

**Anderson v Pena**

2013 NY Slip Op 33820(U)

April 25, 2013

Supreme Court, Bronx County

Docket Number: 0308401/2010

Judge: Ben R. Barbato

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This opinion is uncorrected and not selected for official publication.

PART 21

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

Case Disposed   
 Settle Order   
 Schedule Appearance

ANDERSON, PETRA

Index No. 0308401/2010

-against-

Hon. [REDACTED]

PENA, ANILFA

**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 pursuant to the attached Decision and Order.

Motion is Respectfully Referred to:  
 Justice: \_\_\_\_\_  
 Dated: \_\_\_\_\_

Dated: 04/25/2013

Hon. [Signature]

**BEN R. BARBATO**

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

**Present:** Honorable Ben R. Barbato

\_\_\_\_\_  
PETRA ANDERSON,

Plaintiff,

-against-

ANILFA PENA and PATRICIA RODRIGUEZ,

Defendants.

**DECISION/ORDER**

Index No.: 308401/10

\_\_\_\_\_  
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 Petra Anderson'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 145<sup>th</sup> 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 spine had, at the time of the examination, resolved. Dr. Nason further opines that Plaintiff has no objective evidence of disability.

Plaintiff presents the Affirmation of Dr. Arnold B. Wilson who states that he examined

and treated Plaintiff on November 4, 2009. Dr. Wilson's initial examination revealed diffuse tenderness and moderate pain in Plaintiff's neck and diffuse tenderness upon palpation in Plaintiff's lower back. During a follow-up examination on December 30, 2009, Dr. Wilson found restrictions of motion in Plaintiff's cervical spine and determined that Plaintiff sustained a significant limitation of use of her cervical spine. Dr. Wilson states that Plaintiff remained out of work for a period of two weeks following the accident, returned to work on limited duty for five weeks and then continued working on restricted duty for a month and a half before going back to regular duty. Dr. Wilson causally relates Plaintiff's injuries to the accident of October 26, 2009. On June 7, 2012, Dr. Wilson re-examined Plaintiff and found range of motion restrictions in her cervical spine and mild tenderness in the lumbosacral junction. Dr. Wilson opines that Plaintiff sustained a permanent disability from injuries to her cervical and lumbosacral spine 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 cervical spine was taken on November 6, 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. This MRI report, which is annexed to Dr. Stemerman's Affirmation, shows that the C4-5 and C5-6 discs are mildly desiccated and reveal a mild diffuse bulge, and that there is some narrowing of the left neural foramen at C3-4 and C4-5. Also, the MRI study reveals that no other significant abnormality was detected. Plaintiff further submits records from St. Luke's Roosevelt Hospital from October 26, 2009 which discuss Plaintiff's headache 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 (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, 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 (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).

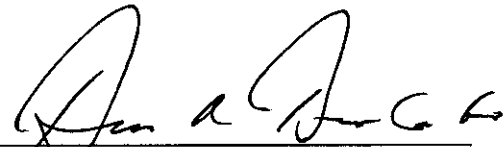
In the instant case Plaintiff has not demonstrated by admissible evidence and objective and quantitative evaluation that she has suffered significant limitations to the normal function, purpose and use of a body organ, member, function or system sufficient to raise a material issue of fact for determination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

Therefore it is

**ORDERED**, that Defendants Anilfa Pena and Patricia Rodriguez' motion for an Order granting summary judgment dismissing Plaintiff Petra Anderson's Complaint for failure to satisfy the serious injury threshold pursuant to Insurance Law §5102(d) is **granted**.

Dated: April 25, 2013

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