

| |
|--|
| Taylor-Wilson v Breitbart |
| 2015 NY Slip Op 30793(U) |
| April 13, 2015 |
| Sup Ct, Bronx County |
| Docket Number: 308969/11 |
| Judge: Ben R. Barbato |
| Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office. |
| This opinion is uncorrected and not selected for official publication. |

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

Present: Honorable Ben R. Barbato

YAVETTE TAYLOR-WILSON,

Plaintiff,

-against-

DECISION/ORDER

Index No.: 308969/11

FANNY BREITBART,

Defendant.

The following papers numbered 1 to 6 read on this motion for summary judgment noticed on June 20, 2013 and duly transferred on July 11, 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 Sharon A.M. Aarons on July 11, 2014, Defendant, Fanny Breitbart, seeks 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 February 6, 2011, on Peartree Avenue, in CO-OP City, County of Bronx, City and State of New York.

On September 13, 2012, the Plaintiff appeared for a physical examination conducted by Defendant's appointed physician Dr. Michael J. Katz, an Orthopedic surgeon. Upon examination and review of Plaintiff's medical records, Dr. Katz determined that Plaintiff suffered cervical strain, lumbosacral strain and left shoulder contusion, all of which had resolved at the time of the

examination. Dr. Katz finds full range of motion in Plaintiff's cervical spine with no tenderness or paravertebral muscle spasm and full range of motion in Plaintiff's left shoulder. Dr. Katz notes that Plaintiff had a decompression of the lumbar spine for spinal stenosis, a condition related to age and degeneration and not to the accident of February 6, 2011. Dr. Katz reports that Plaintiff's MRI studies revealed degenerative changes at the cervical spine and lumbar spine as well as degenerative cystic formation in Plaintiff's left shoulder, unrelated to the subject accident. Dr. Katz further notes that Plaintiff is not disabled and that she is capable of performing her activities of daily living.

This court has read the Affirmations of Dr. Maria Ciechorska and Dr. Shahid Mian as well as the MRI report of Dr. Harvey Lefkowitz, 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 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 (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 her 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 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 (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. 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.

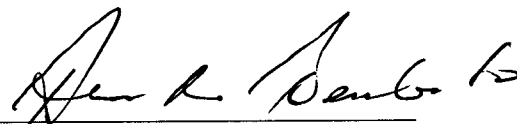
Therefore it is

ORDERED, that Defendant Fanny Breitbart's motion for an Order granting summary

judgment 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.

This constitutes the Decision and Order of this Court.

Dated: April 13, 2015



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