

Figueroa v Ortiz

2013 NY Slip Op 33948(U)

August 19, 2013

Supreme Court, Bronx County

Docket Number: 307658/11

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

SOPHIA FIGUEROA,

Plaintiff,

-against-

GILBERT ORTIZ,

Defendant.

DECISION/ORDER

Index No.: 307658/11

The following papers numbered 1 to 6 read on this motion for summary judgment noticed on September 14, 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 Alison Y. Tuitt on July 8, 2013, Defendant, Gilbert Ortiz, seeks 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 July 25, 2011, on the Major Deegan Expressway at or near the East 161st Street southbound entrance, in the County of Bronx, City and State of New York.

On July 19, 2012, the Plaintiff appeared for an orthopedic examination conducted by Defendant's appointed physician Dr. J. Serge Parisien. Upon examination, Dr. Parisien determined that Plaintiff's alleged injury to her cervical, thoracic and lumbar spine, right shoulder and right hip had, at the time of the examination, resolved. Dr. Parisien further opined

that Plaintiff showed no evidence of any disability.

Defendant also offers the report of Dr. Peter A. Ross, a radiologist, who reviewed the MRIs of Plaintiff's cervical spine which revealed vertebral spondylosis changes at the C5 and C6 levels with dessication of the C2-3 through the C5-6 discs, all pre-existing to the subject accident. Dr. Ross finds that the C5-6 level shows a small focal central right parasagittal disc herniation component mildly deforming the ventral subarachnoid space, which is associated with the degenerative vertebral and discogenic changes, also pre-existing to and not caused by the accident of July 25, 2011.

Plaintiff offers the affirmed narrative report of Dr. Zuheir Jamil Said, dated October 19, 2012, which states that Plaintiff was seen in his office on July 28, 2011, August 16, 2011, August 23, 2011, September 22, 2011, November 3, 2011, December 13, 2011 and January 26, 2012. Dr. Said found range of motion restrictions in Plaintiff's cervical and lumbar spine, right shoulder and right hip, and reported the results of Plaintiff's MRI films which revealed a normal examination of Plaintiff's lumbar and thoracic spines and right shoulder. With respect to Plaintiff's cervical MRI, Dr. Said notes that it revealed a herniation at the C5-6 level and bulging at the C2 through the C5 levels. Dr. Said opines that, based on all the examinations, Plaintiff sustained physical injuries causally related to the accident of July 25, 2011 which could persist for an indefinite period of time. Plaintiff also submits the Affirmation of Dr. Ronald J. Roskin, a radiologist who reviewed Plaintiff's cervical spine MRI which revealed dessication and posterior bulging at C2-3, C3-4 and C4-5 causing impingement of the anterior thecal space and a posterior herniation at C5-6. Dr. Roskin further states that Plaintiff's spinal cord demonstrates normal signal intensities.

Any reports, Affirmation or medical records not submitted in admissible form were not

considered for the purpose of this Decision and Order. In addition, the Court notes that Dr. Said's initial report and follow-up examinations have been referenced to but not attached to his 2012 narrative report and that no measurements or medical assessment contemporaneous with the accident were provided.

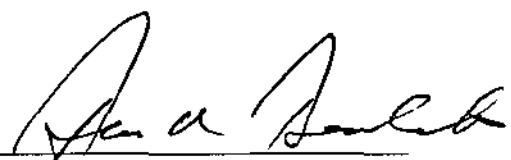
Under the "no fault" law, in order to maintain an action for personal injury, a plaintiff must establish that a "serious injury" has been sustained. *Licari v. Elliot*, 57 N.Y.2d 230 (1982). The proponent of a motion for summary judgment must tender sufficient evidence to the absence of any material 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. Calcagno*, 7 A.D.3d 279 (1st Dept. 2004). Such limitations must also be causally related to the subject accident by a contemporaneous doctor's report. *Perl v. Meher*, 18 N.Y.3d 208 (2011); *Torres v. Villanueva*, 90 A.D.3d 523 (1st Dept. 2011).

In the instant case Plaintiff has not demonstrated by admissible evidence an 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 Defendant has met that burden.

Therefore it is

ORDERED, that Defendant Gilbert Ortiz' 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: August 19, 2013



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