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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 : 109297/2011
SCHNURMAN, JUDITH
vs.
DIALLO, OUSMANE
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 3, were read on this motion to/for SJ

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

FILED
FEB 10 2014
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 2/5/14

_____, J.S.C.
HON. ARLENE P. BLUTH

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

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

Judith Schnurman and Alan Schnurman,

Plaintiffs,

-against-

Ousmane Diallo, Lelio Bresier, Abdelhak Dougadir and Ronald Sherman,

Defendants.

Index No.: 109297/11
Motion Seq: 002

DECISION/ORDER

HON. ARLENE P. BLUTH, JSC

Defendants Diallo and Bresier's motion for summary judgment dismissing this action on the grounds that plaintiff Judith Schnurman 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, then 63 years old, alleges she sustained personal injuries when she was a passenger in a taxi which was hit in the rear on May 17, 2011. Plaintiff Alan Schnurman asserts only 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 neck, back, arm and hand injuries as well as pain in the buttock and right shoulder (exh B to moving papers, para. 11).

Defendants' showing

Defendants met their prima facie burden of showing that plaintiff did not sustain a serious injury causally connected to this accident. Defendants submit the affirmations of a radiologist,

Dr. Eisenstadt (exh C to moving papers) who examined MRI films of the cervical and lumbar spine, each taken on June 6, 2011, just three weeks after the accident. Dr. Eisenstadt found extensive degeneration, long-standing disc disease and no evidence of trauma. Specifically, with regard to the cervical MRI, Dr. Eisenstadt found extensive degeneration at C5-6 and C6-7 and to a milder extent at C4-5, bulges and stenosis; none of this was acute or from trauma: "There was no evidence or recent or acute post-traumatic injury". The cervical stenosis, bony changes and narrowing of the spinal canal "could not have developed in less than six months' time and due to their extent are more likely years in their development". In short, according to Dr. Eisenstadt, none of plaintiff's extensive neck issues were causally related to the accident.

Likewise, with regard to the lumbar MRI, Dr. Eisenstadt found extensive degeneration and related bulges at L2-3, L3-4, L4-5 and L5-S1, all due to degeneration and not due to any trauma. Dr. Eisenstadt attributed the stenosis she found from L2-3 through L5-S1 to congenital narrowing and degeneration. In short, according to Dr. Eisenstadt, none of the MRI findings was acute or from trauma and none of plaintiff's extensive lumbar spine issues were causally related to the accident.

Defendants also submitted the June 18, 2012 affirmed report of their orthopedist (Dr. Nason, exh D) who stated that after examining plaintiff, and measuring the range of motion in her cervical and lumbar spine (normal), and right shoulder (normal), muscle testing and reflexes in arms and legs (all normal), she found that plaintiff had no objective orthopedic residuals relating to the subject accident.

Defendants also submitted the affirmed report of neurologist Roy Shanon, MD, who reported that ranges of motion in plaintiff's cervical and lumbar spine were normal as was sensation in lower and upper extremities. He concluded that there is no evidence of neurological

injury.

Finally, in his affirmation in support, defendants' attorney noted that in her deposition, pages 36-37, plaintiff testified that she was not confined to her bed or home as a result of or after this accident.

Based on the foregoing, defendants sustained their burden of showing a lack of serious injury as defined by the Insurance Law; the burden switched to plaintiffs to demonstrate that a triable issue of fact exists.

Plaintiffs' showing

In opposition, plaintiffs submit only one admissible medical record**: Exhibit D**, the certified records of New York Downtown Hospital, where plaintiff went the morning after the accident. This record shows that she complained of pain, was given Motrin and a muscle relaxant and sent home. The following exhibits were **not admissible**, or if admissible, were of no weight for the reasons that follow.

Exhibit E, is a letter from Dr. Harrison; while it has affirmation language, it is not signed, and cannot be considered as an affirmation in opposition to defendants' motion. *See* CPLR 2106; *Burgos v Vargas*, 33 AD3d 579, 580, 822 NYS2d 297, 298 (2d Dept 2006) (examining physician's report was without probative value because it was unsigned, and thus not properly subscribed and affirmed by him). Plaintiffs' opposition papers were served on February 14, 2013. In paragraph 8 of his affirmation in support, plaintiffs' attorney incorrectly referred to exhibit E as Dr. Harrison's affirmed report. In the reply (para. 3), served on February 22, 2013, defendants' attorney pointed out that Dr. Harrison's report was not in admissible form, and thus plaintiffs failed to raise an issue of fact to dispute defendants' doctors' findings of degeneration or to provide proof of a recent exam.

The motion was marked submitted on February 26, 2013. By letter dated February 28, 2013, plaintiffs' attorney tried to remedy this defect with an unauthorized, post-submission letter to the Court (copies to defendants' attorneys) and a signed copy of Dr. Harrison's letter report[1]. In his cover letter, plaintiffs' attorney said that an unsigned copy of Dr. Harrison's report "was inadvertently attached" to the opposition. Plaintiffs' attorney does not submit an affirmation explaining how Dr. Harrison's unsigned draft report was in plaintiffs' counsel's possession, and how it was annexed to the opposition papers. Significantly, plaintiffs' attorney does not state, in an affirmation, that Dr. Harrison signed his report before the opposition was served, or before the reply was served, and/or that it was law office failure to submit an unsigned draft when there was a signed version in existence. The unauthorized letter was written by the same attorney who, in his affirmation in opposition to the motion (para. 8), specifically stated that Dr. Harrison's affirmed report was attached. Nor has Dr. Harrison submitted an affirmation to clarify when he signed his report or explain how a draft of his report came into plaintiffs' attorney's possession. Accordingly, the Court will not consider either Dr. Harrison's unsigned report or the signed version, which was submitted belatedly. *Compare Colon v Torres*, 106 AD3d 458, 965 NYS2d 90 (1st Dept 2013) (counsel demonstrated that the failure to annex affirmations was the result of clerical error and the affirmations had been provided to plaintiffs who were not prejudiced by the delayed submission). Here, it is simply unfair to permit plaintiffs to correct a defect in their papers which was pointed out in the reply.

Exhibit F contains radiology reports; while Dr. Jahre's introductory affirmation itself is admissible, it does not make her unaffirmed reports admissible as she does not affirm that her

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[1]Because there was no date next to Dr. Harrison's signature, the Court cannot determine the date he signed it.

reports are true and accurate. She only affirms that the name, date and identifying number on the films is correct. Dr. Jahre's admissible affirmation does not even mention Dr. Eisenstadt's opinion and, of course, does not contradict it; nor do her reports, even if admissible, state that the MRIs show any trauma or causally connect any of the findings to the accident. **Exhibit G**, copies of records from Aspen Valley Hospital are not certified or affirmed. **Exhibits H and I** are "certified" physical therapy records from two facilities. "Only hospital records, and not physician office records, are admissible by certification (see CPLR 4518 [c]; 2306 [a]; Matter of Damon J., 144 AD2d 467 [1988])." *Bronstein-Becher v. Becher* 25 A.D.3d 796, 809 NYS2d 140 (2d Dept 2006).

Because plaintiffs have failed to submit medical evidence in proper form to contest the findings of defendants' doctors as to plaintiff Judith Schnurman's physical condition, findings of degeneration, permanency and/or causation, they have not raised any issues of fact sufficient to defeat defendants' motion for summary judgment.

Accordingly, it is

ORDERED that defendants' motion for summary judgment dismissing this action on the grounds that plaintiff Judith Schnurman did not sustain a "serious injury" within the meaning of Insurance Law §5012(d) is granted. The case is dismissed.

This is the Decision and Order of the Court.

Dated: February 5, 2014
New York, New York

HON. ARLENE P. BLUTH, JSC