

**Jurgens v Jallow**

2018 NY Slip Op 32772(U)

October 26, 2018

Supreme Court, New York County

Docket Number: 157849/2013

Judge: Adam Silvera

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART IAS MOTION 22**

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ERIC JURGENS,  
  
Plaintiff,  
  
- v -  
  
ALGASIMU JALLOW, NATINAT TRANSIT INC.  
  
Defendant.

**INDEX NO.** 157849/2013  
  
**MOTION DATE** 10/03/2018,  
10/03/2018  
  
**MOTION SEQ. NO.** 002 003

**DECISION AND ORDER**

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HON. ADAM SILVERA:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 28, 29, 30, 31, 32, 33, 34, 35, 36, 39, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 003) 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 79, 80

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER

Upon the foregoing papers, it is ordered that defendants' motion is denied and plaintiff's motion is granted for the reasons set forth below. Before the court are two motions, motion sequence 002 and motion sequence 003. Defendants' motion, motion sequence 002, is for summary judgment in favor of defendants on the issue of "serious injury" as defined by Insurance Law § 5102(d). Plaintiff opposes the motion. Plaintiff's motion, motion sequence 003, is for summary judgment on the issue of liability in favor of plaintiff against defendant Algasimu Jallow.

## BACKGROUND

The suit at bar stems from an incident which occurred on December 29, 2012, at the intersection of Avenue A and East 14<sup>th</sup> Street in the County, City, and State of New York, when a vehicle operated by defendant, Algasimu Jallow and owned by defendant, Natinat Transit, Inc., struck pedestrian plaintiff Eric M Jurgens, while he was walking within the crosswalk with the pedestrian signal sign in his favor, and allegedly led to his serious injury.

## DISCUSSION

### Mot. Seq. 002 Summary Judgment (Serious Injury)

Defendants' motion, for summary judgment, pursuant to CPLR 3212, in favor of defendants 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"]).

Here, defendants allege that plaintiff has failed to demonstrate the existence of a “serious injury” as defined under Section 5102(d) of the Insurance Law. In support of their argument, defendants submit the affirmations of defendants’ doctors, Dr. Chffandra M. Sharma, Dr. Steven A. Renzoni and Dr. Audrey Eisenstadt, and the deposition testimony given by plaintiff on February 24, 2017, a signed letter by Dr. Stuart Kahn. Plaintiff testified at his deposition that the x-rays at the emergency room on the day of the accident at issue did not show a fracture (Mot, Exh C at 47-48). Dr. Sharma examined plaintiff on March 6, 2018, and concluded that plaintiff had a full range of motion in all body parts examined and “that a permanent injury has not been sustained” (*id.*, Exh Dat 4). Dr. Renzoni examined plaintiff on April 24, 2017, and concluded that plaintiff’s ranges of motion to be within normal limits and that “despite the claimant’s subjective complaints, there were no objective findings to support them (*id.*, Exh E at 4). Lastly, Dr. Eienstadt, reviewed MRI films of plaintiff’s right ankle and right lower extremity and did not find a fracture in the MRIs (*id.*, Exh F). Defendants have made a prima facie showing that plaintiff has not sustained a “serious injury” as defined under the Insurance Law and the burden now shifts to plaintiff.

In opposition, plaintiff submits the medical report of orthopedic surgeon, Dr. Drew Stein, who examined plaintiff on January 10, 2013. Dr. Stein’s medical report records a decrease in range of motion of plaintiff’s right ankle and attributes the injury to the underlying accident of December 29, 2012 (Aff in Op, Exh I). On August 1, 2018, Dr. Stein concluded that plaintiff “has a permanent orthopedic disability” and “will develop post-traumatic arthritis of the right ankle” (*id.*). On January 14, 2013, at the request of Dr. Stein, Dr. Gregory Wilde reviewed the MRI of plaintiff and concluded that the right ankle had suffered a nondisplaced fracture (*id.*, Exh

J). Thus, plaintiff has raised an issue of fact precluding defendants motion for summary judgment as to “serious injury” under the Insurance Law.

**Mot Seq. 003 Summary Judgment (Liability)**

Plaintiff’s motion for summary judgment on the issue of liability is granted. Plaintiff’s motion, which alleges that he was in the crosswalk with the light in his favor when he was struck by defendants’ turning vehicle, has made out a prima facie case of negligence, and the burden shifts to defendants to raise 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 pedestrian who demonstrates that they were walking within a crosswalk, with the light in their favor when struck by a turning vehicle, is entitled to a judgment as a matter of law on the issue of liability. (*Perez-Hernandez v M. Marte Auto Corp.*, 104 AD3d 489, 490 [1st Dep’t 2007] [Finding that plaintiff could not have avoided the accident and noticed the car only moments before being struck]).

Here, defendants, pursuant to this Court’s Decision/Order dated March 23, 2018, defendant driver Algasimu, was precluded from testifying at the time of trial, and also from submitting an affidavit from himself in substantive motion practice (Mot., Exh G). Thus, plaintiff’s motion for summary judgment as to liability in favor of plaintiff against defendants is granted.

Accordingly, it is

ORDERED that defendants’ motion for summary judgment on the issue of “serious injury” is denied; and it is further

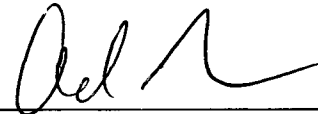
ORDERED that plaintiff’s motion for summary on the issue of liability in favor of plaintiff against defendants is granted; and it is further

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

This constitutes the Decision/Order of the Court.

10/26/2018

DATE



ADAM SILVERA, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE