

Nakamura v Montalvo
2015 NY Slip Op 31180(U)
June 10, 2015
Supreme Court, Bronx County
Docket Number: 308409/12
Judge: Ben R. Barbato
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX**

Present: Honorable Ben R. Barbato

MAYAN NAKAMURA,

Plaintiff,

-against-

DECISION/ORDER

Index No.: 308409/12

ISABEL MONTALVO, MYRIAM MONTALVO, JEAN
C. RAMOS, HELP PSI, INC. and JANIS M. DENARDIS,

Defendants.

The following papers numbered 1 to 13 read on these motions for summary judgment noticed on August 25, 2014 and October 27, 2014 and duly transferred on December 30, 2014.

<u>Papers Submitted</u>	<u>Numbered</u>
Notice of Motion, Affirmation & Exhibits (Carton)	1, 2, 3
Notice of Motion, Affirmation & Exhibits (Vicario)	4, 5, 6
Notice of Motion, Affirmation & Exhibits (Sudol)	7, 8, 9
Memorandum of Law	10
Affirmation in Opposition & Exhibits	11, 12
Reply Affirmation	13

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, Defendant, Janis M. Denardis, seeks an Order granting summary judgment dismissing Plaintiff's Complaint for failure to satisfy the serious injury threshold under Insurance Law §5102(d). Defendants Isabel Montalvo and Myriam Montalvo also seek an Order granting summary judgment dismissing Plaintiff's Complaint for failure to satisfy the serious injury threshold under Insurance Law §5102(d). Defendants Jean C. Ramos and Help PSI, Inc. have made a motion seeking the same relief.

This is an action to recover for personal injuries allegedly sustained as a result of a motor vehicle accident which occurred on February 6, 2012, on the Northern State Parkway near Roslyn

Road, Town of North Hempstead, State of New York.

On April 24, 2014, the Plaintiff appeared for an orthopedic examination conducted by Defendants' appointed physician Dr. Joseph Y. Margulies. Upon examination and review of Plaintiff's medical records, Dr. Margulies determined that Plaintiff suffered cervical sprain, lumbar sprain and contusion of both shoulders, all of which had, at the time of the examination, resolved. Dr. Margulies finds full range of motion in Plaintiff's cervical spine, lumbar spine and both shoulders with no paraspinal muscle spasm or tenderness. Dr. Margulies further opines that Plaintiff suffers no orthopedic disability or residuals and is capable of continuing her employment and usual activities of daily living.

Defendants further submit Plaintiff's medical records from Mary F. DiDio, D.C., P.C., which indicate that Plaintiff began treatment on February 7, 2012 and was out of work until February 14, 2012. These records include a note by Mary Didio dated February 14, 2012 certifying that Plaintiff had recovered sufficiently to be able to return to work as a nursing assistant on regular duty. In addition, Defendants submit the report of Dr. Roberto Rivera, who examined Plaintiff on September 9, 2012 and determined that her right shoulder's sprain/strain and pain had resolved then proceeded to discharge Plaintiff from active care.

This Court has read the Affidavits of Plaintiff's treating chiropractors, Dr. Mary F. DiDio and Dr. Michael Gruttadauria, as well as the affirmed MRI reports of Dr. Robert Diamond, all presented by Plaintiff.

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. *Aivarez 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 (1st 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 (1st 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 (1st Dept. 2004).

In the instant case Plaintiff has not 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 not 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 (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). Based upon the exhibits and deposition testimony submitted, the Court finds that Defendants

have met that burden.

Therefore it is

ORDERED, that Defendant Janis M. Denardis' 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**; and it is further

ORDERED, that Defendant Isabel Montalvo and Myriam Montalvo'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 **granted**; and it is further

ORDERED, that Defendants Jean C. Ramos and Help PSI, Inc.'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**.

The above constitutes the Decision and Order of this Court.

Dated: June 10, 2015



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