

**Ahmed v Kahman**

2014 NY Slip Op 33320(U)

May 9, 2014

Supreme Court, Bronx County

Docket Number: 309266/08

Judge: Ben R. Barbato

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

**Present:** Honorable Ben R. Barbato

GIAS UDDIN AHMED,

Plaintiff,

-against-

NURUL KAHMAN and Y. MEIR TAXI, INC.,

Defendants.

**DECISION/ORDER**

Index No.: 309266/08

The following papers numbered 1 to 6 read on this motion for summary judgment noticed on May 17, 2013 and duly transferred on April 7, 2014.

<u>Papers Submitted</u>	<u>Numbered</u>
Notice of Motion, Affirmation & Exhibits	1, 2, 3
Memorandum of Law	4
Affirmation in Opposition & Exhibit	5, 6

Upon the foregoing papers, and after reassignment of this matter from Justice Mark Friedlander on April 7, 2014, Defendants, Nurul Kahman and Y. Meir Taxi, 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 November 10, 2007, on Park Avenue South at or near its intersection with East 29<sup>th</sup> Street, in the County, City and State of New York.

On October 1, 2012, the Plaintiff appeared for a neurological examination conducted by Defendants' appointed physician Dr. Edward M. Weiland. Upon examination, Dr. Weiland determined that Plaintiff suffered cervical, thoracic and lumbosacral spine sprains and strains, which at the time of the examination had resolved. In addition, Dr. Weiland determined that

Plaintiff had a history of closed head trauma and multiple contusions which had also resolved. Dr. Weiland found full range of motion in Plaintiff's shoulders, cervical, thoracic and lumbar spine and noted that Plaintiff presented a normal neurologic examination. Dr. Weiland further states that he found no reason why Plaintiff should not be able to perform activities of daily living and continue gainful employment without restrictions. He also opined that Plaintiff did not suffer any permanent or residual effects based upon his examination.

On December 17, 2012, the Plaintiff appeared for an orthopedic examination conducted by Defendants' appointed physician Dr. Gabriel L. Dassa. Upon examination and review of Plaintiff's medical records, Dr. Dassa determined that Plaintiff suffered cervical spine, lumbosacral spine and left knee sprains and strains which at the time of the examination had resolved, herniated discs at L5-S1 and at C3-4 and C5-6 all based on MRIs but with no correlating clinical orthopedic findings. Dr. Dassa finds no clinical evidence of cervical or lumbosacral spine radiculopathy nor carpal tunnel syndrome. Dr. Dassa opines that there is no ongoing orthopedic disability that would curtail Plaintiff's full time employment or activities of daily living.

This Court has read the Affirmations of Plaintiff's treating physicians, Dr. Miriam Kanter and Dr. Nitin Narkhede, as well as the Affirmation of Dr. Richard Rizzuti, the radiologist who read and interpreted the MRI films of Plaintiff's cervical spine, lumbar spine and left knee, 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 (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, 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 (1<sup>st</sup> 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 (1<sup>st</sup> 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 (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 he has been unable to perform substantially all of his 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 Nurul Kahman and Y. Meir Taxi, Inc.'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: May 9, 2014

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