

**Almenares v V VA Serv. Corp.**

2021 NY Slip Op 34049(U)

September 21, 2021

Supreme Court, Bronx County

Docket Number: Index No. 24608/2019E

Judge: Ben R. Barbato

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**SUPREME COURT STATE OF NEW YORK  
COUNTY OF BRONX PART 15**

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**TOMAS E. ALMENARES and EVELYN L. MENDOSA  
MARCIAS,**

**DECISION**

Plaintiffs,

**Index No.: 24608/2019E**

-against-

**V VA SERVICE CORP., RAMON A. MORONTATAVERAS  
and NINA S. GRANDINETTI,**

Defendants.  
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The instant action sounds in personal injury sustained from a motor vehicle accident occurring on March 15, 2017, on Boston Road at or near the intersection of Southern Boulevard, in the County of Bronx, City and State of New York. The Defendant, Nina S. Grandinetti, moves this court for an Order pursuant to CPLR § 3212 awarding Summary Judgment in favor of the Defendant dismissing Plaintiffs' Complaint, claiming that the Plaintiffs, Tomas Almenares and Evelyn L. Mendosa, cannot meet the serious injury threshold requirement mandated by Insurance Law § 5102(d).

Defendant, offers the medical records of the Plaintiff, Tomas E. Almenares, from Smart Choice Medical P.C., Southern Boulevard Chiropractic, P.C., SaQi Acupuncture, GW Acupuncture, P.C. Defendant also offers the medical records of Evelyn L. Mendosa Marcias, from St. Barnabas Hospital, Smart Choice Medical P.C., Southern Boulevard Chiropractic, P.C., SaQi Acupuncture, GW Acupuncture, P.C.

Defendant offers the report of Dr. Jeffery Warhit, a Board-Certified Radiologist, who reviewed the MRIs of Plaintiff Tomas Almenares' right shoulder, lumbar and cervical spines taken on April 7, 2017 at Comprehensive MRI of New York. Dr. Warhit's report states that his review of the right shoulder MRI and Lumbar spine MRI reveal no traumatic injury. Dr. Warhit's review of the MRI of Plaintiff's cervical spines reveals degenerative disc disease with no indication of traumatic injury. Dr. Warhit also reviewed the MRI of Plaintiff's right knee also taken at Comprehensive MRI of New York on April 14, 2017 which revealed no evidence of traumatic injury.

Defendant offers the report of Dr. Jeffery Warhit, a Board-Certified Radiologist, who reviewed the MRIs of Plaintiff, Evelyn L. Mendosa Marcias' cervical, thoracic and lumbar spine taken on April 7, 2017 at Comprehensive MRI of New York. Dr. Warhit opines that Plaintiff's MRI of the cervical and thoracic spine revealed degenerative disc disease with no indication of traumatic injury. His review of the lumbar spine finds no evidence of traumatic injury. Dr. Warhit also reviewed the MRIs of Plaintiff's right and left knees taken on April 24, 2017 at Comprehensive MRI of New York finding no evidence of traumatic injury.

The Plaintiff, Tomas E. Almenares, submits the Affirmation of Dr. Denise McCarthy, a Board Certified Radiologist, who reviewed the MRI of the Plaintiff's right and left knees taken at Stand-Up MRI of Yonkers on April 13, 2017. Dr. McCarthy states that the MRI of Plaintiff's right knee reveals mild thickening of the proximal medial collateral ligament, mild patellar subluxation, and a small popliteal cyst. Dr. McCarthy further states that the MRI of the Plaintiff's left knee reveals small knee joint effusion and a mild lateral patella tilt.

The Plaintiff, Tomas E. Almenares, submits the Affirmation of Dr. Samuel Mayerfield, a Board Certified Radiologist, who reviewed the MRI of the Plaintiff's cervical spine, lumbar spine and right shoulder taken at Stand-up MRI of Yonkers on April 7, 2017. Dr. Mayerfield states that the MRI of Plaintiff's cervical spine reveals a posterior central disc herniation at C5/6 with cord impingement, and a C4/5 posterior disc herniation. Dr. Mayerfield states that the MRI of Plaintiff's lumbar spine reveals a L3/4 posterior subligamentous disc bulging, and straightening of the lumbar lordosis and mild dextroscoliosis; the right shoulder MRI was negative.

The Plaintiff, Tomas E. Almenares, submits the Affirmation of Dr. Ali Guy, Board Certified in Physical Medicine and Rehabilitation, who states that his review of the Plaintiff's medical records and states his disagreement with Dr. Warhit's determination of no traumatic injury resulting from the March 15, 2017 accident. Dr. Guy's stated diagnoses determines that Plaintiff, as a result of the March 15, 2017 accident, suffered C4 to C6 disc herniations, cervical and lumbar radiculopathy and traumatic left knee chondromalacia.

The Plaintiff, Evelyn L. Mendosa Marcias, submits the Affirmation of Dr. Ali Guy, Board Certified in Physical Medicine and Rehabilitation, who states that his review of the Plaintiff's medical records and states his disagreement with Dr. Warhit's determination of

no traumatic injury resulting from the March 15, 2017 accident. Dr. Guy's diagnoses stated C3/4 and C5/6 disc herniations, T2-3 disc herniation, cervical and lumbar radiculopathy and traumatic myofascial pain syndrome.

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 §1129(b); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980); *Singer v. Friedman*, 220 A.D.2d 574 (2<sup>nd</sup> Dept 1995). Mere conclusions, expressions of hope or unsubstantiated allegations are insufficient to raise a triable issue of fact. *Alvord & Swift v. Muller Constr. Co.*, 46 N.Y.2d 276 (1978) 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 (1<sup>st</sup> 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 (1<sup>st</sup> 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). Viewing the evidence in the light most favorable to the party opposing the motion for summary judgment, namely the Plaintiffs, there exists triable issues 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). However, the Plaintiffs have failed to present evidence in admissible form indicating that they were unable to perform their usual and customary activities for a period of 90 out of the first 180 days immediately following the accident. *Hayes v. Gaceur*, 162 A.D.2d 437 (1<sup>st</sup> Dept 2018)

Accordingly

The Plaintiffs claim that they were unable to perform their usual and customary activities for a period of 90 out of the first 180 days immediately following the accident is **dismissed.**

The Defendant's motion for an Order pursuant to CPLR § 3212 awarding Summary Judgment in favor of the Defendant dismissing Plaintiffs' Complaint for failure to comply with the threshold requirement of Insurance Law § 5102(d) is in all other respects **denied**.

Settle Order.

Dated: September 21, 2021

  
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Hon. Ben R. Barbato, JSC