

Rivera v Jimenez

2012 NY Slip Op 33898(U)

March 15, 2012

Supreme Court, Bronx County

Docket Number: 301449/08

Judge: Ben R. Barbato

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

Present: Honorable Ben R. Barbato

ROSARIO ARIAS RIVERA,

Plaintiff,

-against-

RAUL JIMENEZ,

Defendant.

DECISION/ORDER

Index No.: 301449/08

The following documents papers numbered 1 to 7 read on this motion for summary judgment noticed on October 11, 2011 and duly transferred on March 1, 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 Sharon A.M. Aarons on March 1, 2012, Defendant, Raul Jimenez, seeks an Order granting summary judgment and dismissing Plaintiff's Complaint for failure to satisfy the serious injury threshold requirement 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 February 6, 2007 at or near the intersection of East 180th Street and Hughes Avenue, in the County of Bronx, City and State of New York.

On June 17, 2011 the Plaintiff, Rosario Arias Rivera, appeared for a physical examination conducted by Defendant's appointed physician Dr. Gregory Montalbano, an Orthopedic surgeon. Upon examination, Dr. Montalbano determined that Plaintiff did not sustain any permanent

injury to the left knee as a result of the accident. Dr. Montalbano opines that the surgical findings after Plaintiff's arthroscopic procedure are routine tissue changes, degenerative meniscus tearing related to physiologic stress and consistent with Plaintiff's age and body habitus. In addition, Dr. Montalbano's review of Plaintiff's left knee MRI reveals no evidence of recent trauma such as bone contusion or intra-articular effusion. Dr. Montalbano further determined that Plaintiff sustained a sprain and strain of the lumbar and cervical spines which, at the time of the examination, had resolved.

Defendant also submits the report of Dr. David A. Fisher, a radiologist retained by the Defendant to review the MRI of Plaintiff, Rosario Arias Rivera's left knee. Upon review, Dr. Fisher determined that it revealed mild cartilage wear and intrasubstance degeneration within the posterior horn of the medial meniscus with no radiographic evidence of traumatic or causally related injury to the left knee.

The Plaintiff, Rosario Arias Rivera, offers the Affirmation of Dr. Maxim Tyorkin, an orthopedic surgeon who examined the Plaintiff on December 12, 2011 after having performed surgery on Plaintiff's left knee on March 19, 2007. Dr. Tyorkin found limited range of motion of Plaintiff's left knee and his review of the MRI of Plaintiff's left knee taken in February 21, 2010 revealed a large, grade III oblique tear involving the undersurface of the posterior horn of the medial meniscus. On March 19, 2007, Dr. Tyorkin performed arthroscopic surgery to repair a torn medial meniscus. Dr. Tyorkin further opines that Plaintiff's injuries to the left knee are permanent and causally related to the subject accident.

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).

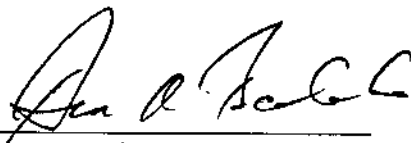
In the instant case Plaintiff has demonstrated by admissible evidence an objective and quantitative evaluation that she has suffered significant limitations to the normal function, purpose and use of a body organ, member, function or system sufficient to raise a material issue of fact for determination by a jury. Further, she has demonstrated by admissible evidence the extent and duration of her 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 Defendant has not met that burden.

Therefore it is

ORDERED, that Defendant, Raul Jimenez' motion for an Order granting summary judgment and dismissing Plaintiff's Complaint for failure to satisfy the serious injury threshold requirement under Insurance Law §5102(d) is **denied**.

Dated: March 15, 2012



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