

**Dingle v Guadalupe**

2014 NY Slip Op 33316(U)

February 7, 2014

Supreme Court, Bronx County

Docket Number: 308705/09

Judge: Ben R. Barbato

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

**Present:** Honorable Ben R. Barbato

SHIRLEY DINGLE,

Plaintiff,

-against-

IRIS GUADALUPE and JOSE BERMUDEZ, JR.,

Defendants.

**DECISION/ORDER**

Index No.: 308705/09

The following papers numbered 1 to 6 read on this motion for summary judgment noticed on October 17, 2012 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, Iris Guadalupe and Jose Bermudez, Jr., 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 vehicle accident which occurred on August 26, 2007, on West 166<sup>th</sup> Street at or near its intersection with Broadway, in the County, City and State of New York.

On November 3, 2010, 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 thoracolumbosacral strain and left hip contusion, both of which had resolved at the time of the examination. Dr. Katz finds full range of motion with no positive findings and reports that

Plaintiff shows no signs or symptoms of permanence relative to the musculoskeletal system. Dr. Katz notes that Plaintiff's prognosis is excellent. Dr. Katz states that Plaintiff's MRI report reveals a disc bulge which is degenerative in nature and that she suffered a prior work injury to the back in 2005. Dr. Katz further notes that Plaintiff is not disabled and that she is capable of her full time, full duty work as a dispatcher as well as capable of performing her activities of daily living and all pre-loss activities without restrictions.

Plaintiff submits the Affirmation of her treating physician, Dr. Cheri Durden. Dr. Durden examined Plaintiff on September 6, 2007 and found restrictions in Plaintiff's lumbar spine along with muscle spasm and tenderness. Dr. Durden's initial impression was that Plaintiff sustained a lumbar disc injury which rendered her disabled from work until November 2, 2007. Dr. Durden reviewed medical records from Plaintiff's prior work related injury in December 2005 and determined that Plaintiff was then diagnosed with only a lumbar sprain and strain and no disc injuries. Dr. Durden examined Plaintiff on September 20, 2007, October 18, 2007, November 1, 2007 and December 18, 2007 and found ongoing restrictions in her lumbar spine, muscle spasms, tenderness and a positive straight leg raise. Dr. Durden opined that the accident of August 26, 2007 was the cause of Plaintiff's injuries. Dr. Durden reports that Plaintiff received physical therapy for about eight months when it was discontinued because Dr. Durden felt that Plaintiff had achieved maximum medical benefit and further therapy would have only be palliative. Upon reexamination of Plaintiff on November 15, 2012, Dr. Durden found ongoing restrictions in Plaintiff's lumbar spine and a positive straight leg raise consistent with a left sided disc bulge at L4-5. Dr. Durden opines that Plaintiff sustained a left paracentral disc bulge at L4-5 as a result of the subject accident which cannot be attributed to an aging process or preexisting condition. Dr. Durden further states that Plaintiff's injuries are permanent, consequential and significant.

Plaintiff also offers the affirmation of Dr. Harold M. Tice, a radiologist who read the MRI of Plaintiff's lumbar spine. Dr. Tice's report of Plaintiff's lumbar spine MRI, performed seven weeks following the accident, reveals a left paracentral disc bulge at the L4-5 level.

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).

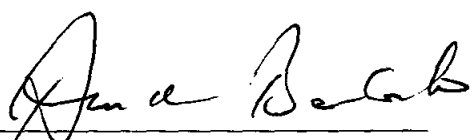
In the instant case Plaintiff has demonstrated by admissible evidence an objective and quantitative evaluation that she has suffered significant limitations to the normal function, purpose and use of a body organ, member, function or system sufficient to raise a material issue of fact for determination 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 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 she has been unable to perform substantially all of her 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 Defendants Iris Guadalupe and Jose Bermudez, Jr.'s motion for an Order granting summary judgment and dismissing Plaintiff's 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: February 7, 2014

**FEB 19 2014**

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