

**Thomas v Mila Transp. Inc.**

2013 NY Slip Op 33738(U)

April 14, 2013

Sup Ct, Bronx County

Docket Number: 0302185/2009

Judge: Ben R. Barbato

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This opinion is uncorrected and not selected for official publication.

[\* 1]

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PART 21/SJT

Case Disposed   
Settle Order   
Schedule Appearance

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

THOMAS,LOLIETA

Index No. 0302185/2009

-against-

Hon. [REDACTED]

MILA TRANSPORTATION INC.

**BEN R. BARBATO** Justice.

The following papers numbered 1 to \_\_\_\_\_ Read on this motion, **SUMMARY JUDGMENT DEFENDANT**  
Noticed on **November 28 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		

Upon the foregoing papers this motion is decided pursuant to the attached Decision and Order.

Motion is Respectfully Referred to:

Justice: \_\_\_\_\_

Dated: \_\_\_\_\_

Dated: 04/14/2013

Hon. [REDACTED]

**BEN R. BARBATO**

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

**Present:** Honorable Ben R. Barbato

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LOLIETA THOMAS,

Plaintiff,

-against-

MILA TRANSPORTATION INC. and ANOWAR  
HOSSAIN, M.D.,

Defendants.

**DECISION/ORDER**

Index No.: 302185/09

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The following papers numbered 1 to 8 read on this motion for summary judgment noticed on November 28, 2012 and duly transferred on April 1, 2013.

<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
Memorandum of Law	7
Reply Affirmation	8

Upon the foregoing papers, and after reassignment of this matter from Justice Sharon A. M. Aarons on April 1, 2013, Defendants, Mila Transport Inc. and Anowar Hossain, M.D., seek an Order granting summary judgment dismissing Plaintiff's Complaint for failure to satisfy the serious injury threshold under Insurance Law §5102(d) and §5104(a).

This is an action to recover for personal injuries allegedly sustained as a result of a motor vehicle accident which occurred on June 19, 2006, on Rowland Avenue at or near the intersection with Frisby Avenue in the County of Bronx, City and State of New York.

On July 17, 2012, the Plaintiff appeared for an orthopedic examination conducted by Defendants' appointed physician Dr. J. Serge Parisien. Upon examination, Dr. Parisien determined that Plaintiff's alleged injury to her cervical, thoracic and lumbar spine, left shoulder,

right elbow and bilateral wrists had, at the time of the examination, resolved. Dr. Parisien further opined that Plaintiff could perform all of her usual daily activities of daily living and usual occupation without restriction.

On January 13, 2010, the Plaintiff appeared for a neurological examination conducted by Defendants' appointed physician Dr. Edward M. Weiland. Upon examination, Dr. Weiland determined that Plaintiff presented a normal neurological examination. Dr. Weiland, also opined that he found no reason why Plaintiff should not be able to perform activities of daily living and continue her employment without restriction. He further opined that Plaintiff did not suffer any permanent or residual effects based upon his examination.

Defendants offer the report of Dr. Audrey Eisenstadt, a radiologist, who reviewed the MRIs of Plaintiff's cervical spine which revealed discogenic ridging and osteophyte formation at the C3-4, C4-5 and C5-6 levels, disc degeneration at the C4-5 and C5-6 levels, desiccation at the C2-3, C3-4 and C6-7 levels, bulging at the C3-4, C4-5 and C5-6 levels.

Plaintiff offers the undated Affirmation of Dr. Randall V. Ehrlich, who states that he examined the Plaintiff on June 2, 2010 with respect to the subject 2006 accident. Plaintiff also submits the Affirmation of Dr. Ranga Chelva Krishna, dated June 20, 2011, which states that he had the opportunity to treat Plaintiff but does not indicate the date that he first saw Plaintiff.

Any reports, Affirmation or medical records not submitted in admissible form were not considered for the purpose of this Decision and Order.

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 (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, 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 (1<sup>st</sup> Dept. 2004). Plaintiff must still establish evidence of the extent of his purported physical limitations and its duration. *Arjona v. Calcagno*, 7 A.D.3d 279 (1<sup>st</sup> Dept. 2004).

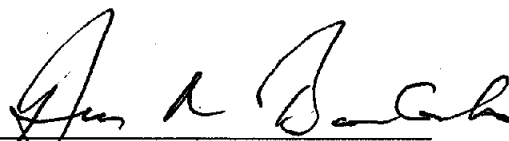
In the instant case Plaintiff has not demonstrated by admissible evidence and objective and quantitative evaluation that she has suffered significant limitations to the normal function, purpose and use of a body organ, member, function or system sufficient to raise a material issue of fact for determination by a jury. Further, she has not 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 met that burden.

Therefore it is

**ORDERED**, that Defendants' 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) and §5104(a) is **granted**.

Dated: April 14, 2013



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