

Wynn v Rivera

2014 NY Slip Op 33309(U)

July 7, 2014

Supreme Court, Bronx County

Docket Number: 307938/10

Judge: Ben R. Barbato

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

Present: Honorable Ben R. Barbato

ERNEST WYNN,

Plaintiff,

-against-

ALEXIS RIVERA, ALDE MASONRY HEATING, INC.
and GERALDINE HAYES,

Defendants.

DECISION/ORDER

Index No.: 307938/10

The following papers numbered 1 to 9 read on this motion and cross-motion for summary judgment noticed on December 28, 2012 and January 23, 2013 and duly transferred on April 7, 2014.

<u>Papers Submitted</u>	<u>Numbered</u>
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 Alison Y. Tuitt on April 7, 2014, Defendant, Geraldine Hayes, 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 Alexis Rivera and Alde Masonry Heating, 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 September 27, 2007, at Sunnyside Boulevard at or near its intersection with Summit South Plainview, Town of Oyster Bay, in the County of Nassau and State of New York.

On January 19, 2012, the Plaintiff appeared for a physical examination conducted by Defendants' appointed physician Dr. Michael J. Katz, an Orthopedic surgeon. Upon examination and review of Plaintiff's medical records, Dr. Katz determined that Plaintiff suffered cervical and lumbosacral strain with radiculopathy by history as well as a right shoulder contusion, all of which had resolved at the time of the examination. Dr. Katz finds full range of motion in Plaintiff's cervical spine, lumbar spine and right shoulder. Dr. Katz reports that Plaintiff shows no signs or symptoms of permanence relative to the musculoskeletal system or relative to the accident of September 27, 2007. Dr. Katz also states that Plaintiff's cervical and lumbar spine MRI reports indicate changes which are degenerative in nature. Dr. Katz further notes that Plaintiff is not disabled and that he is capable of full time full duty work in a demanding capacity as a chimney cleaner as well as capable of performing his activities of daily living.

On December 15, 2011, the Plaintiff appeared for a neurological examination conducted by Defendants' appointed physician Dr. Daniel Feuer. Upon examination and review of Plaintiff's medical records, Dr. Feuer determined that Plaintiff had a normal neurological examination with no evidence of any neurological disability or permanency causally related to the accident of September 27, 2007. Dr. Feuer finds full range of motion in Plaintiff's cervical and lumbar spine with no tenderness or spasm. Dr. Feuer further finds that Plaintiff is able to engage in full active employment as a fireplace and chimney cleaner, as well as in activities of daily living without restriction.

Defendants also offer the affirmed reports of Dr. Peter A. Ross, a radiologist appointed by Defendants to review the MRIs of Plaintiff's cervical spine. Dr. Ross' review of Plaintiff's cervical spine MRI, performed about two weeks following the accident, reveals vertebral spondylosis changes involving C3-7 vertebrae with dessication of the C2-3 through C7-T1 discs.

Dr. Ross opines that these findings are associated with Plaintiff's degenerative vertebral and discogenic changes, pre-existing to and not caused by the accident of September 27, 2007. Dr. Ross further notes no post traumatic changes.

This Court has read the Affirmed report of Dr. Douglas A. Schwartz, the Affidavit of Dr. Bozena Augustyniak, dated May 30, 2013, as well as the Affidavits of Dr. Charles DeMarco, the radiologist who interpreted the MRI films of Plaintiff's lumbar spine and Dr. Steven Brownstein, the radiologist who interpreted the MRI films of Plaintiff's cervical spine, presented by Plaintiff. The Court notes that Dr. Schwartz performed a single examination of Plaintiff and rendered an opinion as to causation over five years following the accident of September 27, 2007. In addition, Dr. Schwartz noted the wrong accident date in his report and failed to mention Plaintiff's subsequent motor vehicle accident in which Plaintiff sustained injuries to the same body parts. The Court also notes that Plaintiff's medical records indicate that he received physical therapy for approximately one month and then that there was no further treatment until his most recent examination with Dr. Schwartz. Moreover, Dr. Augustyniak fails to adequately explain the lengthy gap of treatment by submitting the explanation in an Affidavit dated 5 ½ years following her single initial examination of Plaintiff on October 9, 2007. See *Pommels v. Perez*, 4 N.Y.3d 566 (2005); *Berete v. Ford*, 29 A.D.3d 452 (1st Dept. 2006).

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

In the instant case Plaintiff has failed to demonstrate 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 failed to demonstrate 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 Defendant, Geraldine Hayes' 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**; and it is further

ORDERED, that Defendants Alexis Rivera and Alde Masonry Heating, Inc.'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 likewise **granted**.

Dated: July 7, 2014



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