

**Cajamarca v Euro Marble Ctr., Inc.**

2012 NY Slip Op 31891(U)

May 15, 2012

Supreme Court, Queens County

Docket Number: 25228/09

Judge: Bernice Daun Siegal

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Short Form Order

**NEW YORK STATE SUPREME COURT – QUEENS COUNTY**  
Present: HONORABLE BERNICE D. SIEGAL IAS TERM, PART 19  
Justice

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Livia Cajamarca,  
Plaintiff,

Index No.: 25228/09  
Motion Date: 5/15/12  
Motion Cal. No.: 3  
Motion Seq. No.: 3

-against-

Euro Marble Center, Inc., George A. Efstathopoulos,  
Tabares Emperatri and Luis E. Vigoya,

Defendants.

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The following papers numbered 1 to 15 read on this motion for an order pursuant to CPLR §3212, granting summary judgment to defendant Vigoya, on the ground that the plaintiff has failed to meet the statutory requirements of a “serious injury” under New York State Insurance Law §5102.

	PAPERS NUMBERED
Notice of Motion - Affidavits-Exhibits.....	1 - 4
Notice of Cross-Motion- Affidavits.....	5 - 9
Affirmation In Opposition.....	10 - 12
Reply.....	13 - 15

Upon the foregoing papers, it is hereby ordered that the motion is resolved as follows:

Defendants Tabares Emperatriz and Luis E. Vigoya (“Moving Defendants”) move for an order pursuant to CPLR §3212 granting summary judgment in their favor on the issue of liability as co-defendants were the sole proximate cause of the motor vehicle accident and alternatively, granting summary judgment against plaintiff on the issue of threshold, thereby dismissing the Summons and Complaint. Defendants Euro Marble Center, Inc and George A. Efstathopoulos

(“Cross-Moving Defendants”) cross-move for summary judgment dismissing plaintiff’s complaint on the issue of threshold and oppose the motion for summary judgment on the issue of liability.

In the within action, Note of Issue was filed on May 15, 2011, however, various discovery remained outstanding. On August 9, 2011, the parties entered into a stipulation wherein the plaintiff agreed to be produced for a deposition (“EBT”) on or before September 15, 2011 and the defendants were to designate physicians to conduct Independent Medical Exams (“IME”) within five days thereafter with the IME to be conducted within thirty days after the completion of plaintiff’s EBT. The parties also agreed that the time to serve dispositive motion would be extended to sixty days following the completion of IME’s. (Moving Defendants Exhibit E.) The court notes that the stipulation was not So Ordered by the court.

CPLR §3212(a) provides that motions for summary judgment shall be made no later than 120 days after the filing of the note of issue, except with leave of court on “good cause” shown. Under the standard announced in *Brill v. City of New York*, 2 N.Y.3d 648 (2004), leave to file a late motion for summary judgment under CPLR §3212(a) requires a showing of a satisfactory explanation for the delay in filing the motion. “Good cause” requires a satisfactory explanation for the untimeliness of the motion even if the motion has merit and the adversary is not prejudiced. (See *Brill v City of New York*, supra; *Miceli v State Farm Mut. Auto Ins. Co.*, 3 N.Y.3d 725, 726-727[2004]; *Tower Ins. Co. of New York v. Razy Associates*, 37 A.D.3d 702 [2<sup>nd</sup> Dept 2007]; *Soltes v 260 Waverly Owners*, 42 A.D.3d 565 [2<sup>nd</sup> Dept. 2007].)

Plaintiff, in opposition, argues that the Moving Defendants’ motion for summary judgment was untimely as it was made almost one year following the filing of the Note of Issue and beyond the stipulated time frame for dispositive motions.

In reply, Moving Defendants now contend that plaintiff's dilatory tactics are a reasonable excuse for their delay in moving for summary judgment: plaintiff was to appear for a deposition on September 9, 2011 and that prior to said date plaintiff's counsel advised them that plaintiff would not be able to appear. Accordingly, the Moving Defendants were "forced" to file a motion to Compel Discovery on September 13, 2011. However, as of September 13, 2011 the plaintiff was not in violation of the August 9, 2011 stipulation which clearly sets the date of the deposition as September 15, 2011. In addition, the Moving Defendants fail to submit correspondence from the plaintiff that would buttress their claim that plaintiff was not unable to attend the agreed upon date for the EBT. Therefore, the Moving Defendants have failed to show that they had a justifiable reason to move to Compel on September 13, 2011<sup>1</sup>.

Nonetheless, it is undisputed that plaintiff was ultimately deposed on October 20, 2011 and thereafter, plaintiff appeared for an IME on December 29, 2011, by Monette Basson, M.D., a Neurologist. Moving Defendants contend that plaintiff was scheduled for an additional Orthopedic IME with Eduardo Alvarez on March 3, 2012, but failed to appear, and the IME was rescheduled for April 7, 2012 when plaintiff appeared. However, the court notes that the moving papers are devoid of a copy of the purported Orthopedic Report or the notice for such IME nor are either document attached to the reply papers. Accordingly, as the only IME that the moving defendants rely upon was conducted on December 29, 2011, Moving Defendants cannot now argue that their lengthy delay in bringing the underlying motion was due to plaintiff's failure to appear for the Orthopedic IME. For the reasons set forth above, Moving Defendants' request for leave to extend time to move for summary judgment is denied as the requested discovery,

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<sup>1</sup>As the date for plaintiff to be produced for a deposition was September 15, 2011.

specifically the Orthopedic IME, was not essential to the motion and does not “provide the evidentiary basis for [defendant's] motion for summary judgment.” (See *Van Dyke v. Skanska USA Civil Northeast, Inc.*, 83 A.D.3d 1049 [2<sup>nd</sup> Dept 2011]; see also *Caiola v. Allcity Ins. Co.*, 277 A.D.2d 27 [2<sup>nd</sup> Dept 2000]; *LoGrasso v. Myer*, 16 A.D.3d 1089 [4<sup>th</sup> Dept 2005]; *Espejo v. Hiro Real Estate Co.*, 19 A.D.3d 360 [2<sup>nd</sup> Dept 2005].)

In addition, pursuant to the parties stipulation, defendants were to designate IME physicians within five days after plaintiff's EBT, however, Moving Defendants' papers are devoid of evidentiary proof that they complied with this provision of the stipulation. All that is before the court is the affirmation of counsel who concedes that the Orthopedic IME was only first scheduled for March 3, 2012.

Furthermore, the parties own stipulation clearly sets forth that the time to serve dispositive motions is extended sixty days following completion of IMEs.. As the only IME relied upon by the moving defendants was completed on December 29, 2011, more than sixty days before the within motion was made, the court concludes that the within motion is untimely under the terms of the stipulation.

Even if Moving Defendants complied with the parties out of court agreement, the fact that the August 9, 2011 stipulation was not so ordered is likewise fatal. Parties to a litigation cannot stipulate, amongst themselves, to extend the time to move for summary judgment, which is statutory; rather the parties are to request an extension of time to file a motion for summary judgment from the court. (*Eum ex rel. Yeun Hee Hong v. Stephens*, 26 Misc.3d 1223(A) [NY Sup. 2010] citing *Balcerzak v. DNA Contracting, LLC*, 9 Misc.3d 524 [NY Sup. 2005].)

Moreover, Moving Defendants also request summary judgment on liability, although no

mention of same is found on the notice of motion. Clearly neither IME was essential to such a motion and accordingly, the motion for summary on judgment as to liability is late without any reasonable excuse. (See *Tower Ins. Co. of New York v. Razy Associates*, 37 A.D.3d 702, supra.)

For the reasons set forth above, the moving defendants request for leave to extend time to move for summary judgment is denied.

The cross-motion is likewise deemed untimely as it was made more than 120 days after the Note of Issue was filed and more than 60 days after the completion of all relevant IMEs without an explanation for their untimeliness. (see *Van Dyke v. Skanska USA Civil Northeast, Inc.* 83 AD3d 1049 [2<sup>nd</sup> Dept 2011].)

### **Conclusion**

For the reasons set forth above, Defendants Tabares Emperatriz and Luis E. Vigoyamotion motion for an order pursuant to CPLR §3212 granting summary judgment in their favor on liability against co-defendant Efstathopoulos and in the alternative, granting summary judgment in their favor on the grounds that Plaintiff failed to meet the meet the statutory requirements under the New York State Insurance Law and thereby dismissing the Summons and Complaint are denied as untimely. Defendants Euro Marble Center, Inc and George A. Efstathopoulos cross-motion for summary judgment dismissing plaintiff's complaint on the issue of threshold is likewise denied for failure to provide a reasonable excuse for the late filing.

Dated: July , 2012

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Bernice D. Siegal, J. S. C.