SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. KATHRYN E. FREED** **PART** **IAS MOTION 2**

Justice

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INDEX NO. 158354/2013

PAULETTE JONES,

MOTION DATE 01/09/2018

Plaintiff,

MOTION SEQ. NO. 003

- v -

NEW YORK CITY TRANSIT AUTHORITY, MV TRANSPORTATION, INC., and JACQUES SYLVERT,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 74

were read on this motion to/for SUMMARY JUDGMENT.

Upon the foregoing documents, it is ordered that the motion is **denied**.

In this action by plaintiff Paulette Jones to recover for personal injuries sustained in a motor vehicle accident, defendants New York City Transit Authority ("NYCTA"), MV Transportation, Inc. ("MVT"), and Jacques Sylvert ("Sylvert") (collectively "defendants") move, pursuant to CPLR 3212, for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined by Insurance Law § 5102(d). Plaintiff opposes the motion. After oral argument, and after a review of the motion papers and the relevant statutes and case law, the motion is **denied**.

FACTUAL AND PROCEDURAL BACKGROUND:

Plaintiff commenced this personal injury action against defendants by filing a summons and complaint on September 12, 2013. Doc. 1.[1] She claimed that she was injured near the intersection of Broadway and Lafayette Street in Manhattan on June 26, 2012, at which time she was a passenger in an Access-A-Ride bus ("the bus") allegedly owned by NYCTA and MVT and operated by Sylvert. Doc. 38; Doc. 40, at pars. 1-3.[2] Plaintiff alleged that the bus came to an abrupt stop with such force that she was thrown from her seat and injured ("the 2012 accident"). Doc. 40, at par. 4. As a result of the alleged incident, plaintiff alleged that she sustained "serious injuries" as defined in Insurance Law § 5102(d), including, inter alia, the following:[3]

- Chondral impact fracture in two areas of the medical femoral condyle of the left knee
- Anterior cruciate ligament tear of the left knee
- Post traumatic synovitis of the left knee
- Suprapatellar effusion and subcutaneous swelling and edema in the left knee
- Exacerbation of preexisting degenerative joint disease
- Posterior annular tear at L4-L5
- T11-T12 3 mm herniation with deformity and compression of the medial sac

Doc. 40, at par. 6.

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[1] Unless otherwise noted, all references are to the documents filed with NYSCEF in this matter.
[2] In their answer, NYCTA and MVT both deny that they owned the bus. Docs. 38 and 39. They also deny that Sylvert drove the bus within the scope of his employment by NYCTA or MVT. Docs. 38 and 39. However, defendants' motion is premised solely on the argument that plaintiff did not sustain a "serious injury."
[3] Although Insurance Law § 5102 (d) sets forth various categories pursuant to which a "serious injury" may be established, plaintiff does not allege in her complaint or bill of particulars any particular category(ies) into which she falls. Docs. 17, 40.

Plaintiff further alleged that, as a result of the 2012 accident, she underwent surgery on her left knee on August 24, 2012 and a discectomy at L4-L5 level on April 3, 2015. Doc. 40, at par. 6. Additionally, she claimed that she underwent three lumbar nerve block injections as well as two lumbar steroid injections. Doc. 40, at par. 6.

In an amended bill of particulars, plaintiff alleged a need for future lumbar surgery, as well as the need for lifetime care expenses. Doc. 40.

On June 6, 2016, plaintiff appeared for a deposition in this matter. Doc. 53. Plaintiff, who had been a nanny, testified that she was last employed on March 26, 2010. Doc. 53, at p. 11. Her employment ended because she was struck by a motor vehicle and injured ("the 2010 accident"). Doc. 53, at p. 13. Her left ankle and right tibia were injured in the 2010 accident and she commenced a lawsuit as a result of that occurrence. Doc. 53, at p. 13-14, 16. The injuries she sustained as a result of the 2010 accident required 4 surgeries, 3 on her left ankle and one on her right tibia. Doc. 53, at p. 16-18.[4] In 2011, plaintiff underwent physical therapy in connection with the 2010 accident. Doc. 53, at p. 21. Plaintiff denied that she injured her left knee, left hip, or back in the 2010 accident. Doc. 53, at p. 22-23. She further stated that, after the 2010 accident, she never healed to the point where she could have returned to work as a nanny. Doc. 53, at p. 28-29. Plaintiff began using Access-A-Ride as a result of the 2010 accident. Doc. 53, at p. 29. As of the date of the 2012 accident, she was still using a cane she obtained due to the 2010 accident. Doc. 53, at p. 32.

According to plaintiff, the 2012 accident occurred because the driver of the bus came to an abrupt stop, throwing her out of her seat. Doc. 53, at p. 48. After she fell to the floor of the bus,

[4] In her bill of particulars in her lawsuit arising from the 2010 accident, plaintiff alleged that she sustained, inter alia, a comminuted fracture of the left ankle requiring two surgeries and a comminuted fracture of the lateral tibial plateau of the right knee requiring surgery. Doc. 42.

her left knee, left ankle, shoulders, and lower back were in pain, and she had a headache. Doc. 53, at p. 53, 60-63.

Two days after the 2012 incident, plaintiff was treated by Dr. Koyen, to whom she was referred by her attorney's office. Doc. 53, at p. 65-66. She complained to Dr. Koyen of pain in her shoulders, neck, left knee, and left ankle and she underwent chiropractic treatment at his office beginning in 2012. Doc. 53, at p. 67, 70, 77; Doc. 54, at p. 80.[5] Dr. Koyen referred her to a Dr. Baum in 2012. Doc. 53, at p. 74. Dr. Baum reviewed an MRI of her left knee, told her that she had a fracture and a tear, and recommended surgery. Doc. 53, at p. 75. Dr. Baum performed surgery on plaintiff's left knee in August of 2012 but did not treat any other part of her body. Doc. 53, at p. 75-77.[6] She had no other surgeries resulting from the 2012 incident. Doc. 53, at p. 76. She stopped treating with Dr. Koyen and Dr. Baum in 2014. Doc. 53, at p. 66, 72-73, 76-77.

After her knee surgery, plaintiff was referred to a Dr. Merolla, who diagnosed problems with her back at L4-L5. Doc. 54, at p. 87. Dr. Agarwal administered pain injections to plaintiff's lower back at Downstate Medical Center. Doc. 54, at p. 87-95. In early 2015, Dr. Merolla and Dr. Uribe referred her to Dr. Reyfman, a pain management doctor, with whom she was still treating as of the time of her deposition. Doc. 54, at p. 90-91. In April of 2015, Dr. Reyfman performed a lumbar discectomy. Doc. 54, at p. 94-95. She was also administered lumbar injections at Dr. Reyfman's office in 2015 through June of 2016. Doc. 54, at p. 101.

Plaintiff filed a note of issue on January 17, 2017. Doc. 26. By notice of motion filed February 2, 2017, defendants moved (mot. seq. 002) to vacate the note of issue. Doc. 27. The

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[5] Dr. Koyen examined plaintiff on June 28, 2012, two days after the 2012 accident, and found limited range of motion in her left knee and lumbar and cervical spine. Doc. 55. Dr. Koyen's records reflect that he referred plaintiff to Dr. Aleksandr Levin, who conducted electrodiagnostic testing on July 31, 2012 and diagnosed lumbosacral radiculopathy. Doc. 55.

[6] Dr. Baum's surgical report dated August 24, 2012 reflects, inter alia, that plaintiff had a "[c]hondral impact fracture in 2 areas of the medical femoral condyle." Doc. 58.

motion was resolved by so-ordered stipulation dated October 10, 2017, pursuant to which plaintiff was to provide defendants with all outstanding discovery. Doc. 75.

On March 30, 2017, defendants filed the instant motion for summary judgment. Doc. 36. In support of the motion, defendants submit, inter alia, the affirmed report of Dr. William J. Kulak, an orthopedist, who examined plaintiff on November 30, 2016 "in regard to her ongoing symptoms to the left knee." Doc. 43. Plaintiff advised Dr. Kulak that, despite improvement following surgery following the 2012 accident, she still experienced "symptoms" of varying degrees when climbing stairs, walking, squatting, standing for long periods of time, and doing housework. He noted, however, that "[i]t is undetermined how many of the above difficulties that she claims are due to her prior right knee surgery and left ankle fusion with the fusion itself limiting many of the activities that she stated were difficult as before." Doc. 43.

The examination conducted by Dr. Kulak revealed that plaintiff's "left knee had 120 degrees of flexion approximately and full extension to 0 without symptoms (which is equal to that of the right knee)." Doc. 43. However, he did not state what the normal range of motion was. Further, Dr. Kulak opined that the right knee surgery and left [ankle] fusion which plaintiff underwent following the 2010 accident "would definitely alter mechanics affecting the left knee without specific trauma to the left knee." Doc. 43.

Dr. Kulak noted that plaintiff was still being seen by her pain management physician. Doc. 44. He concluded that "[i]t is felt that [Dr. Baum's] operative findings are completely pre-existing, degenerative in nature, not inconsistent with her chronic 'morbid obesity' that was present at least since 2010 at the time of [the 2010 accident] and that mechanically there would be additional stress applied to the left knee as a result of the fractures and surgeries obtained following the [2010 accident]." Doc. 43.

Defendants also submit the affirmed report of Dr. Daniel J. Feuer, a neurologist, who examined plaintiff on December 13, 2016. Doc. 44. Dr. Feuer found that plaintiff had normal range of motion in her cervical spine. Doc. 44. Range of motion testing of the lumbar spine revealed "[m]ild bilateral paraspinal tenderness", "no spasm", and that "[s]traight leg raising was negative bilaterally in the sitting position." Doc. 44. He further noted that range of motion of her lumbar spine was restricted by her body size and her inability to bear weight on her left foot. Doc. 44. He concluded that plaintiff did "not demonstrate any objective neurological disability or neurological permanency which is causally related to the [2012 accident]." Doc. 44.

CONTENTIONS OF THE PARTIES:

Defendants, relying on the affirmed reports of Dr. Kulak and Dr. Feuer, assert that the complaint must be dismissed since plaintiff failed to establish that she sustained a "serious injury" within the meaning of Insurance Law § 5102 (d). They assert that no "serious injury" could have been sustained in the 2012 accident because plaintiff's injuries existed prior to that occurrence.

In opposition to the motion, plaintiff argues that the affirmed reports of Dr. Kulak and Dr. Feuer are insufficient as a matter of law to entitle defendants to summary judgment since the doctors fail to represent that no objective medical findings exist which support her claim of "serious injury." She maintains that, since her left knee and lumbar spine were not injured in the 2010 accident, her injuries to those parts of her body were clearly cause by the 2012 accident. Plaintiff also submits an affidavit in opposition to the motion (Doc. 52) asserting, inter alia, that she did not undergo medical treatment between July, 2014 and March, 2015 because her no-fault carrier stopped paying her benefits. Doc. 69.

In reply, defendants assert that, in opposing the motion, plaintiff unfairly relies on materials related to the 2010 accident, since defendants are still owed discovery regarding that prior occurrence.[7] Defendants further assert that plaintiff's affidavit in opposition to the motion, which is tailored merely to meet the requirements of Insurance Law § 5102 (d), should be disregarded.

LEGAL CONCLUSIONS:

> The proponent of a summary judgment motion must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]; *Pokoik v Pokoik*, 115 AD3d 428 [1st Dept 2014]). To prevail on a motion for summary judgment, the defendant has the initial burden to present competent evidence showing that the plaintiff did not suffer a "serious injury" as a result of the accident (*Franchini v Palmieri*, 1 NY3d 536 [2003]; *Shaw v Looking Glass Associates, LP*, 8 AD3d 100 [1st Dept 2004]).
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> The defendant may meet this burden by submitting expert affidavits indicating that the plaintiff's injury was caused by a pre-existing condition and not the accident (*Pommells v Perez*, 4 NY3d 566 [2005]); *Spencer v Golden Eagle, Inc.*, 82 AD3d 589 [1st Dept 2011]). In cases involving a claim of aggravation, exacerbation and/or activation of a pre-existing injury or condition, a defendant may demonstrate entitlement to summary judgment upon submission of experts' findings of no deficits in range of motion in the subject body part and opinion that MRI findings were pre-existing and not caused by the subject accident (*Kendig v Kendig*, 115 AD3d 438 [1st Dept 2014]; *Nova v Fontanez*, 112 AD3d 435 [1st Dept 2013]; *Mitrotti v Elia*, 91 AD3d 449 [1st Dept 2012]).
>
> Once the defendant meets this threshold, the burden shifts to the plaintiff to present objective medical evidence that the subject motor vehicle accident aggravated the pre-existing condition so severely as to produce a statutory serious injury above and beyond the pre-existing condition (*Suarez v Abe*, 4 AD3d 288 [1st Dept 2004]). Objective proof, according to the Court of Appeals in *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 353 [2002], includes MRI and CT scan tests and reports, paired with an expert's observations of muscle spasms during a physical examination of the plaintiff.

(Dewitt v NY City Tr. Auth., 2018 NY Slip Op 30550[U], *2-3 [Sup Ct, NY County 2018].)

[7] As noted above, defendants' motion to strike the note of issue was resolved by stipulation requiring plaintiff to provide all outstanding discovery. Doc. 75.

Here, defendants have failed to establish their prima facie entitlement to summary judgment as a matter of law.

Despite plaintiff's allegations of injuries to her left knee and lumbar and cervical spine (Doc. 40, at par. 6), Dr. Kulak limited his examination to plaintiff's left knee. Doc. 43, at p. 2. He noted that plaintiff had difficulty with activities such as climbing stairs or standing too long, but admitted that "[i]t is undetermined how many of the above difficulties that she claims are due to her prior right knee and left ankle fusion [sustained as a result of the 2010 accident] with the fusion itself limiting many of the activities that she stated were difficult as before." Doc. 43. Thus, Dr. Kulak's own report raised an issue of fact regarding causation of plaintiff's left knee injury. *See Koneski v Seppala*, 158 AD3d 1211, 1212 (4th Dept 2018).

Additionally, although Dr. Kulak noted that the "left knee had 120 degrees of flexion approximately and full extension to 0 without symptoms (which is equal to that of the right knee)" (Doc. 43), he did not state whether this reflected normal range of motion. Since he did not state that he found no objective evidence of injury as a result of the 2012 accident and that plaintiff had full range of motion of the knee, his report fails to establish defendants' burden. *Cf. Streeter v Stanley*, 128 AD3d 477 (1st Dept 2015).

In attempting to establish that the 2012 accident did not cause plaintiff's left knee injury, Dr. Kulak opines that the right knee and left ankle injuries sustained in the 2010 accident "would definitely alter mechanics affecting the left knee without specific trauma to the left knee." Doc. 43. He then states that "[c]onsequential stress and pathology to the left knee would certainly not be unexpected as a result of that injury." However, this latter statement, aside from contradicting the former, is "too equivocal to satisfy defendant's burden on the issue of causation." *Prince v Lovelace*, 115 AD3d 424, 424 (1st Dept 2014), citing *Glynn v Hopkins*, 55 AD3d 498 (1st Dept

2008). Also equivocal is Dr. Kulak's statement that "*[i]t is felt* that [Dr. Baum's] operative findings are completely pre-existing, degenerative in nature, not inconsistent with her chronic 'morbid obesity' that was present at least since 2010 at the time of [the 2010 accident] and that mechanically there would be additional stress applied to the left knee as a result of the fractures and surgeries obtained following the [2010 accident]." Doc. 43 (emphasis added).

Dr. Kulak's report is also conclusory (*see Jeffers v Style Trans. Inc.*, 99 AD3d 576 [1st Dept 2012]) and inaccurate. He states that the operative report generated as a result of plaintiff's left knee surgery on August 24, 2012 reflects that the "medical femoral condyle had some damage to the articular cartilage but there was no evidence of any bony fracture or pathology." Doc. 43, at p. 9. However, the operative report clearly reflects that plaintiff had a "[c]hondral impact fracture in 2 areas of the medial femoral condyle as well as a lateral meniscal tear, and synovitis." Doc. 58. If plaintiff indeed sustained a fracture, she would be able to establish a "serious injury" pursuant to Insurance Law § 5102 (d). Further, if the jury finds that plaintiff sustained a "serious injury" to her left knee, it will be able to award her damages for all of her injuries causally related to the 2012 accident. *See Street v Stanley*, 128 AD3d at 478, citing *Rubin v SMS Taxi Corp.*, 71 AD3d 548, 549 (1st Dept 2010). Thus, this Court denies defendants' motion for summary judgment based on Dr. Kulak's report and there is no need to address Dr. Feuer's report.[8]

Therefore, in light of the foregoing, it is hereby:

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[8] Even if this Court were to consider Dr. Feuer's report, however, it would not entitle defendants to summary judgment given that his report (Doc. 44) failed to quantify any limitations in range of motion of plaintiff's lumbar spine. *See Jackson v Leung*, 99 AD3d 489 (1st Dept 2012). Further, Dr. Feuer acknowledges that electrodiagnostic testing conducted by Dr. Levin on July 31, 2012 (Doc. 55) revealed findings consistent with lumbosacral radiculopathy. Doc. 44. Assuming, arguendo, that Dr. Feuer's report regarding plaintiff's lumbar spine established defendants' prima facie entitlement to summary judgment, the records of Dr. Levin, as well as plaintiff's physician Dr. Koyen, who recorded limited range of motion of plaintiff's lumbar spine on June 28, 2012, two days after the 2012 accident (Doc. 55), would raise issues of fact warranting denial of the motion. *See Jackson v Leung*, 99 AD3d at 489 (citations omitted).

ORDERED that the motion by defendants New York City Transit Authority, MV Transportation, Inc., and Jacques Sylvert for summary judgment dismissing the complaint pursuant to CPLR 3212 is denied; and it is further

ORDERED that this constitutes the decision and order of the court.

9/17/18
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE