

**Lopez v Jones**

2014 NY Slip Op 33310(U)

May 5, 2014

Supreme Court, Bronx County

Docket Number: 308314/11

Judge: Ben R. Barbato

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

**Present:** Honorable Ben R. Barbato

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JOYCE LOPEZ and LOUIS NAZARIO,

Plaintiffs,

**DECISION/ORDER**

-against-

Index No.: 308314/11

CHRISTOPHER A. JONES,

Defendant.

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The following papers numbered 1 to 6 read on this motion for summary judgment noticed on August 6, 2013 and duly transferred on April 7, 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 Julia Rodriguez on April 7, 2014, Defendant, Christopher A. Jones, seeks an Order granting summary judgment dismissing Plaintiffs' 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 28, 2011, on Third Avenue Bridge, in the County of Bronx, City and State of New York.

On March 6, 2013, the Plaintiff Joyce Lopez appeared for a neurological examination conducted by Defendant's appointed physician Dr. Rene Elkin. Upon examination and review of records provided, Dr. Elkin determined that Plaintiff presented with no findings for any structural neurological injury incurred as a result of the subject accident. Dr. Elkin states that Plaintiff's

symptoms are consistent with cervical and lumbar muscle sprain and cervicogenic headaches and notes a prior history of lower back pain as well as a left knee arthroscopy. Dr. Elkin further states that the MRI of Plaintiff's cervical spine reveals multilevel degenerative changes with foraminal narrowing that might explain the electrodiagnostic studies for which there is no causal relationship to the accident of March 28, 2011. Dr. Elkin explains that the restrictions found in Plaintiff's cervical and lumbar spine are attributed to the presence of extensive degenerative disease and further opines that there is no evidence for neurological permanency or disability.

Defendant also offers medical records dated June and August, 2011 from Beacon Hill Orthopedics which reveal that Plaintiff was involved in a work related accident on September 2, 2010. These records do not make any reference to the accident of March 28, 2011 and also note that Plaintiff was diagnosed with cervical spinal degenerative disc disease and that she was out of work since September 2, 2010 as a result of injuries sustained in that accident.

The Court has read the Affirmed narrative report of Plaintiff's treating physician, Dr. Imelda M. Cruz-Banting, who examined Plaintiff on July 20, 2011 and found restrictions in Plaintiff's cervical spine, lumbar spine and left hip along with spasm and tenderness. Dr. Cruz-Banting's initial diagnosis was cervical and lumbar herniated discs with radiculopathy, left hip pain radicular in nature and post traumatic headaches which she causally related to the accident of March 28, 2011. Dr. Cruz-Banting conducted additional examinations of Plaintiff in 2011, 2012 and 2013 until August 14, 2013, when Dr. Cruz-Banting reported that Plaintiff's range of motion had worsened. Dr. Cruz-Banting opines that Plaintiff's injuries are serious, chronic, permanent in nature and causally related to the accident of March 28, 2011. Dr. Cruz-Banting states that her opinion is based upon her examinations of Plaintiff and diagnostic tests performed as well as the fact that Plaintiff was asymptomatic for many years prior to the subject accident.

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 (1<sup>st</sup> 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 (1<sup>st</sup> 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 (1<sup>st</sup> 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 (1<sup>st</sup> Dept. 2004).

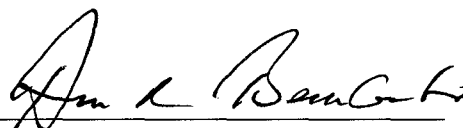
In the instant case Plaintiff has demonstrated by admissible evidence an objective and quantitative evaluation that she has suffered significant limitations to the normal function, purpose and use of a body organ, member, function or system sufficient to raise a material issue

of fact for determination by a jury. Further, she has demonstrated by admissible evidence the extent and duration of her 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 (4<sup>th</sup> 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 submitted, the Court finds that Defendant has not met that burden. However, based upon the medical evidence submitted and the fact that Plaintiff was out of work since September 2, 2010 as a result of injuries sustained in that accident, Plaintiff has not established that she has been unable to perform substantially all of her normal activities for 90 days within the first 180 days immediately following the accident of record and as such is precluded from raising the 90/180 day threshold provision of the Insurance Law.

Therefore it is

**ORDERED**, that Defendant Christopher A. Jones' motion for an Order granting summary judgment and dismissing Plaintiffs' Complaint for failure to satisfy the serious injury threshold pursuant to 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: May 5, 2014

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