Sterling v Nisbett
2014 NY Slip Op 33234(U)
April 4, 2014
Supreme Court, Bronx County
Docket Number: 302618/12
Judge: Ben R. Barbato
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

Present: Honorable Ben R. Barbato

SONIA STERLING,

Plaintiff,

-against-

EDMUND NISBETT, DONNETTE ANDRE DUNCAN-GREEN and KELVIN GREEN,

Defendants.

DECISION/ORDER

Index No.: 302618/12

The following papers numbered 1 to 12 read on these motions for summary judgment noticed on June 11, 2013 and July 9, 2013 and duly transferred on January 6, 2014.

Papers Submitted	Numbered
Notice of Motion, Affirmation & Exhibits (Orcel)	**1, 2, 3**
Notice of Motion, Affirmation & Exhibits (Ford)	**4, 5, 6**
Affirmations in Opposition & Exhibits	**7, 8, 9, 10**
Reply Affirmation & Exhibits	**11, 12**

The above Motions have been consolidated for the purpose of this Decision and Order.

Upon the foregoing papers, and after reassignment of this matter from Justice Sharon A.M. Aarons on January 6, 2014, Defendants, Donnette Andre Duncan-Green and Kelvin Green, seek an Order granting summary judgment dismissing Plaintiff's Complaint for failure to satisfy the serious injury threshold under Insurance Law §5102(d). By Motion, Defendant Edmund Nisbett also seeks an Order granting summary judgment 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 May 11, 2011, at or near the intersection of Baisley Blvd. and Merrick Blvd., in the County of Queens, City and State of New York.

On January 3, 2013, the Plaintiff appeared for an orthopedic examination conducted by

Defendants' appointed physician Dr. Arnold T. Berman. Upon examination and review of Plaintiff's medical records, Dr. Berman determined that Plaintiff suffered cervical and lumbar spine strain and sprain, which had fully resolved at the time of the examination. Dr. Berman finds no aggravation of a preexisting condition and reports that Plaintiff is fully recovered with no residuals. With regard to Plaintiff's cervical spine MRI performed on May 19, 2011, Dr. Berman states that it revealed degenerative disc changes at C3-7 which pre-existed the accident in question and did not correlate with Plaintiff's normal clinical examination. With regard to Plaintiff's lumbar spine MRI performed on June 15, 2011, Dr. Berman reports that it revealed a herniated disc at L5-S1 which pre-existed the accident in question and did not correlate with Plaintiff's normal examination. Dr. Berman finds no evidence of radiculopathy radiologically or clinically. Dr. Berman further notes that Plaintiff is capable of participating in all of her usual activities of daily living and work full time as a home health aide without restrictions.

On September 7, 2011, the Plaintiff appeared for a physiatric evaluation conducted by Dr. Francisco H. Santiago. Upon examination and review of Plaintiff's medical records, Dr. Santiago determined that Plaintiff suffered cervical and lumbar spine sprain and strain, which had resolved at the time of the examination. Dr. Santiago finds that Plaintiff has full range of motion in her cervical and lumbar spine with no tenderness or spasm. Dr. Santiago opines that Plaintiff is able to return to her pre-loss activity levels including occupational duties with no physical restrictions.

In opposition, Plaintiff submits and Affirmation and an Affirmed narrative report of Dr. James R. Avellini, who first examined Plaintiff on September 27, 2011 and then on May 20, 2013, certified records from two medical facilities and the MRI reports of Dr. William Weiner.

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 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 Donnette Andre Duncan-Green and Kelvin Green's motion for an Order granting summary judgment 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; and it is further

ORDERED, that Defendant Edmund Nisbett's motion for an Order granting summary judgment 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: April 4, 2014

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