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| <b>Awunyo-Akaba v Waugh</b>  |
| 2014 NY Slip Op 33322(U)   |
| December 22, 2014  |
| Supreme Court, Bronx County  |
| Docket Number: 310122/2011   |
| Judge: Lucindo Suarez  |
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SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF BRONX: I.A.S. PART 19

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 SENANU AWUNYO-AKABA and MATILDA  
 AWUNYO-AKABA,

DECISION AND ORDER

Plaintiffs,

Index No. 310122/2011

- against -

HAMLET WAUGH,

Defendant.

-----X  
 PRESENT: Hon. Lucindo Suarez

Upon defendant's notice of motion dated December 17, 2013 and the affirmation, affirmed reports and exhibits submitted in support thereof; plaintiffs' affirmation in opposition dated July 2, 2014 and the affirmation, affidavit and exhibits annexed thereto; defendant's reply affirmation dated July 9, 2014; the stipulation of discontinuance filed February 5, 2014; and due deliberation; the court finds:

In this action arising out of a June 11, 2011 motor vehicle accident, defendant moves pursuant to CPLR 3212 for summary judgment dismissing the complaint of plaintiff Matilda Awunyo-Akaba on the ground that she did not sustain a "serious injury," as the phrase is defined in Insurance Law § 5102. Plaintiff alleges in her verified bill of particulars to have suffered sprains to her spine and a disc bulge at L5-S1. She underwent surgery on her right knee for internal derangement, Grade 1 chondromalacia, and joint effusion. She was confined to her bed for two days following the accident and intermittently thereafter. She claims her injuries fall within the categories of significant disfigurement; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; and a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such

person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment ("90/180"). Plaintiff Senanu Awunyo-Akaba has since discontinued his action with prejudice in a stipulation filed February 5, 2014.

Submitted on the motion are the affirmed reports of Michael J. Carciente, M.D., John H. Buckner, M.D., and Stanley Sprecher, M.D. Dr. Carciente found no evidence to support a claim for radiculopathy and no evidence of an ongoing neurological injury, disability or permanency from his September 10, 2013 examination of plaintiff. He reported a normal neurologic examination. Dr. Buckner found full, normal, and symmetric ranges of motion in plaintiff's upper and lower extremities during his orthopedic evaluation of plaintiff performed September 16, 2013. All additional objective tests yielded negative results. Based on his review of the records, plaintiff's right knee surgery was unrelated to the accident. Plaintiff told both Drs. Carciente and Buckner that she no longer suffered any pain in her neck or back. Dr. Sprechner reviewed the MRIs taken within one month of the accident. He reported that the posterior horn of the medial meniscus and the lateral meniscus were intact and normal and found no evidence of any structural post-traumatic abnormalities in the right knee MRI. The lumbar spine MRI was a normal study.

Plaintiff deposition testimony reveals that she was employed as a clinical medical technologist at Montefiore Medical Center. She missed one day from work and a few days after undergoing knee surgery. She was placed on light duty but has since resumed performing her regular work activities. She denied suffering prior or post-accident injuries to her neck, back or right knee.

Defendant has demonstrated that plaintiff did not suffer a serious injury within the meaning of the Insurance Law. *See Long v. Taida Orchids, Inc.*, 117 A.D.3d 624, 986 N.Y.S.2d 469 (1st Dep't 2014). The burden having shifted, plaintiff submits her affidavit, an affirmation from treating orthopedist Mehran Manouel, M.D. and his treatment records, and records from U-Heights Medical P.C., Excel Imaging P.C., Hillside Surgical Care, Morris Park Medical Care P.C., and Core Rehab

P.T.P.C. Although the records are not certified or affirmed, they are not the sole basis of plaintiff's opposition. *See Pietropinto v. Benjamin*, 104 A.D.3d 617, 961 N.Y.S.2d 461 (1st Dep't 2013). In addition, Dr. Buckner reviewed and commented on several of those records in his report.

The court finds that plaintiff has raised a triable issue of fact concerning her right knee. *See Vargas v. Moses Taxi, Inc.*, 117 A.D.3d 560, 986 N.Y.S.2d 84 (1st Dep't 2014). Although Dr. Manouel first examined plaintiff over three months after the accident, the objective evidence of injury as described by Dr. Manouel who related the right knee injury to the accident is sufficient. *See McSweeney v. Sang H. Cho*, 115 A.D.3d 572, 983 N.Y.S.2d 503 (1st Dep't 2014); *Salman v. Rosario*, 87 A.D.3d 482, 928 N.Y.S.2d 531 (1st Dep't 2011). Dr. Manouel reported finding range of motion limitations, a positive McMurray test and pain to palpation of the joint line during his first examination. He also found range of motion deficits for the right knee in two examinations post-surgery and at a more recent examination. Dr. Manouel personally reviewed plaintiff's right knee MRI film and found no evidence of degenerative changes on the MRI or during surgery. Plaintiff was also asymptomatic prior to the accident. He opined that the further deterioration of chondromalacia in the right knee would require plaintiff to take medication and attend therapy. plaintiff has raised an issue of fact concerning her right knee, the court need not address whether her other claimed injuries meet the serious injury threshold. *See Lee v. Cornell Univ.*, 112 A.D.3d 466, 976 N.Y.S.2d 85 (1st Dep't 2013).

Plaintiff, though, did not allege an injury in the nature of a permanent scar in her verified bill of particulars, *see Perez v. Vasquez*, 71 A.D.3d 531, 897 N.Y.S.2d 412 (1st Dep't 2010), and her deposition testimony refutes the 90/180 claim. *See Valdez v. Benjamin*, 101 A.D.3d 622, 957 N.Y.S.2d 325 (1st Dep't 2012).

Accordingly, it is

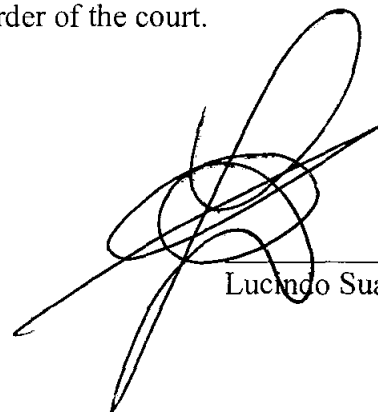
ORDERED, that defendant's motion for summary judgment dismissing the complaint of plaintiff Matilda Awunyo-Akaba is granted to the extent of dismissing plaintiff's claim of serious injury

in the categories of significant disfigurement and a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment; and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of Hamlet Waugh dismissing the serious injury claims of plaintiff Matilda Awunyo-Akaba in the categories of significant disfigurement and a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

This constitutes the decision and order of the court.

Dated: July 14, 2014

A handwritten signature in black ink, appearing to read 'Lucindo Suarez', is written over a horizontal line. The signature is highly stylized and cursive.

Lucindo Suarez, J.S.C.