

Abebrese v Santana

2014 NY Slip Op 33313(U)

July 23, 2014

Supreme Court, Bronx County

Docket Number: 308572/11

Judge: Ben R. Barbato

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

Present: Honorable Ben R. Barbato

KWAME ABEBRESE,

Plaintiff,

-against-

WILLIAM SANTANA,

Defendant.

DECISION/ORDER

Index No.: 308572/11

The following documents papers numbered 1 to 6 read on this motion for summary judgment noticed on September 27, 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 Kenneth L. Thompson on April 7, 2014, Defendant, William Santana, seeks an Order granting summary judgment and 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 February 20, 2011 on 167th Street at or near its intersection with River Avenue, in the County of Bronx, City and State of New York.

On April 16, 2013, the Plaintiff appeared for a neurological examination conducted by Defendant's appointed physician Dr. Marianna Golden. Upon examination, Dr. Golden determined that Plaintiff presented a normal neurologic examination with no clinical evidence of radiculopathy. Dr. Golden also states that Plaintiff's examination revealed no objective evidence of any disability or permanency causally related to the subject accident. Dr. Golden opines that

Plaintiff is capable of working and of performing his normal activities of daily living without any restrictions or limitations.

On April 16, 2013, the Plaintiff appeared for an orthopedic evaluation conducted by Defendant's appointed physician Dr. Thomas P. Nipper. Upon examination, Dr. Nipper determined that Plaintiff suffered sprains to his cervical and lumbosacral spine, which had resolved by the time of the examination. Dr. Nipper also determined that Plaintiff suffered internal derangement to his left shoulder, which was status post arthroscopy and clinically healed. Dr. Nipper found full range of motion in Plaintiff's cervical and lumbar spine with no muscle spasms or tenderness on palpation and no evidence of radiculopathy or any orthopedic disability. With regard to Plaintiff's left shoulder, Dr. Nipper found decreased ranges of motion which he attributed to suboptimal effort. Dr. Nipper opines that Plaintiff is capable of working and of performing all of his normal activities of daily living without any limitations.

Defendant also presents unsigned reports of Dr. Jessica F. Berkowitz, a radiologist, who reviewed the MRI films of Plaintiff's cervical spine, lumbar spine and left shoulder.

This Court has read the Affidavit of Plaintiff's treating physician, Dr. Gregori Pasqua, the Affirmations of Dr. Robert Haar and Dr. Robert Marini as well as the Affirmation of Dr. David Payne, the radiologist who reviewed the MRI films of Plaintiff's cervical spine, lumbar spine and left shoulder, all 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 upon defendant 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).

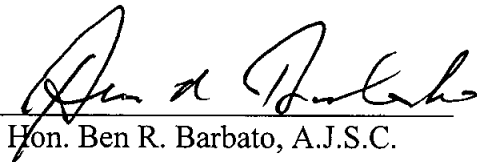
In the instant case Plaintiff has demonstrated by admissible evidence an objective and quantitative evaluation that he has suffered significant limitations to the normal function, purpose and use of a body organ, member, function or system sufficient to raise a material issue of fact for determination 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 Defendant has not met that burden.

Therefore it is

ORDERED, that Defendant William Santana's motion for an Order granting summary judgment and dismissing Plaintiff's Complaint for failure to satisfy the serious injury threshold under Insurance Law §5102(d) is **denied**.

Dated: July 23, 2014



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