

Terrero v Mamadou
2012 NY Slip Op 33900(U)
March 2, 2012
Supreme Court, Bronx County
Docket Number: 301893/09
Judge: Ben R. Barbato
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX**

Present: Honorable Ben R. Barbato

JEAN TERRERO, ISAMIL DE LOS SANTOS and
HEIRY RAMOS,

Plaintiffs,

-against-

DECISION/ORDER

Index No.: 301893/09

BAH MAMADOU, LISA ROBERTS and CHADIA
JARDINE,

Defendants.

The following documents papers numbered 1 to 11 read on this motion and cross motion for summary judgment noticed on February 15, 2011 and duly transferred on March 1, 2012.

<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 & Exhibits	7, 8
Cross-Motion, Affirmation & Exhibits	9, 10, 11

Upon the foregoing papers, and after reassignment of this matter from Justice Norma Ruiz on March 1, 2012, Defendant, Bah Mamadou, seeks an Order granting summary judgment and dismissing Plaintiffs' Complaint for failure to satisfy the serious injury threshold requirement under Insurance Law §5102(d). By Cross-Motion Defendants, Lisa Roberts and Chadia Jardine, seek an Order granting summary judgment and dismissing Plaintiffs' Complaint for failure to satisfy the serious injury threshold requirement 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 October 10, 2008 at or near the intersection of West 116th Street and 7th Avenue, in the County, City and State of New York.

On February 19, 2010 the Plaintiff, Jean Terrero, appeared for a physical examination

conducted by Defendant's appointed physician Dr. Gregory Montalbano, an Orthopedic surgeon. Upon examination, Dr. Montalbano determined that Plaintiff did not sustain a substantial or permanent injury to the right knee as a result of the accident. He further opines that the condition of Plaintiff's knee was pre-existing and degenerative in nature.

Defendant also submits the report of Dr. David A. Fisher, a radiologist retained by the Defendant to review the MRI of Plaintiff, Jean Terrero's right knee. Upon review Dr. Fisher determined that it revealed a normal study.

On November 20, 2009, the Plaintiff, Isamil De Los Santos, appeared for a physical examination conducted by Defendant's appointed physician Dr. Gregory Montalbano, an Orthopedic surgeon. Upon examination, Dr. Montalbano determined that Plaintiff sustained a sprain and strain of the lumbar and cervical spines which had, at the time of the examination, resolved. He further opines that the condition of Plaintiff's left shoulder was either congenital or degenerative in nature. Dr. Montalbano's review of the left shoulder MRI from Lenox Hill Radiology reveals a completely normal study.

Defendant also submits the report of Dr. David A. Fisher, a radiologist retained by the Defendant to review the MRI of Plaintiff, Isamil De Los Santos' left shoulder. Upon review Dr. Fisher determined that it revealed an unremarkable study.

On November 20, 2009 the Plaintiff, Heiry Ramos, appeared for a physical examination conducted by Defendant's appointed physician Dr. Gregory Montalbano, an Orthopedic surgeon. Upon examination, Dr. Montalbano determined that Plaintiff did not sustain a permanent injury to the cervical spine and presented a normal clinical examination of the lumbar spine. Dr. Montalbano further opines that the Plaintiff underwent surgery to treat a pre-existing condition of subacromial impingement of the right shoulder.

Defendant also submits the report of Dr. David A. Fisher, a radiologist retained by the Defendant to review the MRI of Plaintiff, Heiry Ramos' right shoulder. Upon review, Dr. Fisher determined that it revealed an unremarkable study.

The Plaintiff, Jean Terrero, offers the Affirmation of Dr. Mark McMahon, an orthopedic surgeon who examined the Plaintiff on April 21, 2011 after having performed surgery on Plaintiff's right knee on December 31, 2008. Dr. McMahon found limited range of motion of the right knee, lumbar spine and cervical spine. On December 31, 2008, Dr. McMahon performed arthroscopic surgery to repair a torn anterior cruciate ligament and a torn medial meniscus. Dr. McMahon further opines that Plaintiff's injuries to the right knee are permanent and causally related to the subject accident. Likewise, Plaintiff's injuries to his cervical and lumbar spines are permanent in nature and causally related to the subject accident.

The Plaintiff, Isamil De Los Santos, offers the Affirmation of Dr. Mark McMahon, an orthopedic surgeon who examined the Plaintiff on May 20, 2011 after having performed surgery on Plaintiff's left shoulder on January 13, 2009. After review of the medical records of the Plaintiff obtained from his treating physician Dr. Fira Nihamin, Dr. McMahon found limited range of motion of the left shoulder, lumbar spine and cervical spine. On January 13, 2009, Dr. McMahon performed arthroscopic surgery to repair a torn rotator cuff. Dr. McMahon's examination of May 20, 2011 reveals continuing loss of range of motion to the left shoulder, cervical and lumbar spines. Dr. McMahon further opines that Plaintiff's injuries to the left shoulder, cervical spine and lumbar spine are permanent partial impairments and causally related to the subject accident.

The Plaintiff, Heiry Ramos, offers the Affirmation of Dr. Mark McMahon, an orthopedic surgeon who examined the Plaintiff on March 21, 2011 after having performed

surgery on Plaintiff's right shoulder on November 24, 2008. After review of the medical records of the Plaintiff obtained from her treating physician Dr. Fira Nihamin, Dr. McMahon found limited range of motion of the right shoulder, lumbar spine and cervical spine. On January 13, 2009, Dr. McMahon performed arthroscopic surgery to repair a torn rotator cuff. Dr. McMahon's examination of March 21, 2011 revealed continuing loss of range of motion to the right shoulder, as well as the cervical and lumbar spines. Dr. McMahon further opines that Plaintiff's injuries to the left shoulder, cervical spine and lumbar spine are permanent partial impairments and causally related to the subject accident.

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 (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 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.

Therefore it is

ORDERED, that Defendant, Bah Mamadou's motion for an Order granting summary judgment and dismissing Plaintiffs' Complaint for failure to satisfy the serious injury threshold requirement under Insurance Law §5102(d) is **denied**; and it is further

ORDERED, that Defendants, Lisa Roberts and Chadia Jardine's cross-motion for an Order granting summary judgment and dismissing Plaintiffs' Complaint for failure to satisfy the serious injury threshold under Insurance Law §5102(d) is **denied**.

Dated: March 2, 2012



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