

<b>Berkovitch v Nisimow</b>
2013 NY Slip Op 33786(U)
July 29, 2013
Supreme Court, Bronx County
Docket Number: 304541/11
Judge: Ben R. Barbato
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX**

**Present:** Honorable Ben R. Barbato

AVRAHAM BERKOVITCH,

Plaintiff,

-against-

NISSIM NISIMOW,

Defendant.

**DECISION/ORDER**

Index No.: 304541/11

The following documents papers numbered 1 to 6 read on this motion for summary judgment noticed on November 30, 2012 and duly transferred on July 8, 2013.

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

Upon the foregoing papers, and after reassignment of this matter from Justice Sharon A.M. Aarons on July 8, 2013, Defendant, Nissim Nisimow, seeks 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 December 21, 2010 on Riverdale Avenue at or near its intersection with West 238<sup>th</sup> Street, in the County of Bronx, City and State of New York.

On January 3, 2012, the Plaintiff appeared for a neurological examination conducted by Defendant's appointed physician Dr. Marianna Golden. Upon examination and review of Plaintiff's medical records, Dr. Golden determined that Plaintiff presented a normal neurological examination with no clinical evidence of radiculopathy. Dr. Golden also states that Plaintiff's

examination revealed no objective evidence of any disability or permanency causally related to the accident of December 21, 2010.

On January 2, 2012, Plaintiff appeared for an orthopedic examination conducted by Defendant's appointed physician Dr. Lisa Nason. Upon examination, Dr. Nason determined that Plaintiff suffered from cervical and lumbar sprain/strain, bilateral knee sprain/contusion, left rib contusion and left ankle sprain, all of which had resolved at the time of the examination. Dr. Nason notes that x-ray studies of Plaintiff's left knee done on the date of the accident and three weeks later indicate no sign of fracture. She also states that Plaintiff had left knee arthroscopic surgery on April 5, 2010 due to a pre-existing left knee condition. Dr. Nason opines that Plaintiff presented with no evidence of orthopedic disability or residuals as it relates to the accident of December 21, 2010.

Defendant presents the report of Dr. Richard A. Heiden, a radiologist, who states that he reviewed the MRI films of the Plaintiff's left knee, cervical and lumbar spine and right knee. Dr. Heiden's review of the MRI of Plaintiff's left knee reveals bone bruising of the lateral femoral condyle consistent with the time of the accident, otherwise a normal left knee MRI. No soft tissue edema, fluid collections, hemorrhage, fractures, dislocations or joint effusions are seen. Dr. Heiden's review of the MRI of Plaintiff's cervical spine reveals desiccation and herniation with no hemorrhage, bone bruise or compressions, no edematous changes to the discs, supporting ligaments or surrounding soft tissues. Dr. Heiden's review of the MRI of Plaintiff's lumbar spine reveals a normal examination with no hemorrhage, spondylolisthesis, bone bruise or compressions, and no edematous changes to the discs, supporting ligaments or surrounding soft tissues. Dr. Heiden's review of the MRI of Plaintiff's right knee reveals a normal examination with no hemorrhage, bone bruise, fracture or joint effusion, no extrasynovial fluid or soft tissue

edema and normal menisci and ligaments.

Plaintiff offers the Affirmed report of Dr. Joyce Goldenberg, a physiatrist who conducted an examination of Plaintiff on January 3, 2011 and found limited range of motion in the cervical and lumbar spines as well as the left knee. Dr. Goldenberg's review of the MRI films of Plaintiff's left knee reveals joint effusion and a subchondral fracture of lateral condyle. Her review of the MRI films of Plaintiff's cervical spine reveals midline herniation at C5-6 intervertebral disc indenting the ventral aspect of the thecal canal and review of the MRI films of Plaintiff's right knee reveals partial thickness tear of the tibio-fibular ligament and partial thickness tear of proximal insertion of the infra-patellar ligament with joint effusion. Dr. Goldenberg's review of the Upper EMG of Plaintiff's cervical and lumbar spines indicates bilateral C5-6 radiculopathy. Dr. Goldenberg relates Plaintiff's injuries to the subject motor vehicle accident. Dr. Goldenberg's re-evaluation of the Plaintiff on November 6, 2012 reveals continued loss of range of motion of the cervical and lumbar spines as well as the right and left knees. Dr. Goldenberg opines, based upon her physical examination and review of diagnostic studies coupled with the history provided, that Plaintiff sustained a subchondral fracture of lateral femoral condyle in the left knee, a midline herniation at C5-6 intervertebral disc indenting the ventral aspect of the thecal canal, bilateral C5-6 radiculopathy, a partial thickness tear of the tibio-fibular ligament and a partial thickness tear of proximal insertion of the infra-patellar ligament, all casually related to the motor vehicle accident of December 21, 2010.

This Court has read the Affirmed reports of Dr. Michael Daras, Dr. Yakov Perper and Dr. Jacob Lichy, the radiologist who conducted the MRIs of Plaintiff's cervical spine, left and right knees, all presented by Plaintiff.

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 upon 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 (1<sup>st</sup> 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 (1<sup>st</sup> 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 (1<sup>st</sup> Dept. 2004).

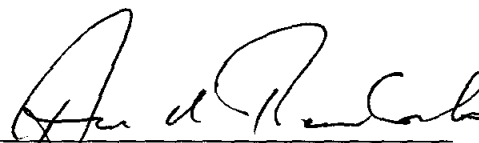
In the instant case Plaintiff has demonstrated by admissible evidence an objective and quantitative evaluation that he has suffered significant limitations to the normal function, purpose and use of a body organ, member, function or system sufficient to raise a material issue of fact for determination 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 (4<sup>th</sup> 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. However, based upon the medical evidence and testimony submitted, Plaintiff has not established that he has been unable to perform substantially all of his normal activities for 90 days within the first 180 days immediately following the accident and as such is precluded from raising the 90/180 day threshold provision of the Insurance Law.

Therefore it is

**ORDERED**, that Defendant Nissim Nisimow's motion for an Order granting summary judgment and dismissing Plaintiff's Complaint for failure to satisfy the serious injury threshold under Insurance Law §5102(d) is **granted** to the extent that Plaintiff is precluded from raising the 90/180 day threshold provision of the Insurance Law.

Dated: July 29, 2013



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