

<b>Rai v Alvarez</b>
2015 NY Slip Op 32148(U)
October 7, 2015
Supreme Court, Bronx County
Docket Number: 306695/11
Judge: Ben R. Barbato
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX**

**Present:** Honorable Ben R. Barbato

SAVATREE RAI,

Plaintiff,

-against-

JESSICA ALVAREZ and WILLIAM CASSIE,

Defendants.

**DECISION/ORDER**

Index No.: 306695/11

The following papers numbered 1 to 11 read on this motion and cross motion for summary judgment noticed on February 11, 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
Notice of Cross-Motion, Affirmation & Exhibits	5, 6, 7
Affirmation in Opposition	8, 9
Reply Affirmations	10, 11

Upon the foregoing papers, and after reassignment of this matter from Justice Kenneth L. Thompson on December 30, 2014, Defendant, William Cassie, seeks an Order granting summary judgment and dismissing Plaintiff's Complaint for failure to satisfy the serious injury threshold under Insurance Law §5102(d). By Cross-motion, Defendant Jessica Alvarez also seeks an Order granting summary judgment and 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 February 12, 2010, on McLean Avenue, at or near 1033 McLean Avenue, in the County of Westchester, State of New York.

The Court notes that, by Order of Justice Kenneth L. Thompson dated July 14, 2015,

Defendant William Cassie's motion for summary judgment on the issue of liability was granted on default dismissing Plaintiff's Complaint and all cross claims against Defendant Cassie only.

On May 13, 2013, the Plaintiff appeared for an orthopedic examination conducted by Defendants' appointed physician Dr. Lisa Nason. Upon examination, Dr. Nason determined that Plaintiff's injury to the cervical spine, lumbar spine and bilateral shoulders had resolved at the time of the examination. Dr. Nason finds full range of motion in Plaintiff's cervical spine and lumbar spine with no tenderness or spasm and full range of motion in Plaintiff's bilateral shoulders. Dr. Nason opines that Plaintiff presented with no evidence of orthopedic residuals or permanency. Dr. Nason further states that Plaintiff is able to perform her usual occupation and activities of daily living with no restrictions.

On May 20, 2013, the Plaintiff appeared for a neurological examination conducted by Defendants' appointed physician Dr. Jean-Robert Desrouleaux. Upon examination, Dr. Desrouleaux determined that Plaintiff's injury to the cervical and lumbar spine and posttraumatic headaches had resolved at the time of the examination. Dr. Desrouleaux finds full range of motion in Plaintiff's cervical and lumbar spine with no evidence of permanence or residuals. Dr. Desrouleaux further opines that Plaintiff is able to function in her pre-accident capacity and carry out her work duties and day-to-day activities without neurological restriction.

Defendants further offer the affirmed reports of Dr. A. Robert Tantleff, a radiologist who reviewed the MRIs of Plaintiff's cervical spine and lumbar spine. Dr. Tantleff's review of Plaintiff's cervical spine and lumbar spine MRIs revealed regional discogenic changes at C4-5 and C5-6 and a congenital transitional lumbosacral junction, all unrelated to the accident of February 12, 2010. Dr. Tantleff opines that there is no evidence of any acute or recent injury or evidence of an acute disc herniation.

The Court has read the May 6, 2014 Affidavit of Plaintiff's treating chiropractor, Henry Hall, D.C., who treated Plaintiff from February 15, 2010, as well as the records annexed to Dr. Hall's Affidavit, presented by Plaintiff.

Any reports, Affirmation 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, 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 (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).

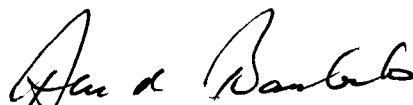
In the instant case Plaintiff has demonstrated by admissible evidence an objective and quantitative evaluation that she has suffered significant limitations to the normal function, purpose and use of a body organ, member, function or system sufficient to raise a material issue of fact for determination 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 Defendants have not met that burden.

Therefore it is

**ORDERED**, that Defendant, William Cassie's motion seeking an Order granting summary judgment dismissing Plaintiff's Complaint for failure to satisfy the serious injury threshold pursuant to Insurance Law §5102(d) is **denied** as moot.

**ORDERED**, that Defendant, Jessica Alvarez' cross-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 **denied**.

Dated: October 7, 2015

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