

Johns v Marcellin

2021 NY Slip Op 31190(U)

March 18, 2021

Supreme Court, Kings County

Docket Number: 513083/2019

Judge: Mark I. Partnow

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part ⁴³ of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 18th day of March, 2021.

P R E S E N T:

HON. MARK I. PARTNOW,
Justice.

----- X

JAMELL JOHNS,
Plaintiff,

- against -

WILLIAM MARCELLIN, PATRICIA EDWARD,
ABDUL AWAL AND CB LIVERY LEASING LLC,

Defendants.
----- X

DECISION AND ORDER
Index No. 513083/2019

The following papers numbered 40 to 72 read herein:

NYSCEF Page #

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____

40-56 58-61

Opposing Affidavits (Affirmations)
Memorandums of Law _____

63-66 67-70

Reply Affidavits (Affirmations) _____

71 72

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Upon the foregoing papers, defendants, Abdul Awal and CB Livery Leasing LLC, move (sequence 3) for an order granting them: 1) leave of Court to file a late motion; and 2) summary judgment pursuant to CPLR 3212 and dismissal of the complaint on the basis that Jamell Johns (Plaintiff) did not suffer a serious injury as defined by New York State's Insurance Law 5102(d) and 5104(a). Co-defendants, William Marcellin and Patricia Edward, cross-move (sequence 4) for the same relief and rely on the exhibits submitted as part of motion sequence 3. For the reasons stated below, both motions are denied in their entirety.

Background

On June 13, 2019, Plaintiff commenced the instant action for damages for personal injuries sustained by filing a summons and verified complaint with the Kings County Clerk's office. Plaintiff's verified complaint and deposition testimony allege the following salient facts amongst others. On or about August 2, 2018, Plaintiff was a backseat passenger in a vehicle operated by William Marcellin and owned by Patricia Edward. While Plaintiff was in the Marcellin vehicle, the Marcellin vehicle collided into a vehicle operated by Abdul Awal and owned by CB Livery Leasing LLC. According to the verified complaint (attached as Exhibit A to motion sequence 3) Plaintiff alleges that the collision caused him to sustain serious physical injuries. According to the bill of particulars (attached as Exhibit B to motion sequence 3), Plaintiff alleges injuries to his Lumbar and Cervical Spine, his right shoulder and his right wrist. Furthermore, Plaintiff alleges to have sustained: 1) a significant limitation of use of a body function and/or system; 2) a permanent consequential limitation of use of a body organ and/or member; and 3) a medically determined injury or impairment of a non-permanent nature that prevented Plaintiff from performing substantially all of the material acts that constituted Plaintiff's usual and customary daily activities for not less than ninety days during one hundred eighty days immediately following the accident.

Timeliness of Defendants' Summary Judgment Motions

Plaintiff contends that the instant motions must be denied as untimely, since the motions were filed and served beyond time frames required by CPLR 3212(a) and the Kings County Supreme Court Uniform Civil Term Rules.

CPLR 3212(a) provides that any party may move for summary judgment after issue has been joined; provided however, that the Court may set a date after which no such motion may be made (see CPLR 3212[a]). The Kings County Supreme Court Uniform Civil Term Rules provides in pertinent part that, “motions for summary judgment may be made no later than sixty (60) days after the filing of a Note of Issue... the above time limitation may only be extended by the Court upon good cause shown.”

Plaintiff filed his note of issue on May 6, 2020. Shortly thereafter, defendants Marcellin and Edward moved by motion [seq. 2] to vacate the note of issue, arguing that discovery was not complete. Specifically, Defendants contended that Plaintiff had yet to appear for an independent medical examination and thus, the filing of the note of issue was premature. By order dated August 3, 2020, the Honorable Justice Lizette Colon denied vacatur of the note of issue and ordered the parties to conduct additional discovery pursuant to the deadlines set out in the order. Further, Justice Colon declined to extend the time for service of any substantive motion and permitted the parties to renew that portion of the application “before IAS Judge pursuant to Brill” (Justice Colon’s order attached as Exhibit E to motion sequence 3).

Here, Defendants demonstrated good cause in the delay in filing their summary judgment motions by explaining that the Plaintiff’s independent medical examination was not conducted until after the note of issue had been filed, and that the results of these examinations provided the evidentiary basis for their motions for summary judgment (see *Kunz v. Gleeson*, 9 AD3d 480, 481 [2d Dept 2004]; see also *Brill v. City of New York*, 2 NY3d 648 [2004]). Thus, Plaintiff’s request to deny the instant motions as untimely is denied.

Motion for Summary Judgment pursuant to CPLR 3212

The defendants seek an order pursuant to CPLR 3212 dismissing the verified complaint on the basis that Plaintiff did not suffer a serious injury as defined by New York State's Insurance Law 5102(d). "As the moving party, the defendants initially have the burden to establish that Plaintiff did not sustain a 'serious injury' within the meaning of the statute" (see *Nolasco-Ochoa v. Kollanethu*, 181 AD3d 688, 689 [2nd Dept 2020], citing *Toure v. Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; see also *Gaddy v. Eyler*, 79 NY2d 955, 956—957[1992]).

"A defendant can establish that the plaintiff's injuries are not serious within the meaning of New York State Insurance Law 5102(d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (*Nunez v. Teel*, 162 AD3d 1058, 1059 [2d Dept 2018], quoting *Grossman v. Wright*, 268 AD2d 79, 83 [2d Dept 2000]). "With this established, the burden shifts to the plaintiff to come forward with evidence to overcome the defendant's submissions by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law" (*Grossman*, 268 AD2d at 84).

Here, defendants Awal and CB Livery Leasing LLC submitted the affirmation of Dr. Dana Mannor, an orthopedist, who, with the use of a goniometer, tested the range of motion of Plaintiff's cervical spine, lumbar spine, right shoulder, left shoulder, and right wrist/hand. The orthopedist reported that the ranges of motion were all within normal ranges, and set forth her specific measurements, and compared them to the norms. She also described the various other orthopedic tests that she performed and reported that all the results of these other exams were negative. Dr. Mannor concluded that Plaintiff's injuries were now resolved and without

permanency, and that Plaintiff was capable of performing all of his daily living activities without restriction. Thus, Defendants submitted competent medical evidence establishing, prima facie, that Plaintiff's alleged injuries do not constitute serious injuries under either the permanent consequential limitation of use or significant limitation of use categories of Insurance Law 5102(d).

In opposition, however, Plaintiff raised a triable issue of fact as to whether he sustained serious injuries under the permanent consequential limitation of use and significant limitation of use categories of Insurance Law 5102(d). Plaintiff submitted the affidavit of Dr. Scott Leist, a chiropractor, who also tested Plaintiff's range of motion in his cervical and lumbar spine. Dr. Leist used a goniometer to examine Plaintiff and reports that the test results show a significant restriction in Plaintiff's range of motion of the cervical and lumbar spine. Additionally, Plaintiff submits the affidavit of Dr. Narayan Parachuri, a radiologist, who attests that a magnetic resonance imaging (MRI) conducted on Plaintiff reveals significant injuries to Plaintiff's right shoulder and right wrist. Specifically, Dr. Parachuri states that Plaintiff has a surface tear of the supraspinatus tendon of the right shoulder and extensor carpi ulnaris tendinosis of the right wrist, amongst other injuries. Therefore, Plaintiff has demonstrated a triable issue of fact as to whether he sustained serious injuries under the permanent consequential limitation of use and significant limitation of use categories of Insurance Law 5102(d).

Lastly, defendants Awal and CB Livery Leasing LLC failed to meet their prima facie burden of showing that Plaintiff did not sustain a serious injury within the meaning of the 90/180-day category of Insurance Law 5102(d). Awal and CB Livery Leasing LLC relied upon the transcript of the Plaintiff's deposition testimony to establish their prima facie entitlement

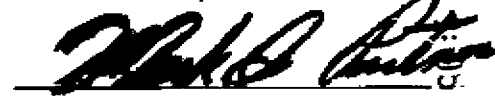
to judgment as a matter of law. Awal and CB Livery Leasing I.LC failed to identify Plaintiff's "usual and customary daily activities during the specific relevant time frame, and did not compare Plaintiff's pre-accident and post-accident activities during that relevant time frame" (see *Reid v. Edwards-Grant*, 186 AD3d 1741, 1742 [2d Dept 2020]). Since Defendants failed to meet their prima facie burden, it is unnecessary to determine whether the papers submitted by the Plaintiff in opposition were sufficient to raise a triable issue of fact with regard to the 90/180-day category of Insurance Law 5102(d). Accordingly, it is hereby

ORDERED, that the portions of motion sequence 3 and the cross-motion sequence 4, seeking to file a late motion for summary judgment is granted; and it is further

ORDERED, that the portions of motion sequence 3 and the cross-motion sequence 4, seeking summary judgment pursuant to CPLR 3212 and dismissal of the complaint on the basis that Plaintiff did not suffer a serious injury as defined by New York State's Insurance Law 5102(d) and 5104(a) is denied in its entirety.

This constitutes the decision and order of the Court.

E N T E R,



Hon. Mark I. Partnow, J. S. C.

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