

**Wilkins v Santana**

2011 NY Slip Op 34142(U)

October 8, 2011

Sup Ct, Bronx County

Docket Number: 303900/2009

Judge: Ben R. Barbato

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX**

**Present:** Honorable Ben R. Barbato, A.J.S.C.

TINA WILKINS,

Plaintiff,

**DECISION/ORDER**

-against-

Index No.: 303900/2009

JOSE SANTANA, QLR THREE INC., KOUASSI  
DESOUZA and PASKODES TAXI INC.,

Defendants.

The following papers numbered 1 to 8 read on this motion to Dismiss noticed on November 18, 2010 and duly submitted on the Motion Calendar of January 27, 2011 and transferred October 4, 2011..

<u>Papers Submitted</u>	<u>Numbered</u>
Notice of Motion, Affirmation in Support & Exhibits	1, 2, 3
Affirmation in Opposition & Exhibits	4, 5
Affirmation in Partial Opposition & Exhibit	6, 7
Reply Affirmation	8

Upon the foregoing cited papers, and upon transfer of this motion from Judge John Barone on October 4, 2011, Defendants, KOUASSI DESOUZA, and PASKODES TAXI INC., seek an Order pursuant to CPLR §§3211 and 3212 dismissing the above captioned for Plaintiff's failure to state a cause of action upon which relief may be granted and to convert the instant motion to that of a summary judgment motion seeking dismissal of Plaintiff TINA WILKINS's Complaint for her failure to meet the serious injury threshold requirement mandated by New York State Insurance Law §5102(d). The Defendants, KOUASSI DESOUZA and PASKODES TAXI INC., seek an Order granting summary judgment on the issue of liability as against JOSE SANTANA and QLR THREE INC.

Defendant's motion to dismiss the above caption pursuant to CPLR §3111(a)(7) is denied in that Plaintiff has set forth a viable cause of action as appropriately alleged in her Complaint.

Further the Court shall treat the instant motion as one for summary judgment the parties having received notice of the court's intention by that determination dated March 29, 2011 by Justice John Barone directing oral argument on the issue of serious injury.

This is an action to recover damages for personal injuries allegedly sustained by Plaintiff as a result of a motor vehicle accident which occurred on August 5, 2008 at the intersection of Central Park West and 72<sup>nd</sup> Street, in the County, City and State of New York. Plaintiff commenced this action by the service of a Summons and Verified Complaint, and issue was joined by the service of an Answer of behalf of Defendants. In her Verified Bill of Particulars, Plaintiff Tina Wilkins alleges to have sustained: Torn medial meniscus of the right knee, right knee arthroscopy, linear tear posterior horn medial meniscus of the left knee, disc herniation at L4-L5, L5-S1, C4-C5, C5-C6, C6-C7, among other injuries. Defendants now move for summary judgment, challenging Plaintiff Wilkins' claims of serious injury.

The issue of whether a claimed injury falls within the statutory definition of a "serious injury" is a question of law for the courts which may be decided on a motion for summary judgment. *Perez v. Rodriguez*, 25 A.D.3d 506 (1<sup>st</sup> Dept. 2006); *Licari v. Elliott*, 57 N.Y.2d 230, 237 (1982). Once the proponent of a motion for summary judgment has set forth a prima facie case that the claimed injury is not serious, the burden shifts to the plaintiff to demonstrate, by the submission of objective proof of the nature and degree of the injury, that he/she did sustain such injury or that there are questions of fact as to whether the purported injury was "serious". *Toure v. Avis Rent A Car Sys.*, 98 N.Y.2d 345, 350 (2002); *Cortez v. Manhattan Bible Church*, 14 A.D.3d 466 (1<sup>st</sup> Dept. 2005). However, "even where there is medical proof, when additional contributing factors interrupt the chain of causation between the accident and claimed injury - such as a gap in treatment...summary dismissal of the complaint may be appropriate." *Pommels*

*v. Perez, Brown v. Dunlap, Carrasco v. Mendez*, 4 N.Y.3d 566, 572 (2005).

In support of the instant motion, Defendants proffer the properly affirmed reports of Julio V. Westerband, M.D., A. Robert Tantleff, M.D. and R.C. Krishna, M.D., as well as Plaintiff's testimony from her deposition on February 19, 2010. Dr. Krishna performed a neurological examination of Plaintiff on April 8, 2010, and noted that Ms. Wilkins' examination with respect to mental status, cranial nerve, motor system, cervical and lumbar range of motion, sensory, meningeal and deep tendon reflexes were all within normal limits. Dr. Krishna further noted that the examination of Plaintiff revealed no objective evidence of disability or permanency. Accordingly, Dr. Krishna concluded that ". . . the claimant has no objective evidence of a disability from a neurological standpoint concerning the activities of daily living and work activities." (See Dr. Krishna's report, Defendant's Exhibit G; p. 4).

The report of Dr. Westerband, who examined Plaintiff on March 31, 2010, states that the injuries to Ms. Wilkins' cervical spine, thoracic spine, lumbar spine, left and right knees, left and right shoulders are resolved. Dr. Westerband examined all claimed areas of injury and found that all ranges of motion of the cervical, lumbar spines, as well as, the right and left shoulders, right and left knee were within normal limits noting surgical portals on the right knee. He further performed Apley test, McMurray test, Lachman test and Patella tracking test which were all determined to be negative. Dr. Westerband concluded that "There is no evidence of an orthopedic disability." (See Dr. Westerband's report, Defendant's Exhibit E; p. 6).

By letter dated October 1, 2010, Dr. Tantleff reviewed Plaintiff's cervical, lumbar, and right shoulder MRI's performed the month following the accident. Dr. Tantleff's review of the MRI films contradicts the findings of the original radiologist who reported disc herniations of the

cervical and lumbar spines, including bulging present in the lumbar spine. Dr. Tantleff's findings reveal that the bulging and herniation of both the lumbar and cervical spines are due to longstanding chronic degenerative disc disease. He further concludes that there is no causal relationship between the claimant's alleged accident and the findings on MRI examinations of Plaintiff's lumbar and cervical spine. Dr. Tantleff's review of the right shoulder confirms the initial report of no significant abnormalities. By letter dated March 23, 2010, Dr. Tantleff reported his review of the MRI of Plaintiff's right knee via CD-ROM of the film without radiology report and determined that the MRI revealed no evidence of meniscal tear or ligamentous abnormality.

In further support of their motion, Defendants submit portions of Plaintiff's February 19, 2010 testimony. Ms. Wilkins testified that her last medical appointment was in November of 2009 to obtain a note from Dr. Stanley Liebowitz allowing her to return to work and that she underwent physical therapy treatment from the end of April 2009 to the beginning of May 2009. [Plaintiff's EBT, pp 92-93.]

With Defendants having met their burden as to Plaintiff's claim of serious injury, the Court now turns its attention to Plaintiff's Affirmation in Opposition. Ms. Wilkins proffers the affirmed report of Dr. Thomas A. Scilaris, Plaintiff's treating physician and surgeon dated December 10, 2010, which indicates that Plaintiff underwent surgery on November 20, 2008 to repair a lateral meniscal tear of the right knee as well as chondroplasty of a lateral femoral condyle defect, a medial facet patella defect and a synovectomy. Following surgery Plaintiff was placed on physical therapy of the right knee due to the development of tendonitis. Dr. Scilaris' diagnosis reveals a post arthroscopic right knee with stiffness, atrophy and loss of motion and a left knee which suffers from medial meniscal tear and loss of motion. Plaintiff further submits

disability certificates from Dr. Stanley Liebowitz dated from February 19, 2009 to July 19, 2009 indicating that Plaintiff was incapacitated from November 7, 2009 due to right knee surgery.

Upon review of Plaintiff's submissions, the Court finds that this evidence is sufficient to raise a triable issue of fact as to whether that Ms. Wilkins sustained a "serious injury" or that there are questions of fact as to whether the purported injuries are of such a nature as to conform to those requirements set forth in the Insurance Law. Since the exhibits proffered on these motions for summary judgment contain conflicting evidence regarding the nature and extent of Plaintiff's injuries, material issues of fact exist which necessitate a trial.

Therefore it is

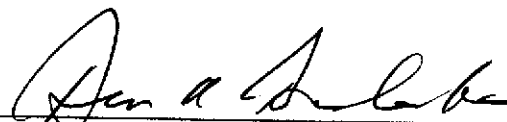
**ORDERED** that Defendants KOUASSI DESOUZA, and PASKODES TAXI INC.'s motion for an Order pursuant to CPLR §3211(a)(7) dismissing Plaintiff's case for failure to state a cause of action upon which relief may be granted and to convert the instant motion to that of a summary judgment motion seeking dismissal of Plaintiff TINA WILKINS's Complaint on the issue of Plaintiff's failure to meet those requirements set forth in Insurance Law Art. 52 is **Granted** to the extent that said motion shall be treated as a motion for summary judgment on the issue of serious injury and it is further

**ORDERED** that Defendants KOUASSI DESOUZA, and PASKODES TAXI INC.'s motion for an Order pursuant to CPLR §3212 granting summary judgment and dismissing Plaintiff TINA WILKINS' Complaint for her failure to meet the serious injury threshold requirement mandated by New York State Insurance Law §5102(d) is **Denied** and it is further

**ORDERED** that Defendants KOUASSI DESOUZA, and PASKODES TAXI INC.'s motion for an Order pursuant to CPLR §3212 granting summary judgment on the issue of liability as against JOSE SANTANA and QLR THREE INC., is **Denied**.

The foregoing constitutes the Decision and Order of this Court.

Dated: October 8, 2011

  
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Hon. Ben R. Barbato, A.J.S.C.