

Quiaoit v Mendez

2019 NY Slip Op 35188(U)

October 3, 2019

Supreme Court, Queens County

Docket Number: Index No. 707646/2017

Judge: Chereé A. Buggs

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This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: HONORABLE CHEREÉ A. BUGGS
Justice

IAS PART 30

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MYTHAMONA I. QUIAOIT and RENE M.
QUIAOIT,

Index No.: 707646/2017

Plaintiffs,

Motion

-against-

Date: August 21, 2019

LEOBARDO R. MENDEZ and FRANKLIN B.
SONGOR SIBRI,

Motion Cal. No.: 42

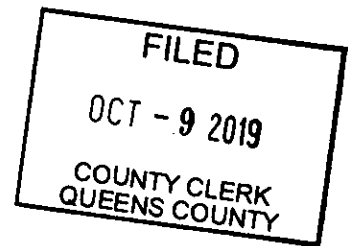
Defendants.

Motion Sequence No.: 1

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The following efile papers numbered 16-33, 35 submitted and considered on this motion by defendants Leobardo R. Mendez and Franklin B. Songor Sibri seeking an Order pursuant to Civil Practice Law and Rules ("CPLR") 3211 (a)(2), 3211 (a) (7) and 3212.

	<u>Papers Numbered</u>
Notice of Motion-Affidavits-Exhibits.....	EF 16-24
Affirmation in Opposition-Affidavits-Exhibits....	EF 25-33
Reply Affirmation-Affidavits-Exhibits.....	EF 35



On June 5, 2017, plaintiff's Mythamona I. Quiaoit and Rene M. Quiaoit commenced this personal injury action seeking to recover damages for personal injuries sustained in a car accident on December 30, 2016.¹ Discovery is complete and plaintiffs filed a Note of Issue and Certificate of Readiness on May 23, 2019. Now, defendants Leobardo R. Mendez and Franklin B. Songor Sibri seek an Order pursuant to Civil Practice Law and Rules ("CPLR") 3211 (a)(2), 3211 (a) (7) and 3212 to dismiss this case against Rene M. Quiaoit only, on the grounds that he did not sustain a serious injury as defined under the Insurance Law sections 5104 and 5104. In support of the motion, defendants' submitted the pleadings, Rene M. Quiaoit's verified bill of particulars and deposition transcript; medical records of City MD and Atlas Radiology; and the independent medical examination report of Board Certified Orthopedist Dr. Stuart Springer.

¹ Defendants papers incorrectly state the date of accident as February 26, 2019.

Plaintiff Rene M. Quiaoit claimed in his verified bill of particulars that as a result of the accident he sustained injuries to his left shoulder and cervical spine, and aggravation and exacerbation of previously latent cervical discogenic disease. He claimed that his injuries were permanent, and that following the accident, he was confined to his home for approximately three months except doctor's visits. Further, during this same time frame, he was incapacitated from his household duties. He claimed that he sustained a serious injury under the permanent consequential limitation of use of a body organ, member, function or system; significant limitation of use of a body function or system; and/or the 90/180 day categories of the Insurance Law.

Plaintiff Rene M. Quiaoit gave sworn testimony on October 15, 2018. He stated, in sum and substance, that as a result of the accident he sustained injuries to his left shoulder and neck. Following the accident, he treated at an Urgent Care Center and soon after began treating with Dr. Xu, who treated him with acupuncture about three times a week for four or five months. He stated that he stopped treating because his No-Fault benefits stopped. He wore a sling on his left arm for about a week following the accident and stated that it was difficult to perform his housework and to take care of his children and his wife, the co-plaintiff. He had not injured his left shoulder or neck prior to the accident and did not sustain any subsequent injuries to these areas. He was not employed but was a homemaker, cooking and cleaning and taking care of the children. He was able to drop off and pick up his 5 year old daughter from school following the accident, however he had difficulties in performing his household duties, such as changing a light bulb. He claimed that because of the accident he could no longer exercise and play with his children in the manner that he used to. He also stated that he has gained weight. He was still experienced pain in his neck and left shoulder.

Defendants annexed a billing summary for plaintiff Rene M. Quiaoit dated January 5, 2017 from City MD wherein his diagnosis was a shoulder contusion and MVA (motor vehicle accident). Additionally annexed was a February 16, 2017 MRI report taken at Atlas Radiology of his thoracic spine. In Dr. John T. Rigney's opinion the impression was "straightening of the cervical curvature which may reflect muscle spasm and for which clinical correlation is recommended. No evidence of thoracic disc bulge or a herniation." Also annexed to defendant's papers was a March 12, 2017 MRI report of his left shoulder taken at Atlas Radiology. The impression of Dr. John S. Lyons was "AC joint capsular hypertrophy without impingement. Mild fluid in the subdeltoid bursa and joint capsule compatible with tenosynovitis/bursitis."

Independent Medical Examination Report of Dr. Stuart Springer

Dr. Stuart Springer performed an independent orthopedic examination on plaintiff Rene M. Quiaoit on February 26, 2019 and rendered his report the same day. The doctor reviewed the verified bill of particulars and the police accident report. The doctor stated that this plaintiff "was employed as a home maker at the time of the accident. He did not miss any time out as a result of the accident. The claimant is currently a home maker." The examination also had a neurologic component. Range of motion testing was performed with a goniometer and the results were as

follows:

Cervical Spine- flexion 50 degrees (50 degrees normal); extension 60 degrees (60 degrees normal); right rotation and left rotation 80 degrees (80 degrees normal); right and left lateral flexion 45 degrees (45 degrees normal);

Left Shoulder-abduction 180 degrees; forward flexion 180 degrees (180 degrees normal); internal rotation 80 degrees (80 degrees) and external rotation 90 degrees (90 degrees normal).

In Dr. Springer's opinion, plaintiff Rene M. Quiaoit sustained cervical spine and left shoulder sprains/strains which had resolved.

Discussion

Defendants allege herein that plaintiff's complaint should be dismissed pursuant to CPLR 3211(a)(2) because the court does not have subject matter jurisdiction over this cause of action, and under 3211 (a) (7) because the facts alleged do not fit within any cognizable legal theory and are thus without any merit (*see generally Hecht v Andover Assocs. Mgmt. Corp., et al.*, 114 AD3d 638 [2d Dept 2014]; *Salvatore v Bd. of Educ. of Mineloa Union Free School Dist.*, 89 AD3d 1078 [2d Dept 2011]; *Treeline 1 OCR, LLC v Nassau County Indus. Dev. Agency*, 82 AD3d 748 [2d Dept 2011]). "If from the four corners of the complaint factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, a motion to dismiss will fail" (*Cooper v 620 Prop. Assocs.*, 242 AD2d 359 [1997]). "On a motion to dismiss pursuant to CPLR 3211 (a) (7), the claim must be afforded a liberal construction, the facts therein must be accepted as true, and the [plaintiff] must be accorded the benefit of every favorable inference" (*Leon v Martinez*, 84 NY2d 83 [1994]; *see also Sawitsky v State*, 146 AD3d 914 [2d Dept 2017]).

Defendants also seek relief under CPLR 3212. It is well settled that summary judgment is a drastic remedy, which will not be granted by the Court if there is any doubt as to the existence of a triable issue of fact (*Andre v Pomeroy*, 32 NY2d 361 [1974]; *Kwong on Bank, Ltd., v Montrose Knitwear Corp.*, 74 AD2d 768 [2d Dept 1980]). The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met her or his burden, the opponent must produce competent evidence in admissible form to establish the existence of a triable issue of fact. (*See Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Under New York's Insurance Law §5102(d) a "serious injury" is "a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system, or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary

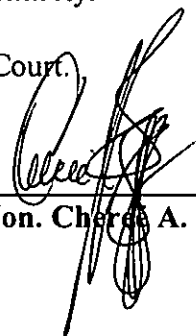
daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.”

Defendants failed to establish their entitlement to relief under CPLR sections 3211 (a) (2), 3211 (a) (7) and 3212. They failed to demonstrate that the court lacked jurisdiction of the subject matter of the cause of action or that plaintiff did not state a cause of action or a prima facie entitlement to judgment as a matter of law that plaintiff Rene M. Quiaoit did not sustain a “serious injury” within the meaning of Insurance Law §§5102(d) and 5104(a) (see *Toure v Avis Rent A Car, Sys., Inc.*, 98 NY2d 345 [2002]; *Gaddy v Eyler*, 79 NY2d 955 [1992]; *Licari v Elliott*, 57 NY2d 230, 235 [1982]; *Grossman v Wright*, 268 AD2d 79, 83-84 [2d Dept 2000]). Defendants examining physician, Dr. Springer failed to state range of motion in plaintiff Rene M. Quiaoit’s left shoulder on adduction (see Dr. Springer’s February 26, 2019 report; A.M.A. “Guides to the Evaluation of Permanent Impairment,” fifth edition). Since the defendants failed to meet their prima facie burden, it is not necessary for the Court to consider plaintiff Rene M. Quiaoit’s opposition papers (see *Chang v Cardone*, 113 AD3d 582 [2d Dept 2014]; *Tudy v Sandoval*, 97 AD3d 739 [2d Dept 2012]; *Coscia v 938 Trading Corp.*, 283 AD2d 538 [2d Dept 2011]).

Therefore, defendants’ motion is denied in its entirety.

This constitutes the decision and Order of the Court.

Dated: October 3, 2019



Hon. Cheryl A. Buggs, JSC

FILED
OCT - 9 2019
COUNTY CLERK
QUEENS COUNTY