Gonzalez v Irizarry
2013 NY Slip Op 33785(U)
July 15, 2013
Supreme Court, Bronx County
Docket Number: 303785/11
Judge: Ben R. Barbato
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
Present: Honorable Ben R. Barbato

MARIA E. GONZALEZ,

Plaintiff,

-against-

JOHN IRIZARRY, COMPAS CAR SERVICE and YADIRA ESPINAL,

Defendants.

DECISION/ORDER

Index No.: 303785/11

The following papers numbered 1 to 12 read on these motions for summary judgment noticed on October 25, 2012 and duly transferred on April 1, 2013.

Papers Submitted	Numbered
Notice of Motion, Affirmation & Exhibits	**1, 2, 3**
Memorandum of Law	**4**
Notice of Motion, Affirmation & Exhibits	**5, 6, 7**
Supplemental Affirmation in Support & Exhibits	**8, 9**
Affirmation in Opposition & Exhibits	**10, 11**
Reply Affirmation	**12**

The above Motions have been consolidated for the purpose of this Decision and Order.

Upon the foregoing papers, and after reassignment of this matter from Justice Alison Y. Tuitt on April 1, 2013, Defendants, Compas Car Service and Yadira Espinal, seek an Order granting summary judgment and dismissing Plaintiff's Complaint for failure to satisfy the serious injury threshold under Insurance Law §5102(d). Defendant John Irizarry also 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 December 18, 2010, on Boston Road at or near its intersection with Boller Avenue, in the County of Bronx, City and State of New York.

Defendants offer the affirmations of Dr. David A. Fisher, a radiologist, who reviewed the MRIs of Plaintiff's right shoulder, cervical spine and thoracic spine. Dr. Fisher's review of the January 31, 2011 MRI of Plaintiff's right shoulder reveals a normal examination with no radiographic evidence of recent traumatic or causally related injury. Dr. Fisher states that the rotator cuff appeared intact and that there was no finding of joint effusion or bursal fluid collection. Dr. Fisher's review of the January 14, 2011 MRI of Plaintiff's cervical spine reveals diffuse degenerative changes most pronounced at C4-5 and C5-6 with no evidence of disc herniations. Dr. Fisher determines that there is no radiographic evidence of traumatic or causally related injury to Plaintiff's cervical spine. Dr. Fisher's review of the January 14, 2011 MRI of Plaintiff's thoracic spine reveals a normal examination with no evidence of disc herniation or significant annular bulge. Dr. Fisher opines that there is no radiographic evidence of recent traumatic or causally related injury to Plaintiff's thoracic spine.

On December 12, 2011, the Plaintiff appeared for an orthopedic examination conducted by Defendants' retained physician Dr. John H. Buckner. Upon examination and review of Plaintiff's medical records, Dr. Buckner determined that Plaintiff demonstrated no tenderness, spasm or deformity in her cervical and thoracic spine. The muscles of Plaintiff's cervical, lumbar and thoracic spines revealed normal reciprocating function with side bending range of motion and gait. Plaintiff's shoulders demonstrated normal range of motion with some clicking in Plaintiff's right shoulder. Dr. Buckner determines that Plaintiff suffered cervical muscle strain superimposed on pre-existing enthesopathy and congenital/developmental scoliosis, clinically resolved, as well as right shoulder strain superimposed on pre-existing enthesopathy with excellent post-surgery outcome. Dr. Buckner further notes in his Addendum that he reviewed Plaintiff's MRI films of her cervical/thoracic spine and right shoulder and finds no evidence of

foraminal neural impingement at any spinal level or bleeding, swelling or edema in any of the soft tissues. His review of Plaintiff's right shoulder films showed evidence of acromioclavicular arthritis and impingement with no findings to suggest a recent injury. Dr. Buckner opines that Plaintiff may have experienced an exacerbation of her previous right shoulder impingement with an excellent result from her shoulder decompression and further opines that Plaintiff did not sustain any cervical injury or disability as a result of the subject accident.

This court has read the Affirmed reports of Dr. David T. Neuman, Dr. Eric Hausknecht and Dr. Arden M. Kaisman presented by Plaintiff.

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 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 Defendants have 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 Defendants' motions for an Order granting summary judgment dismissing Plaintiff's Complaint for failure to satisfy the serious injury threshold pursuant to Insurance Law §5102(d) are **granted** to the extent that Plaintiff is precluded from raising the 90/180 day threshold provision of the Insurance Law.

Dated: July 15, 2013

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