Lewis v City of New York
2015 NY Slip Op 31733(U)
August 20, 2015
Supreme Court, Bronx County
Docket Number: 307242/09
Judge: Ben R. Barbato
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FILED Aug 28 2015 Bronx County Clerk

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

Present: Honorable Ben R. Barbato

DARLENE LEWIS,

DECISION/ORDER

Plaintiff,

-against-

Index No.: 307242/09

THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION, MICHAEL PHILLIPS, BRADY RIVERA and DL PETERSON TRUST,

Defendants.

The following papers numbered 1 to 6 read on this motion for summary judgment noticed on September 5, 2013 and duly transferred on December 30, 2014.

Papers Submitted	Numbered
Notice of Motion, Affirmation & Exhibits	**1, 2, 3**
Affirmation in Opposition & Exhibits	**4, 5**
Reply Affirmation	**6**

Upon the foregoing papers, and after reassignment of this matter from Justice Julia Rodriguez on December 30, 2014, Defendants, Brady Rivera and DL Peterson Trust, seek an Order granting summary judgment 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 24, 2009, on 138th Street, at or near its intersection with Brook Avenue, in the County of Bronx, City and State of New York.

On April 3, 2013, the Plaintiff appeared for a neurological examination conducted by Defendants' appointed physician Dr. Rene Elkin. Upon examination and review of records provided, Dr. Elkin determined that Plaintiff presented with no evidence for acute traumatic

injury to the cervical or lumbar spine as a result of the subject accident. Dr. Elkin finds full range of motion in Plaintiff's cervical spine and lumbar spine with no findings for radiculopathy. Dr. Elkin opines that there is evidence for multilevel degenerative disease that might explain Plaintiff's ongoing pain and further notes no clinical findings for neurological dysfunction that would prevent Plaintiff from performing all her usual activities of daily life without restrictions.

On October 24, 2012, the Plaintiff appeared for a physical examination conducted by Defendants' appointed physician Dr. Martin Barschi, an Orthopedic surgeon. Upon examination and review of Plaintiff's medical records, Dr. Barschi determined that Plaintiff sustained soft tissue injuries to her right knee on February 24, 2009. Dr. Barschi finds full range of motion in Plaintiff's lumbar spine and right knee and no tenderness on patellofemoral compression. Dr. Barschi notes degenerative changes and osteophytes in Plaintiff's cervical spine which would have been present for years and further opines that her present physical findings related to her right knee would not prevent Plaintiff from her activities of daily living. Dr. Barschi also states that further orthopedic treatment or physical therapy relating to the accident of February 24, 2009 is neither indicated nor necessary.

This Court has read the Affirmation of Plaintiff's treating physician, Dr. Ahmad Riaz, as well as the Affirmations of Dr. Hank Ross and Joseph Leadon, all presented by Plaintiff.

Any reports, Affirmations 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 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 Brady Rivera and DL Peterson Trust'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 20, 2015

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