

<b>Diop v Youth Tr. LLC</b>
2018 NY Slip Op 32335(U)
September 20, 2018
Supreme Court, New York County
Docket Number: 161599/2015
Judge: Adam Silvera
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART IAS MOTION 22

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MOUHAMADOU DIOP,  
  
Plaintiff,  
  
- v -  
  
YOUTH TRANSIT LLC, WILLIAMSBURG TAXI CO.  
INC., LOBSANG DORJEE  
  
Defendant.

INDEX NO. 161599/2015  
  
MOTION DATE 08/13/2018  
  
MOTION SEQ. NO. 002

**DECISION AND ORDER**

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HON. ADAM SILVERA:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 43, 44, 47, 48, 49, 50, 51, 52, 53 were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, it is ORDERED that defendants' motion for summary judgment, pursuant to CPLR 3212 to dismiss plaintiff's complaint is denied. Plaintiff Mouhamadou Diop alleges that on June 6, 2016, at the intersection of Park Avenue and East 70<sup>th</sup> Street, in the County, City and State of New York, he was seriously injured when the taxi cab he was operating was stopped at a red light and struck from behind by a vehicle operated by defendant Lobsang Dorjee and controlled/maintained by defendant Williamsburg Taxi Co. Inc. and defendant Youth Transit LLC. This decision and order addresses defendants' motion for summary judgment in favor of defendants against plaintiff for failure to show the existence of a serious injury as defined under Insurance Law 5102(d). The decision and order are as follows:

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York University Medical Center*, 64

NY2d 851, 853 [1985]). Once such entitlement has been demonstrated by the moving party, the burden shifts to the party opposing the motion to “demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure ... to do [so]” (*Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]).

In order to satisfy their burden under Insurance Law § 5102(d), a plaintiff must meet the “serious injury” threshold (*Toure v Avis Rent a Car Systems, Inc.*, 98 NY2d 345, 352 [2002] [finding that in order establish a prima facie case that a plaintiff in a negligence action arising from a motor vehicle accident did sustain a serious injury, plaintiff must establish the existence of either a “permanent consequential limitation of use of a body organ or member [or a] significant limitation of use of a body function or system”]).

The Court notes that summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently established that it is warranted as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). “In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility” (*Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 [1st Dep’t 1992], citing *Dauman Displays, Inc. v Masturzo*, 168 AD2d 204 [1st Dep’t 1990]). As such, summary judgment is rarely granted in negligence actions unless there is no conflict at all in the evidence (*See Ugarriza v Schmieder*, 46 NY2d 471, 475-476 [1979]).

Here, defendants allege that plaintiff did not sustain a serious injury and provide the affirmations of Dr. Naunihal Sachdev Singh and Dr. Arnold T. Berman who opined that the alleged injuries did not prevent plaintiff from working or daily activities (Mot, Exh F & G). Defendants allege that plaintiff had prior medical issues and provide the affirmation of Dr.

Audrey Eisenstadt who opined that plaintiff suffers from degenerative joint disease in the left shoulder and degenerative disc disease in the cervical spine (*id.*, Exh H).

In his medical report, Dr. Berman records the range of motion of plaintiff's left shoulder which shows that the body part has a range of motion that differs 40 degrees from normal in forward elevation and 80 degrees from normal in abduction (*id.*, Exh G at 3). Defendants' motion contains evidence of a restriction in plaintiff's range of motion. Thus, defendants have failed to satisfy their burden as a defendant fails to meet its initial burden when one of its examining physicians finds a limited range of motion (*Servones v Toribio*, 20 AD3d 330 [1st Dep't 2005] citing *McDowall v Abreu*, 11 Ad3d 590 [2d Dep't 2004] [finding that "defendants' examining doctor found that the plaintiff continued to have restrictions in motion of her lower back ... in light of this finding by the defendants' expert, the defendants did not meet their initial burdens"]).

The Court also notes that plaintiff's opposition raises an issue of fact. Plaintiff's opposition, contrary to defendants' motion, notes that plaintiff did indeed stop working as a cab driver for 7 months following the incident at issue. Plaintiff also attaches the affirmed medical report of Dr. Stella Mansukhani who found objective range of motion loss in plaintiff's cervical spine and left shoulder and noted that plaintiff did not suffer from prior injuries to these body part (*Aff in Op*, Exh B). Dr. Mansukhani concludes that plaintiff's injuries are indeed causally related to the accident at issue (*id.*). Thus, plaintiff has raised an issue of fact precluding summary judgment.

Accordingly, it is

ORDERED that defendants' motion for summary judgment to dismiss plaintiff's Complaint on the grounds that plaintiff allegedly has not sustained a "serious injury" as defined in 5102 and 5104 of the Insurance Law is denied; and it is further

ORDERED that within 30 days of entry, plaintiff shall serve a copy of this decision/order upon defendants with notice of entry.

This constitutes the Decision/Order of the Court.



9/20/2018  
DATE

ADAM SILVERA, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER			<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN			<input type="checkbox"/>
					<input type="checkbox"/>
					REFERENCE