

Fludd v Pena
2013 NY Slip Op 33819(U)
April 19, 2013
Supreme Court, Bronx County
Docket Number: 308399/10
Judge: Ben R. Barbato
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PART 21

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

- Case Disposed
- Settle Order
- Schedule Appearance

FLUDD, SHAKINA

Index No. 0308399/2010

-against-

Hon. [REDACTED]

PENA, ANILFA

HON. BEN R. BARBATO Justice.

The following papers numbered 1 to _____ Read on this motion, **SUMMARY JUDGMENT DEFENDANT**
Noticed on **May 30 2012** 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**.

APR 24 2013

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

Dated: 04 / 19 / 2013

Hon. *[Signature]*

HON. BEN R. BARBATO

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

Present: Honorable Ben R. Barbato

SHAKINA FLUDD,

Plaintiff,

-against-

DECISION/ORDER

Index No.: 308399/10

ANILFA PENA and PATRICIA RODRIGUEZ,

Defendants.

The following papers numbered 1 to 6 read on this motion for summary judgment noticed on May 30, 2012 and duly transferred on April 1, 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 April 1, 2013, Defendants, Anilfa Pena and Patricia Rodriguez, 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 October 26, 2009, at or near the intersection of the 145th Street and Amsterdam Avenue in the County, City and State of New York.

On November 9, 2011, the Plaintiff appeared for an orthopedic examination conducted by Defendants' appointed physician Dr. Lisa Nason. Upon examination, Dr. Nason determined that Plaintiff's alleged injury to her cervical and lumbar spine had, at the time of the examination, resolved. Dr. Nason also determined that Plaintiff had healed from a left knee arthroscopy

performed on August 29, 2011. Dr. Nason further opined that Plaintiff had no objective evidence of disability.

Plaintiff presents the Affirmation of Dr. Arnold B. Wilson who states that he examined and treated Plaintiff on November 2, 2009. Upon examination, Dr. Wilson found restrictions of motion in Plaintiff's lumbar spine and left shoulder and determined that Plaintiff sustained lower back strain and was status post left shoulder contusion. Dr. Wilson states that Plaintiff was restricted from her employment for a period of eight weeks following the accident and then returned to work on limited duty for another eight weeks. Dr. Wilson causally relates Plaintiff's injuries to the accident of October 26, 2009. On May 23, 2012, Dr. Wilson re-examined Plaintiff and found range of motion restrictions in her cervical and lumbar spine as well as in her left shoulder. Dr. Wilson opines that Plaintiff sustained a permanent disability to her cervical spine, lumbar spine and left shoulder as a result of the subject accident.

Plaintiff also submits the Affirmation of Dr. David Hugh Stemerman, a radiologist who states that the MRI of Plaintiff's lumbar spine was taken on December 17, 2009 at Open High Field MRI and CT of Westchester, New York, and further attests that the name, date, identification number as well as his name and address appear on said films. The lumbar MRI report is not annexed to this Affirmation. In addition, Plaintiff submits records from St. Luke's Roosevelt Hospital dated February 9, 2010 and February 10, 2010 which discuss Plaintiff's chest pain complaints.

Any reports, Affirmation or medical records not submitted in admissible form were not considered for the purpose of this Decision and Order.

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, simple strains and even 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 and 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 not 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 Defendants
have not met that burden.

Therefore it is

ORDERED, that Defendants' 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**.

Dated: April 19, 2013



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