

<b>Hossain v Ali</b>
2015 NY Slip Op 32381(U)
November 20, 2015
Supreme Court, Bronx County
Docket Number: 303224/12
Judge: Ben R. Barbato
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX**

**Present:** Honorable Ben R. Barbato

BM ZAKIR HOSSAIN,

Plaintiff,

-against-

**DECISION/ORDER**

Index No.: 303224/12

SHAH MOHAMMED ALI and VEL CAB CORP.,

Defendants.

The following papers numbered 1 to 7 read on this motion for summary judgment noticed on June 2, 2014 and duly transferred on September 8, 2015.

<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
Reply Affirmation	7

Upon the foregoing papers, and after reassignment of this matter from Justice Norma Ruiz on September 8, 2015, Defendants, Shah Mohammed Ali and Vel Cab Corp., 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 June 12, 2009 on 98<sup>th</sup> Street at or near its intersection with 25<sup>th</sup> Avenue, in the County of Queens, City and State of New York.

On March 10, 2014, 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 did not sustain any significant injury as a result of the subject accident. With regard to Plaintiff's cervical spine and lumbar

spine, Dr. Buckner reports that Plaintiff's examination and all appendages including motor testing, sensory testing and reflex testing was normal and that his cervical and lumbar MRI reports indicated no recent injury. With regard to Plaintiff's left knee, Dr. Buckner finds mild osteoarthritis and notes no findings that would indicate recent injury. Dr. Buckner notes that Plaintiff's left knee MRI report indicated no recent injury. Dr. Buckner further notes that there is no permanency as a result of the accident in question and that Plaintiff may continue working without causally-related restrictions.

Defendants also submit the Affirmed reports of Dr. Michael Setton, a radiologist who states that he reviewed the MRIs of Plaintiff's left knee, cervical spine and lumbar spine. Dr. Setton's review of Plaintiff's left knee MRI reveals no evidence of osseous or soft tissue injury resulting from the accident of June 12, 2009. Dr. Setton finds mild intrasubstance degeneration of the posterior horn medial meniscus, moderate to marked patellar and mild medial and lateral compartment chondromalacia with minimal joint effusion. Dr. Setton identifies no meniscal or ligament tear in Plaintiff's left knee MRI. Dr. Setton's review of Plaintiff's cervical spine MRI reveals no evidence of disc herniation, osseous or soft tissue injury as a result of the subject accident four months prior to the examination. Dr. Setton finds multilevel degenerative disc disease and spondylosis, minimal bulging discs at C4-5 and C5-6 with mild bulging at C6-7. With regard to Plaintiff's lumbar spine MRI, Dr. Setton opines that these studies also reveal no evidence of disc herniation, osseous or soft tissue injury resulting from the subject accident four months prior to the examination. Dr. Setton finds multilevel degenerative disc disease and moderate disc bulging at the L2-3 and L4-5 levels which he attributes to degeneration and not to recent trauma. Dr. Setton further finds hypertrophic degeneration of the lower lumbar facet joints and notes no findings of abnormal bone marrow or paraspinal soft tissue signal to indicate

recent injury to Plaintiff's lumbar spine.

The Court has read the Affirmed reports of Plaintiff's treating physician, Dr. Ajoy K. Sinha and the affirmed MRI reports of Dr. Robert Scott Schepp, 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 (1<sup>st</sup> 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 (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 her purported physical limitations and its duration. *Arjona v. Calcano*, 7 A.D.3d 279 (1<sup>st</sup> Dept. 2004).

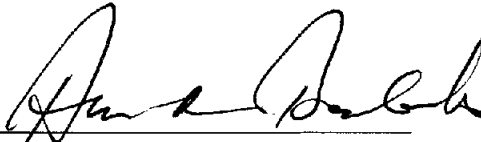
In the instant case Plaintiff has demonstrated by admissible evidence an objective and quantitative evaluation that he has suffered significant limitations to the normal function, purpose and use of a body organ, member, function or system sufficient to raise a material issue of fact for determination 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 Shah Mohammed Ali and Vel Cab Corp.'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.

This constitutes the Decision and Order of this Court.

Dated: November 20, 2015

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