

Sylvestre v Miah

2015 NY Slip Op 32399(U)

November 18, 2015

Supreme Court, Bronx County

Docket Number: 305064/12

Judge: Ben R. Barbato

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

Present: Honorable Ben R. Barbato

ROSELENE SYLVESTRE,

Plaintiff,

DECISION/ORDER

-against-

Index No.: 305064/12

KHALIS MIAH and BANGLA AUTO REPAIRS AND
BODY SHOP,

Defendants.

The following papers numbered 1 to 8 read on this motion for summary judgment noticed on February 6, 2015 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	4
Affirmation in Opposition & Exhibits	5, 6
Reply Affirmation & Exhibit	7, 8

Upon the foregoing papers, and after reassignment of this matter from Justice Kenneth L. Thompson on September 8, 2015, Defendants, Khalis Miah and Bangla Auto Repairs and Body Shop, 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 6, 2011 at or about the intersection of East 91st Street and Park Avenue, in the County, City and State of New York.

On July 21, 2014, the Plaintiff appeared for an orthopedic examination conducted by Defendants' retained physician Dr. John H. Buckner. Upon examination and review of Plaintiff's medical records, Dr. Buckner determined that Plaintiff did not sustain any serious injury as a result of the subject accident. Dr. Buckner reports that Plaintiff's cervical spine examination was normal and notes that the cervical MRI report does not describe a single finding

that would indicate recent trauma. With regard to Plaintiff's lumbar spine, Dr. Buckner finds no injury or causally related disability, except for a congenital flat-back scoliosis. Dr. Buckner reports that Plaintiff's lumbar spine examination was normal and notes that the lumbar MRI report does not describe a single finding that would indicate recent trauma. With regard to Plaintiff's left shoulder, Dr. Buckner finds no injury or causally related disability. Dr. Buckner reports that Plaintiff's left shoulder examination was normal except for healed arthroscopy incisions. Dr. Buckner further reports that Plaintiff's x-rays interpretation does not contain a single finding that would indicate recent injury. Dr. Buckner notes that the operative report does mention chronic findings of remote shoulder trauma but no findings of recent trauma. Dr. Buckner finds no permanency as a result of the subject accident and opines that Plaintiff may perform all activities of daily living and usual and customary work without restrictions.

Defendants submit the affirmed reports of Dr. Audrey Eisenstadt, a radiologist, who states that she reviewed the MRIs of Plaintiff's lumbar spine and cervical spine. Plaintiff's lumbar spine MRI revealed L1-2 anterior osteophyte formation, endplate degenerative signal change at L2-3 and L4-5 levels, dessication at L1-2, L3-4 and L4-5 levels and bulging at L1-2 and L4-5. Dr. Eisenstadt opines that the degenerative changes in Plaintiff's lumbar spine predate the accident of September 6, 2011. With regard to Plaintiff's cervical spine MRI, Dr. Eisenstadt notes this to be an entirely normal study with no changes seen involving the osseous, ligamentous or intervertebral disc structures.

Defendants also submit the affirmed report of Dr. Nicholas D. Caputo, dated July 1, 2014. Upon review of Plaintiff's Emergency Department records, Police Accident report and Bill of Particulars, Dr. Caputo determined that there were no acute traumatic findings to causally relate Plaintiff's injuries to the accident of September 6, 2011 other than lumbar strain.

The Court has read the Affirmed reports of Dr. Donald I. Goldman and Dr. Igor Cohen, the Affirmed MRI reports of Dr. Alan S. Lubitz, Dr. Daniel Schlusberg and Dr. Jeffrey S. Chess, as well as the operative report of Dr. Patrick J. Derosa included with the certified records from Mercy Medical Center, 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).

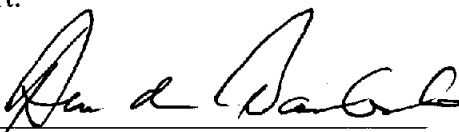
In the instant case Plaintiff has demonstrated by admissible evidence an objective and quantitative evaluation that she has suffered significant limitations to the normal function, purpose and use of a body organ, member, function or system sufficient to raise a material issue of fact for determination 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 Khalis Miah and Bangla Auto Repairs and Body Shop's 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 **granted** to the extent that Plaintiff is precluded from raising the 90/180 day threshold provision of the Insurance Law.

This constitutes the Decision and Order of this Court.

Dated: November 18, 2015



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