though they were not certified. Although plaintiff's counsel states that plaintiff was taken there by ambulance after the accident (aff. in opp., para. 3), counsel does not cite to a single notation in plaintiff's emergency room chart which indicates that plaintiff that complained of, or was treated for, a shoulder or cervical injury. The Court's review of these records show that plaintiff complained about her right lower left (calf) and x-rays were taken of her right knee and 2 views of the tibia and fibula on the right.

Exhibit C are the unaffirmed records of Yaffe, Ruden & Associates, a physical therapy group, which were not considered but the Court. Although Dr. Ruden is apparently a physician,

he did not submit an affirmation in connection with these records; nor did any other physician. Exhibit D is a narrative report from Elisabeth Frank DPT and exhibit E are her treatment records from 5/4/09 to 1/11/11. Neither exhibit is admissible because CPLR Rule 2106 permits only attorneys and physicians, osteopaths and dentists who are authorized to practice in the state and not a party to the action to affirm. Ms. Frank is not a physician, and her unsworn statement that she "duly licensed to practice physical therapy in the State of New York and I hereby swear under penalties of perjury" does not transform her statement into either an affidavit or affirmation; therefore, it is not admissible.

Exhibit F is plaintiff's file from Empire State Orthopaedics. While there is a certification from Ms. Ramos, identified only as a "supervisor" in which she states that the exhibit contains true and exact copies of Empire's records, these records are not admissible because none of the reports is affirmed. Only hospital records, and not physician office records, are admissible by certification (*see Bronstein-Becher v Becher,* 25 AD3d 796, 809 NYS2d 140 [2d Dept 2006]). Similarly, exhibit G, plaintiff's file from the Center for Specialty Care, Inc. (with a certification from its Medical Record Director), exhibit H, plaintiff's file from Midtown Surgery Center (right shoulder surgery) (with a certification from its Patient Coordinator) and exhibit I, plaintiff's file from Lenox Hill Radiology (with a certification of an individual titled "Medical Records") is inadmissable.

Exhibit J is the affirmed narrative report of Dr. Rosen dated January 17, 2013. In his history, Dr. Rosen states that on September 15, 2009 plaintiff first presented with a chief complaint of left greater than right shoulder pain. The subject motor vehicle accident occurred on October 3, 2008, approximately one year earlier. Therefore, plaintiff has not presented, in

admissible form, a scintilla of evidence that she made a complaint or sought medical treatment in connection with her alleged shoulder or cervical injury until almost one year after the subject accident. "Absent admissible contemporaneous evidence of alleged limitations, plaintiff cannot raise an inference that his injuries were caused by the accident", *Shu Chi Lam v Wang Dong*, 84 AD3d 515, 922 NYS2d 381 (1st Dept 2011). *See* also *Soho v Konate,* 85 AD3d 522, 523, 925 NYS2d 456, 457 (1st Dept 2011) (plaintiff must show contemporaneous limitations as a result of the accident even where plaintiff has undergone surgery; five months after accident is too long), *Cabrera v Gilpin*, 72 AD3d 552, 899 NYS2d 211 (1st Dept 2010) (six months is too long); *Toulson v Young Han Pae*, 13 AD3d 317, 788 NYS2d 334 (1st Dept 2004) (five months is too long). An initial consultation almost one year after the accident is not contemporaneous.

In *Rosa v Mejia,* 95 AD3d 402 (1st Dept 2012), a case where the plaintiff did not present any admissible proof that she was evaluated for the injuries which she tried to attribute to the accident until five months after the accident, the Court found plaintiff did not prove causation. The Court held:

> The recent Court of Appeals decision in Perl v Meher (18 NY3d 208 [2011]) does not require a different result. Perl did not abrogate the need for at least a qualitative assessment of injuries soon after an accident (see Salman v Rosario, 87 AD3d 482, 484 [2011]). In fact, the Court noted with approval the comment in a legal article that "a contemporaneous doctor's report is important to proof of causation; an examination by a doctor years later cannot reliably connect the symptoms with the accident. But where causation is proved, it is not unreasonable to measure the severity of the injuries at a later time" (18 NY3d at 217-218).

Because plaintiff has failed to provide any admissible, contemporaneous evidence of limitation, Dr. Rosen's statement that "in his opinion (the right and left shoulder) injuries matches the mode of injury described by the [plaintiff], that of a pedestrian being struck" (exh J, p. 2) is speculative and insufficient to defeat defendants' motion.

p. 2) is speculative and insufficient to defeat defendants' motion.

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 granted, and the case is dismissed.

This is the Decision and Order of the Court.

Dated: December 17, 2013
New York, New York

HON. ARLENE P. BLUTH, JSC