

<b>Diaz v Exclusive One LLC</b>
2018 NY Slip Op 31235(U)
June 19, 2018
Supreme Court, New York County
Docket Number: 150811/2016
Judge: Adam Silvera
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**SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY  
PRESENT: Hon. Adam Silvera Part 22**

**IDELFONZO DIAZ,**

**Plaintiff,**

**-against-**

**EXCLUSIVE ONE LLC D/B/A  
MONTCLAIR LIMOUSINE & CAR SERVICES  
and GUNER SELCUK,**

**Defendants,**

**DECISION/ORDER**

**Index No. 150811/2016  
MOTION SEQ NO 003**

**EXCLUSIVE ONE LLC D/B/A  
MONTCLAIR LIMOUSINE & CAR SERVICES  
and GUNER SELCUK,**

**Third-Party Plaintiffs,**

**-against-**

**STEVE J. ALEXANDER and SJA TRANSPORTATION  
LLC,**

**Third-Party Defendants.**

**Third-Party  
Index No. 595846/2016**

**ADAM SILVERA, J. :**

Upon the foregoing papers, it is ordered that third-party defendants Steve J. Alexander and SJA Transportations’ motion is denied for the reasons set forth below. Before the court is Third-party defendants’ motion, Motion Sequence 003, for (1) an Order pursuant to CPLR §3212 granting summary judgment in favor of third-party defendants; (2) to dismiss the Complaint of defendants/third-party plaintiffs Exclusive One LLC D/B/A Montclair Limousine & Car Services and Guner Selcuk (collectively “Defendants”), and all cross-claims on the grounds that said defendants bear no liability for the incident at bar and the claims against said defendants are

dismissible as a matter of law; (3) to dismiss the complaint of plaintiff Idelfonzo Diaz on the grounds that the injuries allegedly sustained by plaintiff do not satisfy the “serious injury” requirement as defined by Insurance Law § 5102(d). Defendants/third-party plaintiffs partially oppose the motion as to the branch of third-party defendants’ motion on the issue of liability and cross-move to grant summary against plaintiff as to the issue of “serious injury” raised in third-party defendants’ motion.

### **BACKGROUND**

The suit at bar stems from a three car chain collision which occurred on May 1, 2015, while plaintiff Idelfonzo Diaz was operating a motor vehicle at JFK Airport and the Van Wyck Expressway in the County of Queens, City and State of New York when his vehicle was struck by Defendants’ vehicle and allegedly resulted in the serious injury of plaintiff. Plaintiff filed suit against Defendants on February 1, 2016. Defendants answered timely and filed a Third-Party Complaint against third-party defendants Steve J. Alexander and SJA Transportation LLC on November 7, 2016 alleging that third-party defendants rear ended Defendants’ vehicle during the May 1, 2015 accident and were the sole cause of the collision between plaintiff and Defendants.

### **DISCUSSION**

#### **Summary Judgment (Serious Injury)**

The branch of both third-party defendants’ motion and Defendants’ cross-motion, for summary judgment, pursuant to CPLR 3212, against plaintiff on the issue of “serious injury” as defined under Section § 5102(d) of the Insurance Law is denied. “The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). Once such

entitlement has been demonstrated by the moving party, the burden shifts to the party opposing the motion to “demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure ... to do [so]” (*Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]).

In order to satisfy their burden under Insurance Law § 5102(d), a plaintiff must meet the “serious injury” threshold (*Toure v Avis Rent a Car Systems, Inc.*, 98 NY2d 345, 352 [2002] [finding that in order establish a prima facie case that a plaintiff in a negligence action arising from a motor vehicle accident did sustain a serious injury, plaintiff must establish the existence of either a “permanent consequential limitation of use of a body organ or member [or a] significant limitation of use of a body function or system”]).

Third-Party defendants’ opposition and Defendants’ opposition allege that plaintiff has failed to demonstrate the existence of a “serious injury” as defined under Section 5102(d) of the Insurance Law. The opposition highlight that plaintiff has a history of injuries which resulted from three prior motor vehicle accidents, a slip and fall accident, and two surgeries for tumors and cancer (Cross-Mot., ¶¶ 29-33). In further support of their argument, third-party defendants, submit the Orthopedic IME Report of Dr. Robert S. Goldstein. The IME Report finds that plaintiff’s cervical spine and lumbar spine have normal range of motion at all levels and that plaintiffs left and right shoulder and left and right knees had operative arthroscopy portal scars. Dr. Goldstein’s report concludes that lumbar spine issues were preexisting in nature and that changes to plaintiff’s left shoulder and right knee were not caused by the incident.

In response, plaintiff provides the Narrative Report of Dr. Maxim Tyorkin, MD which states that plaintiff sustained permanent consequential limitation to the use of his left shoulder and right knee as a result of the accident at issue. Thus, there exists an issue of fact and the

branches of both the third-party defendants' motion and Defendants' cross-motion for summary judgment in favor of plaintiff on the issue of "serious injury" as defined by Insurance Law § 5102(d) are denied.

### **Summary Judgment (Liability)**

The branch of third-party defendants' motion for summary judgment on the issue of liability is denied. The motion, which alleges that the vehicle owned by SJA Transportation LLC and operated by Steve J. Alexander was the middle vehicle in a three-car chain collision when it was struck from behind by Defendants' vehicle and propelled forward into plaintiff's vehicle, fails to make out a prima facie case of negligence as there is a triable issue of fact. (*See Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]; *see also Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]). "[A] rear-end collision with a stopped ... vehicle establishes a prima facie case of negligence on the part of the driver of the rear vehicle, ... [and] shift[s] the burden to defendant to come forward with an adequate nonnegligent explanation for the accident". *Cruz v Lise*, 123 AD3d 514 (1<sup>st</sup> Dep't 2014) (internal quotations omitted).

Here, third-party defendants allege that their vehicle was fully stopped when it was rear ended by Defendants' vehicle. However third-party defendants' motion contains deposition testimony and SUV dash cam video footage which raise material triable issues of fact as to the cause of the accident. Additionally, plaintiff's testimony raises an issue of fact in that plaintiff claimed he heard a collision into third-party defendants' SUV only after his car was struck in the rear (Cross Mot. Exh G, at 43, ¶¶ 21-23). The sequence of events of the crash raises an issue of fact with respect to liability. Thus, the branch of third-party defendants' motion for summary judgment on the issue of liability is denied.

Accordingly, it is

ORDERED that the branches of both third-party defendants' motion and Defendants' cross-motion for summary judgment against plaintiff on the issue of "serious injury" as defined under Section § 5102(d) of the Insurance Law are denied; and it is further

ORDERED that the branch of third-party defendants' motion for summary judgment on the issue of liability against third-party plaintiffs and to dismiss the Complaint of third-party plaintiffs is denied; and it is further

ORDERED that within 30 days of entry, plaintiff shall serve a copy of this decision/order upon all parties with notice of entry.

This constitutes the Decision/Order of the Court.

Dated: 6/19/18

ENTER:



Hon. Adam Silvera, J.S.C.

**HON. ADAM SILVERA  
J.S.C.**