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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 : 100796/2012
HIRALDO, HERIBERTO
vs.
NUNEZ, JEFFREY
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 - 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, 4

Surreply

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

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION/ORDER

FILED
DEC 27 2013
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 12/23/13

_____, 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 NY
COUNTY OF NEW YORK: PART 22
HERIBERTO HIRALDO

Plaintiff,

-against-

JEFFREY NUNEZ & IRIS RAMIREZ

Defendants.

Index No.:100796/2012
Motion Seq. 002

DECISION/ORDER

HON. ARLENE P. BLUTH, JSC

Defendants' 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 this action, plaintiff alleges that on August 31, 2010 he sustained personal injuries when, while operating a motor vehicle, he collided with a vehicle operated by defendant Iris Ramirez and owned by defendant Jeffrey Nunez. Due to this collision, plaintiff hit his face on the deployed air bag and his back on the seat. Plaintiff continues to complain of pain in his lower back and claims disabilities as serious personal injuries within the meaning of Insurance Law Section 5012 (d). Defendants deny that plaintiff's injuries are sufficiently serious to bring him within the ambit of Insurance Law Section 5012 (d), and move for summary judgment of dismissal pursuant to CPLR 3212.

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 [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 [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*, 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 [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 motion, defendants submit the affirmed report of Dr. P. Leo Varriale, M.D. Dr. Varriale conducted an orthopedic examination of plaintiff on October 16, 2012; he also reviewed CT scans of plaintiff's lumbar spine taken on October 3, 2012 and on November 17, 2010. He further reviewed a CT scan of the cervical spine taken on September 23, 2010, an x-ray report on the said cervical spine taken September 7, 2010, range of motion examinations done on September 1, October 21, November 11 and December 22 in 2010, and office visit and hospital notes concerning plaintiff since the date of his accident. In his examination of plaintiff, Dr. Varriale conducted a range of motion test by goniometer and found that the cervical spine, lumbar spine, shoulder, elbows, wrists, hips, knees, ankles and feet were all within normal range. Dr. Varriale concluded that plaintiff was not disabled in any way, and that plaintiff could perform all the activities of daily living, including work, without restrictions.

Defendants requested a radiologist to examine the CT studies of the plaintiff's lumbar spine taken on November 17, 2010. This examination was performed on October 3, 2012 by Dr. Stephen W. Lastig, a radiologist, who submitted an affirmed report in which he could find no evidence of any fracture or other injury to the plaintiff's back in said studies.

A third report, dated and affirmed on August 20, 2012, was submitted by neurologist Dr. Daniel J. Feuer. After examining plaintiff, Dr. Feuer determined that plaintiff had no neurological disability or neurological permanency, and was fit to engage in his customary employment as a doorman.

Based on the foregoing reports of a neurologist, orthopedist and radiologist, defendants

made a prima facie showing that the plaintiff did not sustain a permanent consequential or significant limitation to his back.

Plaintiff's opposition

In opposition, plaintiff sought to raise an issue of fact with respect to his claimed back injury by submitting the affirmed report of Dr. Arkadiy Shusterman, dated April 8, 2013 concerning a examination conducted on April 3, 2013. Dr. Shusterman performed a goniometer test of plaintiff's range of motion of his lumbosacral spine and found deficits ranging from 25% to 50%. Relying on previous medical reports submitted by Dr. Varriale and Dr. Lastig, Dr. Shusterman finds himself in disagreement with their conclusions, and opines that plaintiff has a permanent and significant loss of the use of a body part causally related to the automobile collision on August 31, 2010.

Dr. Shusterman recites his review of records of the previous report, follow-up report, range of motion testing and MRI and CT Scans. The Court has reviewed the medical records of exams taken in closer proximity to the plaintiff's injuries than Dr. Shusterman's involvement. The report by radiologist Dr. Steven Brownstein, M.D. of an exam taken on November 17, 2010 is not affirmed within the requirements of CPLR 2106 and therefore cannot be considered as evidence. A similar lack of affirmation detracts from the electrodiagnostic report, for a test administered on October 11, 2010. Nor is there a signature annexed to the affirmation of Dr. Alex Veder who authored a "Final Narrative" of plaintiff's condition dated September 6, 2011. In *Bycinthe v Kombos*, (29 AD3d 845, 846 [2nd Dept 2006]), the court held that the affirmation of plaintiff's examining physician— in this case, Dr. Shusterman—was of no probative value where

the said physician "relied on the unsworn and un-affirmed medical reports of others in coming to his conclusions [citations omitted]" (*id.*).

Even when a plaintiff's treating physician recites the findings in the unaffirmed reports, that affirmation may not be used to "bootstrap[]" the unaffirmed and inadmissible reports (see *Malupa v Oppong*, 106 AD3d 538, __ NYS2d __ [1st Dept 2013]). Dr. Shusterman was not even plaintiff's treating physician and his examination was almost three years after the accident. As such, Dr. Shusterman's "opinions as to causation, permanence and significance [are] properly rejected as conclusory, speculative and seemingly tailored to meet the statutory definition [citation omitted]" (*St. Rose v Care Bus Ltd.*, 12 Misc 3d 138 (A) [App Term 1st Dept 2006]). (see also *Bycinthe v Kombos, supra*; *Merrick v Lopez–Garcia*, 100 AD3d 456,457 [1st Dept 2012]). Dr. Shusterman's affirmation is therefore without probative value.

Based upon the sur-reply affirmation of Andrea E. Ferrucci, in support of the instant motion, and a copy of a letter dated July 22, 2013 from defendants' counsel to the court, it appears that after serving the opposition and receiving the reply, plaintiff submitted a corrected copy of the "Final Narrative" of Dr. Veder (exhibit C to opposition) with the said physician's signature added between the "Sincerely" and the printed rendition of his name at the end of the "Final Narrative." This is unpersuasive as a cure for the earlier unsigned and inadmissible submission of the "Final Narrative" for several reasons. First, no permission was ever sought to do so, and it would be highly prejudicial to allow litigants to correct papers after the adversary points out defects. Second, this purported correction is deficient; there is no indication as to when the signature was affixed and whether or not Dr. Veder remembered the content of what he was signing, or would have chosen to modify some of the content, or would have reiterated his

full support of the content. A cure would require a separate affirmation with a current date, reciting Veder's recollection of the document and its contents, or the refreshing of his recollection, and his continued support of all the contents thereof, not merely affixing a signature stamp to the already-submitted original document.

Third, the plain fact is that even if Dr. Veder's report was initially properly affirmed, it still would not have been sufficient to create an issue of fact because it was not made upon personal knowledge. Plaintiff went to Avicenna Medical P.C. facility and, although Dr. Veder's report is on their letterhead, he states that plaintiff "came to our office" but Dr. Veder does not claim to have ever examined the patient. It is clear from his report - signed or not - that he is merely cutting-and-pasting various items from some file, and not doing such a good job of it. For example, on the top of page five, of the report states "since his initial visits to all the physicians mentioned above..." yet not a single physician is mentioned. The words "patient was examined" is used; never "I examined the patient". On page six he states "after discussing current treatment with this patient and all treating physicians, it is our opinion... it has been determined" and not "I discussed" and "I determined".

While an expert may base her opinions upon various medical records, plaintiff is not offering Dr. Veder as an expert. And while a treating doctor may rely on other doctors' reports in the treatment, Dr. Veder does not refer to other doctors' reports. A treating physician, which plaintiff claims is Dr. Veder's status, must have personal knowledge about which he or she affirms, and nothing in Dr. Veder's report reflects any personal knowledge about anything except reading the file. Therefore, Dr. Veder's report, affirmed or not, is of no probative value.

Accordingly, plaintiff has not raised a triable issue of fact to contradict defendants' prima

facie showing.

Therefore, it is

ORDERED that defendants' 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 and the complaint is dismissed.

This is the Decision and Order of the Court.

Dated: December 23, 2013
New York, New York

ARLENE P. BLUTH, JSC