

Wesel v Malik

2025 NY Slip Op 34817(U)

December 5, 2025

Supreme Court, Kings County

Docket Number: Index No. 516828/19

Judge: Lisa S. Ottley

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.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS – PART 24

-----X
GITA WESEL and SIDNEY WESEL,

Mot. Seq. # 1

Plaintiffs,

Index # 516828/19

-against-

DECISION AND ORDER

MOHAMMAD A. MALIK and ADOM RENTAL
TRANSPORTATION INC.,

Defendants.
-----X

HON. LISA S. OTTLEY

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Notice of Motion for Summary Judgment submitted on January 13, 2025.

Papers	Numbered
Notice of Motion and Affirmation	1&2 [Exh. A-E]
Affirmation/Affidavit in Opposition.....	3 [Exh. A-G]

Plaintiffs, Gita Wesel and Sidney Wesel, commenced this action to recover for injuries allegedly sustained as a result of a motor vehicle accident which occurred on July 9, 2017. Defendants move for an order pursuant to CPLR 3212 dismissing plaintiffs' complaint in its entirety on the grounds that the plaintiff has not sustained a serious injury pursuant to Section 5102(d) of the Insurance Law.

The Bill of Particulars for the plaintiff, Gita Wesel, alleges that she sustained injuries to the lumber spine: derangement; L4-L5 and L3-L4 disc herniations; L5-S1, L2-L3 and L1-L2 disc bulges; L5-S1 radiculopathy; exacerbation; thoracic spine: derangement; T11-T12 and T10-T11 disc herniations; radiculopathy; exacerbation; cervical spine: derangement; compression fractures at the C4, C5, and C6 disc levels; C4-C5 posterior disc herniation and posterior osseous vertebral ridging; C5-C6 posterior central disc bulge; C6-C7 posterior broad-based disc herniation and posterior osseous ridging; C7-T1 broad based central disc bulge; radiculopathy; exacerbation; left wrist: derangement; median nerve entrapment; carpal tunnel syndrome; left knee: derangement; anterior and posterior cruciate ligament tears; extensive tear of the medial meniscus; synovial effusion; narrowing of the medial femorotibial joint compartment; medial collateral ligament strain; medial distraction of meniscal fragments; tear of the lateral meniscus; patellofemoral chondromalacia; and exacerbation.

The Bill of Particulars for the plaintiff, Sidney Wesel, alleges that he sustained injuries to the lumbar spine: derangement; L4-L5 disc herniation; L5-S1, L3-L4 and L2-L3 disc

bulges; radiculopathy; acute L5 radiculopathy; exacerbation; left wrist: derangement; entrapment of the median nerve; carpal tunnel syndrome; cervical spine: derangement; sprain; discogenic neck pain; C3-C4 posterior disc herniation; C4-C5 posterior broad based central disc herniation; C5-C6 posterior disc herniation; C6-C7 posterior broad based central and peripheral disc herniation; C2-C3 posterior broad based disc bulging; C7-T1 posterior central disc bulging; radiculopathy; and exacerbation.

It is well settled that to grant summary judgment, it must clearly appear that no material issue of fact has been presented. *See, Grassick v. Hicksville Union Free School District*, 231 A.D.2d 604, 647 N.Y.S.2d 973 (2nd Dept., 1996), “where the moving party has demonstrated its entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring the trial of the action.” *See also, Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 [1980].

The defendants argue that the plaintiffs have failed to meet the serious injury threshold, and the medical reports submitted in support of the motion for summary judgment, objectively demonstrate a lack of disability or impairment to establish proof of a serious injury, pursuant to CPLR Section 5102(d) of the New York State Insurance Law. Specifically, the defendants argue that the plaintiffs’ alleged injuries are not permanent, did not result in a significant limitation of use of a body part, and did not prevent the plaintiffs from performing substantially all their customary daily activities for the 90 days following the accident in question. In support of defendants’ motion for summary judgment, defendants submitted the independent medical findings of Dr. Hugh Selznick, a board-certified orthopedic surgeon, who concluded upon objective tests and examination of the plaintiffs that their alleged injuries had resolved and were not significant or permanent as a result of the motor vehicle accident. Dr. Selznick found no functional disability or objective verification of the plaintiffs’ complaints that would negate the objective tests performed on plaintiffs’ cervical spine, lumbar spine, thoracic spine, left wrist, and left knee. The conducted tests revealed full range of motion for both plaintiffs, except for the lumbar spine of plaintiff, Sidney Wesel. Defendants also argue that plaintiff, Sidney Wesel’s testimony as to being confined to home from work for one to two weeks immediately after the accident fails to establish that he was confined for a significant duration of time after the accident, nor were his activities significantly curtailed.

In opposition to the defendants’ motion for summary judgment, plaintiffs argue that the defendants’ doctor found restricted range of motion, paraspinal tenderness, and tenderness on palpation to the lumbar spine of plaintiff, Sidney Wesel, yet still diagnosed him with a resolved lumbar spine and failed to address whether the range of motion restrictions found were a result of, or exacerbated by, the subject accident that took place two years after the accident. The plaintiffs further argue that the defendants’ doctor failed to note any pre-existing injuries/issues and admitted that he reviewed none of the plaintiffs’ medical records from their treating providers. In addition, the defendants failed to submit a radiological review of plaintiffs’ MRI films taken after the accident and cannot challenge the findings of plaintiffs’ treating providers. In further support, plaintiffs submit their MRI reports/affirmations and affirmations of Dr. Leonard Bleicher to raise issues of fact as to the plaintiffs having sustained serious injuries pursuant to CPLR 5102(d). According to the

plaintiffs, their medical treatment and affirmed reports raise an issue of fact as to whether they suffered a serious injury and therefore, summary judgment should not be granted.

A defendant can establish that a plaintiff's injuries are not serious within the meaning of 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. *See, Edwards v. Ali*, 75 Misc.3d 1213(a), 168 N.Y.S.3d 676 (2nd Dept., 2022). Once established, the burden shifts to the plaintiff to come forward with evidence to negate the defendant's submissions by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law. *See, Grossman v. Wright*, 268 A.D.2d 79 (2nd Dept., 2000).

Pursuant to Insurance Law CPLR 5102(d), a serious injury is defined as follows:

A personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member, significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities or not less than ninety days during the one hundred eighty days immediately following the injury or impairment.

To recover under the permanent consequential loss category, the limitation of use or function needs to be significant or consequential as it relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose, and use of a body part. *See, Como v. Tomasky*, 64 Misc.3d 1224(A), 117 N.Y.S.3d 471 (2nd Dept., 2019) *citing, (Dufel v. Green*, 84 N.Y.2d 795, 622 N.Y.S.2d 900 [1995]). A minor, mild, or slight limitation of use cannot satisfy the meaning of serious injury as defined by 5102(d). To satisfy the definition of serious injury under the 90/180 category a plaintiff must provide competent medical evidence to support their claim that they sustained a medically determined injury of a non-permanent nature which prevented them from performing their usual and customary activities for no less than 90 out of 180 days following the subject accident. *See, Sainte-Aime v. Suwai Ho*, 274 A.D.2d 569, 712 N.Y.S.2d 133 (2nd Dept., 2000).

The court finds that the defendants' submissions fail to make a prima facie showing that the plaintiffs did not sustain a serious injury within the meaning of Insurance Law 5102(d) because of the subject accident. The defendants' examining doctor, Dr. Selznick, stated in his report that there were no legally authenticated medical records available for review, and after having conducted objective range of motion tests, as well as objective orthopedic tests, concluded that the plaintiff did not sustain any significant or permanent injury as a result of the motor vehicle accident. However, the court notes that Dr. Selznick's independent examinations were conducted approximately six years after the subject accident and fails to offer an opinion regarding the plaintiff's physical condition contemporaneously to the accident. *See, Washington v. Lawrence*, 58 Misc.3d 1214(A), 95

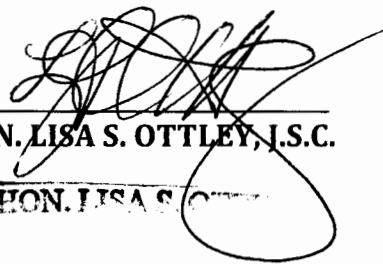
N.Y.S.3d 126 (2nd Dept., 2018); *Faun Thai v. Butt*, 34 A.D.3d 447, 824 N.Y.S.2d 131 (2nd Dept., 2006); *Volpetti v. Yoon Kap*, 28 A.D.3d 750, 814 N.Y.S.2d 236 (2nd Dept., 2006) where the court held that the experts failed to relate their findings concerning this category of serious injury for the period of time immediately following the accident, and under these circumstances, it was not necessary to consider whether the plaintiff's papers submitted in opposition to defendant's motion were sufficient to raise a trial issue of fact.

The burden to raise a triable issue of fact has not shifted to the plaintiff.

Accordingly, it is hereby ORDERED, that the defendants' motion for summary judgment dismissing plaintiff's complaint is denied in its entirety.

This constitutes the decision and order of this Court.

Dated: Brooklyn, New York
December 5, 2025



HON. LISA S. OTTLEY, J.S.C.
HON. LISA S. OTTLEY

KINGS COUNTY CLERK
FILED
2025 DEC 11 A 9:39