

<b>Perez v Bah</b>
2014 NY Slip Op 33329(U)
March 17, 2014
Supreme Court, Bronx County
Docket Number: 303967/10
Judge: Ben R. Barbato
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX**

**Present:** Honorable Ben R. Barbato

JOAN PEREZ,

Plaintiff,

-against-

ABDULAI BAH, AMADOU DIALLO and  
JORGE TONUELLAS,

Defendants.

**DECISION/ORDER**

Index No.: 303967/10

The following papers numbered 1 to 12 read on these motions for summary judgment noticed on October 29, 2012 and June 25, 2013, and duly transferred on October 11, 2013.

<u>Papers Submitted</u>	<u>Numbered</u>
Notice of Motion, Affirmation & Exhibits	1, 2, 3
Memorandum of Law	4
Affirmation in Support & Exhibits	5, 6
Notice of Motion, Affirmation & Exhibits	7, 8, 9
Notice of Cross-Motion, Affirmation & Exhibits	10, 11, 12

The above motions and cross-motion have been consolidated for the purpose of this Amended Decision and Order.

Upon the foregoing papers, and after reassignment of this matter from Justice Sharon A.M. Aarons on October 11, 2013, Defendants, Abdulai Bah, Amadou Diallo and Jorge Tonuellas, seek an Order granting summary judgment and dismissing Plaintiff's Complaint for failure to satisfy the serious injury threshold under Insurance Law §5102(d). By cross-motion, Defendants seek an Order dismissing this action as Plaintiff cannot prove damages.

This is an action to recover for personal injuries allegedly sustained as a result of a motor vehicle accident which occurred on November 15, 2009, on East 167<sup>th</sup> Street at or near its intersection with Clay Avenue, in the County of Bronx, City and State of New York.

Defendants offer the affirmations of Dr. David A. Fisher, a radiologist, who reviewed the MRIs of Plaintiff's right knee, lumbar spine and cervical spine. Dr. Fisher's review of Plaintiff's right knee MRI reveals a normal examination with no evidence of meniscal or ligament injury. Dr. Fisher states that there is no radiographic evidence of recent traumatic or causally related injury to the right knee. Dr. Fisher's review of the MRI study of Plaintiff's lumbar spine performed one month post accident reveals degenerative changes throughout the lower thoracic spine without herniations or fractures. Dr. Fisher opines that there is no radiographic evidence of traumatic or causally related injury to Plaintiff's lumbar spine. Dr. Fisher's review of the MRI study of Plaintiff's cervical spine performed two weeks post accident reveals moderate degenerative changes at C4-5, C5-6 and C6-7 with no herniations or bulges.

On April 23, 2012, the Plaintiff appeared for an orthopedic examination conducted by Defendants' retained physician Dr. John H. Buckner. Upon examination and review of Plaintiff's medical records, Dr. Buckner determines that there is no evidence of a causally related right knee injury or of a causally related cervical or lumbar spine injury. Dr. Buckner opines that Plaintiff has no disability or permanency as a result of the subject accident.

The Court notes that any reports, Affirmation 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). The Court further notes that Plaintiff has not opposed Defendants' motions and has failed to produce *prima facie* evidence in admissible form to support her claim of serious injury.

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).

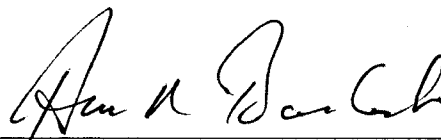
In the instant case Plaintiff has not demonstrated by admissible evidence an objective and quantitative evaluation that she has suffered significant limitations to the normal function, purpose and use of a body organ, member, function or system sufficient to raise a material issue of fact for determination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

Therefore it is

**ORDERED**, that Defendants Abdulai Bah, Amadou Diallo and Jorge Tonuellas' motions for an Order granting summary judgment dismissing Plaintiff's Complaint for failure to satisfy the serious injury threshold pursuant to Insurance Law §5102(d) and cross-motion to dismiss this action are **granted** without opposition.

Dated: March 17, 2014

A handwritten signature in black ink, appearing to read "Ben R. Barbato", written over a horizontal line.

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