

**Turner v Doumbouya**

2020 NY Slip Op 35570(U)

May 13, 2020

Supreme Court, New York County

Docket Number: Index No. 159506/2018

Judge: Adam Silvera

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. ADAM SILVERA PART IAS MOTION 22

*Justice*

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DEBORAH TURNER and JOSEPH JAMES,

Plaintiffs,

- v -

BANGALY DOUMBOUYA,

Defendant.

-----X

INDEX NO. 159506/2018

MOTION DATE 5/13/2020

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36

were read on this motion to/for JUDGMENT - SUMMARY.

Before the Court is defendant's motion for summary judgment pursuant to CPLR 3212 to dismiss plaintiffs, Deborah Turner and Joseph James' Complaint on the grounds that plaintiffs have not suffered a "serious injury" as defined under Section 5102(d) of the Insurance Law. Defendant's motion is denied.

This matter stems from a motor vehicle incident, which occurred on April 4, 2018, at 7<sup>th</sup> Avenue and West 147<sup>th</sup> Street in the County, City, and State of New York, which allegedly led to the serious injury of both defendants.

"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”]).

Defendants allege that both plaintiffs have failed to demonstrate the existence of a “serious injury” as defined under Section 5102(d) of the Insurance Law. Defendants allege that the injuries plaintiffs are seeking relief for do not rise to the level of a “serious injury.”

#### **Plaintiff Deborah Turner**

Defendants attach the independent medical report of Dr. Joseph Marguiles who found plaintiff to have a normal range of motion in the alleged injured body parts (Mot Exh F at 3). Dr. Marguiles notes that plaintiff suffered sprains to the cervical and lumbar spine in addition to contusions to the left knee and shoulder (*id.*). Dr. Marguiles concluded that Ms. Turner’s above-mentioned injuries had resolved and that plaintiff “revealed no functional disability” (*id.*). Thus, defendants have made a prima facie showing of entitlement to summary judgment on the issue of serious injury as to plaintiff Deborah Turner and the burden now shifts to plaintiffs.

#### **Plaintiff Joseph James**

Defendants also attach a report by Dr. Marguiles in regards to plaintiff Joseph James (Mot, Exh G). Dr. Marguiles found plaintiff to have normal range of motion in the alleged injured body parts (*id.*). Dr. Marguiles notes that plaintiff’s injuries of a lumbar and cervical sprain and right shoulder contusion have all resolved and that plaintiff “revealed no functional disability” (*id.*). Thus, defendants have made a prima facie showing of entitlement to summary

judgment on the issue of serious injury as to plaintiff Joseph James and the burden now shifts to plaintiffs.

### Opposition

In opposition, plaintiffs raise an issue of fact as to both plaintiffs. Plaintiffs attach the report of Dr. John R. Denton who examined plaintiff Turner on July 23, 2018, and concluded that plaintiff Turner had losses of range of motion to the cervical spine, lumbar spine, and left shoulder (Aff in Opp Exh E). Dr. Denton concludes that “[b]ased on the findings of my examination of Ms. Turner, further orthopedic treatment indicates secondary to the reported accident and an end result has not been reached” (*id.*). Thus, plaintiffs have raised an issue of fact as to plaintiff Turner’s alleged injuries and defendant’s motion is denied as to plaintiff Turner.

Plaintiffs attach the report of Dr. Gurvansh Anand who examined plaintiff James on September 17, 2018 and found losses of range of motion to plaintiff’s lumbar and cervical spine (Aff in Opp, Exh H at 1 & 5). Dr. Anand concluded that plaintiff presented due to the underlying motor vehicle accident and that “[b]ased on my physical examination, the claimant’s cervical and lumbar spine revealed muscle spasm with tenderness and decrease in range of motion to warrant further chiropractic treatment” (*id.* at 6). Thus, as there are conflicting doctors’ affirmations regarding both plaintiffs’ injuries, plaintiffs have raised an issue of fact precluding summary judgment on the issue of “serious injury” as defined in 5102 of the Insurance Law.

Accordingly, it is

ORDERED that defendant’s motion for summary judgment to dismiss plaintiffs’ Complaint on the grounds that plaintiffs have not sustained a “serious injury” as defined in 5102 of the Insurance Law is denied; and it is further

ORDERED that within 120 days of entry, plaintiffs shall serve a copy of this decision/order upon defendant with notice of entry.

This constitutes the Decision/Order of the Court.



5/13/20

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