

Basabe v Carrozza

2015 NY Slip Op 30838(U)

April 29, 2015

Supreme Court, Bronx County

Docket Number: 306873/2010

Judge: Ben R. Barbato

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

Present: Honorable Ben R. Barbato

MARIA BASABE,

Plaintiff,

DECISION/ORDER

-against-

Index No.: 306873/2010

JOSEPH CARROZZA, SOBEIDA SANTANA and
VIP CAR SERVICE, INC.,

Defendants.

The following papers numbered 1 to 15 read on this motion and cross-motions for summary judgment noticed on August 19, 2013 and September 23, 2013, and duly transferred on July 11, 2014.

<u>Papers Submitted</u>	<u>Numbered</u>
Notice of Motion, Affirmation & Exhibits (Kelly)	1, 2, 3
Notice of Cross-Motion, Affirmation & Exhibits (Steinberg)	4, 5, 6
Notice of Cross-Motion, Affirmation & Exhibits (Williams)	7, 8, 9
Memorandum of Law	10
Affirmation in Opposition & Exhibits	11, 12
Reply Affirmation & Exhibits	13, 14
Reply Affirmation	15

Upon the foregoing papers, and after reassignment of this matter from Justice Alison Y. Tuitt on July 11, 2014, Plaintiff, Maria Basabe, seeks an Order granting partial summary judgment on the issue of serious injury pursuant to Insurance Law §5102(d). By cross-motion, Defendant, Joseph Carrozza, seeks an Order granting summary judgment dismissing Plaintiff's Complaint for failure to satisfy the serious injury threshold under Insurance Law §5102(d). By cross-motion, Co-Defendants Sobeida Santana and VIP Car Service, Inc., also 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 August 3, 2010, on White Plains Road at or near its intersection with Cross Bronx Expressway, in the County of Bronx, City and State of New York.

In support of her motion, the Plaintiff submits the Affidavit and affirmed reports of Dr. Gideon Hedrych, a Trauma Specialist, who examined Plaintiff on August 9, 2010 for injuries allegedly sustained to her cervical and lumbar spine. Dr. Hedrych found range of motion limitations with pain in Plaintiff's cervical and lumbar spine. Dr. Hedrych determined that Plaintiff suffered from cervical spine derangement with traumatic myofascitis, cervical radiculopathy and/or myelopathy, dorsal spine strain/sprain, dorsal radiculopathy and/or myelopathy, lumbosacral spine derangement with traumatic myofascitis, lumbar radiculopathy, blunt craniofacial trauma and cerebral concussion. On September 26, 2010, Dr. Hedrych noted that MRIs were performed on Plaintiff's spine which revealed cervical disc herniations and bulges as well as lumbar disc bulges. On May 1, 2012, Dr. Hedrych reexamined Plaintiff and found range of motion limitations with pain in Plaintiff's cervical and lumbar spine. Dr. Hedrych determined that Plaintiff sustained cervical disc herniations and bulges, cervical radiculopathy and myelopathy, lumbosacral spine derangement, lumbar disc herniations and bulges and lumbar radiculopathy. On May 9, 2013, Dr. Hedrych reexamined Plaintiff and again found range of motion restrictions with pain in Plaintiff's cervical and lumbar spine. Dr. Hedrych determined that Plaintiff sustained cervical disc herniations and bulges, cervical radiculopathy and myelopathy, lumbosacral spine derangement, lumbar disc herniations and bulges and lumbar radiculopathy. Dr. Hedrych noted that Plaintiff was status-post surgery cervical and lumbar spine surgery and opined that Plaintiff's injuries were causally related to the accident of August 3, 2010. Dr. Hedrych further opines that Plaintiff sustained a permanent impairment/disability of her cervical, thoracic and lumbosacral spine and that she will not fully recover.

Plaintiff also submits the Affidavit of Dr. John Galeno, an orthopedic surgeon, who examined Plaintiff on several occasions from January 19, 2012 through June 24, 2013. Dr. Galeno performed a laminectomy with disc excision of Plaintiff's lumbar spine and an anterior disc excision and fusion of Plaintiff's cervical spine. Dr. Galeno opines that Plaintiff's cervical and lumbar spine injuries, medical treatment and physical limitations were caused by the motor vehicle accident of August 3, 2010. Dr. Galeno further opines that Plaintiff is permanently disabled and unable to engage in her normal activities of daily living.

In support of their cross-motions, Defendants submit the affirmed reports of Dr. Jacqueline Emmanuel, an orthopedic surgeon, Dr. Jean-Robert Desrouleaux, a neurologist, and Dr. Sheldon P. Feit, a radiologist. Defendants' appointed physicians examined Plaintiff, found full range of motion in Plaintiff's cervical and lumbar spine and normal results on the tests they performed. Defendants' physicians determined that Plaintiff's cervical and lumbar sprains and strains were fully resolved with no residual effects as a result of the accident of August 3, 2010. Furthermore, Defendants' physicians opined that Plaintiff revealed no functional disability or permanency and noted that she could carry out her work duties and all activities of daily living without restrictions.

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 (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 Plaintiff to establish, by submission of evidentiary proof in admissible form, that she has suffered a “serious injury.” *Lowe v. Bennett*, 122 A.D.2d 728 (1st Dept. 1986) *aff’d* 69 N.Y.2d 701 (1986).

Based upon the exhibits and deposition testimony submitted, the Court finds that Plaintiff has failed to meet her burden for a determination that she has met the requirements of Insurance Law 5102(d) sufficient not to submit that issue to the jury. In their cross-motions, Defendants have raised an issue of fact as to whether Plaintiff suffered any injury as a result of the August 3, 2010 accident. 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).

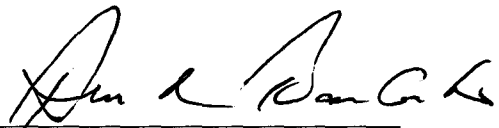
Therefore it is

ORDERED, that Plaintiff Maria Basabe’s motion for an Order granting partial summary judgment on the issue of serious injury pursuant to Insurance Law §5102(d) is **denied**; and it is further

ORDERED, that Defendants Joseph Carrozza, Sobeida Santana and VIP Car Service, Inc.’s cross-motions for an Order granting summary judgment dismissing Plaintiff’s Complaint for failure to satisfy the serious injury threshold under Insurance Law §5102(d) are also **denied**.

The above constitutes the Decision and Order of this Court.

Dated: April 29, 2015



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