

Sanchez v Draper

2013 NY Slip Op 33987(U)

June 28, 2013

Supreme Court, Bronx County

Docket Number: 308214/09

Judge: Ben R. Barbato

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

Present: Honorable Ben R. Barbato

ANTONIO SANCHEZ,

Plaintiff,

-against-

DAWN DRAPER, ROMEO MARQUEZ, JR., ROSEMARY
MAGTIBAY and LAURA LABRIANA,

Defendants.

DECISION/ORDER

Index No.: 308214/09

The following papers numbered 21 to read on these motions and cross motion for summary judgment noticed on May 31, June 25, July 16 and July 27, 2012 and duly transferred on April 1, 2013.

<u>Papers Submitted</u>	<u>Numbered</u>
Notice of Motion, Affirmation & Exhibits (Manus)	1, 2, 3
Affirmation in Opposition & Exhibits	4, 5
Reply Affirmation	6
Notice of Motion, Affirmation & Exhibits (Walker)	7, 8, 9
Notice of Cross-motion, Affirmation & Exhibits (Nanni)	10, 11, 12
Notice of Motion, Affirmation & Exhibits (Walsh)	13, 14, 15
Affirmations in Opposition	16, 17, 18
Reply Affirmations	19, 20, 21

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 Sharon A.M. Aarons on April 1, 2013, Defendants, Romeo Marquez, Jr., Rosemary Magtibay and Dawn Draper, seek an Order granting summary judgment dismissing Plaintiff's Complaint for failure to satisfy the serious injury threshold under Insurance Law §5102(d). By Cross-motion Defendant, Laura Labriana, seeks an Order granting summary judgment dismissing Plaintiff's Complaint for failure to satisfy the serious injury threshold under Insurance Law §5102(d). In addition, the

Defendants, Romeo Marquez, Jr., Rosemary Magtibay and Dawn Draper, seek an Order granting summary judgment on the issue of liability.

This is an action to recover for personal injuries allegedly sustained as a result of a motor vehicle accident which occurred on August 5, 2008, on the Bruckner Boulevard Expressway at or near Bronx River Avenue, in the County of Bronx, City and State of New York.

On November 3, 2010, the Plaintiff appeared for an orthopedic examination conducted by Defendants' appointed physician Dr. Robert Israel. Upon examination, Dr. Israel determined that Plaintiff suffered cervical and lumbar spine sprain as a result of the subject accident, both of which had resolved at the time of the examination. Dr. Israel opines that Plaintiff presented no disability as a result of the accident of record and that he is capable of work activities and activities of daily living without restrictions.

On September 22, 2010, the Plaintiff appeared for a neurological evaluation conducted by Defendants' appointed physician Dr. Michael J. Carciente. Upon examination, Dr. Carciente determined that Plaintiff had a normal neurological examination with no evidence of a myotomal weakness, dermatomal sensory deficits, asymmetric reflexes or atrophy to support the presence of a radiculopathy. He finds no correlation between the findings in the spine MRI reports and his examination of Plaintiff. Dr. Carciente further opines that Plaintiff presented no evidence of neurological injury, disability or permanency as a result of the subject accident.

Defendants also submit the Affirmed report of Dr. David A. Fisher, a radiologist, who reviewed the MRI of Plaintiff's cervical spine taken on September 2, 2008 which reveals diffuse degenerative changes, most pronounced at the C5-6 and C6-7 levels. Dr. Fisher opines that these degenerative changes represent a preexisting condition. He further notes that there are no disc herniations and no radiographic evidence of recent traumatic or causally related injury to the

cervical spine.

Plaintiff offers the undated narrative report of Dr. Madhu B. Boppana. Dr. Boppana states that the Plaintiff's last visit was on July 12, 2012 and that Plaintiff presented spinal range of motion loss, impaired neurological function, impaired use of extremities, impaired sensori-motor function, impaired gait, quality of life loss, acute and chronic pain and suffering, and social, recreational and occupational impairment. Dr. Boppana determined that Plaintiff suffered cervical myelopathy and spinal cord compression secondary to intervertebral disc displacement, lumbar disc displacement, nerve root impingement and radiculopathy. Dr. Boppana opines that Plaintiff's injuries are permanent and causally relates them to the August 5, 2008 accident.

Plaintiff submits an Affirmation from Dr. Michael Shapiro who states that he took or supervised the taking of the MRIs of Plaintiff's cervical and lumbar spine on September 2, 2008. Dr. Shapiro states that the MRI of Plaintiff's cervical spine reveals central disc herniations at C3-4 and C5-6, mild degenerative disease, hypertrophic spur formation, no central spinal stenosis and muscle spasm. The MRI of Plaintiff's lumbar spine reveals central disc bulging at L3-4 and muscle spasm. Dr. Shapiro further noted disc dessication at L3-4 and L5-S1.

The Court notes that 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 (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 her purported physical limitations and its duration. *Arjona v. Calcano*, 7 A.D.3d 279 (1st Dept. 2004).

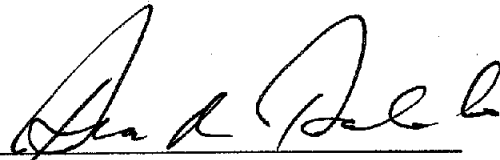
In the instant case Plaintiff has failed to demonstrate by admissible evidence an objective and quantitative evaluation that he has suffered significant limitations to the normal function, purpose and use of a body organ, member, function or system sufficient to raise a material issue of fact for determination by a jury. Further, he has failed to demonstrate 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 (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 met that burden.

Therefore it is

ORDERED, that Defendants' motion and cross-motion for an Order granting summary judgment and dismissing Plaintiff's Complaint for failure to satisfy the serious injury threshold pursuant to Insurance Law §5102(d) is **granted**; and it is further

ORDERED, that Defendants' motion for an Order granting summary judgment on the issue of liability is **denied** as moot.

Dated: June 28, 2013



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