

Evans v Soumare

2012 NY Slip Op 33899(U)

March 18, 2012

Supreme Court, Bronx County

Docket Number: 301526/09

Judge: Ben R. Barbato

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

Present: Honorable Ben R. Barbato

CALVIN EVANS and TYRONE WILLIAMS,

Plaintiffs,

-against-

MAMADOU SOUMARE, MOISANA SOUMAHORO,
EUGENE BOSTIC, BARRY W. MILES and
STEPHANIE REYES,

Defendant.

DECISION/ORDER

Index No.: 301526/09

The following papers numbered 1 to 5 read on this motion for summary judgment noticed on December 2, 2011 and duly transferred on March 1, 2012.

<u>Papers Submitted</u>	<u>Numbered</u>
Notice of Motion, Affirmation & Exhibits	1, 2, 3
Affirmation in Opposition & Exhibits	4, 5

Upon the foregoing papers, and after reassignment of this matter from Justice John A. Barone on March 1, 2012, Defendants, Mamadou Soumare and Moisan Soumahoro, seek an Order granting summary judgment and dismissing Plaintiff Tyrone Williams' 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 July 20, 2008, on or at the southbound Major Deegan Expressway and 135th Street, in the County of Bronx, City and State of New York.

On November 10, 2010, the Plaintiff, Tyrone Williams, appeared for an neurological examination conducted by Defendants' appointed physician Dr. Ravi Tikoo. Upon examination, Dr. Tikoo determined that the Plaintiff suffered from strain of the cervical and lumbar spines as well as soft tissue injuries to the right knee. Dr. Tikoo further opines that Plaintiff has reached

his maximal medical improvement and, as of the date of the report, he is able to work in his normal capacity.

On January 4, 2011, the Plaintiff, Tyrone Williams, appeared for an orthopaedic examination conducted by Defendant's appointed physician Dr. Robert J. Orlandi. Upon examination, Dr. Orlandi determined that the Plaintiff demonstrated full and painless range of motion for all areas that are symptomatic and demonstrated no radicular symptoms or neurologic deficits into either arm or leg to suggest a nerve root syndrome. Dr. Orlandi further opines that Plaintiff's diagnosis of a cervical and lumbar radiculopathy and a significant sprain of the right knee is not compatible with his ability to continue his work without lost time.

Defendant offers the report of Dr. Sheldon Feit, a radiologist who reviewed the MRI of the Plaintiff's lumbar spine and determines that Plaintiff has mild disc desiccation and disc bulging at the L4-5 level, disc desiccation at the L5-S1 level with no disc herniation. Dr. Feit determines that the MRI reveals pre-existing disc degenerative changes and states that disc bulges are not posttraumatic but are degenerative. Dr. Feit also reviewed the MRI of Plaintiff's right knee and determined that there was no evidence of a meniscal tear, ligamentous injury or fracture and no abnormalities causally related to the accident of July 20, 2008.

Plaintiff, Tyrone Williams, submits the Affirmation of Dr. Thomas M. Kolb, a radiologist who states that Plaintiff's MRI of the right knee indicates a tear of the posterior horn of the medial meniscus, a partial tear of the anterior cruciate ligament with surrounding joint effusion and a partial tear of the medial collateral ligament. Dr. Kolb's review of the MRI of the Plaintiff's lumbar spine reveals a herniated disc at the L5-S1 level. Dr. Kolb's review of the MRI of Plaintiff's cervical spine also reveals a disc herniation at the C5-6 level with spinal cord impingement.

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 Defendants 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).

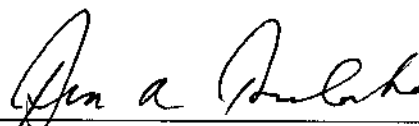
In the instant case Plaintiff has not demonstrated by admissible evidence an objective and quantitative evaluation that he has suffered significant limitations to the normal function, purpose and use of a body organ, member, function or system sufficient to raise a material issue of fact for determination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

Therefore it is

ORDERED, that Defendants, Mamadou Soumare and Moisana Soumahoro's motion for an Order granting summary judgment dismissing Plaintiff Tyrone Williams' Complaint for failure to satisfy the serious injury threshold under Insurance Law §5102(d) is **granted**.

Dated: March 18, 2012



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