

Diallo v Rosa

2014 NY Slip Op 33260(U)

March 17, 2014

Supreme Court, Bronx County

Docket Number: 304630/11

Judge: Ben R. Barbato

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

Present: Honorable Ben R. Barbato

ABDOURAHAMANE DIALLO,

Plaintiff,

DECISION/ORDER

-against-

Index No.: 304630/11

FABIAN ROSA and DTG ENTERPRISE, INC.,

Defendants.

The following papers numbered 1 to 7 read on this motion for summary judgment noticed on July 18, 2013 and duly transferred on January 6, 2014.

<u>Papers Submitted</u>	<u>Numbered</u>
Notice of Motion, Affirmation & Exhibits	1, 2, 3
Memorandum of Law	4
Affirmation in Opposition & Exhibits	5, 6
Reply Affirmation	7

Upon the foregoing papers, and after reassignment of this matter from Justice Sharon A.M. Aarons on January 6, 2014, Defendants, Fabian Rosa and DTG Enterprise, Inc., seek 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 March 31, 2011 on East 158th Street at or about its intersection with Elton Avenue, in the County of Bronx, City and State of New York.

On June 11, 2012, the Plaintiff appeared for an orthopedic examination conducted by Defendants' appointed physician Dr. Alan M. Crystal. Upon examination and review of Plaintiff's medical records, Dr. Crystal determined that Plaintiff had no findings of a

symptomatic herniated disc at a lumbar or cervical level causing nerve root impingement. Dr. Crystal finds full range of motion in Plaintiff's cervical and lumbar spine with no tenderness or spasm. Dr. Crystal opines that there is no basis to causally relate Plaintiff's cervical and lumbar spine injuries to the accident in question. Dr. Crystal also determined that Plaintiff's left shoulder was fully functional and that it had no impairments. Plaintiff's left shoulder MRI revealed degenerative changes caused by spurs from the acromion and acromioclavicular joint. Dr. Crystal opines that there is no basis to causally relate Plaintiff's left shoulder injuries to the subject accident. With regard to Plaintiff's left knee, Dr. Crystal reports that the emergency room records noted no bruising or swelling and that Plaintiff had full range of motion in his left knee. Dr. Crystal further states that the operative report of Plaintiff's left knee revealed arthritis of the medial condyle and loose bodies. Dr. Crystal opines that there is no basis to causally relate Plaintiff's left knee injuries to the accident of March 31, 2011. With regard to Plaintiff's right knee, Dr. Crystal reports that the emergency room records noted no bruising or swelling and that an MRI performed five days after the accident revealed no findings of acute trauma but degenerative changes with a horizontal tear of the medial meniscus. Dr. Crystal opines that there is no basis to causally relate Plaintiff's right knee injuries to the accident in question.

Defendants also submit the reports of Dr. Audrey Eisenstadt, a radiologist, who states that she reviewed the MRIs of Plaintiff's cervical spine, lumbar spine, left shoulder, left and right knees. Plaintiff's cervical spine MRI revealed degenerative osteophyte formation at C5-6 and C7-T1 and disc bulging at C4-5 and C5-6 with no traumatic basis. Dr. Eisenstadt reports that no annular tears are seen at any level to suggest any acute rupture. Plaintiff's lumbar spine MRI revealed disc dessication and herniation at L4-5 and L5-S1 which Dr. Eisenstadt states have a degenerative etiology. Plaintiff's left shoulder MRI revealed developmental and degenerative

changes at the acromioclavicular joint which could not have occurred in the interval between the MRI examination and the accident. Dr. Eisenstadt finds no joint effusion and no osseous, ligamentous, tendinous or labral abnormality post traumatic in origin or causally related to the accident of March 31, 2011. Plaintiff's left knee MRI revealed early degenerative joint disease, intrasubstance mucoid grade II degenerative signal change with no ligamentous, tendinous or osseous changes. Dr. Eisenstadt opines that Plaintiff's meniscal changes in his left knee are longstanding and degenerative. Plaintiff's right knee MRI revealed pre-existing degenerative changes involving the posterior horn of the medial meniscus and linear signal change indicative of mucoid intrasubstance mucoid grade II degenerative signal change. Dr. Eisenstadt reports that the chronic nature of these changes is evident by the absence of a significant joint effusion or secondary ligamentous, tendinous or osseous abnormalities. She further opines that this process is indicative of a longstanding meniscal abnormality predating the accident of March 31, 2011.

The Court has read the affirmed reports of Dr. David R. Payne, Dr. Dina Nelson and Dr. Emmanuel Hostin, 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 on Defendants to establish, by submission of

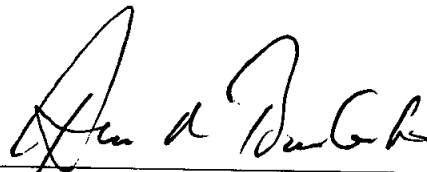
evidentiary proof in admissible form, that Plaintiff has not suffered a "serious injury." *Lowe v. Bennett*, 122 A.D.2d 728 (1st Dept. 1986) *aff'd* 69 N.Y.2d 701 (1986). Where a defendant's motion is sufficient to raise the issue of whether a "serious injury" has been sustained, the burden then shifts 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 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.

Therefore it is

ORDERED, that Defendants Fabian Rosa and DTG Enterprise, Inc.'s motion for an Order granting summary judgment dismissing Plaintiff's Complaint for failure to satisfy the serious injury threshold pursuant to Insurance Law §5102(d) is **denied**.

Dated: March 17, 2014

A handwritten signature in black ink, appearing to read "Ben R. Barbato", written over a horizontal line.

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