

**Toro v Calderon**

2012 NY Slip Op 33690(U)

February 24, 2012

Sup Ct, Bronx County

Docket Number: 0302777/2009

Judge: Ben R. Barbato

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This opinion is uncorrected and not selected for official publication.

[\* 1]

PART ●

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

Case Disposed   
Settle Order   
Schedule Appearance

TORO, MIGDALIA

Index No. 0302777/2009

-against-

Hon. [REDACTED]

CALDERON, HECTOR M.

**BEN R. BARBATO** Justice.

The following papers numbered 1 to \_\_\_\_\_ Read on this motion, SUMMARY JUDGEMENT DEFENDANT  
Noticed on January 06 2012 and duly submitted as No. \_\_\_\_\_ on the Motion Calendar of \_\_\_\_\_


	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

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MAR - 7 2012

Upon the foregoing papers this motion is decided in accordance with  
the attached Decision and Order.

Motion is Respectfully Referred to:  
Justice: \_\_\_\_\_  
Dated: \_\_\_\_\_

Dated: 02/24/2012

Hon.   
**BEN R. BARBATO**

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

**Present:** Honorable Ben R. Barbato

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MIGDALIA TORO,

Plaintiff,

-against-

**DECISION/ORDER**

Index No.: 302777/09

HECTOR M. CALDERON, TBS TRADING, INC.,  
and JOSEPH C. CHIN,

Defendants.

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The following documents papers numbered 1 to 8 read on this motion and cross-motion for summary judgment noticed on January 6, 2012 and duly transferred on February 22, 2012.

<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

Upon the foregoing papers, and after reassignment of this matter from Justice John A. Barone on February 22, 2012, Defendants, TBS Trading, Inc. and Joseph C. Chin, seek an Order granting summary judgment and dismissing Plaintiff's Complaint for failure to satisfy the serious injury threshold under Insurance Law §5102(d). By Cross-Motion Defendant, Hector M. Calderon seeks an Order granting summary judgment and 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 March 17, 2008 on Randall Avenue at or near its intersection with Bryant Street, in the County of Bronx, City and State of New York.

On February 28, 2011 the Plaintiff appeared for a physical examination conducted by Defendants' appointed physician Dr. William J. Kulak, an Orthopedic surgeon. Upon

examination, Dr. Kulak determined that Plaintiff's soft tissue injuries of the cervical, lumbar and left knee, which Dr. Kulak terms as extremely minor, were resolved at the time of the examination. Dr. Kulak further opines that the arthroscopic surgery undergone by Plaintiff was for a pre-existing pathology not related to the accident.

Plaintiff offers the Affirmation of Dr. Charles DeMarco, a radiologist who supervised the taking of the MRI of Plaintiff's cervical spine and left knee. The MRI of Plaintiff's cervical spine reveals bulging discs at C 4-5 and C5-6; narrowing of the C2-3, C4-5, C5-6 and C6-7 discs; slight dextroscoliosis and slight posterior curvature of the cervical spine. The MRI of Plaintiff's left knee reveals an oblique linear tear of the posterior horn of the medial meniscus and suprapatellar effusion.

Plaintiff also offers the Affirmation of Dr. Harvey A. Manes, an orthopedic surgeon who performed surgery on Plaintiff's left knee resulting from injuries sustained by Plaintiff as a result of the subject motor vehicle accident. The operative report of Dr. Manes states that, upon the insertion of the arthroscope, he noted a partial tear of the medial meniscus and a partial tear of the anterior cruciate ligament with generalized synovitis.

Plaintiff offers the Affirmation of Dr. Max Jean-Giles, a physician who worked at Amaury Medical Care, P.C., who treated and examined the Plaintiff and who affirms the truth and accuracy of that facilities' records. The records of that facilities reveal a limited range of motion of the left knee due to pain and stiffness caused by blunt trauma as well as limited ranges of motion of the lumbar and cervical spines.

Plaintiff further offers the Affirmed report of Dr. Ida Tetro who examined Plaintiff on December 19, 2011. Dr. Tetro states that plaintiff has sustained injuries to her neck, left knee and back and opines that Plaintiff has difficulty performing her daily activities due to her

symptoms. Dr. Tetro further opines that Plaintiff's injuries are permanent and consequential impairments and directly related to the accident of March 17, 2008.

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 defendant 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 (1<sup>st</sup> 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 (1<sup>st</sup> 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 (1<sup>st</sup> 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 (4<sup>th</sup> 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.

Therefore it is

**ORDERED**, that Defendants, TBS Trading, Inc. and Joseph C. Chin's motion for an Order granting summary judgment and dismissing Plaintiff's Complaint for failure to satisfy the serious injury threshold under Insurance Law §5102(d) is **denied**; and it is further

**ORDERED**, that Defendant, Hector M. Calderon's cross-motion for an Order granting summary judgment and dismissing Plaintiff's Complaint for failure to satisfy the serious injury threshold under Insurance Law §5102(d) is **denied**.

Dated: February 24, 2012

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