

Nelson v Ambery

2013 NY Slip Op 33788(U)

July 19, 2013

Supreme Court, Bronx County

Docket Number: 305263/11

Judge: Ben R. Barbato

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

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

JUNIOR NELSON,

Plaintiff,

-against-

DECISION/ORDER

Index No.: 305263/11

GEORGE AMBERY and LARI ALHASSAN,

Defendants.

The following papers numbered 1 to 6 read on this motion for summary judgment noticed on October 18, 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, Defendants, George Ambery and Lari Alhassan, seek an Order granting summary judgment 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 February 2, 2011 on Garden State Parkway, in the State of New Jersey.

On May 24, 2012, the Plaintiff appeared for an orthopedic examination conducted by Defendants' appointed physician Dr. Alan M. Crystal. Upon examination, Dr. Crystal determined that Plaintiff presented with no impairment from his cervical or thoracic spine. Dr. Crystal states that Plaintiff's thoracic MRI was unremarkable while Plaintiff's cervical MRI

revealed bulging discs which Dr. Crystal opines were pre-existing degenerative changes and not caused by the accident of February 2, 2011. With regard to Plaintiff's left knee examination, Dr. Crystal determines that the left knee remains unstable, that Plaintiff had patellar arthritis and that Plaintiff's ACL deficiency predates the subject accident. Dr. Crystal further notes that Plaintiff had a procedure of thermal surgery performed for his left knee anterior cruciate ligament ("ACL") tear which is no longer done by mainstream orthopedists.

Defendants also submit the report of Dr. Audrey Eisenstadt, a radiologist, who states that she has reviewed the MRIs of Plaintiff's left knee which reveal a sprain of the medial collateral ligament, small joint effusion, small bone island proximal to the tibia, hypoplasia, minimal mucoid signal change in the posterior horn of the medial meniscus and a small popliteal cyst. Dr. Eisenstadt opines that the sprain will resolve following immobilization without permanent sequela and that the other findings are related to a longstanding degenerative process with no clinical or traumatic basis and no association to the accident of February 2, 2011.

Plaintiff offers the Affirmed narrative report of Dr. Ramachandran Nair, who examined Plaintiff on February 8, 2011. Dr. Nair's examination of Plaintiff's cervical and thoracic spine revealed tenderness and range of motion limitations while the examination of Plaintiff's left knee revealed tenderness, crepitus and decreased range of motion. Dr. Nair determined that Plaintiff suffered sprain/strain of the neck, thoracic spine and left knee, referred Plaintiff for physical therapy and recommended MRIs of the affected body parts. On December 31, 2012, Dr. Nair reexamined Plaintiff and found ongoing range of motion limitations in Plaintiff's cervical spine with a positive result for cervical compression. Dr. Nair opines that Plaintiff has permanent and significant range of motion restrictions of the neck which are causally related to the February 2, 2011 accident. Dr. Nair further notes that the subject accident aggravated and exacerbated a

prior asymptomatic neck injury causing the Plaintiff's current symptoms and restrictions.

Plaintiff also offers the Affirmed narrative report of Dr. Mark S. McMahon, orthopedic surgeon, who states that he conducted his initial examination of Plaintiff's left knee on March 25, 2011 which revealed tenderness in the lateral joint line, patella sensitivity, positive Lachman test and severe decreased range of motion. On April 26, 2011, Plaintiff underwent surgery of the left knee with Dr. McMahon. During the surgery, Dr. McMahon found chondromalacia of the patella with a grade 2 tear of the ACL, synovitis and fibrosis. At follow-up examinations, Dr. McMahon found that Plaintiff demonstrated continuing limited range of motion of the left knee. Dr. McMahon reexamined Plaintiff on December 10, 2012 and found that Plaintiff's left knee had instability and swelling along with positive anterior drawer sign and significant range of motion restrictions despite lengthy post-surgery therapy. Dr. McMahon determines that Plaintiff has reached maximum medical benefits and opines that he sustained permanent restrictions and impairment in the left knee. Dr. McMahon further notes that Plaintiff was asymptomatic before the subject accident and causally relates the chondromalacia of the patella with a grade 2 tear of the ACL and the restrictions in Plaintiff's left knee to the accident of February 2, 2011.

Plaintiff further offers the Affirmation of Dr. Jacob Lichy, a radiologist who reviewed the MRI film of Plaintiff's left knee and determined that it revealed joint effusion and partial thickness tear of the ACL. Dr. Mark Shapiro's MRI report of Plaintiff's cervical spine is also submitted for the Court's consideration as well as the Affirmation of Dr. Ritika Arora, both radiologists. The cervical spine MRI reveals focal bulges at C3-4, C4-5 and C5-6, creating impingement on the neural canal, and the left knee radiographs taken on November 2, 2009 (prior to the subject accident) and reviewed by Dr. Arora, reveal no indications of joint effusion or tears of the anterior cruciate ligament.

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 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. 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 Defendants George Ambery and Lari Alhassan's motion for an Order granting summary judgment dismissing Plaintiff's Complaint for failure to satisfy the serious injury threshold pursuant to 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 19, 2013



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