Wireko v Ayala
2016 NY Slip Op 30672(U)
March 3, 2016
Supreme Court, Bronx County
Docket Number: Supreme Court, Bronx County
Judge: Ben R. Barbato
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

Present: Honorable Ben R. Barbato

DILYS WIREKO,

Plaintiff,

-against-

FREDDY AYALA,

Defendant.

DECISION/ORDER

Index No.: 306641/12

The following papers numbered 1 to 5 read on this motion for summary judgment noticed on October 9, 2014 and duly transferred on January 11, 2016.

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

Upon the foregoing papers, and after reassignment of this matter from Justice Mark Friedlander on January 11, 2016, Defendant, Freddy Ayala, 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 June 9, 2011, on 1st Avenue at or near its intersection with 125th Street, in the County, City and State of New York.

On February 24, 2014, the Plaintiff appeared for a physical examination conducted by Defendant's appointed physician Dr. Howard V. Katz, an Orthopedic surgeon. Upon examination and review of Plaintiff's medical records, Dr. Katz determined that Plaintiff suffered cervical spine, thoracic spine, lumbar spine, right shoulder and right knee sprain/strain, all of which had

resolved at the time of the examination. Dr. Katz finds full range of motion in Plaintiff's cervical spine, thoracic spine and lumbar spine with no tenderness or paravertebral muscle spasm, and full range of motion in Plaintiff's right shoulder, right knee and wrists with no heat, swelling, effusion, erythema or crepitus appreciated. Dr. Katz notes no evidence of carpal tunnel syndrome. Dr. Katz further notes that Plaintiff has fully recovered from the injuries sustained in the subject accident and that she is capable of working and performing activities of daily living without limitations.

Defendant submits the affirmed reports of Dr. Scott S. Coyne, a radiologist, who states that he reviewed the MRIs of Plaintiff's right knee, right shoulder and lumbosacral spine. Plaintiff's right knee MRI reveals minimal degenerative signal in the menisci which Dr. Coyne opines is chronic, long-standing, preexisting and not causally related to the accident of June 9, 2011. Dr. Coyne finds a small multilocular focal area of signal abnormality in the mid tibial plateau which may represent subchondral cyst formation and is not typical for bone contusion, and signal abnormality anterior to the patella tendon which may represent soft tissue injury. Plaintiff's right shoulder MRI reveals a normal examination with no osseous, soft tissue abnormality or any other trauma causally related to the accident of June 9, 2011. Plaintiff's lumbosacral spine MRI reveals mild, focal degenerative disc and facet joint changes which Dr. Coyne also opines are chronic, long-standing, preexisting and not causally related to the accident of June 9, 2011.

This court has read the Affirmed report of Dr. Mark S. McMahon as well as the MRI reports of Dr. Jacob Lichy and Dr. Michael Shapiro, 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 her 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 Defendant has 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 Defendant Freddy Ayala'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: March 3, 2016

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