

**Mooktadeer v Majdalawieh**

2021 NY Slip Op 32943(U)

March 23, 2021

Supreme Court, Westchester County

Docket Number: Index No. 67913/2018

Judge: James W. Hubert

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

-----X  
ANITA MOOKTADEER and YEAASEN MOOKTADEER,

Plaintiffs,

-against-

SAM MAJDALAWIEH, ROCIO MENDOZA and ADIM MOOKTADEER,

Defendants.  
-----X

DECISION AND ORDER  
Index No. 67913/2018  
Motion Seq. Nos. 1 and 2

HUBERT, J.

The following documents were read on

(A) this motion (Motion Seq. No. 1) by Defendants, Sam Majdalawieh (hereafter, "Majdalawieh") and Rocio Mendoza (hereafter, "Mendoza"), pursuant to Rule 3212 of the Civil Practice Law and Rules for an order dismissing the complaint and granting them summary judgment as against Plaintiffs, Anita Mooktadeer (hereafter, "Anita") and Yeaasen Mooktadeer (hereafter, "Yeaasen"), in the above-captioned action and

(B) this cross-motion (Motion Seq. No. 2) by Defendant, Adim Mooktadeer (hereafter, "Adim"), pursuant to CPLR 3212 for an order dismissing the complaint and granting him summary judgment as against Anita and Yeaasen in the above-captioned action:

- Notice of Motion (Motion Seq. No. 1) - Affirmation - Exhibits
- Affirmation in Opposition - Exhibits
- Notice of Cross-Motion (Motion Seq. No. 2) - Affirmation
- Affirmation in Opposition - Exhibits

Upon consideration of the foregoing, and for the following reasons, both motions are denied.

### Factual and Procedural Background

This is an action to recover money damages for personal injuries allegedly sustained by Anita and Yeaasen on July 16, 2016. Anita and Yeaasen were passengers in a vehicle owned and then being operated by Adim when said vehicle was struck by a vehicle which was owned by Majdalawieh and then being operated by Mendoza.

The action was commenced by the filing via the New York State Courts E-Filing system (hereafter, "NYSCEF") of a summons and verified complaint on October 24, 2018.

Majdalawieh and Mendoza appeared in the action on November 29, 2018, by filing via NYSCEF a joint verified answer in which they plead ten affirmative defenses and two cross-claims against Adim.

Adim appeared on January 28, 2019, by filing via NYSCEF a verified answer, bill of particulars and combined demands, in which verified answer he pleads five affirmative defenses and one cross-claim against Majdalawieh and Mendoza.

A preliminary conference was scheduled for, and the parties executed a preliminary conference stipulation on, March 6, 2019, and the stipulation so ordered by this court (Lefkowitz, J.) was entered on March 8, 2019.

Defendants deposed Anita and Yeaasen on July 9, 2019.

A trial readiness conference was held on February 21, 2020, and a trial readiness referee report & order, which was so ordered by this court (Lefkowitz, J.), was entered via NYSCEF on February 24, 2020, pursuant to which order, inter alia, the action was marked ready for trial as all discovery had been completed or waived, and Plaintiffs were directed to serve and file a note of issue and certificate of readiness for trial within twenty days.

On February 28, 2020, Plaintiffs filed via NYSCEF a note of issue and certificate of readiness for trial.

Majdalawieh and Mendoza made the instant motion (Motion Seq. No. 1) on May 7, 2020, by filing via NYSCEF.

Adim made the instant cross-motion (Motion Seq. No. 2) on June 4, 2020, by filing via NYSCEF.

Plaintiffs filed papers in opposition to both motions via NYSCEF on November 17, 2020.

Neither Majdalawieh and Mendoza, nor Adim, filed reply papers in further support of their respective motions, which motions were each deemed fully submitted on December 17, 2020, the date to which each had been adjourned by the parties.

### Discussion

#### Defendants' Motions are Denied.

Pursuant to CPLR 3212 (b) a motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party[, and] the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." Thus, the movant must submit evidentiary proof in admissible form which establishes that he is entitled to judgment as a matter of law, and one opposing the motion "must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

A plaintiff in a motor vehicle collision action does not have a right of recovery for personal injuries arising out of a defendants' alleged negligence, "except in the case of a serious injury" (Insurance Law § 5104 [a]).

Pursuant to Insurance Law § 5102 (d):

"Serious injury" means a personal injury which results in . . . 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.

Anita and Yeaasen each seek damages for serious injuries under each of these three categories. According to the Plaintiffs' bill of particulars, Anita allegedly sustained injuries to her head, shoulder and spine, including disc herniations at C3-4, C4-5, C5-6 and C6-7, and Yeaasen

allegedly suffered injuries to her head, shoulder and spine, including cervical and lumbar sprains and strains (*see* verified bill of particulars, a copy of which is annexed to the notice of motion for summary judgment [Motion Seq. No. 1] as part of Exhibit B [NYSCEF DOC. NO. 30], at ¶11). The ground for each of the instant motions is that neither Anita nor Yeaasen has sustained a serious injury within the meaning of Insurance Law § 5102 (d).

Movants have each established *prima facie* cases on this issue. A defendant "establishe[s] a *prima facie* case that [a] plaintiff's injuries were not serious through the affidavit of a physician who examined [the plaintiff] and concluded that she had a normal neurological examination" (*Gaddy v Eyer*, 79 NY2d 955, 956-957 [1992]). In support of the instant motions, *inter alia*, Defendants submit the affidavits of five physicians, two of whom reviewed CT and MRI films, and three of whom conducted neurological, orthopedic or chiropractic examinations, of Anita's spine, shoulders, elbows, wrists, knees and ankles; all of the examining physicians concluded that Anita's ranges of motion were within normal. Defendants also submit the affidavits of four physicians, two of whom reviewed CT and MRI films, and two of whom conducted neurological or orthopedic examinations of Yeaasen's spine and shoulders; all of the examining physicians concluded that Yeaasen's ranges of motion were within normal. Thus, Defendants have established a *prima facie* case that each Plaintiff's injuries did not constitute a "serious injury" within the meaning of the three relevant categories of Insurance Law § 5102 (d).

Anita and Yeaasen have raised material questions of fact, requiring a trial as to each of the three categories. With respect to the permanent consequential and significant limitation categories, a plaintiff may raise triable questions of fact as to the extent or degree of her physical limitations through "[a]n expert's qualitative assessment[, which] evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system" (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350 [2002]). With respect to the "90/180" category, "a plaintiff must present objective evidence of a medically determined injury or impairment of a non-permanent nature (internal quotation marks and citations omitted)" (*Toure v Avis Rent A Car Sys.*, 98 NY2d at 357).

In addition to their own affidavits, Anita and Yeaasen submit in opposition to the instant motions the affidavits of six physicians. Two of the physicians reviewed MRI films. One

physician reviewed films of Anita's cervical spine taken on March 14, 2018, and reported disc herniations and other spinal injuries. Another physician reviewed films of Yeaasen's right shoulder taken on October 2, 2016, and reported tears to the anterior cruciate labrum and biceps tendon, and a partial tear to the supraspinatus tendon. One physician conducted range of motion examinations of Anita and Yeaasen on July 27, 2016, and reported that, compared to normal: Anita had significant loss of range of motion in her cervical spine and right shoulder, and, Yeaasen had significant loss of range of motion in her right shoulder. One physician conducted a neurological examination of Anita on July 23, 2020, and reported "significant restriction on range of motion testing at the cervical region." And another physician conducted an orthopedic examination of Yeaasen on July 27, 2020, and reported that compared to normal, she had significant loss of range of motion in her right arm and shoulder. Each of the examinations in which range of motion was tested were conducted using a goniometer.

In sum, Plaintiffs' expert submissions constitute qualitative assessments based on objective evidence of medically determined injuries of both a permanent and non-permanent nature, which satisfy the statutory threshold (*see, e.g., (Toure v Avis Rent A Car Sys., 98 NY2d at 350-355; Ramirez v L-T. & L. Enter., 189 AD3d 1636, 1637-1639 [2d Dept 2020])*) and which, when considered in conjunction with Anita's and Yeaasen's affidavits, raise material questions of fact requiring a trial as to whether they sustained a serious injury under each of the permanent consequential limitation, significant limitation and "90/180" categories of Insurance Law § 5102 (d).

To the extent that it may be inferred that Defendants' motions include an argument that Anita's and Yeaasen's injuries were not caused by the collision (*but see* Affirmation in Support [NYSCEF DOC. NO. 28] at ¶ 3), Defendants fail to establish a prima facie case on that issue. Where a "moving defendant fail[s] to meet its prima facie burden, it is unnecessary to determine whether the papers submitted by [the plaintiff] in opposition [are] sufficient to raise a triable issue of fact" (*Owens-Stephens v PTM Mgt. Corp., 191 AD3d 691, 691 [2d Dept 2021]*).

Therefore, Defendants' motions are denied.

Accordingly, for the foregoing reasons, it is hereby

ORDERED that the motion of Defendants, Sam Majdalawieh and Rocio Mendoza,

pursuant to CPLR 3212 for an order dismissing the complaint and granting them summary judgment as against Plaintiffs, Anita Mooktadeer and Yeaasen Mooktadeer, is denied, and it is further

ORDERED that the motion of Defendant, Adim Mooktadeer, pursuant to CPLR 3212 for an order dismissing the complaint and granting him summary judgment as against Plaintiffs, Anita Mooktadeer and Yeaasen Mooktadeer, is denied, and it is further

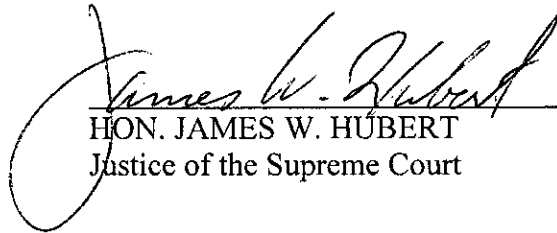
ORDERED that Defendants, Sam Majdalawieh and Rocio Mendoza, shall within twenty days of the date of entry hereof serve a copy of this Decision And Order, with notice of entry, upon all parties, and it is further

ORDERED that Defendants, Sam Majdalawieh and Rocio Mendoza, shall within ten days after service of notice of entry as aforesaid, file proof of said service via NYSCEF.

The forgoing constitutes the decision and order of the Court.

Dated: White Plains, New York  
March 23, 2021

ENTER:

  
HON. JAMES W. HUBERT  
Justice of the Supreme Court