Jones v Seta
2014 NY Slip Op 32658(U)
September 8, 2014
Supreme Court, Bronx County
Docket Number: 308688/11
Judge: Ben R. Barbato
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

Present: Honorable Ben R. Barbato

TYSON JONES and SUSAN WATSON,

Plaintiffs,

-against-

RICHARD V. SETA and MATTHEW SETA,

Defendants.

DECISION/ORDER

Index No.: 308688/11

The following papers numbered 1 to 9 read on this motion for summary judgment noticed on July 12, 2013 and duly transferred on April 7, 2014.

Papers Submitted	Numbered
Notice of Motion, Affirmation & Exhibits	**1, 2, 3**
Memorandum of Law	**4**
Affirmation in Opposition & Exhibits	**5, 6**
Reply Affirmation & Exhibits	**7, 8**
Sur-Reply Affirmation	**9**

Upon the foregoing papers, and after reassignment of this matter from Justice Kenneth L. Thompson on April 7, 2014, Defendants, Richard V. Seta and Matthew Seta, seek an Order granting summary judgment dismissing Plaintiff Susan Watson'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 vehicle accident which occurred on June 3, 2011, on the Cross Bronx Expressway, Eastbound, approximately 100 feet of Webster Avenue, in the County of Bronx, City and State of New York.

On January 9, 2013, the Plaintiff appeared for a physical examination conducted by Defendants' appointed physician Dr. Jay Nathan, an Orthopedist. Upon examination and review of Plaintiff Susan Watson's medical records, Dr. Nathan determined that Plaintiff suffered cervical and lumbar sprains with no objective evidence of an orthopedic disability or residual

impairment as a result of the accident of June 3, 2011. Dr. Nathan reports that Plaintiff had self-limitation of motion on examination which could not be substantiated by any positive orthopedic testing or spasm. Dr. Nathan further finds no clinical evidence of carpal tunnel syndrome.

Defendants also offer the reports of Dr. Mark J. Decker, a radiologist who reviewed the MRIs of Plaintiff Susan Watson's cervical and lumbar spine. Dr. Decker's review of the cervical MRI reveals diffuse multilevel loss of disc signal with loss of disc height, C5-6 and C6-7 and retrolisthesis of C6 on C7 with no evidence of traumatic injury, herniation or fracture. Dr. Decker opines that these injuries are degenerative, longstanding and not causally related to the accident of June 3, 2011. Dr. Decker's review of Plaintiff's lumbar spine MRI reveals diffuse degenerative disc disease with multilevel loss of disc signal and loss of disc height at L5-S1, Grade 1 anterior spondylosisthesis of L5 on S1 due to facet arthropathy. Dr. Decker opines that these injuries are also degenerative, longstanding and not causally related to the accident of June 3, 2011.

Plaintiff submits the Affirmation of Dr. Ranga C. Krishna, Plaintiff's treating neurologist, certified medical records from Harlem Hospital and Westchester Medical Care, as well as the MRI reports of Dr. Gregory Lawler, the radiologist who read the MRIs of Plaintiff's brain, cervical spine and lumbar spine.

Any reports, Affirmations or medical records not submitted in admissible form were not considered for the purpose of this Decision and Order. See: *Barry v. Arias*, 94 A.D.3d 499 (1st Dept. 2012).

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, 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 her purported physical limitations and its duration. *Arjona v. Calcano*, 7 A.D.3d 279 (1st Dept. 2004).

In the instant case Plaintiff has 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 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 Defendants have not met that burden. However, based upon the medical evidence and testimony submitted, Plaintiff has not established that she has been unable to perform substantially all of her normal activities for 90 days within the first 180 days immediately following the accident and as such is precluded from raising the 90/180 day threshold provision of the Insurance Law.

Therefore it is

ORDERED, that Defendants Richard V. Seta and Matthew Seta's motion for an Order granting summary judgment and dismissing Plaintiff Susan Watson's Complaint for failure to satisfy the serious injury threshold pursuant to Insurance Law §5102(d) is **granted** to the extent that Plaintiff Susan Watson is precluded from raising the 90/180 day threshold provision of the Insurance Law.

Dated: September 8, 2014

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