

**Diaz v Yaya**

2020 NY Slip Op 32837(U)

July 2, 2020

Supreme Court, Bronx County

Docket Number: 23211/17E

Judge: Ben R. Barbato

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

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/

**Present:** Honorable Ben R. Barbato

BERBELY DIAZ,

Plaintiff,

**DECISION/ORDER**

Index No. 23211/17E

-against-

MOUHANMANDOU A. YAYA and AMERICAN  
UNITED TRANSPORTATION, INC.,

Defendants.

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
Affirmation in Opposition and Exhibit Annexed	2
Affirmation in Reply	3

The above Motions have been transferred from Justice MaryAnn Brigantti on June 30, 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 August 18, 2016, at or near the intersection of West Tremont Avenue and Harrison Avenue, in the County of the Bronx, City and State of New York. Defendants moves this court for an Order pursuant to CPLR §3212 awarding Summary Judgment claiming that the Plaintiff, Berbely Diaz, cannot meet the serious injury threshold requirement mandated by Insurance Law §§ 5102(d).

Defendants submit the Affirmed report of Dr. Mark J. Decker, radiologist, who reviewed the MRI of Plaintiff's right shoulder dated December 12, 2016 from Precision Radiology. Dr. Decker finds degeneration and tear of the superior labrum and anterior inferior labrum with a

12mm anterior inferior labral cyst. Dr. Decker opines that the finding are of longstanding and not causally related to the subject accident.

Defendants also submit the Affirmed report of Dr. Thomas P. Nipper, a Board Certified Orthopedic Surgeon who examined the Plaintiff on December 14, 2018. Dr. Nipper's examination found normal ranges of motion in the cervical, thoracic and lumbar spine. He notes portal scarring on the right shoulder with minimal reduction in range of motion in both flexion and abduction otherwise normal. His examination of Plaintiff's elbows, wrists, hands, hips, knees, ankles and feet are revealed to all be normal. Dr. Nipper finds no acute traumatic injury to Plaintiff's lumbar spine and right shoulder and states those findings in the Precision Radiology MRIs are consistent with degenerative changes. He further opines that any injuries had, at the time of his examination, resolved with no further need for orthopaedic treatment or physical therapy.

Plaintiff submits the Affirmation of Dr. Orsuville Cabatu, a physiatrist, who initially evaluated Plaintiff on August 23, 2016, for those injuries sustained as a result of the subject accident. Dr. Cabatu states that his examination of the Plaintiff revealed limited range of motion of the lumbar spine with positive straight leg raising bilaterally. He also notes reduced range of motion in the cervical spine as well as the right and left shoulders with reduced strength in the upper extremities. Dr. Cabatu states that he reviewed the December 9, 2016 MRI of Plaintiff taken at Precision Radiology which revealed a herniated disc at the L5/S1 indenting the thecal sac and disc bulging at the L4/5 level. He also reviewed the December 12, 2016 MRI of Plaintiff's right shoulder which he states revealed a superior labral tear, glenoid avulsion of the inferior glenohumeral ligament and articular side tear of the supraspinatus tendon and a SLAP tear. Dr. Cabatu states that Plaintiff underwent right shoulder surgery performed by Dr. David

Capiola on March 28 2017. Dr. Cabatu also states that his examination of Plaintiff conducted on August 22, 2019 revealed persistent loss of range of motion in the cervical and lumbar spine and the right shoulder. He further opines that Plaintiff's MRI do not reveal significant degeneration of the neck, back or right shoulder. Dr. Cabatu states that the Plaintiff's examination revealed that she was medically disabled from carrying out most of her usual daily activities for nine months following the subject accident. Dr. Cabatu causally related Plaintiff's injuries to the motor vehicle accident of August 18, 2016.

Plaintiff also submits the Affirmation of Dr. Davis Capiola, a Board Certified Orthopedic Surgeon, who evaluated the Plaintiff on September 19, 2016. After review of the MRI of Plaintiff's right shoulder Dr. Capiola performed arthroscopic surgery of the shoulder on March 28, 2017. On February 5, 2018, Plaintiff was administered cortisone steroid injection in her right shoulder. Dr. Capiola opines that as a result of the subject motor vehicle accident Plaintiff sustained a permanent disability of the right shoulder.

Plaintiff also presents the MRI report of the right shoulder.

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 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 (2<sup>nd</sup> Dept. 1989); *Mutschnik v. Summit Brokerage Corp.*, 148 A.D.2d 427 (2<sup>nd</sup> Dept. 1989)

Therefore it is

**ORDERED**, that Defendants' 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) is **denied**.

Dated: July 2, 2020

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