Fergus v Fox Ride Inc.
2026 NY Slip Op 31461(U)
April 8, 2026
Supreme Court, Kings County
Docket Number: Index No. 512883/2019
Judge: Anne J. Swern

At an IAS Trial Term, Part 75 of the Supreme Court of the State of New York, Kings County, at the Courthouse located at 360 Adams Street, Brooklyn, New York on the 8th day of April 2026

P R E S E N T: HON. ANNE J. SWERN, J.S.C.

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MAHKI FERGUS,

Plaintiff(s),

-against-

FOX RIDE INC, MAMADOU OURY BAH and MARINA RODRIGUEZ,

Defendant(s).

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DECISION & ORDER

Index No.: 512883/2019

Calendar No.: 16 & 44

Motion Seq.: 5 and 6

Return Date: 2/26/2026

Recitation of the following papers as required by CPLR 2219(a):

		NYSCEF Papers Numbered
005	Notice of Motion and Supporting Documents	96-108
	Affirmation in Opposition and Supporting Documents	109-114
	Reply Affirmation	115
006	Notice of Motion and Supporting Documents	116-122
	Affirmation in Opposition	123

Upon the foregoing papers, the decision and order of the Court is as follows:

Plaintiff commenced this action to recover damages for personal injuries sustained in an automobile accident on 12/14/2018. He was a passenger in the vehicle owned by Fox Ride, Inc. ("Fox Ride"), which was operated by Mamadou Oury Bah's ("Bah") when it was rear-ended by that operated by Marina Rodriguez ("Rodriquez").

Defendants have each moved for summary judgment per CPLR § 3212 dismissing this action based on plaintiff's failure to sustain a serious injury as defined by Insurance Law § 5102. Defendants argue that plaintiff has not sought treatment since 2019. Also, plaintiff's diagnostic testing reveals only disc bulges at C5-6, C6-7 and L5-S1, with associated strain and sprain.

Therefore, since bulging discs in and of themselves do not constitute a serious injury, this action must be dismissed. Defendants also rely on plaintiff's deposition testimony.

Plaintiff testified that he missed approximately a week of high school. He asserted that the accident did not have an impact on his schooling (pp.10-11) and besides this one week, he was not confined to his bed or home (p.46). As of 1/31/2022, the date of his deposition, plaintiff testified that there were no activities he can no longer perform since the accident, but that he is not as physically active as he was before the accident; he does not work out or play pick-up basketball with the same frequency (pp.34-35). Also, he stated that he could not apply for jobs that require physical activity as of 1/31/2022 (pp.36-38).

In opposition, plaintiff asserts that his doctor's recent examination determined with a goniometer that he has decreased range of motion of the affected areas, all of which contradicts the defense IME doctor's negative findings. Additionally, since the defense's radiologist opined that plaintiff's disc bulges are degenerative, this is a question of fact for the jury since plaintiff was 17 years old at the time of the accident.

The motions are granted.

Summary judgment may be granted only when no triable issue of fact exists (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). "A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, producing sufficient evidence to demonstrate the absence of any material issue of fact. However, a failure to demonstrate a *prima facie* entitlement to summary judgment motion, requires a denial of the motion regardless of the adequacy of the opposing papers" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], *citing Alvarez v Prospect Hospital,* 68 NY2d 324). "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to

establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003] and *Alvarez v Prospect Hospital*, 68 NY2d 324).

The Court's only role upon a motion for summary judgment is to identify the existence of triable issues, and not to determine the merits of any such issues (*Vega v Restani Construction Corp.,* 18 NY3d 499, 505 [2012]) or the credibility of the movant's version of events (*see Xiang Fu He v Troon Management, Inc.,* 34 NY3d 167, 175 [2019] [internal citations omitted]). The Court must view the evidence in the light most favorable to the nonmoving party, affording them the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Shop & Stop, Inc*., 65 NY2d 625, 626 [1985]). The motion should be denied where the facts are in dispute, where different inferences may be drawn from the evidence, or where the credibility of the witnesses is in question (*see Cameron v City of Long Beach*, 297 AD2d 773, 774 [2d Dept 2002]).

In the context of a motion for summary judgment based on a plaintiff's failure to meet the "serious injury" criteria of Insurance Law § 5102, the Court of Appeals has found that there is a cessation of treatment rather than a "so-called gap in treatment" when a plaintiff does not seek out treatment until years later for the purposes of litigation (*Pommells v Perez,* 4 NY3d 566, 574 [2005]). Therefore, to survive summary judgment, plaintiff must come forward with some reasonable explanation for this lack of treatment to demonstrate a triable issue of fact (*id.*).

Here, plaintiff's physician does not explain the almost seven-year cessation of treatment since 2019 (*id.*). Likewise, plaintiff's affidavit did not explain it (*Atken v Jackson,* 164 AD3d 870; *see generally Ramkumar v Grand Style Transp. Enters. Inc.,* 22 NY3d 905, 906 [2013]). Plaintiff's affidavit is also contradictory to his deposition testimony. For example, in his affidavit he states that he no longer plays basketball. Assuming this is true, plaintiff does not state when

he stopped playing basketball since his deposition. These statements contradicting the deposition testimony that he played basketball with less frequency are insufficient to defeat summary judgment (*Atamian v Mintz,* 216 AD2d 430, 430 [2d Dept 1995]). More importantly, the affidavit was designed to feign triable issues of fact to avoid the consequences of his deposition testimony (*Mitthauer v T. Moriarty & Sons, Inc.,* 69 AD3d 588, 589 [2d Dept 2010]). Further, a curtailment of recreational and household activities and an inability to lift heavy items as stated in plaintiff's affidavit are insufficient to defeat summary judgment (*Meriweather v Green West 57th Street,* LLC, 156 AD2d 875, 876 [2d Dept 2017]; *Omar v Goodman,* 295 AD2d 413, 414 [2d Dept 2002]).

Next, plaintiff's physician's affirmation offers little probative value since the diagnostic testing films only demonstrated disc bulges with strains and sprains which do not rise to the level of a serious injury (*Ranford v Tim's Tree and Law Service, Inc.,* 71 AD3d 973, 974 [2d Dept 2010]; (*Kearse v New York City Tr. Auth.,* 16 AD3d 45, 51 [2d Dept 2005]). The affirmation further lacks probative value since it is dated almost seven years after plaintiff's last examination (*Keena v Trappen*, 294 AD2d 405, 406 [2d Dept 2002]). Plaintiff's physician's affirmation could not establish that he sustained a "medically determined injury" because he did not review the MRI films and plaintiff's radiologist did not submit an affirmation attesting to the findings in the MRI reports to rebut the defense radiologist's opinion concerning degeneration of plaintiff's cervical and lumbar discs (*see Cavitolo v Broser,* 163 AD3d 913, 914 [2d Dept 2018]); *see generally Keena v Trappen*, 294 AD2d 406.

The Court has considered the parties' remaining arguments and found same to be without merit or moot by reason of the foregoing findings.

Accordingly, it is hereby

ORDERED that motion sequences 005 and 006 for an order of summary judgment per CPLR § 3212 dismissing this action based on Insurance Law § 5102 are GRANTED, and this action is dismissed in its entirety, and it is further

ORDERED that the Clerk shall enter judgment accordingly.

This constitutes the decision and order of the Court.

E N T E R:

Hon. Anne J. Swern, J.S.C.
Dated: April 8, 2026