

<b>Beard v Pena-Taveras</b>
2015 NY Slip Op 31177(U)
June 16, 2015
Supreme Court, Bronx County
Docket Number: 307421/12
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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ELVIRA BEARD,

Plaintiff,

-against-

NELSON PENA-TAVERAS,

Defendant.

**DECISION/ORDER**

Index No.: 307421/12

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The following papers numbered 1 to 6 read on this motion for summary judgment noticed on March 27, 2014 and duly transferred on December 30, 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 December 30, 2014, Defendant, Nelson Pena-Taveras, 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 July 14, 2011 on West 179<sup>th</sup> Street at or near its intersection with East Broadway, in the County, City and State of New York.

On December 17, 2013, the Plaintiff appeared for an orthopedic examination conducted by Defendant's appointed physician, Dr. Isaac Cohen. Upon examination and review of Plaintiff's medical records, Dr. Cohen determined that Plaintiff suffered cervical spine strain and right shoulder and right knee contusions, which had resolved at the time of the examination. Dr.

Cohen finds normal range of motion in Plaintiff's cervical spine and lumbosacral spine with no evidence of tenderness or muscle spasms as well as satisfactory range of motion in Plaintiff's right shoulder and right knee. Dr. Cohen opines that Plaintiff's examination is unremarkable with no evidence of functional sequelae or permanency related to the accident of record. Dr. Cohen further opines that the work up performed revealed a small central disc herniation at C4-5 which was preexistent and not posttraumatic in nature. Plaintiff's MRI evaluation of her right shoulder revealed irregularities with downsloping acromion of the acromioclavicular joint which Dr. Cohen attributed to an anatomical variation and not to a posttraumatic event. Dr. Cohen notes that Plaintiff resumed her normal work activities within a week following the subject accident and that she remains working without restrictions.

This Court has read the Affirmation of Plaintiff's treating physician, Dr. Robert Della Badia, as well as the MRI reports of Dr. William A. Weiner, 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 her purported physical limitations and its duration. *Arjona v. Calcano*, 7 A.D.3d 279 (1<sup>st</sup> Dept. 2004).

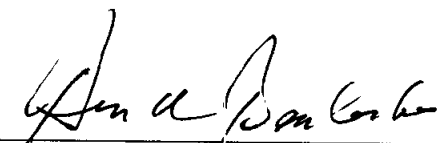
In the instant case Plaintiff has demonstrated by admissible evidence an objective and quantitative evaluation that she has suffered significant limitations to the normal function, purpose and use of a body organ, member, function or system sufficient to raise a material issue of fact for determination 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 Defendant has 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 Defendant Nelson Pena-Taveras' 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.

The above constitutes the Decision and Order of this Court.

Dated: June 16, 2015

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