

**Amaro v Elbakhar**

2020 NY Slip Op 33176(U)

August 18, 2020

Supreme Court, Bronx County

Docket Number: 22278/19E

Judge: Ben R. Barbato

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**SUPREME COURT STATE OF NEW YORK  
COUNTY OF BRONX TRIAL TERM- PART 14**

**Present:** Honorable Ben R. Barbato

BENJAMIN I. PARRA AMARO,

Plaintiff,

-against-

OMAR ELBAKHAR and JOHN DOE, fictitious name as  
true mane is unknown to plaintiff at this time,

Defendants.

**DECISION/ORDER**

Index No.:22278/19E

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

<b>Papers</b>	<b>Numbered</b>
<b>Notice of Motion, Affirmation and Exhibits Annexed</b>	<b>1</b>
<b>Affirmation in Opposition and Exhibit Annexed</b>	<b>2</b>
<b>Affirmation in Reply</b>	<b>3</b>

The instant action sounds in personal injury arising from a motor vehicle accident occurring on December 3, 2017, on Devoe Street at or near its intersection with 177<sup>th</sup> Street in the County of Bronx, City and State of New York. Defendant moves this court for an Order pursuant to CPLR §3212 awarding Summary Judgment claiming that the Plaintiff, Benjamin I Parra Amaro, cannot meet the serious injury threshold requirement mandated by Insurance Law §§ 5102(d) and 5104(a).

Defendant offers the Affirmed report of Dr. Steven A. Ronzoni, Board Certified Orthopaedic Surgeon, who performed an orthopedic examination on September 23, 2019. Dr. Ronzoni’s examination revealed a normal orthopedic examination evidencing normal ranges of motion and negative testing. Dr. Ronzoni opines that Plaintiff suffered from lumbar sprain and strain which at the time of the examination had resolved. Dr. Ronzoni further notes post left knee surgery healed at the time of his examination of the Plaintiff.

Defendant offers the Affirmed report of Dr. Darren Fitzpatrick, a Board Certified

Radiologist, who reviewed the MRI of the Plaintiff's left knee taken at Bronx Medical Diagnostic on January 5, 2018. Dr. Fitzpatrick determines that a review of the MRI revealed a normal knee with no indication traumatic injury. Dr. Fitzpatrick also reviewed the MRI of Plaintiff's lumbar spine taken at Bronx Medical Diagnostic on January 23, 2018. Dr. Fitzpatrick's review reveals loss of height and disc signal at L4/5 and L5/S1 with moderate diffused disc bulge flattening the ventral thecal sac at L4/5 and moderate diffused bulge with a superimposed central protrusion producing mild canal stenosis and mild bilateral neural foraminal narrowing. Dr. Fitzpatrick opines that the foregoing is an indication of degenerative disc disease and not traumatic injury.

Plaintiff submits the Affirmed report of Dr. Maria Ciechorska, who first treated Plaintiff on December 14, 2017 for injuries sustained in the December 3, 2017 accident which is the subject matter of this action. Dr. Ciechorska's examination of the Plaintiff revealed a loss of range of motion to the cervical and lumbar spine. Her examination of Plaintiff's left knee revealed redness and swelling with tenderness over the suprapatellar pouch and joint lines. Range of motion of left knee joint was upon examination decreased. Dr. Ciechorska's review of the MRI of the left knee revealed a medial and lateral meniscal tear, ACL and PCL injuries suggested, tendinitis and joint effusion. A review of the MRI of the lumbar spine revealed L4/5 and L5/S1 herniations, L3/4 bulge, canal and nerve root impingement. Dr. Ciechorska, opines that Plaintiff has developed a significant limitations in his neck, back and left knee causally related to the December 3, 2017 accident.

Plaintiff also submits MRI reports of the lumbar spine and left knee, post procedural follow up visit after left knee arthroscopy and partial menisectomy records from Advanced Orthopedics and Joint Preservation, PC, signed by Dr. Stan Avshalumov and treatment records

from Jacobi Medical Center dated December 8, 2017. Plaintiff submits the report of Dr. Richard Apple who conducted a lumbar epidural steroid injection and a bilateral cervical trigger point injection on April 16, 2018 and May 21, 2018.

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 (4<sup>th</sup> 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 Plaintiff, there exists a triable issue of material fact for determination by a jury. See: *Bacon v. County of Westchester*, 149 A.D.2d 451 (2<sup>nd</sup> Dept. 1989); *Mutschnik v. Summit Brokerage Corp.*, 148 A.D.2d 427 (2<sup>nd</sup> Dept. 1989) However, with respect to Plaintiff's claim that he was unable to perform his usual and customary activities for 90 out of the 180 days immediately following the accident a reading of Plaintiff's deposition transcript and medical records provided do not support such position. *Hayes v. Gaceur*, 162 A.D.3d 437 (1<sup>st</sup> Dept.

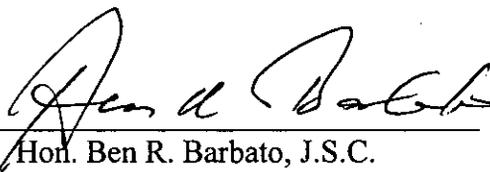
2018); *Holloman v. American United Transportation Inc.*, 162 A.D.3d 423 (1<sup>st</sup> Dept. 2018).

Therefore it is

**ORDERED**, that portion of Defendant, Omar Elbakhar motion seeking dismissal of Plaintiff's claim with respect to the 90/180 day and the Permanent (loss of use) Injury requirement of the Insurance Law is **granted**, and it is further

**ORDERED**, that Defendants, Omar Elbakhar's, motion for an Order pursuant to CPLR §3212 granting summary judgment dismissing the Plaintiff's Complaint for failure to meet the serious injury threshold requirement mandated by Insurance Law §§ 5102(d) and 5104(a) is in all other respects **denied**.

Dated: August 18, 2020

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