Rivera v Grant
2015 NY Slip Op 30796(U)
April 10, 2015
Sup Ct, Bronx County
Docket Number: 309717/11
Judge: Ben R. Barbato
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

Present: Honorable Ben R. Barbato

ELIZABETH RIVERA,

Plaintiff,

-against-

DAVE GRANT and KATHERINE GRANT,

Defendants.

DECISION/ORDER

Index No.: 309717/11

The following papers numbered 1 to 6 read on this motion for summary judgment noticed on November 6, 2013 and duly transferred on July 11, 2014.

Papers Submitted	Numbered
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 Julia Rodriguez on July 11, 2014, Defendants, Dave Grant and Katherine Grant, 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 June 29, 2011, on Decatur Avenue at or near its intersection with 207th Street, in the County of Bronx, City and State of New York.

On October 15, 2012, the Plaintiff appeared for an orthopedic examination conducted by Defendants' appointed physician Dr. Lisa Nason. Upon examination and review of Plaintiff's medical records, Dr. Nason determined that Plaintiff suffered sprain/strain to her cervical, thoracic and lumbar spine, which had, at the time of the examination, resolved. Dr. Nason finds

full range of motion in Plaintiff's cervical spine, thoracic and lumbar spine with no tenderness or spasm. Dr. Nason opines that Plaintiff presented with no evidence of orthopedic disability related to the accident of June 29, 2011.

Defendants also submit the affirmed reports of Dr. Evan Mair, a radiologist, who states that he reviewed the MRI study of Plaintiff's cervical spine performed 2 weeks following the accident in question as well as the MRI study of Plaintiff's lumbar spine performed 4 weeks following the accident. Dr. Mair's review of Plaintiff's cervical spine MRI reveals degenerative endplate spurring and uncovertebral hypertrophy, multilevel degenerative disc dessication and narrowing and disc bulging. Dr. Mair opines that these findings are not causally related to the accident in question. Dr. Mair's review of Plaintiff's lumbar spine MRI reveals multilevel degenerative disc dessication, disc narrowing and disc bulging. Dr. Mair also opines that these findings are not causally related to the accident of June 29, 2011.

The court has read the Affidavit of Plaintiff's treating chiropractor, Dr. Brian Freindlich, D.C., who conducted an examination of Plaintiff on November 19, 2013, over two years following the subject accident, and the Affirmation of Dr. Thomas M. Kolb, presented by Plaintiff. The Court notes that Plaintiff has failed to submit evidence of contemporaneous treatment in admissible form. While the Court of Appeals in *Perl v. Meher* rejected a rule that would make contemporaneous quantitative measurements a prerequisite to recovery, it confirmed the necessity of some type of contemporaneous treatment to establish that a Plaintiff's injuries were causally related to the incident in question. 18 N.Y.3d 208 (2011). Furthermore, Plaintiff's physician fails to account for Plaintiff's gap in treatment and fails to address Defendants' evidence of preexisting degeneration in Plaintiff's cervical spine. See *Valentin v. Pomilla,* 59 A.D.3d 184 (1st Dept. 2009).

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 his purported physical limitations and its duration. *Arjona v. Calcano*, 7 A.D.3d 279 (1st 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 (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 Defendants have met that burden.

Therefore it is

ORDERED, that Defendants Dave Grant and Katherine Grant's motion for an Order granting summary judgment dismissing Plaintiff's Complaint for failure to satisfy the serious injury threshold under Insurance Law §5102(d) is **granted**.

The above constitutes the Decision and Order of this Court.

Dated: April 10, 2015

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