

Desmoulin v Nguyen
2014 NY Slip Op 33238(U)
January 28, 2014
Supreme Court, Bronx County
Docket Number: 305936/11
Judge: Ben R. Barbato
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX**

Present: Honorable Ben R. Barbato

PETERSON J. DESMOULIN,

Plaintiff,

-against-

DECISION/ORDER

Index No.: 305936/11

TRILE NGUYEN,

Defendant.

The following documents papers numbered 1 to 6 read on this motion for summary judgment noticed on May 31, 2013 and duly transferred on January 6, 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 January 6, 2014, Defendant, Trile Nguyen, 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 November 29, 2008 at City Island Circle and City Island Road, in the County of Bronx, City and State of New York.

On September 11, 2012, the Plaintiff appeared for a neurological examination conducted by Defendant's appointed physician Dr. Marianna Golden. Upon examination and review of Plaintiff's medical records, Dr. Golden determined that Plaintiff presented a normal neurological examination. Dr. Golden also states that Plaintiff's examination revealed no objective evidence

of any disability or permanency/residuals causally related to the accident of November 29, 2008.

On September 11, 2012, the Plaintiff appeared for an orthopedic evaluation conducted by Defendant's appointed physician Dr. Thomas P. Nipper. Upon examination, Dr. Nipper determined that the Plaintiff suffered sprains to his cervical, thoracic and lumbosacral spine which had resolved by the time of the examination. Dr. Nipper finds no muscle spasms or tenderness on palpation and further states that there is no evidence of any orthopedic disability. Dr. Nipper opines that Plaintiff is capable of working and of performing all of his normal activities of daily living without any limitations.

This Court has read the Affirmed reports of Dr. Ilya Smuglin and Dr. Osafradu Opam as well as the Affirmation of Dr. Joseph Leadon, the radiologist who read the MRI films of Plaintiff's cervical and lumbar spine, all 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

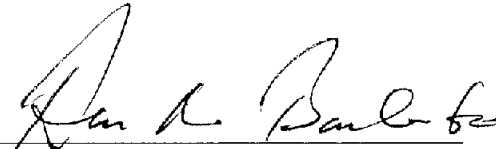
then shifts and it is incumbent upon the plaintiff to produce *prima facie* evidence in admissible form to support the claim of serious injury. *Licari, supra; Lopez v. Senatore*, 65 N.Y.2d 1017 (1985). Further, it is the presentation of objective proof of the nature and degree of a Plaintiff's injury 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 Defendant has 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 Defendant Trile Nguyen'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: January 28, 2014



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