

Rivera v Khan

2014 NY Slip Op 33193(U)

November 19, 2014

Supreme Court, Bronx County

Docket Number: 311183/11

Judge: Ben R. Barbato

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

Present: Honorable Ben R. Barbato

JAVIER RIVERA,

Plaintiff,

DECISION/ORDER

-against-

Index No.: 311183/11

YASIR KHAN and SADIA MEHJABEEN,

Defendants.

The following papers numbered 1 to 6 read on this motion for summary judgment noticed on June 28, 2013 and duly transferred on July 11, 2014.

| <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 11, 2014, Defendants, Yasir Khan and Sadia Mehjabeen, seek 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 November 16, 2010 on West Street at or near its intersection with Wood Street, in the County of Bronx, City and State of New York.

On December 4, 2012, the Plaintiff appeared for a neurological examination conducted by Defendants' appointed physician Dr. Marianna Golden. Upon examination and review of Plaintiff's medical records, Dr. Golden determined that Plaintiff presented a normal neurologic examination. Dr. Golden states that Plaintiff's examination revealed no evidence of an accident

related neurologic disability. Dr. Golden further states that there is no evidence of permanency or radiculopathy and that Plaintiff is capable of working and performing his normal activities of daily living without any restrictions or limitations.

On December 4, 2012, the Plaintiff appeared for an orthopedic evaluation conducted by Defendants' appointed physician Dr. Thomas P. Nipper. Upon examination and review of Plaintiff's medical records, Dr. Nipper determined that Plaintiff suffered cervical and lumbosacral spine sprains and strains, which had resolved by the time of the examination. Dr. Nipper finds full range of motion in Plaintiff's cervical, thoracic and lumbar spine with no spasm or tenderness. Dr. Nipper further finds no clinical evidence of radiculopathy and opines that there is no evidence of any orthopedic disability or permanency.

Defendants also offer the MRI reports of Dr. Bert R. Heyligers, a radiologist who reviewed the MRI films of Plaintiff's cervical spine and lumbar spine. Dr. Heyligers states that Plaintiff's cervical spine MRI reveals a posterior disc herniation at C6-7 which may be chronic in nature. With regard to Plaintiff's lumbar spine MRI, Dr. Heyligers states that it reveals hemangiomas at T12 and L1 which are unrelated to trauma.

This Court has read the Affirmation of Plaintiff's treating physician, Dr. Ranga C. Krishna, who examined Plaintiff on November 19, 2010, May 4, 2011 and June 19, 2013 and found range of motion limitations in Plaintiff's cervical and lumbar spines. In addition, Dr. Krishna performed a Nerve Conduction Study on February 2, 2011 which revealed left C5-6 and left L5-S1 radiculopathies as well as a Functional Capacity Evaluation on May 4, 2011 which revealed significant deficits. The Court has further considered the medical records from Westchester Medical Care and the reports of Dr. Gregory Lawler, the radiologist who read the MRI films of Plaintiff's cervical and lumbar spine, presented by Plaintiff.

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 upon 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. Calcano*, 7 A.D.3d 279 (1st Dept. 2004).

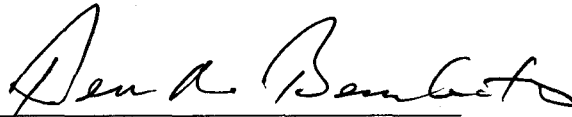
In the instant case Plaintiff has demonstrated by admissible evidence an objective and quantitative evaluation that he has suffered significant limitations to the normal function, purpose and use of a body organ, member, function or system sufficient to raise a material issue of fact

for determination by a jury. Further, he has 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 Defendants have not met that burden. However, based upon the medical evidence and testimony submitted, Plaintiff has not established that he 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 Defendants Yasir Khan and Sadia Mehjabeen's 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** to the extent that Plaintiff is precluded from raising the 90/180 day threshold provision of the Insurance Law.

Dated: November 19, 2014



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