

Matos v Ramon Urena, N.Y. Livery Leasing Inc.

2014 NY Slip Op 33239(U)

January 10, 2014

Supreme Court, Bronx County

Docket Number: 305985/11

Judge: Ben R. Barbato

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

Present: Honorable Ben R. Barbato

ROSA MATOS,

Plaintiff,

-against-

DECISION/ORDER

Index No.: 305985/11

RAMON URENA, N.Y. LIVERY LEASING INC. and
NYLL MANAGEMENT LTD.,

Defendants.

The following papers numbered 1 to 11 read on this motion for summary judgment noticed on February 26, 2013 and duly transferred on October 11, 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
Supplemental Affirmation in Support & Exhibit	7, 8
Supplemental Affirmation in Opposition & Exhibit	9, 10
Reply Affirmation	11

Upon the foregoing papers, and after reassignment of this matter from Justice Julia Rodriguez on October 11, 2013, Defendants, Ramon Urena, N.Y. Livery Leasing Inc. and NYLL Management Ltd., 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 February 23, 2009, on University Avenue at or near its intersection with Morton Place, 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 knee, left knee, lumbar spine, cervical spine and right hip. Dr. Fisher's

review of the August 11, 2009 MRI of Plaintiff's right knee reveals significant degenerative changes with articular cartilage loss and marginal spurring. Dr. Fisher states that there is no radiographic evidence of traumatic or causally related injury to the right knee. Dr. Fisher's review of the August 11, 2009 MRI of Plaintiff's left knee reveals significant degenerative changes with articular cartilage loss and marginal spurring resulting in moderate/severe tricompartment osteoarthritis. Dr. Fisher states that no discrete tear is seen and that there is no radiographic evidence of traumatic or causally related injury to the left knee. Dr. Fisher's review of two MRI studies of Plaintiff's lumbar spine performed one month post accident and two years post accident reveals degenerative changes throughout the lower thoracic and lumbar spine without herniations or fractures. Dr. Fisher opines that there is no radiographic evidence of traumatic or causally related injury to Plaintiff's lumbar spine. Dr. Fisher's review of two MRI studies of Plaintiff's cervical spine performed ten days post accident and two years post accident reveals degenerative changes throughout the cervical spine. Dr. Fisher opines that the small herniation noted at C6-7 is consistent with the amount of degenerative change present and states that there is no radiographic evidence of traumatic or causally related injury to Plaintiff's cervical spine. With regard to the MRI study of Plaintiff's right hip, Dr. Fisher determined that it reveals a normal examination with no radiographic evidence of traumatic or causally related injury.

On July 30, 2012, 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 a well-healed anterior cervical incision, good cervical motion consistent with a successful cervical surgery at C5-6, a normal lumbar examination, arthritic bilateral knees and obesity. With regard to Plaintiff's cervical spine, Dr. Buckner states that Plaintiff experienced chronic pain dating back

to a previous motor vehicle accident of 2002 for which she was still taking medication three months prior to the subject accident. His review of the patient's cervical MRI failed to identify a single injury related change such as fracture, ligament tear, recent disc herniation, or any evidence of bleeding, swelling or edema to suggest injury. With regard to Plaintiff's lumbar spine, Dr. Buckner reports that Plaintiff had an ongoing congenital/developmental condition of her lower spine described as an osteochondroma which was not caused by nor changed by the accident of February 23, 2009. Dr. Buckner states that the medical records between the accident of 2002 and the injuries claimed in the subject accident reflect identical complaints. With regard to Plaintiff's knees, Dr. Buckner reports that Plaintiff had multiple prior complaints and that the only findings in her knee MRIs are degenerative changes which have been present for many years prior to the accident in question. Dr. Buckner further notes in his Addendum that he reviewed additional medical records of Plaintiff predating the accident of February 23, 2009 which indicate that Plaintiff had prior surgery to her knees and prior treatment to her cervical spine. Dr. Buckner determines that Plaintiff has no causally-related diagnoses. Dr. Buckner opines that Plaintiff did not sustain any injury as a result of the subject accident and that she may perform all activities of daily living and her usual and customary work without restrictions.

Defendants further offer the affirmation of Dr. Samuel M. Rock, a psychologist, who evaluated Plaintiff on August 3, 2012 and determined that Plaintiff had no psychological disability emanating from the accident nor restrictions or limitations in terms of her ability to perform activities of daily living.

This court has read the Affirmed reports of Dr. Leonard R. Harrison and Dr. Susan Myrna Seidman, presented by Plaintiff. The Court notes that Plaintiff has failed to submit evidence of contemporaneous treatment in admissible form. While the Court of Appeals in *Perl v. Meher*

rejected a rule that would make contemporaneous quantitative measurements a prerequisite to recovery, it confirmed the necessity of some type of contemporaneous treatment to establish that a Plaintiff's injuries were causally related to the incident in question. 18 N.Y.3d 208 (2011). Furthermore, Plaintiff fails to address Defendants' evidence of preexisting degeneration in Plaintiff's cervical spine, lumbar spine, left knee and right knee. See *Valentin v. Pomilla*, 59 A.D.3d 184 (1st Dept. 2009).

Plaintiff also presents unaffirmed, unsworn and uncertified records from Plaintiff's various medical providers. 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. See: *Barry v. Arias*, 94 A.D.3d 499 (1st Dept. 2012).

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 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 (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 Ramon Urena, N.Y. Livery Leasing Inc. and NYLL Management Ltd.'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**.

Dated: January 10, 2014


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

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