

Coleman v Vilane

2015 NY Slip Op 31652(U)

January 26, 2015

Supreme Court, Bronx County

Docket Number: 302895/11

Judge: Ben R. Barbato

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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

MICHELLE COLEMAN,

Plaintiff,

-against-

DECISION/ORDER

Index No.: 302895/11

MOUHAMETH VILANE and GEO NY HOLDING CORP.,

Defendants.

The following papers numbered 1 to 7 read on this motion for summary judgment noticed on April 19, 2013 and duly transferred on April 7, 2014.

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

Upon the foregoing papers, and after reassignment of this matter from Justice Kenneth L. Thompson on April 7, 2014, Defendants, Mouhameth Vilane and GEO NY Holding Corp., seek an Order granting summary judgment and dismissing Plaintiff's Complaint for failure to satisfy the serious injury threshold under Insurance Law §5102(d) and precluding the Plaintiff from testifying at the time of trial for failure to comply with outstanding discovery.

This is an action to recover for personal injuries allegedly sustained as a result of a motor vehicle accident which occurred on May 9, 2010 on East 163rd Street at or near its intersection with Prospect Avenue, in the County of Bronx, State of New York.

On September 25, 2012, the Plaintiff appeared for a neurological examination conducted by Defendants' appointed physician Dr. Marianna Golden. Upon examination and review of Plaintiff's medical records, Dr. Golden determined that Plaintiff presented a normal neurologic examination with resolved strains and sprains to her cervical and thoracolumbar spine. Dr.

Golden opines that Plaintiff's examination revealed no evidence of any neurologic disability and that Plaintiff is able to perform all activities of daily living as well as duties of her occupation as a nurse without restrictions or limitations. Dr. Golden also opines that there is no evidence of permanency or need for physical therapy.

On September 25, 2012, the Plaintiff appeared for an orthopedic evaluation conducted by Defendants' appointed physician Dr. Thomas P. Nipper. Upon examination and review of Plaintiff's medical records, Dr. Nipper determined that Plaintiff suffered sprains to her cervical, thoracic and lumbar spine and was status post right shoulder internal derangement and surgery, all of which had resolved by the time of the examination. Dr. Nipper finds no muscle spasms or tenderness on palpation and further states that there is no evidence of any orthopedic disability. Dr. Nipper opines that Plaintiff is capable of performing all of her normal activities of daily living and working as a nurse without restrictions or limitations. Dr. Nipper further states that there is no evidence of cervical radiculopathy, permanency or disability.

Defendants present the reports of Dr. Stephen W. Lastig, a radiologist, who states that he reviewed the MRI films of the Plaintiff's right shoulder, lumbar and cervical spine. Dr. Lastig's review of the MRI of Plaintiff's right shoulder reveals no evidence of a fracture, bone contusion, rotator cuff tear or labral tear. Dr. Lastig's review of the MRI of Plaintiff's lumbar spine reveals mild congenital narrowing of the lower lumbar spinal canal and no focal disc herniations or annular bulges. Dr. Lastig's review of the MRI of Plaintiff's cervical spine reveals multilevel degenerative disc disease, mild degenerative spondylosis, no focal disc herniations and mild posterior disc bulges at C4-5 and C5-6 which Dr. Lastig opines are degenerative in origin.

This Court has read the Affirmation of Plaintiff's treating physician, Dr. Aric Hausknecht, as well as the Affirmation and operative report of Dr. David T. Neuman and the

MRI report of Dr. Mark Shapiro, 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 upon defendant 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, 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 her right shoulder 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.

Therefore it is

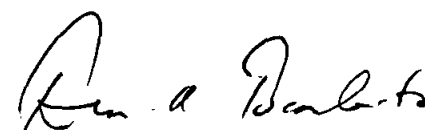
ORDERED, that Defendants Mouhameth Vilane and GEO NY Holding Corp.'s motion for an Order granting summary judgment and dismissing Plaintiff's Complaint for failure to satisfy the serious injury threshold under Insurance Law §5102(d) is **denied**, and it is further

ORDERED, that Plaintiff Michelle Coleman is directed to comply with those discovery demands requesting any and all pre-accident and post-accident reports/records in which Plaintiff was involved, and it is further

ORDERED, that Plaintiff submit authorizations for any and all medical reports/records regarding hospitalization and treatment rendered to Plaintiff as a result of any pre and post-accidents. Said authorizations shall be submitted within 30 days of the date of this Order; failure to comply shall result in the striking of Plaintiff's Complaint.

No further motion practice necessary.

Dated: January 26, 2015


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