

Rodriguez v Russel

2013 NY Slip Op 33954(U)

August 22, 2013

Supreme Court, Bronx County

Docket Number: 310143/09

Judge: Ben R. Barbato

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

Present: Honorable Ben R. Barbato

LYDIA RODRIGUEZ and AMY RODRIGUEZ,

Plaintiffs,

-against-

MOHAMMED RUSSEL and MEGEVE TAXI, LLC,

Defendants.

DECISION/ORDER

Index No.: 310143/09

The following papers numbered 1 to 6 read on this motion for summary judgment noticed on January 11, 2013 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 Mark Friedlander on July 8, 2013, Defendants, Mohammed Russel and Megeve Taxi, LLC, seek an Order granting summary judgment dismissing Plaintiffs' 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 December 23, 2006, on Southern Boulevard at or near its intersection with East 142nd Street, in the County of Bronx, City and State of New York.

On April 17, 2012, the Plaintiff Lydia Rodriguez appeared at the office of Dr. Uriel Davis, a neurologist retained by Defendants to examine Plaintiff. Upon examination and review of Plaintiff's medical records, Dr. Davis determined that Plaintiff suffered lumbar sprain and strain which at the time of the examination had resolved. Dr. Davis further opines that there is

no accident related disability or permanency and states that Plaintiff can work and perform her regular activities of daily living without any restrictions. In addition, Dr. Davis notes that Plaintiff is disabled due to her arthritis and lupus.

On April 23, 2012, the Plaintiff Lydia Rodriguez appeared for an orthopedic examination conducted by Defendants' appointed physician Dr. Gabriel L. Dassa. Upon examination, Dr. Dassa determined that Plaintiff suffered cervical and lumbosacral spine sprain and strain, which at the time of the examination had resolved, along with right knee sprain/strain with no internal derangement on MRI of December 30, 2006, disc herniation at L4-5 and L5-S1 based on MRI of March 3, 2007 and disc bulge at C5-6 with no orthopedic clinical findings. Dr. Dassa notes that Plaintiff presented a right hip fracture with orthopedic surgery unrelated to the accident of record and that she was disabled. Dr. Dassa opines that Plaintiff's activities of daily living are restricted due to her previous right hip replacement as well as a past history of severe rheumatoid arthritis and lupus.

On April 17, 2012, the Plaintiff Amy Rodriguez appeared at the office of Dr. Uriel Davis, a neurologist retained by Defendants to examine Plaintiff. Upon examination and review of Plaintiff's medical records, Dr. Davis determined that Plaintiff suffered cervical and lumbar sprain and strain which at the time of the examination had resolved. Dr. Davis further opines that there is no accident related disability or permanency and states that Plaintiff can work and perform her regular activities of daily living without any restrictions.

On April 23, 2012, the Plaintiff Amy Rodriguez appeared for an orthopedic examination conducted by Defendants' appointed physician Dr. Gabriel L. Dassa. Upon examination, Dr. Dassa determined that Plaintiff suffered cervical and lumbosacral spine, right shoulder and right knee sprain and strain, which at the time of the examination had resolved, along with right

shoulder tendinosis based on MRI of January 6, 2007, disc bulges at L4-5 and L5-S1 based on MRI of February 9, 2007 and disc bulge at C5-6, all without orthopedic clinical findings. Dr. Dassa opines that, based on the normalcy of the examination, there is no contraindication for Plaintiff to continue performing all of her usual activities of daily living and full time employment.

Plaintiff offers the affirmed report of Dr. Gautam Khakhar, who examined Plaintiff Lydia Rodriguez on March 18, 2013, over six years following the accident. Upon examination and review of Plaintiff's medical records, Dr. Khakhar found range of motion limitations in Plaintiff Lydia Rodriguez' lumbar spine area and left shoulder. Dr. Khakhar determined that Plaintiff suffered from lumbar disc herniations at L4-5 and L5-S1, left shoulder impingement and initial right knee grade 1 MCL sprain. Dr. Khakhar opines that Plaintiff Lydia Rodriguez' injuries to her lumbar spine are permanent and significant and causally related to the December 23, 2006 accident. He further notes that Plaintiff's prognosis of her left shoulder remains guarded.

Plaintiff offers the affirmed report of Dr. Gautam Khakhar, who examined Plaintiff Amy Rodriguez on March 18, 2013, over six years following the accident. Upon examination and review of Plaintiff's medical records, Dr. Khakhar found range of motion limitations in Plaintiff Amy Rodriguez' cervical and lumbar spine areas and right shoulder. Dr. Khakhar determined that Plaintiff suffered from disc bulges at C5-6, L4-5 and L5-S1, right shoulder supraspinatus tendinosis and cervical and lumbar myofascial derangement. Dr. Khakhar opines that Plaintiff Amy Rodriguez' injuries to her cervical and lumbar spine are permanent and significant and causally related to the December 23, 2006 accident. He further notes that Plaintiff's prognosis of her right shoulder remains guarded.

Plaintiff further offers the MRI reports of Dr. Charles DeMarco, a radiologist who

interpreted the MRIs of Plaintiff Lydia Rodriguez' lumbar spine which revealed disc herniations at L4-5 and L5-S1 while her right knee MRI revealed suprapatellar effusion and grade 1 sprain medial collateral ligament. With respect to Plaintiff Amy Rodriguez, Dr. DeMarco reported that her cervical MRI revealed a disc bulge at C5-6, her lumbar MRI revealed diffuse bulging of the L4-5 and L5-S1 discs while her right shoulder MRI revealed tendinosis of the supraspinatus tendon.

The Court notes that 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 Defendant to establish, by submission of evidentiary proof in admissible form, that the 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.

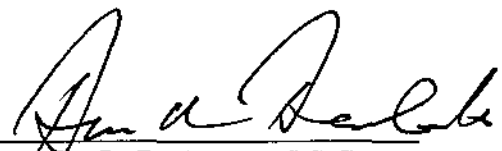
2004). Plaintiff must still establish evidence of the extent of his purported physical limitations and its duration. *Arjona v. Calcano*, 7 A.D.3d 279 (1st Dept. 2004).

In the instant case Plaintiffs have not demonstrated by admissible evidence an objective and quantitative evaluation that they have 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, they have not demonstrated by admissible evidence the extent and duration of their 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 Mohammed Russel and Megeve Taxi, LLC's motion for an Order granting summary judgment dismissing Plaintiffs' Complaint for failure to satisfy the serious injury threshold under Insurance Law §5102(d) is **granted**.

Dated: August 22, 2013



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