

**Flores v Matos**

2015 NY Slip Op 31904(U)

September 23, 2015

Supreme Court, Bronx County

Docket Number: 306050/12

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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GABRIELA FLORES,

Plaintiff,

**DECISION/ORDER**

-against-

Index No.: 306050/12

JOAQUIN MATOS,

Defendant.

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The following papers numbered 1 to 7 read on this motion for summary judgment noticed on June 27, 2014 and duly transferred on December 30, 2014.

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

Upon the foregoing papers, and after reassignment of this matter from Justice Kenneth L. Thompson on December 30, 2014, Defendant, Joaquin Matos, 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 November 10, 2011 on East 183<sup>rd</sup> Street at or near its intersection with Arthur Avenue, in the County of Bronx, City and State of New York.

On January 30, 2014, the Plaintiff appeared for an orthopedic examination conducted by Defendant's appointed physician Dr. Alan M. Crystal. Upon examination and review of Plaintiff's medical records, Dr. Crystal determined that there is no basis to causally relate

Plaintiff's cervical and lumbar spine injuries or Plaintiff's right knee or left shoulder injuries to the accident in question. Dr. Crystal finds full range of motion in Plaintiff's cervical spine with no tenderness and notes that Plaintiff's lumbar spine had no tenderness or spasms. Dr. Crystal opines that Plaintiff has no findings of a symptomatic herniated disc at a lumbar or cervical level causing nerve root impingement. With regard to Plaintiff's right knee, Dr. Crystal states that the operative report of Plaintiff's right knee revealed Grade II to III chondromalacia of the lateral patella facet, extensive lateral patella tracking and a tear of the posterior horn of the medial meniscus which he attributed to meniscal degeneration. With regard to Plaintiff's left shoulder, Dr. Crystal states that the operative report of Plaintiff's left shoulder revealed partial rotator cuff tears, impingement, tendinopathy, and that labral tears were debrided. Dr. Crystal opines that all the operative findings are causally related to degeneration and that Plaintiff's left shoulder MRI also lacks any evidence of trauma. Dr. Crystal further notes that Plaintiff is fully functional to perform all normal and usual daily activities, including work, without any restrictions.

Defendant also submits the reports of Dr. Audrey Eisenstadt, a radiologist, who states that she reviewed the MRIs of Plaintiff's left knee, left shoulder, right foot, lumbar spine and cervical spine. Plaintiff's left knee MRI revealed degenerative joint disease at the femoropatellar joint space, hypertrophic spurring, joint space narrowing, and subarticular signal change noted, all degenerative bony processes present months to years in origin and predating the accident of November 10, 2011. Dr. Eisenstadt finds a small joint effusion which she states is most likely related to the degenerative joint disease. Plaintiff's left shoulder MRI revealed hypertrophic spurring of the acromioclavicular joint with subarticular degenerative signal change and tendinopathy of the supraspinatus and subscapularis tendons. Dr. Eisenstadt finds no rotator cuff tears, joint effusion or bursal fluid. Plaintiff's right foot MRI revealed a mild hallux valgus

deformity (commonly referred to as a bunion) with a small amount of fluid surrounding the joint space of the first metatarsal phalangeal joint. Dr. Eisenstadt reports no evidence of any osseous, tendinous, ligamentous or soft tissue abnormality post-traumatic in origin. Plaintiff's cervical spine MRI revealed a small C5-6 disc herniation and bulging which Dr. Eisenstadt attributed to degenerative disc disease, disc bulging at the C5-6 and C6-7 levels due to arthritis and not post-traumatic in origin. Dr. Eisenstadt finds no annular tears or osseous injuries to indicate any traumatic injury in the cervical spine. Plaintiff's lumbar spine MRI revealed a normal examination. Dr. Eisenstadt finds no post-traumatic abnormalities or changes involving the osseous, ligamentous or intervertebral disc structures.

The Court has read the Affirmations of Dr. Kenneth McCulloch and Dr. Douglas Schottenstein, the MRI reports of Dr. Steve B. Losik and the certified records of Healthworx Medical, P.C. 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).

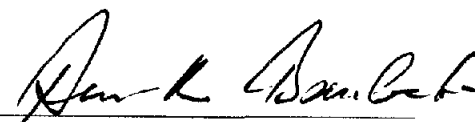
In the instant case Plaintiff has demonstrated by admissible evidence an objective and quantitative evaluation that she has suffered significant limitations to the normal function, purpose and use of a body organ, member, function or system sufficient to raise a material issue of fact for determination 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 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 Joaquin Matos' 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: September 23, 2015

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