

Mohammed v Lopez

2016 NY Slip Op 31149(U)

May 23, 2016

Supreme Court, Bronx County

Docket Number: 306658/11

Judge: Ben R. Barbato

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

Present: Honorable Ben R. Barbato

KHALIYL MOHAMMED and AMIR MOHAMMED,

Plaintiffs,

DECISION/ORDER

-against-

Index No.: 306658/11

RUBEN D. LOPEZ,

Defendant.

The following papers numbered 1 to 9 read on this motion and cross motion for summary judgment noticed on July 9, 2014 and March 16, 2015 respectively and duly transferred on March 9, 2016.

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

Upon the foregoing papers, and after reassignment of this matter from Justice Sharon A.M. Aarons on March 9, 2016, Defendant, Ruben D. Lopez, seeks an Order granting summary judgment dismissing Plaintiffs' Complaint for failure to satisfy the serious injury threshold under Insurance Law §5102(d). By cross-motion, Plaintiff on the Counterclaim, Amir Mohammed, seeks an Order granting summary judgment dismissing Plaintiff Khaliyl Mohammed'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 20, 2008, on Bailey Avenue at or near its intersection with Kingsbridge Avenue, in the County of Bronx, City and State of New York.

On October 11, 2013, the Plaintiff Khaliyl Mohammed appeared for an orthopedic examination conducted by Defendant's appointed physician Dr. Gregory Montalbano. Upon

examination and review of Plaintiff's medical records, Dr. Montalbano determined that Plaintiff did not sustain any permanent injury or disability to his right knee as a result of the subject accident and that the MRI revealed a normal study with no signs of structural damage or recent injury. With respect to the cervical and lumbar spine, Dr. Montalbano finds decreased range of motion in Plaintiff's cervical and lumbar spine with no tenderness or paraspinal spasm. Dr. Montalbano opines that Plaintiff did not sustain any permanent injury to his cervical and lumbar spine and that he has a pre-existing degenerative condition unrelated to the accident in question.

Defendant submits the affirmed reports of Dr. Audrey Eisenstadt, a radiologist, who states that she reviewed the MRIs of Plaintiff Khaliyl Mohammed's lumbar spine, cervical spine and right knee. Plaintiff's lumbar spine MRI reveals a normal study with mild sclerosis of the right sacroiliac joint which is unrelated to the accident of September 20, 2008. With regard to Plaintiff's cervical spine MRI, Dr. Eisenstadt notes that this study reveals disc dessication from C4-5 through C5-6 associated with disc bulging. With regard to Plaintiff's right knee MRI, Dr. Eisenstadt notes that this study reveals a normal examination. Dr. Eisenstadt opines that there is no evidence of any osseous, ligamentous, or intervertebral disc changes causally related to the accident of September 20, 2008.

On October 11, 2013, the Plaintiff Amir Mohammed appeared for an orthopedic examination conducted by Defendant's appointed physician Dr. Gregory Montalbano. Upon examination and review of Plaintiff's medical records, Dr. Montalbano determined that Plaintiff did not sustain any permanent injury to his cervical and lumbar spine. Dr. Montalbano finds decreased range of motion in Plaintiff's cervical and lumbar spine with no tenderness or paraspinal spasm. Dr. Montalbano opines that Plaintiff has a pre-existing condition of degenerative disc disease as revealed on Plaintiff's cervical and lumbar MRIs which is unrelated

to the accident in question.

Defendant submits the affirmed reports of Dr. Audrey Eisenstadt, a radiologist, who states that she reviewed the MRIs of Plaintiff Amir Mohammed's lumbar spine and cervical spine. Plaintiff's lumbar spine MRI reveals a normal study with a transitional S1 vertebra. With regard to Plaintiff's cervical spine MRI, Dr. Eisenstadt notes that this study reveals disc dessication from C2-3 through C5-6 with disc bulging at C3-4 and C5-6. Dr. Eisenstadt opines that there is no evidence of any post-traumatic osseous, ligamentous, or intervertebral disc changes causally related to the accident of September 20, 2008.

The Court has read the certified records of Plaintiff's treating chiropractor, Michael Minick, D.C., the MRI reports of Dr. Joseph Leadon, radiologist, as well as the Affidavit of Jonathan Sirota, D.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 Plaintiffs have demonstrated by admissible evidence an objective and quantitative evaluation that they have 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, they have demonstrated by admissible evidence the extent and duration of their 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, Plaintiffs have not established that they have been unable to perform substantially all of their normal activities for 90 days within the first 180 days immediately following the accident and as such are precluded from raising the 90/180 day threshold provision of the Insurance Law.

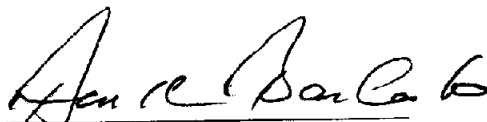
Therefore it is

ORDERED, that Defendant, Ruben D. Lopez' motion for an Order granting summary judgment dismissing Plaintiffs' Complaint for failure to satisfy the serious injury threshold under Insurance Law §5102(d) is **granted** to the extent that Plaintiffs are precluded from raising the 90/180 day threshold provision of the Insurance Law; and it is further

ORDERED, that Plaintiff on the Counterclaim Amir Mohammed's cross-motion for an Order granting summary judgment dismissing Plaintiff Khaliyl Mohammed's Complaint for failure to satisfy the serious injury threshold under Insurance Law §5102(d) is likewise **granted** to the extent that Plaintiff Khaliyl Mohammed 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: May 23, 2016



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