

Palacio v 123 Livery Serv. Inc.

2020 NY Slip Op 35656(U)

June 29, 2020

Supreme Court, Bronx County

Docket Number: Index No. 31819/17E

Judge: Ben R. Barbato

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 21

-----X

PALACIO

Index No. *31819/171E*

C

-against-

Hon. BEN R. BARBATO

Justice Supreme Court

123 LIVERY SERVICE
-----X

The following papers numbered 1 to _____ were read on this motion (Seq. No. _____) for _____ noticed on _____.

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s).
Answering Affidavit and Exhibits	No(s).
Replying Affidavit and Exhibits	No(s).

Motion is Respectfully Referred to Justice:
Dated: _____

SEE ORDER ATTACHED

Dated: *6/29/2020*

Hon. *[Signature]*

BEN R. BARBATO, J.S.C.

- 1. CHECK ONE..... CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
- 2. MOTION IS..... GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE..... SETTLE ORDER SUBMIT ORDER SCHEDULE APPEARANCE
 FIDUCIARY APPOINTMENT REFEREE APPOINTMENT

**SUPREME COURT STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM- PART 21**

Present: Honorable Ben R. Barbato

ALMEIMIR PALACIO and YAIRA LUZ CRUZ,

Plaintiffs,

-against-

123 LIVERY SERVICE INC., IMTIAZ R. BUTT
and ARAVINDA V. MORANT,

Defendants.

DECISION/ORDER

Index No.: 31819/17E

Recitation, as required by CPLR 2219(a) of the papers considered in the review of this motion to dismiss:

Papers	Numbered
Notice of Motion, Affirmation and Exhibits Annexed	1
Notice of Motion, Affirmation and Exhibits Annexed	2
Affirmation in Opposition and Exhibit Annexed	3
Affirmation in Reply	4

The above Motions have been transferred from Justice MaryAnn Brigantti on June 25, 2020 to this court pursuant to Order of the Administrative Judge and shall be decided by this court pursuant to CPLR§9002.

The instant action sounds in personal injury arising from a motor vehicle accident occurring on July 14, 2017, on Fowler Avenue near the intersection of Pierce Avenue, in the County of Bronx, City and State of New York. Plaintiffs, Aleimir Palacio and Yaira Cruz at the time of the accident were passengers in a taxicab owned by Defendant, 123 Livery Service, Inc. and operated by Defendant, Imtiaz R. Butt which came in contact with that vehicle operated by the Defendant, Aravinda V. Morant. Defendants, 123 Livery Service, Inc., Imtiaz R. Butt, and Defendant, Aravinda V. Morant, move this court for an Order pursuant to CPLR §3212 awarding Summary Judgment in favor of Defendants dismissing Plaintiffs' Complaint claiming that the

Plaintiffs cannot meet the serious injury threshold requirement mandated by Insurance Law § 5102(d).

The aforementioned motions are hereby consolidated and decided as follow:

Defendants submits the report of Dr. John H. Bruckner, a Board Certified Orthopaedic Surgeon, dated and Affirmed on March 5, 2019. Dr. Bruckner, states the he evaluated the Plaintiff, Aleimir Palacio, on February 25, 2019. Dr. Bruckner states that he reviewed a number of medical records including the MRI reports of Ms. Palacio's left knee, cervical, lumbar and thoracic spine, right shoulder plus other diagnostic tests performed by Ms. Palacio's treating physicians. Upon examination Dr. Bruckner opines that there was no objective evidence of cervical, thoracic, lumbar or right shoulder injury. He further opines that Ms. Palacio's bilateral shoulder impingement was degenerative in nature and unrelated to the subject accident. Dr. Bruckner further states that the surgery to Ms. Palacio's shoulder was for a degenerative rotator cuff and labral tear also unrelated to the subject accident. He found no left knee injury and determines Ms. Palacio to be obese and suffering from hypertension also unrelated to the accident dated July 14, 2017. Dr. Bruckner states that Ms. Palacio suffered no permanent injury as a result of the subject accident and is capable to performing all activities of daily living.

Defendants submit the Affirmed report of Dr. Eric Postal, dated January 30, 2018. Dr. Postal's review of Ms. Palacio's left knee MRI reveals no sign of injury but which presents age-appropriate joint degeneration.

Defendants submits the report of Dr. John H. Bruckner, a Board Certified Orthopaedic Surgeon, dated and Affirmed on May 20, 2019. Dr. Bruckner, states the he evaluated the Plaintiff, Yaira Luz Cruz, on April 29, 2019. Dr. Bruckner also states that he reviewed a number of medical records including the MRI reports of Ms. Cruz's cervical and lumbar spine, right

shoulder plus other diagnostic tests performed by Ms. Cruz' treating physicians. Upon examination Dr. Bruckner finds that there is no objective evidence causally relating Ms. Cruz' cervical spine injury to the subject accident, that Ms. Cruz suffers from degenerative disc disease at multiple levels of the cervical spine with no indication of aggravation of that condition. Dr. Bruckner also finds no objective evidence of a lumbar spine injury but rather that Ms. Cruz suffers from degenerative disc disease at multiple levels of the lumbar spine with no indication of aggravation of that condition. Dr. Bruckner finds no objective evidence of right shoulder injury and opines that the right shoulder arthroscopy surgery was unrelated to the subject accident. Dr. Bruckner states that Ms. Cruz suffered no permanent injury as a result of the subject accident and is capable to perform all activities of daily living.

Defendants submit the report of Dr. Scott A. Springer, a radiologist, who reviewed the MRI report of Ms. Cruz' cervical spine. Dr. Springer states that the MRI reveals mild to moderate degenerative changes and disc space narrowing throughout the spine. He opines that this result cannot have happened within the time period between the accident and the taking of the MRI which was 18 days. He further opines that the disc bulging at C2/3 and C5/6 have no traumatic basis and that the herniations noted at C4/5 and C6/7 are degenerative in nature and therefore not related to the subject accident. Dr. Springer also reviewed the MRI report of Ms. Cruz' lumbar spine which reveals disc desiccation, osteophytes and a chronic disc herniation at L4/5 none of which Dr. Springer opines is causally related to the accident of July 14, 2017.

Defendants also submit the report of Dr. Darren Fritzpatrick, a radiologist, who reviewed Ms. Cruz' right shoulder MRI report and found it to be unremarkable.

In opposition Plaintiffs submit various medical records and reports including MRIs and the Affirmation of treating physicians, The Plaintiff, Aleimir Palacio, submits the medical report

from Metropolitan Interventional Medical Service, P.C., Dr. Eugene Gorman, who first treated the Plaintiff, Aleimir Palacio, in his office for the subject accident. Dr. Gorman states that Ms. Palacio presented with decreased range of motion in both the cervical and lumbar spine as well as the right shoulder. Dr. Gorman reveals that the MRI of the right shoulder taken on August 17, 2017 revealed 10mm x 18mm high grade tear at the anterior insertion of the supraspinatus. Review of the MRI of the lumbar spine revealed left paracentral disc herniation at L5/S1 with annular tear and encroachment on the descending S1 nerve root, arthropathy at L2/3, L3/4, and L4/5 with disc bulging at L4/5. Review of the MRI of the Cervical spine revealed C5/6 herniation, C4/5 and C6/7 annular bulge, spinal cord impingement, hypolordosis. Review of the MRI of the thoracic spine revealed a T8/9 disc bulge with thecal sac indentation. Review of the MRI of the left knee revealed a medial and lateral meniscal myxoid with additional ACL injury, joint effusion and a gross bony derangement. Dr. Gorman causally relates those injuries stated to the July 17, 2017 motor vehicle accident.

Plaintiff presents that on January 31, 2018 the Plaintiff, Aleimir Palacio, underwent right shoulder arthroscopy at Regency Healthcare Medical, PLLC, performed by Dr. Robert Haar. The post-operative report indicates that Plaintiff sustained a 2.3 cm crescentic tear of the supraspinatus tendon.

Plaintiff, Yaira Cruz, submits the her medical report from Metropolitan Interventional Medical Service, P.C., Dr. Eugene Gorman, who first treated in his office for the July 14, 2017 accident. Dr. Gorman states that Ms. Cruz presented with decreased range of motion in both the cervical and lumbar spine as well as the right shoulder. Dr. Gorman's review of Ms. Cruz' MRI of the right shoulder reveals evidence of rotator cuff tear with tendinitis and gross bony derangement, Review of the lumbar spine MRI reveals multilevel discopathy with herniation at

the L4/5 and L5/S1 level with annular tears, L3/5 disc bulge and canal impingement, high grade L4/5 spinal stenosis with minimal spondylolisthesis. Review of the MRI of the cervical spine reveals multilevel discopathy with herniations at C4/5, C5/6 and C6/7, annular tear, C2/3 annular bulge with canal and cord impingement.

Plaintiff presents that on November 19, 2017 the Plaintiff, Yaira Cruz, underwent right shoulder arthroscopy at Dynamic Surgery Center performed by Dr. Napoleon A. Valdez. The post-operative report indicates arthroscopic synovectomy, extensive SAS debridement SAD with partial acromioplasty and repair of a SLAP lesion. On January 29, 2019 Ms. Cruz underwent an anterior cervical discectomy with removal of posterior osteophytes and decompression of bilateral joints at C4/5 and C5/6 with placement of intervertebral devices at Hudson Regional Hospital performed by Dr. Steven Schiebert.

Dr. Gorman states that the injuries sustained by the Plaintiff, Yaira Cruz, were directly and casually related to the July 14, 2017 motor vehicle accident which is the subject of this lawsuit.

It is settled law that on a motion for summary judgment, the moving party has the initial burden of demonstrating, by admissible evidence, their right to judgment. The burden then shifts to the opposing party, who must proffer evidence in admissible form establishing that an issue of fact exists warranting a trial. CPLR §3112(b); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980); *Singer v. Friedman*, 220 A.D.2d 574(2d Dept 1995). Further, issue finding rather than issue determination is the function of the court on motions for summary judgment. *Esteve v. Abad*, 271 A.D. 725 (1st Dept. 1947); *Stillman v. Twentieth Century Fox F. Corp.*, 3 N.Y.2d 395 (1957); *Clearwater Realty Co. v. Hernandez*, 256 A.D.2d 100 (1st Dept. 1998). Additionally the role of the court is not to resolve issues of credibility. *Knepka v. Tallman*, 278 A.D.2d 811(4th

Dept. 2000) Since summary judgment is a drastic remedy it should not be granted where there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223(1978) Thus where the existence of an issue of fact is arguable summary judgment should not be granted. *Stone v. Goodson*, 8 N.Y.2d 8 (1960). In the instant case viewing the evidence in the light most favorable to the party opposing the motion for summary judgment, namely the Plaintiffs, there exists a triable issue of material fact for determination by a jury. See: *Bacon v. County of Westchester*, 149 A.D.2d 451 (2nd Dept. 1989); *Mutschnik v. Summit Brokerage Corp.*, 148 A.D.2d 427 (2nd Dept. 1989) However, with respect to Plaintiffs' claim that they were unable to perform their usual and customary activities for 90 out of the 180 days immediately following the accident a reading of Plaintiffs' deposition transcript and medical records provided do not support such position. *Hayes v. Gaceur*, 162 A.D.3d 437 (1st Dept 2018); *Holloman v. American United Transportation Inc.*, 162 A.D.3d 423 (1st Dept 2018).

Therefore it is

ORDERED, that Defendants, Livery Service, Inc. and Imtiaz R. Butt, motion for an Order pursuant to CPLR §3212 granting summary judgment dismissing the Plaintiffs' complaint for failure to meet the serious injury threshold requirement mandated by Insurance Law §§ 5102(d) is **denied** and it is further

ORDERED, that Defendant, Aravinda V. Morant's, motion for an Order pursuant to CPLR §3212 granting summary judgment dismissing the Plaintiffs' complaint for failure to meet the serious injury threshold requirement mandated by Insurance Law §§ 5102(d) is likewise **denied**.

Dated: June 29, 2020


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