

**Nieves v Davis**

2013 NY Slip Op 33958(U)

August 8, 2013

Supreme Court, Bronx County

Docket Number: 350594/09

Judge: Ben R. Barbato

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This opinion is uncorrected and not selected for official publication.

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

**Present:** Honorable Ben R. Barbato

STEPHANIE NIEVES, an Infant by her Mother and natural guardian, MIRIAM ESTRELLA and MIRIAM ESTRELLA, Individually,

Plaintiffs,

-against-

**DECISION/ORDER**

Index No.: 350594/09

RONALD DAVIS, NEW YORK CITY TRANSIT AUTHORITY, MTA BUS COMPANY, MINERVA A. GIL and DON THOMAS BUS, INC.,

Defendants.

The following papers numbered 1 to 10 read on this motion and cross-motion or summary judgment noticed on December 13, 2012 and duly transferred on July 8, 2013.

<u>Papers Submitted</u>	<u>Numbered</u>
Notice of Motion, Affirmation & Exhibits	1, 2, 3
Notice of Cross-Motion and Affirmation	4, 5
Affirmation in Opposition & Exhibits	6, 7
Reply Affirmation	8
Reply Affirmation & Exhibit	9, 10

Upon the foregoing papers, and after reassignment of this matter from Justice Larry S. Schachner on July 8, 2013, Defendant, New York City Transit Authority, seeks 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 Defendants, Minerva A. Gil and Don Thomas Bus, Inc., 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 June 4, 2009, at or near the intersection of Claremont

Parkway and Boston Road, in the County of Bronx, City and State of New York.

On November 3, 2010, the Plaintiff, Stephanie Nieves, appeared for a physical examination conducted by Defendant's appointed physician Dr. Shariar Sotudeh, an Orthopedic surgeon. Upon examination and review of Plaintiff's medical records, Dr. Sotudeh determined that Plaintiff suffered thoracic and lumbar spine strain/sprain and left knee internal derangement, which at the time of the examination had resolved. Dr. Sotudeh notes that there is no evidence of any contributing preexisting condition and that Plaintiff is able to carry out her activities of daily living without restrictions. He further finds no evidence of a permanent disability.

Plaintiff offers the Affirmation of Dr. Ali Guy, who conducted a physical examination of Plaintiff on September 4, 2009 and states that he found restrictions in the range of motion of Plaintiff's back. Dr. Guy notes that he performed additional range of motion testing on Plaintiff's back from September 2009 through June 2010 and found continuing restrictions. On December 20, 2012, two and a half years following the accident, Dr. Guy reexamined Plaintiff and states that Plaintiff still had a 50% loss of use of her back. Dr. Guy opines that Plaintiff has a persistent orthopedic impairment to her lumbar region and that these injuries are permanent.

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 not 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 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

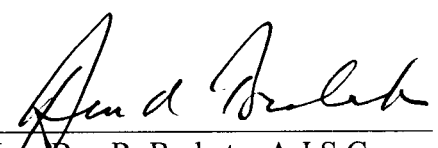
**ORDERED**, that Defendant, New York City Transit Authority’s motion for an Order granting summary judgment and dismissing Plaintiff’s Complaint for failure to satisfy the serious

injury threshold under Insurance Law §5102(d) is **granted**; and it is further

**ORDERED**, that Defendants, Minerva A. Gil and Don Thomas Bus, Inc.'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 **granted**; and it is further

**ORDERED**, that pursuant to 3212(b), Plaintiff's Complaint is likewise dismissed as to Defendants Ronald Davis and MTA Bus Company.

Dated: August 8, 2013

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