

**Santiago v Green**

2015 NY Slip Op 30823(U)

April 17, 2015

Supreme Court, Bronx County

Docket Number: 350192/2011

Judge: Ben R. Barbato

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

**Present:** Honorable Ben R. Barbato

JEANNETTE SANTIAGO, JULIAN ROSARIO, OMAIRA SANTIAGO, MATTHEW SANTIAGO, an infant over the age of fourteen by his mother and natural guardian OMAIRA SANTIAGO and OMAIRA SANTIAGO, individually,

Plaintiffs,

**DECISION/ORDER**

-against-

Index No.: 350192/2011

WILLIAM A. GREEN, JR., NEW YORK BLOOD CENTER, INC. and JAIME NUNEZ,

Defendants.

The following papers numbered 1 to 13 read on this motion and cross-motions for summary judgment noticed on June 17, 2013 and July 19, 2013 respectively and duly transferred on July 11, 2014.

<u>Papers Submitted</u>	<u>Numbered</u>
Notice of Motion, Affirmation & Exhibits (Hughes)	1, 2, 3
Notice of Cross-Motion, Affirmation & Exhibits (Stock)	4, 5, 6
Notice of Cross-Motion, Affirmation & Exhibits (Candiloros)	7, 8, 9
Affirmation in Opposition & Exhibits	10, 11
Reply Affirmations	12, 13

Upon the foregoing papers, and after reassignment of this matter from Justice Mark Friedlander on July 11, 2014, Defendants, Jaime Nunez and New York Blood Center, Inc., seek an Order granting summary judgment dismissing Plaintiffs Omaira Santiago, Matthew Santiago and Julian Rosario's Complaint for failure to satisfy the serious injury threshold under Insurance Law §5102(d). By cross-motion, Co-Defendant William A. Green, Jr. and Plaintiff on the Counterclaim, Jeannette Santiago, also seek an Order granting summary judgment dismissing Plaintiffs Omaira Santiago, Matthew Santiago and Julian Rosario'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 7, 2009, on Crossbay Boulevard at or near its intersection with 165<sup>th</sup> Street, in the County of Queens, City and State of New York.

Defendants made a prima facie showing that Plaintiffs Omaira Santiago, Matthew Santiago and Julian Rosario did not sustain permanent or significant injuries to their lumbar and cervical spines as a result of the subject accident, by submitting the affirmed reports of Dr. Joseph Y. Margulies and Dr. Thomas P. Nipper, orthopedic surgeons and the affirmed reports of Dr. Marianna Golden, neurologist. Defendants' appointed physicians examined all Plaintiffs, found normal results on the tests they performed and determined that Plaintiffs' cervical and lumbar strains were fully resolved with no residual effects as a result of the accident of June 7, 2009. Furthermore, Defendants' physicians opined that Plaintiffs revealed no functional disability or permanency and noted that they could engage in full active employment and all activities of daily living without restrictions.

This court has read the Affirmations of Dr. David Steiner and Dr. Jacob Lichy, as well as the Affidavits of Dr. Mark Heyligers, all presented by Plaintiffs.

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).

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. *Argonne v. Calcano*, 7 A.D.3d 279 (1<sup>st</sup> Dept. 2004).

In the instant case Plaintiffs Omaira Santiago and Matthew Santiago have demonstrated by admissible evidence an objective and quantitative evaluation that they have 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, they have demonstrated by admissible evidence the extent and duration of their 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 with respect to Plaintiffs

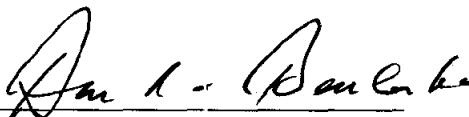
Omaira Santiago and Matthew Santiago. However, based upon the medical evidence and testimony submitted, Plaintiffs Omaira Santiago and Matthew Santiago have not established that they have been unable to perform substantially all of their normal activities for 90 days within the first 180 days immediately following the accident and as such are precluded from raising the 90/180 day threshold provision of the Insurance Law. In addition, based upon the exhibits and deposition testimony submitted, Defendants have met their burden with respect to Plaintiff Julian Rosario.

Therefore it is

**ORDERED**, that Defendants Jaime Nunez and New York Blood Center, Inc.'s motion and Co-Defendant William A. Green, Jr. and Plaintiff on the Counterclaim, Jeannette Santiago's cross-motions for an Order granting summary judgment dismissing Plaintiffs Omaira Santiago, Matthew Santiago and Julian Rosario's Complaint for failure to satisfy the serious injury threshold under Insurance Law §5102(d) are **granted** to the extent that Plaintiffs Omaira Santiago and Matthew Santiago are precluded from raising the 90/180 day threshold provision of the Insurance Law. Furthermore, Defendants' motion and cross-motions are **granted** with respect to Plaintiff Julian Rosario.

The above constitutes the Decision and Order of this Court.

Dated: April 17, 2015

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