

Ashman-Samuels v King of All Birds, Inc.

2021 NY Slip Op 30557(U)

February 16, 2021

Supreme Court, Kings County

Docket Number: 513154/2017

Judge: Lara J. Genovesi

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

KINGS COUNTY CLERK
FILED
2021 FEB 18 AM 9:12

At an IAS Term, Part 34 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 16th day of February 2021.

P R E S E N T:

HON. LARA J. GENOVESI,
J.S.C.

-----X
CHALESE JULIA ASHMAN-SAMUELS,
KISHON EDWARDS, and CHRISTOPHER
ANTHONY WANLISS,

Index No.: 513154/2017

DECISION & ORDER

Plaintiff,

-against-

KING OF ALL BIRDS, INC., and IFEANYI
OKAFOR,

Defendants.

-----X

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

	<u>NYSCEF Doc. No.:</u>
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed _____	<u>27-36, 50-64, 37-49</u>
Opposing Affidavits (Affirmations) _____	<u>93-113, 72-82, 83-92</u>
Reply Affidavits (Affirmations) _____	<u>118, 119, 115</u>

Introduction

Plaintiff Chalese Julia Ashman-Samuels moves for summary judgment, (sequence number two and three) to dismissing defendants' counterclaim, and on the ground that plaintiffs Kishon Edwards and Anthony Wanliss did not sustain a serious injury within the

007
003
004

meaning of Insurance Law § 5102(d). Plaintiffs Edwards and Wanliss oppose these motions.

Defendants King of All Birds, Inc., and Ifeanyi Okafor move (sequence number four) for summary judgment on the grounds that plaintiffs Ashman-Samuels and Edwards did not sustain a serious injury within the meaning of Insurance Law § 5102(d). Plaintiffs Ashman-Samuels and Edwards oppose this application.

Background and Procedural History

Plaintiff commenced this action for personal injuries as the result of a motor vehicle accident which occurred on April 17, 2016 (*see* NYSCEF Doc. # 29). Ashman-Samuels was driving her vehicle, with Edwards as front seat passenger and Wanliss as a rear passenger, when the vehicle was struck near the driver's side door by defendants' vehicle (*see* NYSCEF Doc. # 38). Issue was joined by service of an answer, which included a counterclaim sounding in negligence against plaintiff Ashman-Samuels (*see* NYSCEF Doc. # 30). Defendants allege that in the event that plaintiffs Edwards and Wanliss should recover, Ashman-Samuels shall be liable to indemnify defendants or on the basis of apportionment (*see id.*).

Discussion

Motion Seq. 2

Plaintiff, Ashman-Samuels, moves for summary judgment, to dismiss the defendants' counterclaim on the basis that of plaintiff Kishon Edwards did not sustain a serious injury within the meaning of Insurance Law § 5102(d). In the bill of particulars, plaintiff Edwards alleged that he sustained sprain/strain of the cervical and lumbar spine,

as well as bulging/ herniated discs (*see* NYSCEF Doc. # 32 at ¶ 11). Plaintiff Edwards further alleges that the injuries sustained meet the following categories of Insurance Law § 5102: (1) permanent loss of body function/system, (2) permanent consequential limitation, (3) a significant limitation, and (4) a non-permanent medically determined injury which prevented him from his usual and customary activities for 90 out of the first 180 days following the accident (*see id.* at ¶ 20).

Plaintiff met her burden and establish that Edwards did not sustain a serious injury within the meaning of Insurance Law § 5102(d). Plaintiff provided the sworn medical report of Dr. Edward A. Toriello, M.D., F.A.C.S., who examined Edwards on April 3, 2019 and found that range of motion in his cervical and lumbar spines were normal. The doctor opined that Edwards has “no objective evidence of disability”; his strain of his cervical spine and low back appear resolved (NYSCEF Doc. # 36). This Court notes that although Ashman-Samuels argues that any injuries suffered by Edwards were not causally related to the accident, Dr. Toriello is silent as to causation.¹

With respect to the 90/180 category of Insurance Law § 5102(d), Ashman-Samuels relies on Edwards’ deposition testimony, wherein he testified that he was unemployed at the time of the accident. Edwards was confined to home for 2-3 months and was told by his doctor that he “shouldn’t play any sports” or “do any heavy lifting”. (NYSCEF Doc. # 33 at 38). He testified that before the accident, on a typical day, he was “active”; he walked, went out, attended parties, and completed household chores (*see*

¹ Ashman-Samuels further provided unsworn chiropractic records of Edwards’ NCV/EMG study (*see* NYSCEF Doc. # 35).

id.). However, he testified that although he was home for two or three months, there were no activities that he “couldn’t do at all” (*id.*). Presently, lifting, bending, and sitting for long periods of time are difficult (*see id.* At 39). Here, as plaintiff’s deposition testimony compared his typical activities before the accident and after, it is sufficient to establish that plaintiff does not meet the 90/180 category of Insurance Law § 5102(d) (*see Reid v. Edwards- Grant*, 186 A.D.3d 1741, 129 N.Y.S.3d 798 [2 Dept., 2020]).

In opposition, Edwards provided credible medical evidence sufficient to raise a triable issue of fact on the significant limitation and permanent consequential limitation categories of Insurance Law 5102(d). Plaintiff provided the sworn report of Dr. Kamal A. Tadros, M.D. which demonstrates that at a recent examination on July 30, 2020, Edwards had range of motion loss in his cervical and lumbar spine up to 22.22% (*see* NYSCEF Doc. # 92). Dr. Tadros opines that the injuries are “directly and causally related” to this accident and opines that his prognosis is poor (*see id.*). Accordingly, Ashman-Samuels’ motion for summary judgment (sequence number two) to dismiss defendant’s counter claim pursuant to Insurance Law § 5102(d) is denied.²

Motion Sequence 3

Plaintiff, Ashman-Samuels, moves for summary judgment, to dismiss the defendants’ counterclaim on the basis that of plaintiff Christopher Anthony Wanliss did not sustain a serious injury within the meaning of Insurance Law § 5102(d).

² This Court notes that Wanliss’ opposition to motion sequence three was inadvertently filed in response to motion sequence two. Therefore NYSCEF Doc. # 93-113 will be considered as opposition to motion sequence three. Counsel represents that opposition to motion sequence two is contained within the affirmation in opposition filed in response to motion sequence four. Therefore, NYSCEF Doc. # 83-92 will be considered as opposition to motions sequence two and four.

In the bill of particulars, plaintiff Wanliss alleged that he sustained sprain/strain of the cervical and lumbar spine, as well as bulging/ herniated discs, left ankle contusion and derangement, malunion/nonunion of the medial malleolus, resulting in arthroscopy on September 13, 2016 (*see* NYSCEF Doc. # 32 at ¶ 11). Plaintiff Wanliss further alleges that the injuries sustained meet the following categories of Insurance Law § 5102: (1) permanent loss of body function/system, (2) permanent consequential limitation, (3) a significant limitation, and (4) a non-permanent medically determined injury which prevented him from his usual and customary activities for 90 out of the first 180 days following the accident (*see id.* at ¶ 20).

Plaintiff Ashman-Samuels failed to meet their burden and establish that Wanliss did not sustain a serious injury within the meaning of Insurance Law § 5102(d). Ashman-Samuels provided the sworn medical report of Dr. Edward Toriello, who examined Wanliss on April 3, 2019 and found normal range of motion in his left ankle/foot, cervical spine, and lumbar spine. The doctor opined that Wanliss' cervical and low back strain are resolved. He further opined that his left ankle fracture of the medial malleolus is resolved. He noted that Wanliss had pre-existing tarsal coalition and pes planus which is unrelated to this accident and was not exacerbated by this accident (*see* NYSCEF Doc. # 63). This Court notes that Toriello's report is silent as to causation and does not mention Wanliss' left ankle arthroscopy which took place on September 13, 2016. Plaintiff further provided the report of Dr. Richard Lechtenberg who examined Wanliss on March 26, 2019 and found no loss in range of motion and opined that he has no neurological injury causally related to the accident (*see* NYSCEF Doc. # 64).

However, Ashman-Samuels provided the sworn report of Dr. Alan Greenfield, M.D., plaintiff's own radiologist, who opined that there may be an old fracture in Wanliss' left ankle, and a deformity of the distal fibula which may be related to old trauma (*see* NYSCEF Doc. # 60). Ashman-Samuels further provided the sworn report of Dr. Scott B. Berger, M.D., Ph.D., who reviewed the MRIs taken June 2, 2016, and who opined that Wanliss' ankle fractures were chronic and not causally related to the accident (*see* NYSCEF Doc. # 61). d

However, "[t]he papers submitted by the defendant failed to eliminate triable issues of fact regarding the plaintiff's claim, set forth in the bill of particulars, that he sustained a serious injury under the 90/180-day category of Insurance Law § 5102(d)" (*Reid v. Edwards- Grant*, 186 A.D.3d 1741, 129 N.Y.S.3d 798 [2 Dept., 2020]).

Wanliss' deposition testimony "failed to identify the plaintiff's usual and customary daily activities during the specific relevant time frame, and did not compare the plaintiff's pre-accident and post-accident activities during that relevant time frame" (*id.*). Here, although Wanliss' testified that he has not worked since the accident, he testified that the only activity he cannot do as a result of the accident is play soccer and that he has difficulty lifting heavy objects (*see* NYSCEF Doc. 56 at 28-29).

In support of her motion to dismiss the Wanliss' 90/180 claim, Ashman-Samuels relies on the medical reports provided and contends that the alleged ankle injury was pre-existing and is not causally related to the accident (*see* NYSCEF Doc. # 51). Although plaintiff provided reports from Dr. Berger and Greenfeld, who reviewed records from the first 180 days after the accident, they failed to relate their findings to the 90/180 category.

Further, Dr. Toriello and Lechtenberg, who examined plaintiff three years after the accident, failed to relate their findings to the 90/180 category for the period of time immediately following the accident (*see Rouach v. Betts*, 71 A.D.3d 977, 897 N.Y.S.2d 242 [2 Dept., 2010]; *Pearsall v. Cha*, 114 N.Y.S.3d 176 [App. Term, 2019]; *Tinsley v. Bah*, 50 A.D.3d 1019, 857 N.Y.S.2d 180 [2 Dept., 2008]).

As plaintiff did not meet her burden, this Court need not examine the sufficiency of plaintiff's opposition papers. However, even assuming, arguendo, that Ashman-Samuels met her burden, Wanliss provided credible medical evidence sufficient to raise a triable issue of fact on the significant limitation and permanent consequential limitation categories of Insurance Law 5102(d). The sworn report of Dr. Kamal A. Tadros, M.D. demonstrates that at a recent examination on July 30, 2020, Edwards had range of motion loss in his cervical spine up to 33.33% and in his lumbar spine up to 22.22% (*see* NYSCEF Doc. # 113). Dr. Tadros causally relates the loss to this accident (*see id.*).

Accordingly, Ashman-Samuels' motion for summary judgment (sequence number three) to dismiss defendant's counter claim pursuant to Insurance Law § 5102(d) is denied.

Motion Sequence 4

Defendants move for summary judgment to dismiss the complaint as to Ashman-Samuels and Kishon Edwards on the basis that they did not sustain a serious injury within the meaning of Insurance Law § 5102(d).

Ashman-Samuels

With respect to Ashman-Samuels, defendants failed to meet their burden and establish that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d). In the bill of particulars, plaintiff Ashman-Samuels alleged that she sustained sprain/strain of the cervical and lumbar spine, bulging discs at C4-C7 and radiculopathy at L2-L4 (*see* NYSCEF Doc. # 32 at ¶ 11). Plaintiff Ashman-Samuels further alleges that the injuries sustained meet the following categories of Insurance Law § 5102: (1) permanent loss of body function/system, (2) permanent consequential limitation, (3) a significant limitation, and (4) a non-permanent medically determined injury which prevented him from his usual and customary activities for 90 out of the first 180 days following the accident (*see id.* at ¶ 20).

Defendant provided the sworn medical report of Dr. Edward A. Toriello, M.D., who examined plaintiff on August 21, 2019. Although Dr. Toriello opined that plaintiff's cervical and low back strain are resolved and found normal range of motion in plaintiff's lumbosacral spine, he measured up to 40% loss in range of motion in flexion and up to 50% loss in range of motion in extension in plaintiff's cervical spine (*see* NYSCEF Doc. # 45). He further opined that the resolved injuries are causally related to the accident (*see id.*). Defendants further provided the sworn report of Dr. Eric Cantos, M.D., who reviewed Ashman-Samuels' MRIs and opined that her injuries are degenerative and aging related and cannot be attributed to the accident (*see* NYSCEF Doc. # 46).

Further, "[t]he papers submitted by the defendant failed to eliminate triable issues of fact regarding the plaintiff's claim, set forth in the bill of particulars, that he sustained a

serious injury under the 90/180-day category of Insurance Law § 5102(d)" (*Reid v. Edwards- Grant*, 186 A.D.3d 1741, 129 N.Y.S.3d 798 [2 Dept., 2020]). Defendant relies on plaintiff's deposition testimony that she obtained employment after the accident (*see* NYSCEF Doc. # 38 at ¶ 40). "While the defendant relied upon the transcript of the plaintiff's deposition testimony to establish her prima facie entitlement to judgment as a matter of law with respect to the 90/180-day category, this evidence failed to identify the plaintiff's usual and customary daily activities during the specific relevant time frame, and did not compare the plaintiff's pre-accident and post-accident activities during that relevant time frame" (*id.*). Here, plaintiff testified that since this accident she cannot run like she used to (*see* NYSCEF Doc. # 42 at 97). As defendants did not meet their burden, this Court need not examine the sufficiency of plaintiff's opposition papers.

Accordingly, that branch of defendants' motion for summary judgment to dismiss the complaint of Ashman-Samuels is denied.

Edwards

With respect to Edwards, defendants met their burden and establish that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d). As stated above, Edwards alleged that he sustained sprain/strain of the cervical and lumbar spine, as well as bulging/ herniated discs. Defendant provided the sworn medical report of Dr. Jeffrey Guttman, M.D., who examined plaintiff on January 24, 2019 and found full range of motion in Edwards' cervical and lumbar spine. The doctor opined that "[b]ased on today's examination there is no objective medical evidence in the medical chart and imaging which substantiates that the examinee had incurred traumatic injury to their

body, in the vehicle during the accident. There are no objective clinical findings indicative of a present disability, and functional impairment, which prevents the examinee from engaging in ADL, and usual activities including work, school, and hobbies. There is no permanency as a result of the claimed injuries listed on the bill of particulars” (NYSCEF Doc. # 47). Defendants further provided the sworn report of Dr. Michael J. Carciente, M.D., who examined Edwards on August 28, 2018, and found no neurological injury (*see* NYSCEF Doc. # 48) and the sworn report of Dr. Eric L. Cantos who reviewed plaintiff’s 2016 MRIs and found the injuries to be degenerative (*see* NYSCEF Doc. # 49).

With respect to the 90/180 category, defendants rely on Edwards’ deposition testimony that he was able to obtain employment after the accident and that he was confined to home for two and a half months due to his injuries (*see* NYSCEF Doc. # 38). As stated above, Edward’s deposition testimony compared his typical activities before the accident and after, it is sufficient to establish that plaintiff does not meet the 90/180 category of Insurance Law § 5102(d) (*see Reid v. Edwards- Grant*, 186 A.D.3d 1741, *supra*).

However, in opposition, Edwards provided credible medical evidence sufficient to raise a triable issue of fact on the significant limitation and permanent consequential limitation categories of Insurance Law 5102(d). Plaintiff provided the sworn report of Dr. Kamal A. Tadros, M.D. from his examination on July 30, 2020, which showed range of motion loss in his cervical and lumbar spine (*see above; see* NYSCEF Doc. # 92).

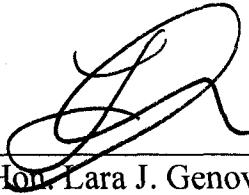
Accordingly, that branch of defendants' motion for summary judgment dismissing the complaint as to Edwards pursuant to Insurance Law § 5102(d) is denied.

Conclusion

For the above stated reasons, motions sequence two, three and four for summary judgment are denied.

This constitutes the decision and order of this Court.

ENTER:



Hon. Lara J. Genovesi
J.S.C.

2021 FEB 18 AM 9:12
KINGS COUNTY CLERK
FILED
