

Rolon v Albanez

2014 NY Slip Op 33263(U)

March 18, 2014

Supreme Court, Bronx County

Docket Number: 305097/11

Judge: Ben R. Barbato

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

Present: Honorable Ben R. Barbato

DAVID ROLON,

Plaintiff,

DECISION/ORDER

-against-

Index No.: 305097/11

LUIS ALBANEZ and N.E.S. TRUCKING CORP.,

Defendants.

The following papers numbered 1 to 6 read on this motion for summary judgment noticed on May 30, 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 Alison Y. Tuitt on January 6, 2014, Defendants, Luis Albanez and N.E.S. Trucking Corp., 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 24, 2011, on 57th Avenue, at or near its intersection with 92nd Street, in the County of Queens, City and State of New York.

On December 12, 2012, the Plaintiff appeared for an orthopedic examination conducted by Defendants' appointed physician Dr. Robert Israel. Upon examination and review of Plaintiff's medical records, Dr. Israel determined that Plaintiff suffered from cervical and lumbar spine sprains, which had resolved at the time of the examination. Dr. Israel opines that Plaintiff

has no disability as a result of the accident of record and further notes that Plaintiff can perform his work activities and activities of daily living without restrictions.

In opposition, Plaintiff submits the unaffirmed report of Dr. Shahid Mian, uncertified emergency room records, unaffirmed MRI reports of Dr. Steven Winter and his own Affidavit. The Court notes that Plaintiff's medical evidence was not submitted in admissible form thus it was 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

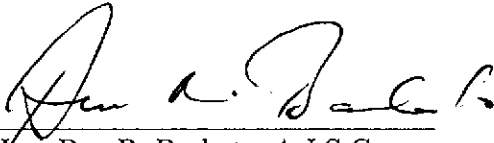
and its duration. *Arjona v. Calcano*, 7 A.D.3d 279 (1st Dept. 2004).

In the instant case Plaintiff has not 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 not 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 met that burden.

Therefore it is

ORDERED, that Defendants Luis Albanez and N.E.S. Trucking Corp.'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 **granted**.

Dated: March 18, 2014



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