

<b>Armstrong v Soumahoro</b>
2015 NY Slip Op 31032(U)
May 18, 2015
Supreme Court, Bronx County
Docket Number: 306060/12
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

DEIDERIE ARMSTRONG,

Plaintiff,

-against-

KARAMOKO SOUMAHORO and NEW BRONX CAR &  
LIMOUSINE, INC.,

Defendants.

KARAMOKO SOUMAHORO s/h/a KARAMOKO SOUMA-RORG  
and NEW BRONX CAR & LIMOUSINE, INC.,

Third-Party Plaintiffs,

-against-

JOSEPH RICHARDSON,

Third-Party Defendant.

The following papers numbered 1 to 9 read on these motions for summary judgment noticed on March 26, 2014 and  
duly transferred on December 30, 2014.

<u>Papers Submitted</u>	<u>Numbered</u>
Notice of Motion, Affirmation & Exhibits (Burke)	1, 2, 3
Notice of Motion, Affirmation & Exhibits (DeOliveira)	4, 5, 6
Affirmation in Opposition & Exhibits	7, 8
Reply Affirmation	9

The above motions have been consolidated for the purpose of this Decision and Order.

Upon the foregoing papers, and after reassignment of this matter from Justice Kenneth L.  
Thompson on December 30, 2014, Defendants, Karamoko Soumahoro and New Bronx Car &  
Limousine, Inc., seek an Order granting summary judgment dismissing Plaintiff's Complaint for

DECISION/ORDER

Index No.: 306060/12

Third-Party Index No.:  
80163/12

failure to satisfy the serious injury threshold under Insurance Law §5102(d). Defendant, Joseph Richardson, also 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 September 9, 2011, at or near the East 135<sup>th</sup> entrance ramp to the southbound Major Deegan Expressway, in the County of Bronx, City and State of New York.

On August 26, 2013, the Plaintiff appeared for an orthopedic examination conducted by Defendants' appointed physician Dr. Lisa Nason. Upon examination, Dr. Nason determined that Plaintiff's injury to the cervical, thoracic and lumbar spine, right shoulder and bilateral wrists had resolved at the time of the examination. Dr. Nason finds full range of motion in Plaintiff's cervical spine, thoracic and lumbar spine with no tenderness or spasm and full range of motion in Plaintiff's right shoulder and bilateral wrists. Dr. Nason opines that Plaintiff presented with no evidence of orthopedic residuals or permanency. Dr. Nason further states that Plaintiff is able to perform her usual occupation and activities of daily living with no restrictions.

On September 9, 2013, the Plaintiff appeared for a neurological examination conducted by Defendants' appointed physician Dr. Jean-Robert Desrouleaux. Upon examination, Dr. Desrouleaux determined that Plaintiff's injury to the cervical, thoracic and lumbar spine had resolved at the time of the examination. Dr. Desrouleaux finds full range of motion in Plaintiff's cervical, thoracic and lumbar spine with no evidence of permanence or residuals. Dr. Desrouleaux further finds no evidence of carpal tunnel syndrome and opines that Plaintiff is able to function in her pre-accident capacity and carry out her work duties and day-to-day activities without neurological restriction.

Defendants also submit the reports of Dr. Audrey Eisenstadt, a radiologist, who states that

she reviewed the MRIs of Plaintiff's cervical spine and lumbar spine. Plaintiff's cervical spine MRI revealed mild anterior C6-7 disc osteophyte formation which Dr. Eisenstadt attributed to early degenerative disc disease, dessication at the C5-6 through T1-2 intervertebral disc levels and mild bulging at the C3-4 level. Dr. Eisenstadt finds no osseous, traumatic intervertebral disc or soft tissue changes causally related to the September 9, 2011 accident. Plaintiff's lumbar spine MRI revealed degenerative disc disease at the L3-4, and L4-L5 disc levels with osseous and intervertebral disc changes which predate the accident in question, L4-5 endplate degenerative signal change, facet joint hypertrophy at L3+4 and L4-5 and a small L3-4 annular tear with no bone contusion or neural impingement.

This Court has read the Affirmations of Plaintiff's treating physicians, Dr. Aric Hausknecht, Dr. Michael Yuz, Dr. Francisco De Lara, Dr. Sireen Gopal, Dr. Jerry G. Kaplan and Dr. John Olsewski, as well as the certified records from Accelerated Rehab & Pain Management, University Diagnostics Medical Imaging, Ahava Medical Diagnostic, Theradynamics Physical Rehab and from Dr. Savitri Motiram, all 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. Calcano*, 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 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 (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. 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.

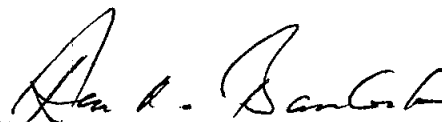
Therefore it is

**ORDERED**, that Defendants Karamoko Soumahoro and New Bronx Car & Limousine, Inc.'s motion for an Order granting summary judgment and 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; and it is further

**ORDERED**, that Defendant Joseph Richardson'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 likewise **granted** to the extent that Plaintiff is precluded from raising the 90/180 day threshold provision of the Insurance Law.

The above constitutes the Decision and Order of this Court.

Dated: May 8, 2015



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