

Gonzalez v Thomas

2013 NY Slip Op 33957(U)

August 13, 2013

Supreme Court, Bronx County

Docket Number: 350586/10

Judge: Ben R. Barbato

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

Present: Honorable Ben R. Barbato

JONATHAN GONZALEZ, an Infant over the age of 14 years
by his Mother and Natural Guardian, EVETTE GONZALEZ,

Plaintiff,

-against-

MORAIS THOMAS,

Defendant.

DECISION/ORDER

Index No.: 350586/10

The following papers numbered 1 to 8 read on this motion for summary judgment noticed on September 21, 2012 and duly transferred on July 8, 2013.

<u>Papers Submitted</u>	<u>Numbered</u>
Notice of Motion, Affirmation & Exhibits	1, 2, 3
Supplemental Affirmation & Exhibit	4, 5
Affirmation in Opposition & Exhibits	6, 7
Reply Affirmation	8

Upon the foregoing papers, and after reassignment of this matter from Justice Sharon A.M. Aarons on July 8, 2013, Defendant, Morais Thomas, seeks an Order granting summary judgment and 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 June 12, 2010, at or near the intersection of Broadway and Manhattan College Parkway, in the County of Bronx, City and State of New York.

On July 19, 2012, the Plaintiff, Jonathan Gonzalez, appeared for a physical examination conducted by Defendant's appointed physician Dr. Michael J. Katz, an Orthopedic surgeon.

Upon examination and review of Plaintiff's medical records, Dr. Katz determined that Plaintiff

suffered cervical and lumbosacral spine strain, left and right hips and buttocks contusion and abrasion, left knee and leg contusion, left elbow, wrist and forearm contusion and abrasion, and left shoulder contusion, all of which had resolved at the time of the examination. Dr. Katz notes that Plaintiff shows no signs or symptoms of permanence relative to the musculoskeletal system or related to the accident of June 12, 2010. Dr. Katz further finds that Plaintiff has full range of motion and that he is capable of full time work and activities of daily living without restrictions.

Defendant also submits the affirmed report of Dr. Mark J. Decker, a radiologist, who reviewed the MRIs of Plaintiff's lumbar and cervical spine, taken on August 13, 2010. Dr. Decker reports that the MRI of the lumbar spine reveals diffuse multilevel bulging and facet arthropathy. Dr. Decker opines that Plaintiff suffers degenerative disc disease at the L4-5 and L5-S1 levels with disc bulging at L3-4 which are longstanding and not causally related to the accident of June 12, 2010. Dr. Decker's review of Plaintiff's cervical spine MRI reveals degenerative disc disease at C5-6, non-acute Schmorl's node superior aspect at C6, bulging and bony ridging at this level with no herniation. Dr. Decker opines that these findings are also longstanding and not causally related to the date of the accident of June 12, 2010.

Plaintiff offers the Affirmed Final Narrative Report of Dr. Rafael Delacruz Gomez, dated November 8, 2010. Dr. Delacruz Gomez states that Plaintiff initially came to his office for evaluation and treatment on June 16, 2010. Dr. Delacruz Gomez notes that on September 15, 2010, Plaintiff stated that he still suffered from residual neck and lower neck pain as well as bilateral shoulders and knees pain. On November 8, 2010, Dr. Delacruz Gomez reexamined Plaintiff and found restrictions in the range of motion of Plaintiff's cervical and lumbosacral spine. Dr. Delacruz determined that Plaintiff suffered displacement of the cervical and lumbar intervertebral disc w/o myelopathy, post traumatic sprain/strain of the neck and lumbar spine,

disc herniation at C5-6, disc bulge at C6-7 and disc herniation at L3-4. Dr. Delacruz Gomez opines that Plaintiff's injuries are directly related to the accident of June 12, 2010.

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. In addition, Dr. Delacruz Gomez' initial report dated June 16, 2010 and Dr. Fleischer's examinations have been referenced but not attached to Plaintiff's opposition papers.

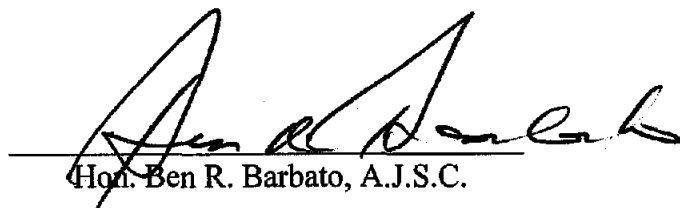
Under the "no fault" law, in order to maintain an action for personal injury, a plaintiff must establish that a "serious injury" has been sustained. *Licari v. Elliot*, 57 N.Y.2d 230 (1982). The proponent of a motion for summary judgment must tender sufficient evidence to the absence of any material 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 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, 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).

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

Therefore it is

ORDERED, that Defendant, Morais Thomas' motion for an Order granting summary judgment and dismissing Plaintiff's Complaint for failure to satisfy the serious injury threshold under Insurance Law §5102(d) is **granted**.

Dated: August 13, 2013


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