Zeigler v Quinones
2015 NY Slip Op 32471(U)
December 1, 2015
Supreme Court, Bronx County
Docket Number: 307056/12
Judge: Ben R. Barbato

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

Present: Honorable Ben R. Barbato

LAWRENCE ZEIGLER,

Plaintiff,

-against-

HECTOR A. QUINONES,

Defendant.

DECISION/ORDER

Index No.: 307056/12

The following papers numbered 1 to 7 read on this motion for summary judgment noticed on June 30, 2014 and duly transferred on September 8, 2015.

Papers Submitted	Numbered
Notice of Motion, Affirmation & Exhibits	**1, 2, 3**
Affirmation in Opposition & Exhibits	**4, 5**
Reply Affirmation & Exhibits	**6, 7**

Upon the foregoing papers, and after reassignment of this matter from Justice Norma Ruiz on September 8, 2015, Defendant, Hector Quinones, 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 August 20, 2011, at or near the intersection of Pelham Parkway and Stillwell Avenue, in the County of Bronx, City and State of New York.

On December 5, 2013, the Plaintiff appeared for an orthopedic examination conducted by Defendant's 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, bilateral knees strain and sprain and right shoulder strain and sprain, all

of which had resolved at the time of the examination. Dr. Berman finds full range of motion in Plaintiff's cervical and thoracolumbar spine with no tenderness or spasm as well as full range of motion in Plaintiff's bilateral shoulders, elbows, wrists, hands, hips, knees, ankles and feet with no tenderness or swelling. Dr. Berman finds no aggravation of a preexisting condition and opines that Plaintiff reached maximum medical improvement. With regard to Plaintiff's cervical MRI performed on October 2, 2011, Dr. Berman states that it revealed small bulging disc changes at C6-7 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 2, 2011, Dr. Berman reports that it revealed herniated disc and foraminal narrowing changes at L5-S1 which pre-existed the accident in question and did not correlate with Plaintiff's normal clinical examination. Dr. Berman finds no evidence of any radiculopathy radiologically or clinically. With regard to Plaintiff's right shoulder MRI performed on September 30, 2011, Dr. Berman reports that it revealed a partial rotator cuff tear. Dr. Berman notes that the findings of partial medial meniscal tear and ACL tear in Plaintiff's right and left knee MRIs, combined with the clinical presentation, reveal that arthroscopic surgery is not indicated. Dr. Berman further notes that Plaintiff can participate in all activities of daily living and work at his regular employment as a bus driver, full time without restrictions.

This Court has read the Affirmed medical reports from Plaintiff's treating physicians, Dr. Joyce Goldenberg, Dr. Richard Seldes and radiologists Dr. Thomas Kolb and Dr. Jacob Lichy, as well as the certified records from Central Park Physical Medicine and Rehabilitation, 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 (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 he 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, he has demonstrated by admissible evidence the extent and duration of his 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 Defendant has not met that burden. However, based upon the medical evidence and testimony submitted, Plaintiff has not established that he has been unable to perform substantially all of his 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 Hector Quinones' 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: December 1, 2015

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