

Carter v Pough

2015 NY Slip Op 32386(U)

November 2, 2015

Supreme Court, Bronx County

Docket Number: 304099/13

Judge: Ben R. Barbato

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX**

Present: Honorable Ben R. Barbato

MELINA CARTER,

Plaintiff,

-against-

DECISION/ORDER

Index No.: 304099/13

ALBERT POUGH, MARVIN POUGH, TRI-STATE BIO
DIESEL, LLC and CHARRAN MANGAL,

Defendants.

The following papers numbered 1 to 11 read on this motion and cross-motion for summary judgment noticed on April 16, 2015 and duly transferred on September 8, 2015.

<u>Papers Submitted</u>	<u>Numbered</u>
Notice of Motion, Affirmation & Exhibits	1, 2, 3
Notice of Cross-motion, Affirmation & Exhibits	4, 5, 6
Affirmations in Opposition & Exhibits	7, 8, 9
Reply Affirmations	10, 11

Upon the foregoing papers, and after reassignment of this matter from Justice Kenneth L. Thompson on September 8, 2015, Defendants, Tri-State Bio Diesel, LLC and Charran Mangal, 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 Albert Pough and Marvin Pough 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 September 28, 2012, at or near the intersection of 7th Avenue and West 145th Street, in the County, City and State of New York.

On April 24, 2014, the Plaintiff appeared for an orthopedic examination conducted by

Defendants' appointed physician Dr. Arnold T. Berman. Upon examination and review of Plaintiff's medical records, Dr. Berman determined that Plaintiff suffered cervical and lumbar spine strain and sprain, which had fully resolved at the time of the examination. Dr. Berman finds no aggravation of a preexisting condition and reports that Plaintiff is fully recovered with no clinical residuals. With regard to Plaintiff's cervical MRI performed on October 16, 2012, Dr. Berman states that it revealed degenerative and bulging disc changes at C5-6 which pre-existed the accident in question and did not correlate with Plaintiff's normal clinical examination. With regard to Plaintiff's lumbar MRI performed on October 16, 2012, Dr. Berman reports that it revealed degenerative and facet hypertrophic disc changes at L3-S1 which pre-existed the accident in question and did not correlate with Plaintiff's normal clinical examination. Dr. Berman further notes that Plaintiff's EMG studies indicated preexisting degenerative changes of the lumbar spine. Dr. Berman opines that Plaintiff can participate in all activities of daily living and that her prognosis is good for continued stable function at the current level.

Defendants also submit the Affirmed reports of Dr. Jonathan Luchs, a radiologist who states that he reviewed the MRIs of Plaintiff's cervical spine and lumbar spine. Dr. Luchs' review of Plaintiff's cervical spine MRI reveals degenerative disc disease with disc dessication and disc bulges and evidence of early arthropathy denoted by joint hypertrophy at C4-5. With regard to Plaintiff's lumbar spine MRI, Dr. Luchs opines that these studies reveal lower lumbar facet arthropathy and findings of early degenerative disc disease from L3 through S1. Dr. Luchs opines that there are no posttraumatic findings evident on these MRI exams.

This Court has read the Affirmations of Plaintiff's treating physicians, Dr. David Capiola, Dr. Spencer A. Colden and Dr. Paul Post, as well as the MRI reports of Dr. Narayan Paruchuri, 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, 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.

The Court notes that, on July 30, 2015, the Honorable Kenneth L. Thompson decided the issue of liability in this matter. Judge Thompson's Decision and Order dismissed the Complaint and all cross-claims against the Defendants Albert Pough and Marvin Pough and deemed Defendant Charran Mangal 100% negligent for the occurrence of the subject accident.

Therefore it is

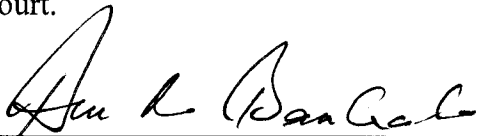
ORDERED, that Defendants Tri-State Bio Diesel, LLC and Charran Mangal's motion for an Order granting summary judgment dismissing Plaintiff's Complaint for failure to satisfy the serious injury threshold under Insurance Law §5102(d) is **granted** to the extent that Plaintiff is precluded from raising the 90/180 day threshold provision of the Insurance Law; and it is further

ORDERED, that Defendants Albert Pough and Marvin Pough'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 **denied** as moot.

The above constitutes the Decision and Order of this Court.

Dated: November 2, 2015



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