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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH _____ PART 22
Justice

Index Number : 103599/2010
MARTINEZ, MARICI
vs.
MARTE AUTO
SEQUENCE NUMBER : 001
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
JUL 24 2013
COUNTY CLERK'S OFFICE
NEW YORK

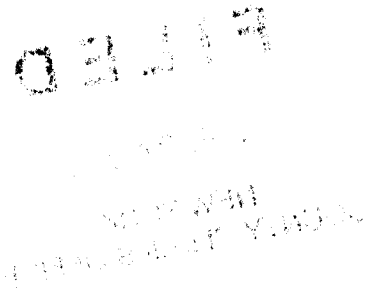
MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 7/23/13

ARLENE P. BLUTH J.S.C.
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

[* 2]



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

Index No.: 103599/10
Motion Seq 01

Marici Martinez,

Plaintiff,

-against-

Marte Auto Corp. and Julian Gomez,

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 denied.

In this action, plaintiff alleges that on January 19, 2010 she sustained personal injuries when she was a pedestrian crossing at the intersection of 168th Street and Amsterdam Avenue in Manhattan. Plaintiff claims that she was struck in the left knee by a vehicle owned by defendant Marte and operated by defendant Gomez and this caused her to fall to the ground.

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 that she suffered, inter alia, injury to her left knee, cervical disc bulge, lumbar herniations/bulges, right shoulder sprain, anxiety and personality changes (exh D to moving papers, para. 7), and a 90/180-day claim.

Defendants made a prima facie showing that the plaintiff did not sustain a permanent consequential or significant limitation by offering the following: the affirmed report of their

neurologist, Dr. DeJesus who examined plaintiff's cervical and thoracolumbar spine, cranial nerves, reflexes and cerebellar functions, and performed a motor system and sensory exam, and concluded that plaintiff had no neurological disability (exh E to moving papers). Additionally, defendants' submitted the affirmed report of their orthopedist, Dr. Nason who examined plaintiff's cervical and lumbar spine, right shoulder and left knee, and concluded that her cervical and lumbar sprain/strain had resolved, and that her left knee had healed from surgery (exh F).

However, defendants have not met their initial burden with respect to plaintiff's 90/180-day claim. In her affirmation in support of this motion (para. 8), defendants' counsel refers to plaintiff's testimony that her doctors issued letters to her employer indicating that she could not return to work for four months (exh G at 9), but does not dispute the existence of such letters which would support a medically-determined injury, or make any other argument as to why this claim should be dismissed. Accordingly, because defendants did not make their prima facie showing on plaintiff's 90/180-day claim, defendants' motion is denied. *See Silverman v MTA Bus Co.,* 101 AD3d 515, 517, 955 NYS2d 597, 598 (1st Dept 2012) (defendants failed to meet their prima facie burden as to plaintiff's 90/180–day claim since plaintiff alleged that she was confined to home for four months and defendants did not submit medical evidence contradicting her claimed disability during that period).

Even assuming that defendants met their burden on plaintiff's 90/180-day claim, plaintiff raised a triable factual question in opposition to defeat dismissal of the action. Plaintiff submits, inter alia, the affirmation of Dr. McMahon (exh A to opp), the orthopedist who performed surgery on plaintiff's left knee on March 9, 2010, less than two months after the accident. Dr. McMahon states that he first saw plaintiff on March 4, 2010 at which time he examined her, found that the range of motion of her left knee was 0-90 with pain, and reviewed the February 5,

2010 MRI of her left knee. He concluded that the condition of the knee, specifically left bone marrow edema in the lateral condyle, the lateral tibial plateau and fibular head consistent with contusion or bone bruise, required surgery and was not attributable to any degenerative changes based on the presence of fluid and the fact that plaintiff said she had no knee pain prior to the accident. Dr. McMahon also reviewed the January 29, 2010 MRI of plaintiff's cervical spine on March 4, 2013 and concluded that because she was asymptomatic before the accident, and experienced pain after the accident, the disc bulge he saw on the film was not degenerative but rather was caused by the accident, Finally, Dr. McMahon examined plaintiff on July 6, 2012 and found limitations in the range of motion of her left knee and cervical spine. Therefore, plaintiff, through the affirmation of Dr. McMahon, has raised an issue of fact with respect to whether she sustained a permanent consequential or significant limitation to her left knee and cervical spine.

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 denied.

This is the Decision and Order of the Court.

Dated: July 23, 2013
New York, New York

ARLENE P. BLUTH, JSC