

**Diaz v John Doe**

2021 NY Slip Op 33746(U)

June 11, 2021

Supreme Court, Queens County

Docket Number: Index No. 716603/2018

Judge: Lourdes M. Ventura

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK - QUEENS COUNTY

Present: HONORABLE LOURDES M. VENTURA, J.S.C.  
-----X  
RUBEN DARIO DIAZ,

IAS Part 37  
Index  
Number: 716603/2018

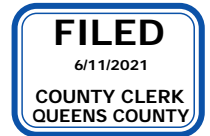
Plaintiff,

-against-

Motion  
Date: November 5, 2020

'JOHN DOE", DEFENDANT'S REAL NAME BEING  
UNKNOWN, and LEROY JOHNSON.

Motion  
Seq. No.: 1



Defendants.  
-----X

The following electronically filed (EF) papers read on this motion by defendant Leroy Johnson, for an Order: granting defendant Leroy Johnson summary judgment pursuant to CPLR §3212, dismissing the complaint against him on the basis that plaintiff did not sustain a “serious injury” under Insurance Law § 5102(d), and for such other and further relief as this Court deems necessary and proper.

	<u>Papers</u>
	<u>Numbered</u>
Notice of Motion - Exhibits.....	EF 9-22
Affirmation in Opposition – Exhibits.....	EF 23-28
Affirmation in Reply.....	EF 29

Upon the foregoing papers, it is Ordered that defendant Leroy Johnson’s motion is determined as follows:

This is an action commenced by plaintiff to recover damages for alleged personal injuries sustained during a motor vehicle collision that occurred on or about March 9, 2018 when a vehicle owned and operated by defendant Leroy Johnson (hereinafter “defendant Johnson”) made contact with plaintiff’s vehicle. Plaintiff alleges that as a result the collision plaintiff sustained serious injuries pursuant to New York State Insurance Law §§ 5102 and 5104.

Defendant Johnson filed this summary judgment motion pursuant to CPLR 3212. Defendant Johnson avers that the allegations of serious injury made in the Bill of Particulars do not have evidentiary support and based on all of the testimony, documentary and medical evidence, it is apparent that the plaintiff has not sustained a “serious injury” within the meaning of the insurance law. Defendant Johnson further avers that plaintiff failed to prove a prima facie case of serious injury and request that this action be dismissed in its entirety.

Plaintiff opposes defendant Johnson’s motion and contends that it must be denied because Plaintiff’s proof in opposition to the motion is sufficient to raise triable issues of fact as to whether

Plaintiff sustained a significant limitation of use of a body function or system (i.e., his left shoulder) or a permanent consequential limitation of the use of a body organ or member (i.e., his left shoulder) within the meaning of Insurance Law § 5102(d).

“It is well settled that ‘the proponent of a summary judgment motions must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact’ ”(see *Pullman v. Silverman*, 28 NY3d 1060 [2016]) quoting (*Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]). Failure to make such prima facie “showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to judgment as a matter of law (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Winegrad v. New York Univ. Medical Center*, 64 NY2d 851[1985]). The burden rests on defendant to establish, by the submission of evidentiary proof in admissible form, that plaintiff has not suffered a "serious injury" (*Lowe v. Bennett*, 122 AD2d 728 [1st Dept 1986], *affd*, 69 NY2d 701, 512 NYS2d 364 [1986]). When a defendant's motion is sufficient to raise the issue of whether a "serious injury" has been sustained, the burden shifts and it is then incumbent upon the plaintiff to produce prima facie evidence in admissible form to support the claim of serious injury (*Lopez v. Senatore*, 65 NY2d 1017 [1985]). In support of a claim that plaintiff has not sustained a serious injury, a defendant may rely either on the sworn statements of the defendant's examining physician or the unsworn reports of plaintiff's examining physician (*Pagano v. Kingsbury*, 182 AD2d 268 [2d Dept 1992]).

Once the burden shifts, it is incumbent upon plaintiff, in opposition to defendant's motion, to submit proof of serious injury in "admissible form". (*Licari v. Elliott*, 57 NY2d 230 [1982]). A medical affirmation or affidavit which is based on a physician's personal examination and observations of plaintiff, is an acceptable method to provide a doctor's opinion regarding the existence and extent of a plaintiff's serious injury is deemed competent medical evidence (see *Yunatanov v Stein*, 69 AD3d 708 [2d Dept 2010]). Thus, in the absence of objective medical evidence in admissible form of serious injury, plaintiff's self-serving affidavit is insufficient to raise a triable issue of fact (*Fisher v. Williams*, 289 AD2d 288 [2d Dept 2001]).

Pursuant to New York Insurance Law § 5102(d), “ ‘serious injury’ means 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.”

The Court of Appeals has long recognized that the “legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries” (see *Toure v Avis Rent A Car Sys., Inc.*, 98 NY2d 345, 350 [2002] citing (*Dufel v Green*, 84 NY2d 795 [1995]; see also *Licari v Elliott*, 57 NY2d 230, 234-235 [1982]). As such, objective proof of a

plaintiff's injury is required in order to satisfy the statutory serious injury threshold (*see e.g. Dufel*, 84 NY2d at 798; *Lopez v Senatore*, 65 NY2d 1017 [1985]); subjective complaints alone are not sufficient (*see e.g. Gaddy v Eyler*, 79 NY2d 955 [1992]; *Scheer v Koubek*, 70 NY2d 678 [1987]). "In order to prove the extent or degree of physical limitation, an expert's designation of a numeric percentage of a plaintiff's loss of range of motion can be used to substantiate a claim of serious injury *Toure v Avis Rent A Car Sys., Inc.*, 98 NY2d 345 [2002] citing (*see e.g. Dufel*, 84 NY2d at 798; *Lopez*, 65 NY2d at 1020). "As such, we have required objective proof of a plaintiff's injury in order to satisfy the statutory serious injury threshold" [citations omitted](*see Toure v Avis Rent A Car Sys., Inc.*, 98 NY2d 345, 350 [2002]). "An expert's *qualitative* assessment of a plaintiff's condition also may suffice, provided that the 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" (*see Toure v Avis Rent A Car Sys., Inc.*, 98 NY2d 345 [2002] citing *Dufel v Green*, 84 NY2d 795 [1995]).

In this action, defendant Johnson submits *inter alia* a report dated March 10, 2020, affirmed by Doctor Gregory Chiaramonte, M.D. (hereinafter "Dr. Chiaramonte"), who examined the plaintiff Ruben Diaz on March 10, 2020. The report in relevant part states:

**"DEGREE OF DISABILITY:**

There is no evidence of an orthopedic disability.

**TREATMENT RECOMMENDATION:**

Mr. Ruben Diaz presents today for an orthopedic examination due to injuries sustained as a result of a motor vehicle accident on 03/09/2018. Based on my examination, there is no need for continued orthopedic treatment, including physical therapy or massage therapy. There is no indication for surgery or injections.

**PERMANENCY:**

There is no evidence of permanency or residuals. Upon completion of the examination, Mr. Ruben Diaz offers no complaints as a result of this examination and left the examining area stable and unchanged."

In opposition, plaintiff submits *inter alia* a report dated October 15, 2020 affirmed by Doctor Kenneth McCullouch, M.D. (hereinafter "Dr. McCullouch") who examined the plaintiff on August 21, 2020. The report in relevant part states:

"It is my opinion, within a reasonable degree of medical certainty that, based on the history as has been provided to me by the patient, a review of the medical records, physical examination findings, radiographic findings, and intraoperative findings, the injuries in question are directly causally related to the accident in which Mr. Diaz was involved on March 9, 2018.

I have had the opportunity to review the orthopedic examination performed by Dr. Gregory Chiamonte on behalf of the carrier dated March 10, 2020. It is noted in the report that the patient does continue to work as a porter with limitations. It is noted that the patient has a complaint of pain in his left shoulder and that he was continuing to use anti-inflammatories and Tylenol. The physical examination performed reflected a normal examination. This is not consistent with any of the examinations that were performed in my office. In addition, specific provocative maneuvers were not performed that demonstrated pathology in my office, such as, and O'Brien's test for SLAP pathology. Despite noting that the patient has continued pain, continues to have limitations at work and continues to utilize anti-inflammatories and Tylenol, it is concluded that there is "no evidence of an orthopedic disability". This conclusion is not consistent with the information in the examiners report and is not consistent with any of the examinations performed by the patient in my office.

It is also my opinion, within a reasonable degree of medical certainty, that Mr. Diaz has sustained a permanent disability. As of his most recent visit to our office, Mr. Diaz continued to have ongoing pain, loss of range of motion and weakness in the left shoulder. Based on his examination he does require repeat surgical intervention in the form of arthroscopic decompression with possible rotator cuff repair and possible biceps tenodesis."

The Court finds that the conflicting medical reports submitted by the parties raise triable issues of fact as to whether the plaintiff Ruben Diaz sustained a "serious injury" within the meaning of Insurance Law § 5102(d) (see *Wilcoxon v. Palladino*, 122 AD3d 727 [2d Dept 2014]).

Accordingly, defendant Johnson's summary judgment motion pursuant to CPLR 3212 is hereby denied. Any other requested relief not expressly addressed herein has nonetheless been considered by this Court and is hereby denied.

This shall constitute the Decision and Order of the Court.

Dated: June 11, 2021



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HON. LOURDES M. VENTURA, J.S.C.