

**Wilson v Ghose**

2015 NY Slip Op 30799(U)

April 6, 2015

Sup Ct, Bronx County

Docket Number: 310160/11

Judge: Ben R. Barbato

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

**Present:** Honorable Ben R. Barbato

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DYREE A. WILSON,

Plaintiff,

**DECISION/ORDER**

-against-

Index No.: 310160/11

SHUBAL G. GHOSE,

Defendant.

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

<u>Papers Submitted</u>	<u>Numbered</u>
Notice of Motion, Affirmation & Exhibits	1, 2, 3
Affirmations 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, Shubal G. Ghose, 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 December 23, 2010 at or about the intersection of East 86<sup>th</sup> Street and 2<sup>nd</sup> Avenue, in the County, City and State of New York.

On August 13, 2012, the Plaintiff appeared for an orthopedic examination conducted by Defendant's retained physician Dr. John H. Buckner. Upon examination and review of Plaintiff's medical records, Dr. Buckner determined that Plaintiff did not sustain any serious injury as a result of the subject accident. Dr. Buckner reports that Plaintiff's examination was

normal and that his cervical and lumbar MRI reports only demonstrate minor disc bulging with no neural impingement at any level. With regard to Plaintiff's left shoulder, Dr. Buckner reports that Plaintiff has full range of motion at his shoulder with healed arthroscopy incisions. Dr. Buckner further reports that Plaintiff's MRI images reveal some edema along the biceps tendon and anterior osteophytes on the humeral head. Dr. Buckner notes no bleeding, swelling, edema, effusion or subcutaneous edema to suggest recent injury.

Defendant also submits the affirmed reports of Dr. Audrey Eisenstadt, a radiologist, who states that she reviewed the MRIs of Plaintiff's cervical spine, lumbar spine and left shoulder. Plaintiff's cervical spine MRI revealed disc degeneration at the C3-4, C5-6 and C6-7 levels, dessication at the C2-3 and C4-5 levels, disc bulging at C3-4 through C6-7 with no focal herniations. Dr. Eisenstadt reports that there is no evidence of acute post-traumatic osseous, ligamentous or intervertebral disc changes seen causally related to the December 23, 2010 accident. Plaintiff's lumbar spine MRI revealed dessication, bulging, and superimposed disc herniation at the L4-5 and L5-S1 levels with a small paracentral L5-S1 annular tear. Dr. Eisenstadt opines that the degenerative changes in Plaintiff's lumbar spine predate the accident in question. With regard to Plaintiff's left shoulder MRI, Dr. Eisenstadt reports that it revealed no evidence of any acute post-traumatic changes. Dr. Eisenstadt finds os acromiale as well as a paralabral cyst which she opines is indicative of longstanding abnormalities within the shoulder joint predating the accident of December 23, 2010.

The Court has read the Affidavit of Dr. Mary Slaughter as well as the Affirmation and operative report of Dr. Danilo Sotelo-Garza, 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, 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. Calcagno*, 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

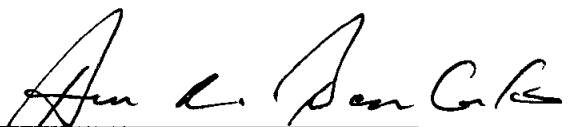
facts. The role of the court is to determine whether bona fide issues of fact exist, and not to resolve issues of credibility. *Knepka v. Tallman*, 278 A.D.2d 811 (4<sup>th</sup> Dept. 2000). The moving party must tender evidence sufficient to establish as a matter of law that there exist no triable 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 Defendant has 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 Defendant Shubal G. Ghose'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 6, 2015

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