

Edwards v Martinez
2020 NY Slip Op 33155(U)
August 10, 2020
Supreme Court, Bronx County
Docket Number: 24245/19E
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

RICHARD EDWARDS,

Plaintiff,

-against-

**EMMANUEL MARTINEZ and JOHN'S PRODUCE
LLC,**

Defendants.

DECISION/ORDER

Index No.: 24245/19E

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
Memorandum of Law	2
Affirmation in Opposition and Exhibits Annexed	3
Memorandum of Law in Opposition	4
Affirmation in Opposition	5

The instant action sounds in personal injury arising from a motor vehicle accident occurring on November 6, 2018, at or near its intersection of 135th Street and St. Anns Avenue, in the County of Bronx, City and State of New York. Plaintiff, Richard Edwards, at the time of the accident was operating his vehicle at the above stated location, which vehicle came in contact with that vehicle operated by the Defendant, Emmanuel Martinez and owned by Defendant, John's Produce. Defendants, Emmanuel Martinez and John's Produce, move this court for an Order pursuant to CPLR §3212 awarding Summary Judgment in favor of Defendants dismissing Plaintiff's Complaint claiming that the Plaintiff cannot meet the serious injury threshold requirement mandated by Insurance Law §5102(d).

Defendants offer the Affirmed report of Dr. Jonathan D. Glassman, a Board Certified

Orthopedic Surgeon, who states that he performed an orthopedic examination of the Plaintiff on December 6, 2019. Dr. Glassman's examination revealed normal range of motion in the cervical, lumbar, and left shoulder with all tests being negative. Dr. Glassman did find a eight degree deficit in the right shoulder upon interior flexion but otherwise normal range of motion and all administered test negative. Dr. Glassman opines that Plaintiff suffered status post sprain and strain of the cervical, lumbar and left shoulder which at the time of his examination had resolved. Dr. Glassman notes pre-existing multi level degenerative disc disease in the lumbar and cervical spine with degenerative joint disease in the left shoulder. The left shoulder was also determined to have a Grade 1 superior labral anterior to posterior SLAP debridement, partial rotator cuff debridement for a tear measuring less than 3mm, abrasion chondroplasty of portions of the humeral head, including portions of the Hill-Sachs injury, arthroscopic subacromial decompression and bursetomy, abrasion chondroplasty of portions of the anterior rim of the glenoid for Grade 4 chondromalacia. Dr. Glassman finds no disability and opines that there is a causal relationship between the accident and the sprains and strains as determined by him with chronic pre-existing degenerative process present.

Defendants offer the affirmed report of Dr. Scott S. Coyne, a Board Certified Radiologist, reviewed the MRI studies of Plaintiff's cervical, lumbar and left shoulder, all of which were conducted at Bronx Standup MRI. Dr. Coyne's review of Plaintiff's MRIs reveals degenerative changes which are chronic and longstanding not causally related to the subject accident.

Plaintiff submits the Affirmation of Dr. Albert Graziosa, an Orthopedic Surgeon, who is the treating physician for the Plaintiff since January 19, 2019. Dr. Graziosa states that he performed surgery on Plaintiff's left shoulder on March 5, 2019 and discharged him on October 31, 2019. Dr. Graziosa opines to a reasonable degree of medical certainty that the injury

sustained to Plaintiff's left shoulder resulted from the subject accident. Dr. Graziosa further states that this determination is based upon his examination of the Plaintiff, which revealed limited range of motion prior to and post surgery along with a review of the MRIs of Plaintiff left shoulder. With respect to pre-existing degeneration Dr. Graziosa opines that the Plaintiff was asymptomatic prior to the accident and that the November 6, 2018 accident was a substantial factor in aggravation or exacerbation of any pre-existing degeneration.

Plaintiff also submits the Affidavit of Dr. Evan G. Pasqua, Doctor of Chiropractic, who first treated the Plaintiff on February 5, 2019. Dr. Pasqua conducted range of motion testing which revealed limited range of motion in Plaintiff's cervical, lumbar spine and left shoulder. Dr. Pasqua causally relates the injuries sustained by the Plaintiff to the subject motor vehicle accident of November 6, 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(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

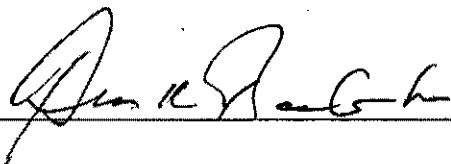
be granted. *Stone v. Goodson*, 8 N.Y.2d 8 (1960). In the instant case viewing the evidence in the light most favorable to the party opposing the motion for summary judgment, namely the Plaintiffs, there exists a triable issue of material fact for determination by a jury. See: *Bacon v. County of Westchester*, 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 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 (1st Dept 2018); *Holloman v. American United Transportation Inc.*, 162 A.D.3d 423 (1st Dept 2018).

Therefore it is

ORDERED, that the portion of Defendants, Emmanuel Martinez and John's Produce, motion seeking dismissal of the 90/180 day claim is **granted** it is further

ORDERED, that Defendants, Emmanuel Martinez and John's Produce'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) is otherwise **denied**.

Dated: August 10, 2020



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