

Aiken v Ndiaye

2021 NY Slip Op 30549(U)

February 23, 2021

Supreme Court, Kings County

Docket Number: 502504/2018

Judge: Debra Silber

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

X

TERRELL AIKEN and HUGH M. LITCHMORE,

Plaintiffs,

-against-

MODIBO NDIAYE,

Defendant.

X

DECISION / ORDER

**Index No. 502504/2018
Motion Seq. No. 3, 4**

Recitation, as required by CPLR 2219 (a), of the papers considered in the review of plaintiffs' motion for summary judgment and defendant's motion for summary judgment.

Papers	NYSCEF Doc.
Notice of Motion, Affirmations, Affidavits and Exhibits Annexed.....	<u>50 – 58</u>
Affirmation in Opposition, Affidavits and Exhibits Annexed.....	<u>75 - 84</u>

Upon the foregoing cited papers, the Decision/Order on these motions is as follows:

This is an action for personal injuries arising from a motor vehicle accident that occurred on December 8, 2017 at the intersection of East New York Avenue and East 96th Street in Brooklyn, New York. Plaintiffs were both back seat passengers in a vehicle driven by nonparty Shakeema Alesia Legrand when Legrand's vehicle was allegedly struck from behind by the vehicle owned and operated by defendant.

In Motion Seq. 3, plaintiffs move for summary judgment on the issue of liability against defendant on the basis that they bear no fault for the collision. In Motion Seq. 4, defendant moves for summary judgment and an order dismissing the complaint against both plaintiffs on the basis that neither can establish a serious injury under Insurance Law § 5102 (d).

Motion Seq. 3

In support of their motion for summary judgment on the issue of liability, plaintiffs submit the verified pleadings, discovery orders, copies of Motions 1 and 2 (motions to strike defendant's answer for failure to comply with discovery), and the plaintiffs' EBT transcripts. The plaintiffs testified that the collision involved three vehicles. According to the plaintiffs, Legrand's vehicle, the one they were passengers in, was the front-most vehicle and the middle vehicle was driven by nonparty Belinda Roberts. Legrand had stopped at a red light for several seconds when the plaintiffs felt one impact from behind. The third (apparently, rear-most) vehicle involved in the collision was operated by defendant.¹

Plaintiffs' attorney argues that they are entitled to summary judgment on the issue of liability as the plaintiffs, lawful passengers in Legrand's vehicle, cannot be found culpable or negligent for causing or contributing to the accident as a matter of law. Defendant's counsel submits no evidence in opposition to the motion and argues only that defendant's fault "cannot simply be inferred merely because" defendant's EBT has not been taken, which in his opinion creates an issue of fact sufficient to defeat the motion. However, it must be noted that Justice Colon, in an order granting Mot. Seq. #2, has precluded him from opposing a summary judgment motion and from testifying at trial, because he has failed to appear to be deposed (E-File Doc 44).

The court finds that both plaintiffs, as passengers, have established entitlement to judgment as a matter of law on the issue of liability by demonstrating, prima facie, that the stopped vehicle which they were passengers in was struck in the rear by defendant's

¹ The verified complaint indicates that defendant's vehicle struck Legrand's vehicle, but the plaintiffs' testimony indicates that it was a three-car accident and defendant's vehicle hit a nonparty's vehicle which then was pushed into the rear of Legrand's vehicle.

vehicle. “A rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence against the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision” (*Volpe v Limoncelli*, 74 AD3d 795 [2d Dept 2010]). In opposition to the plaintiffs’ motion, defendant has failed to provide a nonnegligent explanation for the rear-end collision and has failed to raise a triable issue of fact as to whether either of the plaintiffs was at fault in the happening of the accident. “Upon establishing his or her freedom from fault, the right of an innocent passenger to an award of summary judgment on the issue of liability against one driver is not barred or restricted by potential issues of comparative fault as between that driver and the driver of another vehicle involved in the accident” (see *Medina v Rodriguez*, 92 AD3d 850 [2d Dept 2012]). Further, the motion is not premature (see *Rodriguez v Farrell*, 115 AD3d 929, 930-31 [2d Dept 2014]).

Accordingly, Motion Seq. 3 is granted. This case shall proceed to trial on the issue of damages only.

Motion Seq. 4

Defendant moves, pursuant to CPLR 3212, for summary judgment and an order dismissing the complaint for each plaintiff’s alleged failure to meet the threshold requirements necessary to recover under Insurance Law § 5102 (d). In their Bill of Particulars, plaintiff Aiken claims he sustained injuries to his left shoulder and to his spine as a result of the accident, and plaintiff Litchmore claims he sustained injuries to his right shoulder, right knee and to his spine as a result of the accident.

Defendant argues that plaintiff Aiken’s IME establishes that any injuries he sustained had resolved, and there were no findings of disability or functional impairment. Defendant points out that his EBT testimony establishes that he was confined to bed for only two

weeks after the accident. Similarly, defendant argues that plaintiff Litchmore's IME revealed a resolved knee injury and no findings of any permanent disability or impairment. He testified that he was confined to his home for only one week after the accident occurred.

Defendant has supported his motion with affirmed IME reports from Dr. Jeffrey Guttman, who examined both plaintiffs, and the plaintiffs' EBTs. Neither plaintiff was asked about the period of time in the six months following the accident at his EBT, other than whether he was confined to home or bed.

Defendant's expert, Dr. Guttman, examined plaintiff Aiken in March 2019 and Litchmore in April 2019. He found that Aiken's spinal range of motion was normal and that his left shoulder had healed following surgery with some reduced range of motion (forward elevation of 170 degrees [180 normal] and external rotation to 70 degrees [90 normal]). Dr. Guttman's impression was that Aiken's alleged spine and left shoulder injuries were "resolved" and that there were no objective medical records or clinical findings of a current disability or functional impairment (E-File Doc 55). He does not say anything about the abnormal range of motion findings in plaintiff's left shoulder.

Dr. Guttman found that Litchmore's range of motion for both his right shoulder and right knee were normal. He did not examine his spine or test the range of motion in his spine, despite indicating that he read the Bill of Particulars and the MRI reports. His impression was that the alleged injuries to Litchmore's right shoulder and right knee had resolved following his arthroscopic surgeries and found that there was no evidence or findings of a current disability or impairment (E-File Doc 57).

The court finds that defendant fails to make a prima facie case for summary judgment by establishing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident. See, *Toure v Avis Rent A Car Sys.*, 98

NY2d 345 [2002]. There is nothing in the motion papers to meet defendant's burden with regard to the 90/180 category of injury. Further, with regard to plaintiff Aiken, Dr. Guttman reports significant restrictions in his range of motion in his left shoulder and offers no explanation. With regard to plaintiff Litchmore, Dr. Guttman did not examine his spine although he states that he read the Bill of Particulars and the MRI reports. As the defendant has failed to meet his burden of proof as to all claimed injuries and all applicable categories of injury, the motion must be denied, and it is unnecessary to consider the papers submitted by plaintiff in opposition (see *Yampolskiy v Baron*, 150 AD3d 795 [2d Dept 2017]; *Valerio v Terrific Yellow Taxi Corp.*, 149 AD3d 1140 [2d Dept 2017]; *Koutsoumbis v Paciocco*, 149 AD3d 1055 [2d Dept 2017]; *Aharonoff-Arakanchi v Maselli*, 149 AD3d 890 [2d Dept 2017]; *Lara v Nelson*, 148 AD3d 1128 [2d Dept 2017]; *Sanon v Johnson*, 148 AD3d 949 [2d Dept 2017]; *Weisberg v James*, 146 AD3d 920 [2d Dept 2017]; *Marte v Gregory*, 146 AD3d 874 [2d Dept 2017]; *Goeringer v Turrisi*, 146 AD3d 754 [2d Dept 2017]; *Che Hong Kim v Kossoff*, 90 AD3d 969 [2d Dept 2011]).

In any event, had defendant made a prima facie case for dismissal, plaintiffs have provided enough evidence to overcome it. Plaintiffs' counsel responds that Aiken sustained a partial rotator cuff tear that required surgery, as well as disc bulges, as a result of the accident. Plaintiffs also respond that Litchmore also sustained a partial rotator cuff tear and a knee tear, both of which required surgery, as well as disc bulges, as a result of the accident. Plaintiffs argue that they both meet the permanent and significant limitation of use categories, as well as the 90/180 category, and that there are issues of fact with regard to both plaintiff's claims that he sustained a serious injury within the meaning of the Insurance Law.

Plaintiffs oppose the motion with the pleadings, their own affidavits, and their physician's affirmations. Dr. Marvin Moy provides an affirmation for both plaintiffs. He treated them at Rutland Medical, P.C. (E-File Doc 78). Dr. Andrew Dowd, who performed Aiken's shoulder arthroscopic surgery and Litchmore's knee surgery (E-File Doc 79-80) provides affirmations for each of the plaintiffs. Plaintiffs also provide affirmed radiology reports (E-File Doc 81 [Aiken]), 82 [Litchmore], 83 [Aiken], and 84 [Litchmore]).

Plaintiffs' evidence raises triable issues of fact with regard to the categories of injury "a permanent consequential limitation of use of a body organ or member," "significant limitation of use of a body function or system," and the 90/180 category under Insurance Law Section 5102 (d).

Dr. Moy examined both plaintiffs in connection with this motion. As to Aiken, Dr. Moy noted that his range of motion for his cervical and lumbar spine and left shoulder remained limited as of September 2020 (nearly three years after the accident occurred). Dr. Moy avers that Aiken demonstrated subjective and objective evidence of disability for 90 of the 180 days following the accident (having conducted a follow-up examination about three months after the accident in March 2018) and that Aiken was "informed that he should refrain from walking for long periods of time, bending, carrying or lifting anything heavy" (E-File Doc 78 at 7-8). Dr. Moy concludes that "[g]iven the length of time that Mr. Aiken had been symptomatic," it was Dr. Moy's opinion within a reasonable degree of medical certainty that Aiken "sustained injuries that are permanent and consequential, with significant limitations to his left knee, left shoulder, cervical spine, and lumbar spine," warranting treatment for the rest of his life. Dr. Moy's opinion is that the injuries are the result of the subject accident. Dr. Dowd avers that he performed an arthroscopic surgery on Aiken's shoulder (partial rotator cuff tear) which, in his opinion, was necessitated by the accident (E-

File Doc 79). Imaging reports further indicate Aiken had several disc bulges after the accident.

Dr. Moy found that Litchmore's lumbar spine, cervical spine, right shoulder and left knee had limited range of motion as of September 2020. He further noted that Litchmore "continues to demonstrate subjective and objective evidence of disability" three years after the accident, thus it is Dr. Moy's opinion that Litchmore sustained permanent and consequential injuries, with significant limitations to his right knee, right shoulder, cervical spine and lumbar spine as a result of the accident. Dr. Moy does not address whether Litchmore's alleged injuries qualify for the 90/180 category. Dr. Dowd provides an affirmation and states that he performed Litchmore's right knee surgery (for a lateral meniscal tear and other right knee injuries) and right shoulder surgery (for a partial rotator cuff tear). He opines that both surgeries were necessary because of the injuries Litchmore sustained in the accident (E-File Doc 80).

Accordingly, it is **ORDERED** that plaintiffs' motion for summary judgment on the issue of liability is granted; and it is further

ORDERED that defendant's motion for summary judgment dismissing the complaint is denied.

This constitutes the decision and order of the court.

Dated: February 23, 2020

ENTER:



Hon. Debra Silber, J.S.C.