| **Garcia v Pena** |
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| 2015 NY Slip Op 32404(U) |
| November 9, 2015 |
| Supreme Court, Bronx County |
| Docket Number: 306647/12 |
| Judge: Ben R. Barbato |
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 FILED Nov 12 2015 Bronx County Clerk

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

**Present:** Honorable Ben R. Barbato

RAMON GARCIA,

Plaintiff,

**DECISION/ORDER**

-against-

Index No.: 306647/12

ARISTIDES PENA,

Defendant.

The following papers numbered 1 to 6 read on this motion for summary judgment noticed on May 16, 2014 and duly transferred on September 8, 2015.

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

Upon the foregoing papers, and after reassignment of this matter from Justice Norma Ruiz on September 8, 2015, Defendant, Aristides Pena, seeks 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 July 10, 2011 on Jerome Avenue at or about its intersection with East 172nd Street, in the County of Bronx, City and State of New York.

On July 11, 2013, the Plaintiff appeared for an orthopedic examination conducted by Defendant's retained physician Dr. Alvin M. Bregman. Upon examination and review of Plaintiff's medical records, Dr. Bregman determined that Plaintiff suffered cervical spine, lumbar spine, left upper extremities and lower extremities sprains, which had fully resolved at the time

of the examination. Dr. Bregman finds full range of motion in Plaintiff's cervical spine, thoracic spine, lumbar spine, bilateral shoulders, elbows, knees, ankles, right hand, left wrist and left foot. Dr. Bregman further opines that Plaintiff has no disability.

Defendant also submits the affirmed reports of Dr. Audrey Eisenstadt, a radiologist, who states that she reviewed the MRIs of Plaintiff's cervical spine and lumbar spine. Plaintiff's cervical spine MRI revealed degenerative disc disease and disc dessication at the C4-5 and C5-6 levels with associated disc bulging. Dr. Eisenstadt reports that there is no evidence of any osseous, ligamentous or intervertebral disc changes, recent in origin or posttraumatic in etiology. Dr. Eisenstadt further finds no annular tears at any disc level to indicate an acute disc rupture causally related to the July 10, 2011 accident. Plaintiff's lumbar spine MRI revealed a transitional vertebra at the S1 level, a congenital variant present since birth, disc bulging at the L4-5 level indicative of degenerative disc disease with no traumatic basis. Dr. Eisenstadt reports that there is no evidence of any osseous, ligamentous or intervertebral disc changes, posttraumatic in etiology or causally related to the subject accident. Dr. Eisenstadt again finds no annular tears at any disc level to indicate an acute or traumatic disc rupture.

The Court has read the Affirmation of Dr. Frida Goldin, the Affirmation of Dr. Bhupinder S. Sawhney, as well as the MRI reports of Dr. William A. Weiner, 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, 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 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 (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 Defendant has 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 Defendant Aristides Pena'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 9, 2015

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