Ramirez v Hatco Cab Corp.
2016 NY Slip Op 31361(U)
June 27, 2016
Supreme Court, Bronx County
Docket Number: 303779/13
Judge: Ben R. Barbato
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 FILED Jun 29 2016 Bronx County Clerk

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

Present: Honorable Ben R. Barbato

MARIA RAMIREZ,

Plaintiff,

-against-

HATCO CAB CORP. and MOHAMMED A. SALIK,

Defendants.

DECISION/ORDER

Index No.: 303779/13

The following papers numbered 1 to 5 read on this motion for summary judgment noticed on November 20, 2015 and duly transferred on April 27, 2016.

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

Upon the foregoing papers, and after reassignment of this matter from Justice Howard H. Sherman on April 27, 2016, Defendants, Hatco Cab Corp. and Mohammed A. Salik, 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 2, 2013, on the FDR Drive at or near its intersection with Grand Street, in the County, City and State of New York.

On October 13, 2014, the Plaintiff appeared for an orthopedic examination conducted by Defendants' appointed physician Dr. J. Serge Parisien. Upon examination, Dr. Parisien determined that Plaintiff presented with a resolved injury to the cervical and lumbar spine as well as a resolved injury to the right shoulder status post arthroscopic surgery. Dr. Parisien finds full

range of motion in Plaintiff's spine and right shoulder. Dr. Parisien notes that Plaintiff showed no evidence of residuals or permanency. Dr. Parisien further notes that Plaintiff is capable of working and performing her activities of daily living with no restrictions.

On October 13, 2014, the Plaintiff appeared for a neurological examination conducted by Defendants' appointed physician Dr. Jean-Robert Desrouleaux. Upon examination, Dr. Desrouleaux determined that Plaintiff's injury to the cervical and lumbar spine had, at the time of the examination, resolved. Dr. Desrouleaux finds full range of motion in Plaintiff's spine with no tightness, pain or spasm. Dr. Desrouleaux opines that Plaintiff showed no evidence of permanence or residual effect and that she is able to function in her pre-accident capacity and carry out work duties and day-to-day activities without neurological restriction.

Defendants also offer the affirmed reports of Dr. David A. Fisher, a radiologist appointed by Defendants to review the MRI films of Plaintiff's cervical spine, lumbar spine and right shoulder. Dr. Fisher's review of Plaintiff's multiple MRI films revealed a normal examination of the right shoulder and lumbar spine and degenerative changes at C5-6 in Plaintiff's cervical spine. Dr. Fisher found no radiographic evidence of traumatic or causally related injury to Plaintiff's cervical spine, lumbar spine or right shoulder.

On October 6, 2014, Plaintiff was further examined by Dr. Daniel S. Arick, Otolaryngologist, who found no evidence of permanent injury and determined that Plaintiff presented a normal examination of the ear, nose and throat.

This Court has read the Affirmed reports of Plaintiff's treating physicians, Dr. Aric Hausknecht and Dr. Gabriel L. Dassa, the Affirmation of Dr. Narayan Paruchuri, Radiologist, as well as the Affidavit of Dr. Mitchell M. Zeren, 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, 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 Hatco Cab Corp. and Mohammed A. Salik's 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** 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: June 27, 2016

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