

Meneses v Arroyo

2021 NY Slip Op 34131(U)

August 18, 2021

Supreme Court, Bronx County

Docket Number: Index No. 31423/2018E

Judge: Ben R. Barbato

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 15

ANGIE Z. MENESES

Index No. 31423/2018E

-against-

Hon. Ben R. Barbato

FELIX ALBERTO ARROYO, JR., et al

Justice Supreme Court

The following papers numbered 25 to 103 were read on this motion (Seq. No. 001)
for SUMMARY JUDGMENT THRESHOLD and LIABILITY noticed on July 15, 2020.

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s).25 - 32
Answering Affidavit and Exhibits	No(s).53-58, 80-94
Replying Affidavit and Exhibits	No(s).103

Motion is decided in accordance with the decision attached.

Motion is Respectfully Referred to Justice:
Dated:

Dated: 8/18/2021

Hon.


BEN R. BARBATO, J.S.C.

1. CHECK ONE..... CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
2. MOTION IS..... GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE..... SETTLE ORDER SUBMIT ORDER SCHEDULE APPEARANCE
- FIDUCIARY APPOINTMENT REFEREE APPOINTMENT

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

-----X
ANGIE Z. MENESES,

Plaintiff,

DECISION

Index No.: 31423/2018E

-against-

**FELIX ALBERTO ARROYO, JR.,
JAMES C. CLIFFORD and 222 EAST CORP.,**

Defendants.
-----X

The instant action sounds in personal injury sustained from a motor vehicle accident occurring on July 1, 2018, at or near the intersection of 104th Street and Broadway, in the County, City and State of New York. The Defendant, Felix Alberto Arroyo, Jr., (Arroyo), moves this court for an Order pursuant to CPLR § 3212 awarding Summary Judgment in favor of Defendant dismissing Plaintiff's Complaint, claiming that the Plaintiff, Angie Maneses, cannot meet the serious injury threshold requirement mandated by Insurance Law § 5102(d). Defendant, Arroyo also moves this court for an Order pursuant to CPLR § 3212 awarding summary judgment on the issue of liability in favor of the Defendant, Arroyo, for the subject accident.

Defendants also offer the report of Dr. Richard D. Semble, a Board Certified Orthopaedic Surgeon, who examined the Plaintiff on October 28, 2019. His examination revealed that Plaintiff presented with no objective evidence of orthopaedic disability in the cervical spine. Dr. Semble, further states that limited range of motion of the cervical spine, along with Plaintiff's subjective complaints of pain and tenderness were not supported by positive, objective, correlative findings. Dr. Semble does determine that Plaintiff presented with objective evidence of orthopaedic disability with regard to the lumbar spine and left shoulder which he states is permanent.

Plaintiff submits the MRI report of the left shoulder which reveals intermediate grade interstitial tear of the anterior fibers and tear of the superior fiber of the acromioclavicular ligament.

Plaintiff also submits the report of Dr. Albert Villafuerte, Board Certified in Physical Medicine and Rehabilitation, who determined that, as result of the July 1, 2018 accident Plaintiff suffered cervical disc bulges at C3-4, C4-5 with impingement of the thecal sac, traumatic cervical strain and sprain with myofascial derangement, traumatic disc bulging of the lumbar spine at L4-5 with thecal sac impingement and bilateral foraminal impingement, traumatic lumbar strain and sprain with myofascial derangement, traumatic left shoulder partial rotator cuff tear and traumatic left shoulder sprain and strain.

Defendant, Arroyo also moves this court for an Order directing a finding of sole liability on the part of the co-defendants James C. Clifford and 222 East Corp. The certified police report submitted along with the deposition testimony of the Defendant Arroyo raise questions of fact as to liability which must be determined by a trial of the facts.

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 (2nd 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 (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). Viewing the evidence in the light most favorable to the party opposing the motion for summary judgment, namely the Plaintiff, there exists triable issues 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, Plaintiff has failed to present evidence in admissible form indicating that she was

unable to perform her 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 (1st Dept 2018) Accordingly;

The Plaintiff's claim that she was unable to perform her 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 Plaintiff's Complaint for failure to comply with the threshold requirement of Insurance Law § 5102(d) is **denied**.

The Defendant's motion for an Order pursuant to CPLR § 3212 awarding Summary Judgment in favor of the Defendant Felix Alberto Arroyo, Jr., on the issue of liability is **denied**.

Settle Order.

Dated: August 18, 2021



Hon. Ben R. Barbato, JSC