

Mota v Caez

2014 NY Slip Op 33188(U)

November 7, 2014

Supreme Court, Bronx County

Docket Number: 303810/10

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

ANA MOTA, SANTA GROSS and ROSA THOMAS,

Plaintiffs,

-against-

DECISION/ORDER

Index No.: 303810/10

MARIA CAEZ and ELSIE MERCADO,

Defendants.

The following papers numbered 1 to 8 read on this motion and cross motion for summary judgment noticed on September 12 and October 31, 2013 and duly transferred on July 11, 2014.

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

Upon the foregoing papers, and after reassignment of this matter from Justice Julia Rodriguez on July 11, 2014, Defendant, Elsie Mercado, seeks an Order granting summary judgment dismissing Plaintiff Rosa Thomas' Complaint for failure to satisfy the serious injury threshold under Insurance Law §5102(d). By cross-motion, Defendant Maria Caez seeks an Order granting summary judgment and dismissing Plaintiff Rosa Thomas' 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 30, 2008, on Grand Concourse at or near its intersection with Bedford Park Boulevard, in the County of Bronx, City and State of New York.

On January 28, 2013, the Plaintiff Rosa Thomas appeared for an orthopedic examination conducted by Defendants' appointed physician Dr. Gabriel L. Dassa. Upon examination and

review of Plaintiff's medical records, Dr. Dassa determined that Plaintiff suffered cervical and lumbar spine disc bulging and a C3-4 herniation, all based on MRIs but with no correlating clinical orthopedic findings, bilateral shoulder sprains and left knee sprain and strain which at the time of the examination had resolved. Dr. Dassa found full range of motion in Plaintiff's cervical spine, lumbar spine, bilateral shoulders and knees. Dr. Dassa opines that Plaintiff presents no ongoing orthopedic disability or restrictions for employment as a home attendant which Plaintiff had resumed full-time after an absence of three days. Dr. Dassa further states that Plaintiff can perform her activities of daily living without restriction.

Defendants also offer the MRI report of Dr. Steven L. Mendelsohn, a radiologist who reviewed the MRI of Plaintiff's cervical spine taken on August 12, 2008. Dr. Mendelsohn states that Plaintiff's cervical spine MRI reveals mild multilevel age related degenerative changes with no evidence of focal disc herniation or any abnormality causally related to the accident of June 30, 2008.

This Court has read the Affirmations of Plaintiff's treating physicians, Dr. Pedro Gonzalez, Dr. Gautam Khakhar and Dr. Noel W. Howell, as well as the Affirmation of Dr. Ronald Roskin, the radiologist who read and interpreted the MRI films of Plaintiff's cervical spine, all presented by Plaintiff Rosa Thomas.

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, 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).

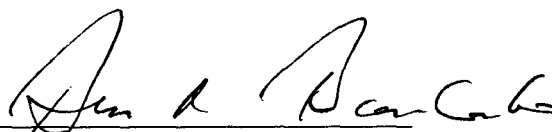
In the instant case Plaintiff has demonstrated by admissible evidence an objective and quantitative evaluation that she has suffered significant limitations to the normal function, purpose and use of a body organ, member, function or system sufficient to raise a material issue of fact for determination 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 his 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 Defendant Elsie Mercado's motion and Defendant Maria Caez' cross motion for an Order granting summary judgment and dismissing Plaintiff Rosa Thomas' Complaint for failure to satisfy the serious injury threshold pursuant to Insurance Law §5102(d) are **granted** to the extent that Plaintiff Rosa Thomas is precluded from raising the 90/180 day threshold provision of the Insurance Law.

Dated: November 7, 2014



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