

Sylla v Woinshet

2016 NY Slip Op 30900(U)

April 5, 2016

Supreme Court, Bronx County

Docket Number: 350203-13

Judge: Fernando Tapia

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
BRONX COUNTY: Part 13**

**MOHAMED SYLLA, AN INFANT BY HIS MOTHER and
NATURAL GUARDIAN, MADOUSSON SYLLA, and
MADOUSSON SYLLA, INDIVIDUALLY**

Plaintiffs,

v.

Index No. 350203-13

**HAILE WOINSHET, PANJSHIR LEASING INC.,
SADOU DIALLOU and WONKENE Y. AWOKE,**

Defendants.

DECISION

These three "serious injury" motions were filed by Defendants under CPLR 3212, seeking summary judgment based on lack of serious injuries sustained by Infant Plaintiff, pursuant to NY Insurance Law §§ 5102(d) and 5104(a).

After careful review of the motion papers, this Court **DENIES** Defendants' motions, as issues of fact exist surrounding the extent of lack of serious injuries sustained by Infant Plaintiff, Mohamed Sylla.¹

Did Infant Plaintiff sustain "serious injuries" under NY Insurance Law § 5102(d)? Fact-finders will decide that, should the parties not settle.

One of the recognized purposes of a summary judgment motion is to determine if any material facts exist. *Marshall, Bratter, Greene, Allison & Tucker v. Mechner*, 53 AD2d 537 (App Div, 1st Dept 1976). Under CPLR 3212(b), a motion for summary judgment must be supported

¹ Motion Sequence 003 was made by Co-Defendant Panjshir Leasing Inc. and Sadou Diallou. Motion Sequence 004 was made by Co-Defendant Wonkene Y. Awoke. Motion Sequence 005 was made by Co-Defendant Haile Woinshet. All three are threshold motions.

by affidavit, a copy of its pleadings, and any other available proof. Regarding the affidavit, not only must it have a recitation of material facts, but it must also show that there is no defense to the action, or that the defense is meritless.

Because a motion for summary judgment has an extremely high burden ["as a matter of law"], it is a drastic remedy for any movant to use. *Rotuba Extruders v. Ceppos*, 46 NY2d 223, 231 (App Ct 1978). It is therefore the movant's burden to produce evidence as would be required in a trial. *Oxford Paper Co. v. S.M. Liquidation Co., Inc.*, 45 Misc2d 612, 614 (Sup Ct, NY Cty 1965); see also *Pirrelli v. Long Island Rail Road*, 226 AD2d 166 (App Div 1st Dept 1996) (the purpose of the motion court is issue-finding, and not issue-determination). Lastly, a summary judgment motion cannot be defeated by a "shadowy semblance of an issue." *Hatzis v. Belliard*, 13 AD3d 106 (App Div, 1st Dept 2004).

Here, Plaintiffs were back-seat passengers of a livery cab who sustained injuries from a two-car motor vehicle accident [MVA] on or about 17 June 2013, approximately 6:30 p.m. See Rashid Aff. at Exh. C, Bill of Particulars. As discussed below, material issues of fact exist regarding serious injuries of Infant Plaintiff.

"Serious injury" threshold

The proper basis to determine if a plaintiff meets the threshold standard is to examine the plaintiff's objective medical proof. *Toure v. Avis Rent A Car Systems*, 98 NY2d 345, 350 (App Ct 2002).

Moreover, there are Range Of Motion [ROM] discrepancies that defeats Defendants' threshold summary judgment motion. *Id.* In *López v. Senatore*, 65 NY2d 1017, 1020 (App Ct 1985), the Court of Appeals denied the defendant's motion for summary judgment on the ground that the plaintiff's physician's affirmation, supported by exhibits setting forth the injuries and

course of treatment identifying ROM limitations, is enough of a basis to deny the defendant's motion [cervical limitation of ten degrees found to be enough significant limitation].

Here, Infant Plaintiff sustained injuries to his forehead, lip, left nasal, neck, back, and left knee. See Rashid Aff. at Exh. D. He submitted to a physical exam [PE] on 8 December 2014, with John H. Buckner, M.D. In addition, Infant Plaintiff sought dental treatment from Evan P. Mondshine, D.D.S. for temporomandibular joint dysfunction [TMJ]² and from Isaac Seinuk, D.D.S., a dentist who conducted the exam on behalf of Defendants. See Rashid Aff. at Exh. E. The following comparison chart shows the discrepancies:

Master Mohamed Sylla, Infant Plaintiff, restrained left back-seat passenger

Lumbar spine	Joyce Goldenberg, M.D.³ [DOE: 16Apr15]	Arnold T. Berman, M.D.⁴ [DOE: 18Oct14]
Flexion	72/85	90/90
Extension	16/25	30/30
Rotation	31/45 [left]; 34/45 [right]	30/30 [bilateral]

Here, the ROMs differ between the two physicians' findings, which were contemporaneous in time. In addition, there were conflicting write-ups between dentists in which Dr. Mondshine found TMJ issues, and Dr. Seinuk did not. As such, Defendants' threshold motions are denied, as there are material issues of fact surrounding Infant Plaintiff's injuries.

² See Resnick Opp. at Exh. F. Movant-Sadou Diallou disputes Dr. Mondshine's write-up because it is not affirmed. See Rashid Reply at ¶ 7.

³ See 19 May 2015 Resnick Opp at Exh. A. Dr. Goldenberg is a physiatrist. These ROMs are patient-to-normal.

⁴ See Mullé Aff. at Exh. G. Dr. Berman is an orthopedist who performed the PE for Defendants who designated him.

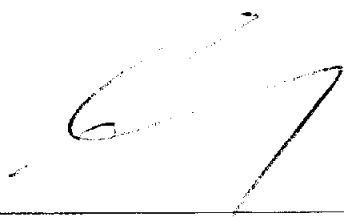
Regarding the 90/180-day category, according to *Licari*, the words "substantially all" should be construed to mean that the person has been curtailed from his/her usual activities to a great extent rather than some slight curtailment. *Licari v. Elliott*, 57 NY2d 230, 236 (App Ct 1985).

Here, Defendants contend that Infant Plaintiff showed no medical evidence to substantiate that he was unable to perform his daily activities of living for ninety [90] days out of the first one-hundred eighty [180] days immediately following the MVA because Infant Plaintiff missed two weeks of seventh grade. See *McSherry Aff.* at ¶ 37. In turn, Infant Plaintiff has proven that there is a material issue of fact regarding his normal and customary activities being curtailed because he attested that he could not go to the gym or ride his bicycle for some time. See *Sylla Aff.* at p. 39, lines 10-25. Accordingly, this will be resolved at trial too, should the parties not settle.

The parties are **ORDERED** to appear before J.H.O. Paul Victor on **Monday, 19 November 2016, Room 705, at 9:30 a.m.**

This constitutes the Decision and Order of this Court.

Dated: April 5, 2016
Bronx, NY



Hon. Fernando Tapia, J.S.C.