SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

Present: Honorable Ben R. Barbato

HELLEN ARROYO,

Plaintiff,

-against-

JOSE LUIS SANCHEZ, LANDMARK FOOD CORP. and ECK LEASING, LLC,

Defendants.

DECISION/ORDER

Index No.: 301791/11

The following papers numbered 1 to 7 read on this motion for summary judgment noticed on June 17, 2013 and duly transferred on July 11, 2014.

Papers Submitted	Numbered
Notice of Motion, Affirmation & Exhibits	**1, 2, 3**
Affirmation in Opposition & Exhibits	**4, 5**
Reply Affirmation & Exhibit	**6, 7**

Upon the foregoing papers, and after reassignment of this matter from Justice Mark Friedlander on July 11, 2014, Defendants, Jose Luis Sanchez, Landmark Food Corp. and Eck Leasing LLC, 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 August 26, 2010, on Fordham Road, at or near its intersection with 3rd Avenue, in the County of Bronx, City and State of New York.

On October 4, 2012, the Plaintiff appeared for a neurological examination conducted by Defendant's appointed physician Dr. Daniel Feuer. Upon examination and review of Plaintiff's records, Dr. Feuer determined that Plaintiff had a normal neurological examination with no evidence of any neurological disability or permanency causally related to the accident of August

26, 2010. Dr. Feuer finds full range of motion in Plaintiff's cervical and lumbar spine with no muscle spasm. Dr. Feuer further reports that there is no evidence to support a diagnosis of cervical or lumbosacral radiculopathy.

On October 10, 2012, the Plaintiff appeared for a physical examination conducted by Defendants' appointed physician Dr. Martin Barschi, an Orthopedic surgeon. Upon examination and review of Plaintiff's records, Dr. Barschi determined that Plaintiff sustained a sprain to her neck and back on August 26, 2010. Dr. Barschi finds full range of motion in Plaintiff's cervical and lumbar spine with no muscle spasm. Dr. Barschi also states that further orthopedic treatment or physical therapy relating to the accident of August 26, 2010 is neither indicated nor necessary.

This Court has read the Affirmed reports of Plaintiff's treating physician, Dr. Ali Guy, as well as the records from Med Alliance Medical Health Services, 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 (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 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 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 (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 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 Jose Luis Sanchez, Landmark Food Corp. and Eck Leasing LLC's motion for an Order granting summary judgment 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.

Dated: January 23, 2015

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