

Caplan v Marsta Taxi, Inc.

2015 NY Slip Op 32143(U)

October 26, 2015

Supreme Court, Bronx County

Docket Number: 306117/12

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

JUDITH CAPLAN,

Plaintiff,

-against-

DECISION/ORDER

Index No.: 306117/12

MARSTA TAXI, INC., SHAHADAT HOSSEN ALL,
SAPPHIRE TRANSIT, INC. and IBRAHIMA MBENGUE,

Defendants.

The following papers numbered 1 to 10 read on this motion and cross-motion for summary judgment noticed on May 7, 2014 and duly transferred on September 8, 2015.

<u>Papers Submitted</u>	<u>Numbered</u>
Notice of Motion, Affirmation & Exhibits	1, 2, 3
Memorandum of Law (Nosowitz)	4
Notice of Cross-motion, Affirmation & Exhibits	5, 6, 7
Affirmation in Opposition & Exhibits	8, 9
Reply Affirmation	10

Upon the foregoing papers, and after reassignment of this matter from Justice Norma Ruiz on September 8, 2015, Defendants, Marsta Taxi, Inc. and Shahadat Hossen Ali, seek an Order granting summary judgment dismissing Plaintiff's Complaint for failure to satisfy the serious injury threshold under Insurance Law §5102(d). By cross-motion, Defendants Sapphire Transit, Inc. and Ibrahima Mbengue also 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 on October 15, 2011, on 2nd Avenue at or near its intersection with 66th Street, in the County, City and State of New York.

On December 17, 2013, the Plaintiff appeared for an orthopedic examination conducted by Defendants' appointed physician Dr. J. Serge Parisien. Upon examination, Dr. Parisien determined that Plaintiff presented with a resolved injury to the cervical and lumbar spine as well as a resolved injury to the left ankle, second right rib, bilateral wrists and knees. Dr. Parisien reports that Plaintiff showed no evidence of residuals or permanency. Dr. Parisien further opines that Plaintiff is capable of working and performing her activities of daily living with no restrictions.

On December 18, 2013, the Plaintiff appeared for a neurological examination conducted by Defendants' appointed physician Dr. Naunihal Sachdev Singh. Upon examination, Dr. Singh determined that Plaintiff's injury to the cervical and lumbar spine had resolved at the time of the examination. Dr. Singh finds full range of motion in Plaintiff's cervical and lumbar spine with no tenderness or spasm. Dr. Singh further finds no neurological disability and opines that Plaintiff is not disabled from working or from activities of daily living.

On December 18, 2013, the Plaintiff appeared for a dental examination conducted by Defendants' appointed dentist Dr. Isaac Seinuk. Upon examination, Dr. Seinuk determined that Plaintiff presented with a temporomandibular joint condition that limited the opening of her jaws. Dr. Seinuk notes that Plaintiff has reached her current maximum improvement of the temporomandibular joint condition. Dr. Seinuk opines that Plaintiff is not disabled by any dental conditions and that she can engage in all normal activities of daily life.

Defendants also submit the reports of Dr. Michael Setton, a radiologist, who states that he reviewed the MRI of Plaintiff's lumbar spine. Plaintiff's lumbar spine MRI revealed no evidence of osseous or soft tissue injury causally related to the October 15, 2011 accident. Dr. Setton finds mild degenerative disc disease with minimal disc bulges at L3-4 and L4-5. Dr. Setton further

finds a shallow Schmorl's node within the inferior endplate of L4, reflecting a degenerative intervertebral disc herniation and relative to degenerative disc disease.

This Court has read the Affirmations of Dr. Barry Rozenberg and Dr. Jerry A. Lubliner as well as the certified records from New York Presbyterian Hospital, Orthopedics New England, Massachusetts General Hospital and Boston University School of Dental Medicine, 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 (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, 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.

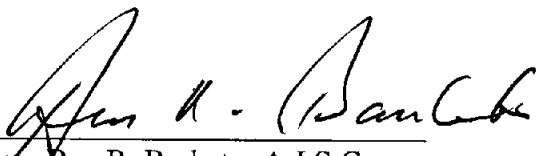
Therefore it is

ORDERED, that Defendants Marsta Taxi, Inc. and Shahadat Hossen Ali's 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; and it is further

ORDERED, that Defendants Sapphire Transit, Inc. and Ibrahima Mbengue's cross-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** 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: October 26, 2015



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