

**Baptiste v Ndiaye**

2020 NY Slip Op 35736(U)

November 2, 2020

Supreme Court, New York County

Docket Number: Index No. 156386/2018

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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JASMINE BAPTISTE,

Plaintiff,

- v -

ALIOUNE NDIAYE, DJIBY GOM

Defendants.

-----X

INDEX NO. 156386/2018

MOTION DATE 09/10/2019

MOTION SEQ. NO. 001

**AMENDED DECISION + ORDER  
ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 17, 18, 19, 20, 21, 22, 23, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52

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

Before the Court is defendants’ cross motion for an Order, pursuant to CPLR 3212, for summary judgment in favor of defendants and to dismiss plaintiff’s complaint, pursuant to Insurance Law 5104(a), on the grounds that plaintiff did not sustain an injury as defined under Insurance Law 5102(d). The Court notes that in its Decision/Order on Motion Sequence 001 dated February 24, 2020, the Court addressed the issue of liability and inadvertently left out the decision on the cross motion. The decision on liability stands and upon review of the papers defendants’ cross motion 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"]).

Defendants allege that plaintiff has failed to demonstrate the existence of a "serious injury" as defined under Section 5102(d) of the Insurance Law. Defendants allege that the injuries plaintiff is seeking relief for are not causally related to the underlying accident and are a result of chronic and longstanding degenerative changes. Defendants attach the Emergency Room record, the affirmation of Dr. Pierce J. Ferriter and the affirmation of Dr. Darren Fitzpatrick (Mot, Exh F, G, I). The Emergency Room record shows that plaintiff has degeneration of the bilateral knees, left shoulder, and lumbar spine (*id.*, Exh I). Dr. Fitzpatrick reported findings of severe multilevel degenerative disc disease in plaintiff's cervical spine (*id.*, Exh G). Thus, defendants have made a prima facie showing of entitlement to summary judgment on the issue of serious injury and the burden now shifts to plaintiff.

In opposition, plaintiff's responding medical submissions raise a triable issue of fact as to plaintiff's alleged degenerative injuries. Plaintiff attaches the Emergency Room record, medical report of Dr. Stella Mansukhani, affirmation and MRI report of Dr. Narayan Paruchi, affirmation and medical report of Dr. Nicky Bhatia, and the affirmation and neuropsychological evaluation of Dr. Charles Robins (Aff in Opp, Exh B, C, D, F, & G). In *Rosa v Delacruz*, 32 NY3d 1060,

2018 N.Y. Slip Op. 07040 [2018], the Court of Appeals found that where a plaintiff's doctor opined that tears were causally related to the accident, but did not address findings of degeneration or explain why the tears and physical deficits found were not caused by the preexisting degenerative conditions, plaintiff failed to raise a triable issue of fact as it "failed to acknowledge, much less explain or contradict, the radiologist's finding. Instead, plaintiff relied on the purely conclusory assertion of his orthopedist that there was a causal relationship between the accident" (*See id.*)

Here, defendants, in contrast to the defendant in *Rosa*, in regards to the cervical spine, has not submitted a finding by plaintiff's own doctor who presented findings of degeneration (*see Rosa* at 571; *Alvarez v NYLL Mgt. Ltd.*, 120 A.D.3d 1043, 1044 [1st Dept 2014])[finding that where plaintiff's own medical records show a degenerative condition, plaintiff's doctor must address or contest the findings of that were acknowledge in reports of plaintiff's own physicians]). Defendants base their findings of cervical spine degeneration from MRI's conducted by Dr. Fitzpatrick, not by plaintiff's own doctors. Thus, plaintiff has 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 defendants' motion to dismiss plaintiff's Complaint is denied; and it is further

ORDERED that within 30 days of entry, plaintiff shall serve a copy of this Decision/Order upon defendants with notice of entry.

This constitutes the AMENDED Decision/Order of the Court.



11/2/2020

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