

Chaston v Doucoure
2013 NY Slip Op 33884(U)
April 14, 2013
Supreme Court, Bronx County
Docket Number: 302310/11
Judge: Ben R. Barbato
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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

SAMUEL CHASTON,

Plaintiff,

-against-

DECISION/ORDER

Index No.: 302310/11

MAMADOU DOUCOURE and HILLSIDE
LEASING INC.,

Defendants.

The following papers numbered 1 to 5 read on this motion for summary judgment noticed on July 24, 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

Upon the foregoing papers, and after reassignment of this matter from Justice Alison Y. Tuitt on April 1, 2013, Defendants, Mamadou Doucoure and Hillside Leasing Inc., 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 19, 2010, at or near the intersection of the 124th Street and Lenox Avenue in the County, City and State of New York.

On March 22, 2012, the Plaintiff appeared for an orthopedic examination conducted by Defendants' appointed physician Dr. Alan M. Crystal. Upon examination and reading of the medical records, Dr. Crystal determined that Plaintiff suffers from significant osteoarthritis of the right knee with on going degenerative process; right shoulder arthritis with degenerative changes

not associated with acute trauma; cervical herniations associated with significant degenerative changes with no showing of acute trauma; degenerative changes to the Lumbar spine with no signs of acute trauma; atrophy of the right thenar musculature which Dr. Crystal opines is indicative of longstanding compression of the median nerve. Dr. Crystal notes previous fracture of the right wrist with past swelling as being the competent cause of carpal tunnel syndrome. Dr. Crystal further opined that Plaintiff's injuries were not caused by the instant accident.

Defendants offer the reports of Dr. David A. Fisher, a radiologist who reviewed the MRIs of Plaintiff's cervical, right shoulder, right knee and lumbar spine. His review of the MRIs in each instance reveals chronic degenerative changes not causally related to the accident.

Plaintiff offers the Affirmation of Dr. Gregory Chiaramonte, an orthopedic surgeon who examined the Plaintiff on August 24, 2011. Dr. Chiaramonte reports inconsistencies as to whether Plaintiff suffered loss of consciousness and whether he was given pain medication at the hospital on the date of the accident. Dr. Chiaramonte also notes that Plaintiff was involved in two prior accidents in which he sustained injury to his right hip and right side of his body and injuries to his left hip. Dr. Chiaramonte, reports normal ranges of motion of the cervical spine, right shoulder, right wrist and right hip.

The MRI reports submitted by Plaintiff are replete with indications of degenerative condition with respect to the cervical spine, thoracic spine, and right shoulder.

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).

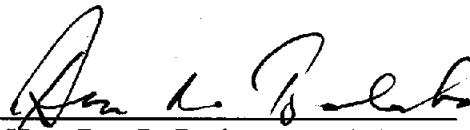
In the instant case Plaintiff has not demonstrated by admissible evidence and objective and quantitative evaluation that he has suffered significant limitations to the normal function, purpose and use of a body organ, member, function or system sufficient to raise a material issue of fact for determination 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' 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 14, 2013



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