

<b>Diaz v Matute-Criollo</b>
2018 NY Slip Op 33074(U)
November 29, 2018
Supreme Court, Kings County
Docket Number: 508355/2016
Judge: Carl J. Landicino
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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 29<sup>th</sup> day of November, 2018.

P R E S E N T:

HON. CARL J. LANDICINO,

Justice.

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SANDRA DIAZ AND SANTO RIVERA,

Index No.: 508355/2016

*Plaintiff,*

DECISION AND ORDER

- against -

JOSUE N. MATUTE-CRIOLLO AND MJGA

CAR SERVICE CORP.,

Motions Sequence #3

*Defendants.*

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**Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:**

	<u>Papers Numbered</u>
Notice of Motion/Cross Motion and	
Affidavits (Affirmations) Annexed.....	<u>1/2.</u>
Opposing Affidavits (Affirmations).....	<u>3</u>
Reply Affidavits (Affirmations).....	<u>4</u>

Upon the foregoing papers, and after oral argument, the Court finds as follows:

This lawsuit arises out of a motor vehicle accident that occurred on February 28, 2016.

The Plaintiffs, Sandra Diaz (hereinafter "Plaintiff Diaz") and Santo Rivera (hereinafter "Plaintiff Rivera") allege in their Complaint that on that day they both suffered personal injuries after the vehicle owned and operated by Plaintiff Diaz, and in which Plaintiff Rivera was a passenger, was involved in a motor vehicle collision with a vehicle operated by Defendant Josue Matute-Criollo (hereinafter "Defendant Matute Criollo") and owned by Defendant MJGA Car Service Corp. (hereinafter "Defendant MJGA"). The Plaintiffs further allege that the incident occurred at 73<sup>rd</sup> Place at or near its intersection with Cooper Avenue in Queens County, New York. In the Plaintiffs' Bill of Particulars (Exhibit B, Paragraph 11) Plaintiff Diaz alleges that as a result of the collision she, *inter alia*, sustained an injury to her right shoulder (leading to surgery), an injury to her lumbar spine, and her cervical spine. In the Plaintiffs' Bill of Particulars (Exhibit B,

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Paragraph 11) Plaintiff Rivera alleges that as a result of the collision he sustained an injury to his left knee (leading to surgery), an injury to his lumbar spine, and his cervical spine. Also, both Plaintiffs allege (Exhibit B, Paragraph 20) that they each sustained “a disabling injury for a period in excess of 90 out of the first 180 days following this occurrence...”

Defendants Matute Criollo and Defendant MJGA move (motion sequence #3) for an order pursuant to CPLR §3212, granting summary judgment and dismissing the complaint of the Plaintiffs on the ground that none of the injuries sustained by the Plaintiffs meet the “serious injury” threshold requirement of Insurance Law § 5102(d).

It has long been established that “[s]ummary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it ‘should only be employed when there is no doubt as to the absence of triable issues of material fact.’” *Kolivas v. Kirchoff*, 14 AD3d 493 [2<sup>nd</sup> Dept, 2005], citing *Andre v. Pomeroy*, 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. See *Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2<sup>nd</sup> Dept, 2004], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2<sup>nd</sup> Dept, 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. See *Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 A.D.3d 518, 520, 824 N.Y.S.2d 166, 168 [2<sup>nd</sup> Dept, 2006]; see *Menzel v. Plotnick*, 202 A.D.2d 558, 558–559, 610 N.Y.S.2d 50 [2<sup>nd</sup> Dept, 1994].

Insurance Law § 5102(d)

The Defendants contend that the reports of Dr. Harold Tice, Dr. Edward Toriello, Dr. Michael Carciente and Dr. Michael Setton, support their contention that neither Plaintiff Diaz nor Plaintiff Rivera suffered a serious injury as defined under Insurance Law § 5102(d). In making a motion for summary judgment on threshold grounds a defendant has the initial burden of demonstrating that the Plaintiffs did not sustain a “serious injury” as that term is defined by Insurance Law § 5102.

Plaintiff Diaz

Dr. Harold M. Tice<sup>1</sup>, a radiologist, did not conduct a medical examination but instead reviewed an MRI of Plaintiff Diaz’s right shoulder and an MRI of Plaintiff Diaz’s neck. In the report completed on March 21, 2016, Dr. Tice states that it was his impression that “C4/5, C5/6 and C6/7 disc herniations deforming the thecal sac abutting the spinal cord with C6/7 right neural foraminal, and C5/6 and C6/7 mild central spinal stenosis in conjunction with posterior ligamentous hypertrophy with decreased conspicuity on flexion view noted at both levels.” In the report completed on April 4, 2016, Dr. Tice states that Plaintiff Diaz complained of right shoulder pain and limited range of motion. Dr Tice stated that an “[a]pproximate 2 mm linear signal hyperintensities is identified within the proximal subscapularis tendon just beyond the musculotendinous junction compatible with intrasubstance partial tear of the rotator cuff.” This led Dr. Tice to list as an impression “ [i]ntrasubstance partial tear of the rotator cuff proximal subscapularis tendon.” (See Defendants’ Motion, Examination of Dr. Tice, Attached as Exhibits G and I).

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<sup>1</sup> Neither report is affirmed in Defendants’ motion. There are separate affirmations for the reports in the Plaintiffs’ Affirmation in Opposition, in relation to these examinations. What is more, the Plaintiffs do not oppose these reports or raise the issue of the admissibility of the reports. As such, the Court will accept them.

Dr. Edward Toriello, conducted a medical examination of Plaintiff Diaz on March 1, 2017. In his report, which was duly affirmed that same day, Dr. Toriello detailed his findings based upon his review of Plaintiff Diaz's medical records, and his personal observations and objective testing. As a diagnosis, Dr. Toriello opined that "[t]he claimant in my opinion did not sustain injury to her right shoulder on February 28, 2016, that would have required surgical intervention." Dr. Toriello further opined that "[t]he MRI did reveal degenerative findings, which were not causally related to the accident and it was these degenerative findings that were addressed in surgery that was performed on the claimant's right shoulder." (See Defendants' Motion, Examination of Dr. Toriello, Attached as Exhibit H).

Dr. Michael Carciente, a nuerologist, conducted an examination of the Plaintiff Diaz on January 31, 2017. In his report, Dr. Carciente performed a neurological exam, a motor examination, and a sensory examination. Dr. Carciente opined that "[t]here was no spasticity, ankle clonus, extensor plantar responses, or sensory levels supporting the presence of a spinal cord injury, and there was no correlation between the findings allegedly found in the spine MRI reports and today's exam." (See Defendants' Motion, Examination of Dr. Carciente, Attached as Exhibit J).

Dr. Michael Setton, a radiologist, did not conduct a medical examination but instead reviewed an MRI of Plaintiff Diaz's right shoulder. As part of his summary Dr. Setton concluded that "[t]here is no evidence of rotator cuff tear, nor is there evidence of peritendinous or myotendinous soft tissue edema to suggest any acute traumatic rotator cuff injury." (See Defendants' Motion, Examination of Dr. Setton, Attached as Exhibit K).

Turning to the merits of the motion for summary judgment, the Court is of the opinion that based upon the foregoing submissions, the Defendants have not met their initial burden of proof. *See Meely v 4 G's Truck Renting Co., Inc.*, 16 AD3d 26, 29-30 [2<sup>nd</sup> Dept, 2005]; *see also Oliva v*

*Gross*, 29 AD3d 551 [2<sup>nd</sup> Dept, 2006]. Dr. Tice did find a partial tear of Plaintiff Diaz's right shoulder, rotator cuff.

However, even assuming, *arguendo*, that the Defendants had met their *prima facie* burden, the Court finds that the Plaintiff Diaz has raised triable issues of fact as to whether the Plaintiff suffered serious injuries. See *Jackson v United Parcel Serv.*, 204 AD2d 605 [2<sup>nd</sup> Dept, 1994]; *Bryan v Brancato*, 213 AD2d 577 [2<sup>nd</sup> Dept, 1995]. In this regard, the Plaintiff Diaz has submitted quantitative objective findings, in addition to opinions, as to the significance of the Plaintiff's injuries. See *Grossman v Wright*, 268 AD2d 79 [2<sup>nd</sup> Dept, 2000].

In order to establish that the Plaintiff suffered a permanent consequential limitation of use of a body organ or member, and/or a significant limitation of use of a body function or system, the Plaintiff must show more than "a mild, minor or slight limitation of use" and is required to provide objective medical evidence in addition to medical opinions of the extent or degree of the limitation and its duration. See *Oberly v Bangs Ambulance, Inc.*, 96 NY2d 295 [2001]; *Burnett v Miller*, 255 AD2d 541 [2<sup>nd</sup> Dept, 1998]; *Beckett v Conte*, 176 AD2d 774 [2<sup>nd</sup> Dept, 1991].

In opposition to the Defendants' motion, Plaintiff Diaz proffers the affirmations of Dr. Mian and Dr. Sterlin. Dr. Shahid Mian, performed orthopedic examinations of Plaintiff Diaz on several different occasions and performed surgery on Plaintiff Diaz's right shoulder on May 4, 2016. As part of Dr. Mian's report dated June 12, 2018, Dr. Mian opined that "[i]t is my medical opinion to a reasonable degree of medical certainty that Ms. Diaz's tears to her right shoulder and the need for right shoulder surgery are causally related to her accident of 2/28/16 and not due to degeneration." (See Affirmation in Opposition, Affirmation of Dr. Mian, Attached as Exhibit E). Dr. Mian also examined Plaintiff Diaz on May 11, 2018. Dr. Mian stated that range of motion testing was measured with a goniometer during that examination. As part of the May 11, 2018 examination Dr. Mian gave as his prognosis that "[t]he patient's injuries are causally related to

accident of 2-28-16. Right shoulder injury is permanent.” (See Affirmation in Opposition, Affirmation of Dr. Mian, Attached as Exhibit G).

Dr. Sterlin performed an examination of Plaintiff Diaz on March 25, 2016. As part of Dr. Sterlin’s examination he conducted range of motion tests for Plaintiff Diaz’s cervical spine, shoulders and lower back. As part of his objective findings Dr. Sterlin found a neck spasm/tenderness with decreased range of motion, left/right shoulder swelling/tenderness with decreased range of motion and back spasm/tenderness with decreased range of motion. Dr. Sterlin also stated that “[b]ased on the reported history and my examination findings, an apparent causal relationship exists between the MVA of February 28, 2016 and the above diagnosis. (See Affirmation in Opposition, Affirmation of Dr. Sterlin, Attached as Exhibit I).

While the affirmation of Dr. Toriello and Dr. Carciente and Dr. Setton were arguably sufficient to meet the Defendants’ *prima facie* burden, Plaintiff Diaz’s evidence, namely the affirmed reports of Dr. Mian and Dr. Sterlin, raise triable issues of fact with regard to Plaintiff Diaz’s claim that she sustained a serious injury. “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.” *Toure v Avis Rent A Car Systems Inc.*, 98 N.Y.2d 345, 774 N.E.2d 1197 [2002]; *see Dufel v. Green*, 84 N.Y.2d at 798, 622 N.Y.S.2d 900, 647 N.E.2d 105 [1995]. Accordingly, the motion by the Defendants as against Plaintiff Diaz is denied.

Plaintiff Rivera

Dr. Edward Toriello, conducted a medical examination of Plaintiff Rivera on March 1, 2017. In his report, which was duly affirmed that same day, Dr. Toriello detailed his findings based upon his review of Plaintiff Rivera’s medical records, and his personal observations and

objective testing. As a diagnosis, Dr. Toriello opined that “[t]he claimant reveals evidence of resolve cervical strain, resolved low back strain, resolved left knee contusion, and status post arthroscopic surgery from which he has fully recovered.” He added that “[b]ased on the history as given by the claimant and the physical examination, the resolved injuries are causally related to the accident.” (See Defendants’ Motion, Examination of Dr. Toriello, Attached as Exhibit L).

Dr. Harold M. Tice, a radiologist, did not conduct a medical examination but instead reviewed an MRI of Plaintiff Rivera’s cervical spine. Dr. Tice states that it was his impression that “C3/4, C4/5, C5/6 and C6/7 disc herniations deforming the thecal sac, with C3/4 and C4/5 cord abutment, C3/4 left neural foraminal narrowing, C4/5 right neural foraminal extension abutting the exiting right C5 nerve root contributing to right neural foraminal narrowing, C5/6 bilateral proximal neural foraminal extension with associated abutment of the exiting nerve roots bilaterally and bilateral neural foraminal narrowing, and C6/7 left proximal neural foraminal extension with abutment of the exiting left C7 nerve root, with increase conspicuity on extension view at both C5/6 and C6/7.” (See Defendants’ Motion, Examination of Dr. Tice, Attached as Exhibit M).

Dr. Michael Carciente, a neurologist, conducted an examination of Plaintiff Rivera on February 12, 2017. In his report, Dr. Carciente performed a neurological exam, a motor examination, and a sensory examination. Dr. Carciente opined that “[t]here was no spasticity, ankle clonus, extensor plantar responses, or sensory levels supporting the presence of a spinal cord condition, and there was no correlation between the findings allegedly found in the spine MRI reports and today’s exam.” (See Defendants’ Motion, Examination of Dr. Carciente, Attached as Exhibit N).

Dr. Michael Setton, a radiologist, did not conduct a medical examination but instead reviewed an MRI of Plaintiff Rivera’s left knee. As part of his summary Dr. Setton concluded that



“[t]here is a moderate sized joint effusion present, reflecting a reactive inflammation of the synovial lining of the knee joint in response to degenerative joint disease.” Dr. Setton also added that “there is no other abnormality of the para-articular soft tissues to suggest any type of recent traumatic injury to the left knee.”

Turning to the merits of the motion for summary judgment, the Court is of the opinion that based upon the foregoing submissions, the Defendants have not met their initial burden of proof. *See Meely v 4 G's Truck Renting Co., Inc.*, 16 AD3d 26, 29-30 [2<sup>nd</sup> Dept, 2005]; *see also Oliva v Gross*, 29 AD3d 551 [2<sup>nd</sup> Dept, 2006]. Dr. Toriello did find limitation in the range of motion of Plaintiff Rivera’s cervical spine and causation between the motor vehicle accident and the injuries.

However, even assuming, *arguendo*, that the Defendants had met their *prima facie* burden, the Court finds that Plaintiff Rivera has raised triable issues of fact as to whether he suffered serious injuries. *See Jackson v United Parcel Serv.*, 204 AD2d 605 [2<sup>nd</sup> Dept, 1994]; *Bryan v Brancato*, 213 AD2d 577 [2<sup>nd</sup> Dept, 1995]. In this regard, the Plaintiff Rivera has submitted quantitative objective findings, in addition to opinions, as to the significance of the Plaintiff’s injuries. *See Grossman v Wright*, 268 AD2d 79 [2<sup>nd</sup> Dept, 2000].

As indicated above, in order to establish that the Plaintiff suffered a permanent consequential limitation of use of a body organ or member, and/or a significant limitation of use of a body function or system, the Plaintiff must show more than “a mild, minor or slight limitation of use” and is required to provide objective medical evidence in addition to medical opinions of the extent or degree of the limitation and its duration. *See Oberly v Bangs Ambulance, Inc.*, 96 NY2d 295 [2001]; *Burnett v Miller*, 255 AD2d 541 [2<sup>nd</sup> Dept, 1998]; *Beckett v Conte*, 176 AD2d 774 [2<sup>nd</sup> Dept, 1991].

In opposition to the Defendants' motion, Plaintiff Rivera proffers the affirmations of Dr. Mian, and Dr. Sterlin. Dr. Mian performed orthopedic examinations of Plaintiff Rivera on several different occasions and performed surgery on Plaintiff Rivera's left knee on April 27, 2016. As part of Dr. Mian's report, he opined that "[i]n my opinion, to a reasonable degree of medical certainty, the MRI films of Mr. Rivera's cervical and lumbar spines and left knee reveal herniating discs with impingement in the cervical and lumbar spines and a tear of the left knee that are causally related to the subject accident and not due to degeneration." (See Affirmation in Opposition, Affirmation of Dr. Mian, Attached as Exhibit F). Dr. Mian also examined Plaintiff Rivera on May 11, 2018. Dr. Mian stated that range of motion testing was measured with a goniometer during this examination. As part of the May 11, 2018 examination Dr. Mian gave as his prognosis that "[t]he patient's injuries are causally related to accident of 2-28-16. Injuries to left knee are permanent." (See Affirmation in Opposition, Affirmation of Dr. Mian, Attached as Exhibit H).

Dr. Sterlin performed an examination of Plaintiff Rivera on February 29, 2016 (report completed on March 25, 2016). As part of Dr. Sterlin's report he conducted range of motion tests for Plaintiff Rivera's cervical spine, lumbar spine and left knee. As part of his objective findings Dr. Sterling found that "the patient sustained injuries to his neck, back and left knee." Dr. Sterling also stated that "the injuries sustained and the accident reported are causally related and there may be serious significant residua affecting his ability to perform all of his previously routine activities of daily living." (See Affirmation in Opposition, Affirmation of Dr. Sterlin, Attached as Exhibit J).

While the affirmations of movant's Doctors were arguably sufficient to meet the Defendants' *prima facie* burden, Plaintiff Rivera's evidence, namely the affirmed reports of Dr. Mian and Dr. Sterlin, raise material triable issues of fact with regard to the Plaintiff Rivera's claim

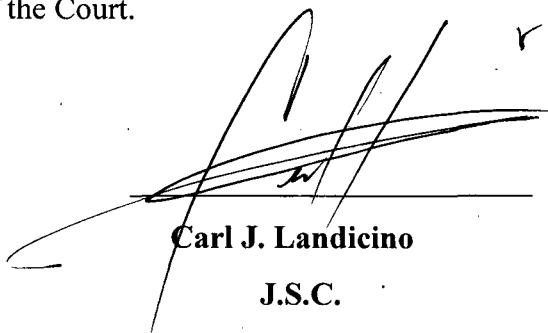
that he sustained a serious injury. "An expert's qualitative assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system." *Toure v Avis Rent A Car Systems Inc.*, 98 N.Y.2d 345, 774 N.E.2d 1197 [2002]; see *Dufel v. Green*, 84 N.Y.2d at 798, 622 N.Y.S.2d 900, 647 N.E.2d 105 [1995]. Accordingly, the motion by the Defendants as against Plaintiff Rivera is also denied.

Based on the foregoing, it is hereby ORDERED as follows:

Defendants' motion (motion sequence #3) for summary judgment is denied.

This constitutes the Decision and Order of the Court.

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