Torres v Roman
2014 NY Slip Op 33262(U)
March 21, 2014
Supreme Court, Bronx County
Docket Number: 304981/11
Judge: Ben R. Barbato
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[* 1] FILED Mar 28 2014 Bronx County Clerk

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

Present: Honorable Ben R. Barbato

CARLOS TORRES,

Plaintiff,

-against-

JOSEPH ROMAN, MARK ROMAN and
JULIA VANDERHORST,

Defendants.

DECISION/ORDER

Index No.: 304981/11

The following papers numbered 1 to 9 read on this motion and cross-motion for summary judgment noticed on June 28, 2013 and duly transferred on January 6, 2014.

Papers Submitted	Numbered
Second Amended Notice of Motion, Affirmation & Exhibits	**1, 2, 3**
Notice of Cross-motion, Affirmation & Exhibits	**4, 5, 6**
Affirmation in Opposition & Exhibits	**7, 8**
Reply Affirmation	**9**

Upon the foregoing papers, and after reassignment of this matter from Justice Kenneth L. Thompson on January 6, 2014, Defendant, Julia Vanderhorst, seeks an Order granting summary judgment dismissing Plaintiff's Complaint for failure to satisfy the serious injury threshold under Insurance Law §5102(d). By cross-motion, Defendants Joseph and Mark Roman 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 September 22, 2009, at or near the intersection of 1st Avenue and East 125th Street, in the County, City and State of New York.

On May 4, 2012, the Plaintiff appeared for an orthopedic examination conducted by Defendant's appointed physician Dr. Arnold T. Berman. Upon examination and review of

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Plaintiff's medical records, Dr. Berman determined that Plaintiff suffered cervical and lumbar spine strain and right thumb strain and contusion, which had fully resolved at the time of the examination. Dr. Berman finds no aggravation of a preexisting condition and reports that Plaintiff did not sustain a permanent injury or disability. With regard to Plaintiff's cervical MRI performed on October 20, 2010, Dr. Berman states that it revealed degenerative herniated disc changes at C3-4 which pre-existed the accident in question and did not correlate with Plaintiff's normal clinical examination. With regard to Plaintiff's right elbow MRI performed on October 23, 2010, Dr. Berman reports that ir revealed findings of a radial collateral ligament tear which was not consistent with Plaintiff's normal examination nor with the mechanism of injury. Dr. Berman further notes that Plaintiff is fully recovered with no residuals and that he is capable of performing all of his usual activities of daily living and work full time without restrictions.

On July 9, 2012, the Plaintiff appeared for a neurological evaluation conducted by Defendant's appointed physician Dr. Chandra M. Sharma. Upon examination and review of Plaintiff's medical records, Dr. Sharma determined that Plaintiff suffered cervical and lumbar spine sprains, which had resolved at the time of the examination. Dr. Sharma opines that Plaintiff presented a normal neurological examination with no limitations to continuation of usual work and activities of daily living. Dr. Sharma further states that there will be no permanent neurological problems of a causally related nature and that Plaintiff has reached pre-accident status.

In opposition, Plaintiff submits the narrative report of Dr. S. Ramachandran Nair, who first examined Plaintiff about three weeks following the accident, the affirmed report of Dr. Mark McMahon, the MRI reports of Dr. Richard DeNise and Dr. Jacob Lichy, and the affirmed report of Dr. Huseyin E. Tuncel.

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 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

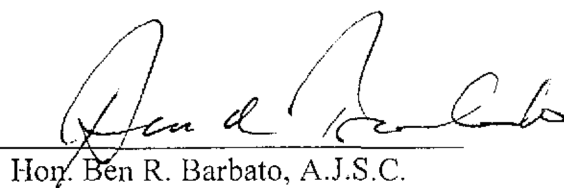
for determination by a jury. Further, he has demonstrated by admissible evidence the extent and duration of his physical limitations sufficient to allow this action to be presented to a trier of facts. The role of the court is to determine whether bona fide issues of fact exist, and not to resolve issues 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 Defendant Julia Vanderhorst'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 Defendants Joseph and Mark Roman's cross-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: March 21, 2014



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