

<b>Irizarry v Compas Car Serv.</b>
2013 NY Slip Op 33946(U)
August 28, 2013
Supreme Court, Bronx County
Docket Number: 302085/11
Judge: Ben R. Barbato
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX**

**Present:** Honorable Ben R. Barbato

JOHN IRIZARRY,

Plaintiff,

-against-

COMPAS CAR SERVICE and YADIRA ESPINAL,

Defendants.

**DECISION/ORDER**

Index No.: 302085/11

The following papers numbered 1 to 6 read on this motion for summary judgment noticed on October 16, 2012 and duly transferred on July 8, 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

Upon the foregoing papers, and after reassignment of this matter from Justice Alison Y. Tuitt on July 8, 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).

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. Mark J. Decker, a radiologist, who reviewed the MRIs of Plaintiff's left knee and cervical spine. Dr. Decker's review of the January 29, 2011 MRI of Plaintiff's left knee reveals degeneration in the posterior horn of the lateral meniscus with no tear, thickened plica with lateral subluxation and lateral tilt of the patella and minimal

effusion. Dr. Decker states that these findings are not causally related to the accident in question and that there is no evidence to suggest that a traumatic injury was sustained. Dr. Decker's review of the February 1, 2011 MRI of Plaintiff's cervical spine reveals reversal of cervical lordosis with diffuse degenerative disc disease. Dr. Decker determines that the finding of multilevel bulge and bony ridging is longstanding and not causally related to the accident of December 18, 2010. Dr. Decker further finds no herniation or fracture.

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 patellar muscle imbalance which was pre-existing and unrelated to the accident in question, right arm and lower back pain, both clinically resolved, as well as radiographic degenerative disc disease of the cervical and lumbar spine with a current normal spinal examination for Plaintiff's age. Dr. Buckner further notes in his Addendum that he reviewed Plaintiff's CD ROM images of his cervical spine dated February 1, 2011 and finds a congenital disc remnant in the mid portion of the body of C2, minimal dessication of the discs at C3-4 and C4-5, a minimal midline disc bulge at C4-5 and no cord impingement. Dr. Buckner also reviewed the peer review of Dr. Fernando Jara with regard to Plaintiff's emergency records and agrees with his assessment that Plaintiff had no findings on any examination to suggest injury of any body part. Dr. Buckner opines that Plaintiff has not sustained any serious injury to his cervical, lumbar spine or left knee as a result of the subject accident and notes that there is no disability that would preclude him from performing his usual and customary work and activities of daily living.

This court has read the Affirmations of Dr. Gabriel L. Dassa, Dr. Charles Blatt, Dr. Steven Winter, Dr. Aric Hausknecht and the Affidavit of Mitchell Zeren, D.C. 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 (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. Calcano*, 7 A.D.3d 279 (1<sup>st</sup> Dept. 2004).

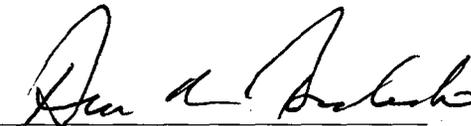
In the instant case Plaintiff has demonstrated by admissible evidence an objective and quantitative evaluation that he has suffered significant limitations to the normal function, purpose and use of a body organ, member, function or system sufficient to raise a material issue of fact for determination by a jury. Further, he has demonstrated by admissible evidence the extent and duration of his 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. However, based upon the medical evidence and testimony submitted, Plaintiff has not established that he has been unable to perform substantially all of his 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 Compas Car Service and Yadira Espinal's 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) is **granted** to the extent that Plaintiff is precluded from raising the 90/180 day threshold provision of the Insurance Law.

Dated: August 28, 2013

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