

Han v Arbee Mgt. Ltd.
2012 NY Slip Op 33686(U)
January 27, 2012
Supreme Court, Bronx County
Docket Number: 307818/09
Judge: Ben R. Barbato
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PART **SJT**

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

Case Disposed
Settle Order
Schedule Appearance

-----X
HAN,INSOO

Index No. **0307818/2009**

-against-

Hon. **Ben R. Barbato**, Justice.

ARBEE MANAGEMENT
-----X

The following papers numbered 1 to _____ Read on this motion, **SUMMARY JUDGMENT DEFENDANT**
Noticed on **June 09 2011** and duly submitted as No. _____ on the Motion Calendar of _____

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this motion is decided in accordance with the
attached Decision and Order.

Motion is Respectfully Referred to:
Justice: _____
Dated: _____

Dated: 01/27/2012

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

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

Present: Honorable Ben R. Barbato

INSOO HAN,

Plaintiff,

-against-

ARBEE MANAGEMENT LTD. and
NEFTALY ROSARI,

Defendants.

DECISION/ORDER

Index No.: 307818/09

The following papers numbered 1 to 7 read on this motion for summary judgment noticed on June 9, 2011 and duly transferred on January 26, 2012.

<u>Papers Submitted</u>	<u>Numbered</u>
Notice of Motion, Affirmation & Exhibits	1, 2, 3
Memorandum of Law (Nosowitz)	4
Affirmation in Opposition & Exhibits	5, 6
Reply Affirmation	7

Upon the foregoing papers, and after reassignment of this matter from Justice John A. Barone on January 26, 2012, Defendants, Arbee Management Ltd. and Neftaly Rosari, seek an Order granting summary judgment and dismissing Plaintiff's Complaint for failure to satisfy the serious injury threshold under Insurance Law §5102(d).

This is an action to recover for personal injuries allegedly sustained as a result of a motor vehicle accident which occurred on September 9, 2009, on Union Street at or near its intersection with Parsons Boulevard, in the County of Queens, City and State of New York.

On March 18, 2011, the Plaintiff appeared for an orthopedic examination conducted by Defendants' appointed physician Dr. Gregory Montalbano. Upon examination Dr. Montalbano determined that Plaintiff did not suffer any permanent injury to his left shoulder, cervical spine or

lumbar spine as a result of the subject accident.

Defendant also offers the Affirmation of Dr. David A. Fisher, a radiologist, who reviewed the MRIs of Plaintiff's left shoulder, lumbar spine and cervical spine. Dr. Fisher finds a normal examination of the left shoulder. He further finds that the MRIs of Plaintiff's cervical and lumbar spines reveal diffused degenerative changes.

Defendant further offers for the court's consideration the Affirmation of Dr. Benjamin Chang, Plaintiff's treating physician who conducted an examination of Plaintiff on September 11, 2009. Dr. Chang's clinical diagnosis determines post traumatic cervical strain and possible cervical radiculitis, post traumatic lumbar strain and left shoulder contusion. He indicates that his examination revealed a loss of motion of the lumbar spine and cervical spine. His review of the MRI of the left shoulder shows a rotator cuff tear and ligament. Dr. Chang's Affirmation also indicates that he conducted EMG/NCV studies of Plaintiff which confirmed cervical (C6-7) and lumbar (L5-S1) radiculopathies. Dr. Chang opines that Plaintiff's condition is permanent in nature and is a result of the accident of September 9, 2009.

Plaintiff submits the Affirmation of Dr. Ayoob Khodadadi, a radiologist who reviewed the MRIs of Plaintiff's cervical spine, lumbar spine and left shoulder. With respect to the left shoulder Plaintiff sustained a tear of the supraspinatus tendon with encroachment syndrome and subacromial bursal effusion. With respect to the lumbar spine Plaintiff suffered a left-sided herniation at L1-2 with bulges from L2 through S1. The MRI of the cervical spine reveals a left-sided herniation at C2-3 and C3-4 levels and central disc herniations at C4-5, C5-6 and C6-7.

Under the "no fault" law, in order to maintain an action for personal injury, a plaintiff must establish that a "serious injury" has been sustained. *Licari v. Elliot*, 57 N.Y.2d 230 (1982). The proponent of a motion for summary judgment must tender sufficient evidence to the absence

of any material issue of fact and the right to judgment as a matter of law. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 (1986); *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 (1985). In the present action, the burden rests on defendant to establish, by submission of evidentiary proof in admissible form, that plaintiff has not suffered a "serious injury." *Lowe v. Bennett*, 122 A.D.2d 728 (1st Dept. 1986) *aff'd* 69 N.Y.2d 701 (1986). Where a defendant's motion is sufficient to raise the issue of whether a "serious injury" has been sustained, the burden then shifts and it is incumbent upon the plaintiff to produce *prima facie* evidence in admissible form to support the claim of serious injury. *Licari*, *supra*; *Lopez v. Senatore*, 65 N.Y.2d 1017 (1985). Further, it is the presentation of objective proof of the nature and degree of a Plaintiff's injury which is required to satisfy the statutory threshold for "serious injury". Therefore, disc bulges and herniated disc alone do not automatically fulfil the requirements of Insurance Law §5102(d). See: *Cortez v. Manhattan Bible Church*, 14 A.D.3d 466 (1st Dept. 2004). Plaintiff must still establish evidence of the extent of his purported physical limitations and its duration. *Arjona v. Calcano*, 7 A.D.3d 279 (1st Dept. 2004).

In the instant case Plaintiff has demonstrated by admissible evidence an objective and quantitative evaluation that he has suffered significant limitations to the normal function, purpose and use of a body organ, member, function or system sufficient to raise a material issue of fact for determination by a jury. Further, he has demonstrated by admissible evidence the extent and duration of his physical limitations sufficient to allow this action to be presented to a trier of facts. The role of the court is to determine whether bona fide issues of fact exist, and not to resolve issues of credibility. *Knepka v. Tallman*, 278 A.D.2d 811 (4th Dept. 2000). The moving party must tender evidence sufficient to establish as a matter of law that there exist no triable issues of fact to present to a jury. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 (1986). Based upon the

exhibits and deposition testimony submitted, the Court finds that Defendants have not met that burden.

Therefore it is

ORDERED, that Defendants, Arbee Management Ltd. and Neftaly Rosari's motion for an Order granting summary judgment dismissing Plaintiff's Complaint for failure to satisfy the serious injury threshold under Insurance Law §5102(d) is **denied**.

Dated: January 27, 2012



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