

Gillece v Sean Cab Corp.
2019 NY Slip Op 33472(U)
November 21, 2019
Supreme Court, New York County
Docket Number: 152364/2018
Judge: Adam Silvera
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ADAM SILVERA PART IAS MOTION 22
Justice
INDEX NO. 152364/2018
ROSA GILLECE MOTION DATE 05/29/2019
Plaintiff, MOTION SEQ. NO. 001
- v -
SEAN CAB CORP, DECISION + ORDER ON MOTION
Defendant.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21 were read on this motion to/for JUDGMENT - SUMMARY.

Before the Court is plaintiff Rosa Gillece's motion for an Order to amend the caption to reflect the addition of defendant David Boateng who was previously identified as "John Doe"; for summary judgment on the issue of liability; and for summary judgment on the issue of "serious injury" finding that plaintiff suffered a fractured bone. Defendants oppose the motion.

Upon the foregoing documents, it is ORDERED that plaintiff's the branch of plaintiff's motion to amend is granted. Plaintiff's motion contends that on February 1, 2018, at the intersection of Lexington Avenue and East 48th Street in the County, City, and State of New York, plaintiff was exiting defendants' vehicle when it began to drive away with her hand inside of the vehicles sliding door and was seriously injured. Plaintiff, at the time of commencement of the action, was unaware of the operator of the vehicle and has since determined the operator to be David Boateng. Plaintiff now seeks to amend the caption of the case to replace David Boateng in the place and stead of defendant "John Doe".

Pursuant to CPLR § 3025(b), "[a] party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court

or by stipulation of all parties.” Leave to amend pleadings is generally freely granted, absent prejudice and surprise (See *Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983]; *Antwerpse Diamantbank N.V. v Nissel*, 27 AD3d 207, 208 [1st Dep’t 2006]). To find prejudice, there must be some indication that the defendant has been hindered in the preparation of his case or prevented from taking some measure in support of his position (See *Abdelnabi v NYC Transit Authority*, 273 AD2d 114, 115 [1st Dep’t 2000]). Plaintiff has set forth a basis for late service on Boateng since he was only recently identified through discovery and has demonstrated that there is no prejudice. Thus, plaintiff’s motion to amend is granted.

The branch of plaintiff’s motion for summary judgment on the issue of liability is granted. “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]).

Violation of the Vehicle and Traffic Law (“VTL”) constitutes negligence per se (See *Flores v City of New York*, 66 AD3d 599 [1st Dep’t 2009]). VTL 1162 states that “no person shall move a vehicle which is stopped, standing, or parked unless and until such movement can be made with reasonable safety. Further it is well settled that motor vehicle operators have a “duty to see that which, through the proper use of senses, should have been seen” (*Griffin v Pennoyer*, 49 AD3 341, 342 [1st Dept 2008]).

Plaintiff has demonstrated that defendants and Boateng violated the VTL. Plaintiff attaches her deposition and the deposition of Boateng in support of the motion. Plaintiff testified that she exited defendant's vehicle when Boateng began to drive off before she finished closing the door (Mot, Exh D at 18, ¶ 15-22). Boateng testified at deposition that he was the driver of the taxi and that he saw plaintiff on the floor through the rear-view mirror when she shouted, "driver stop, driver stop" (Mot, Exh E). Thus, plaintiff has demonstrated that Boateng, the operator of defendant's vehicle, did not look back to ensure that plaintiff had fully exited the taxi cab, and only saw her once she had fallen as a result of his untimely moving of the vehicle. Defendant's opposition fails to raise an issue of fact and hinges its argument on plaintiff's comparative negligence. The Court finds that defendant has not proffered evidence of plaintiff's negligence and that defendant is liable for the accident at issue. Thus, the branch of plaintiff's motion on the issue of liability as against defendants is granted.

The branch of plaintiff's motion for summary judgment for a finding that plaintiff suffered a "serious injury" pursuant to the Insurance Law as plaintiff allegedly fractured a bone is denied. 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"]).

Here, plaintiff submits the March 19, 2018 X-Ray report requested by plaintiff's doctor, Dr. Emmanuel Hostin, and conducted by Dr. Narayan B Paruchuri. The Report reveals that plaintiff sustained a fracture to the right shoulder (Mot, Exh F). While plaintiff's papers do

demonstrate a fracture, in opposition defendant points to the March 15, 2018, Follow-up Visit of Dr. Hostin who notes plaintiff's "fracture sustained on February 28" (Aff in Op, Exh A). The accident at issue occurred on February 1, 2018, thus an issue of fact exists as to whether the fracture was sustained on the date of the accident or afterwards. Thus, the branch of plaintiff's motion for summary judgment finding that plaintiff suffered a fractured bone is denied.

Lastly, the Court notes that during oral argument on November 6, 2019, plaintiff and defendants confirmed that all discovery in this matter is complete. Thus, the Court Orders plaintiff to file the Note of issue on or before December 23, 2019.

Accordingly, it is ORDERED that the branch of plaintiff's motion to amend is granted and the caption read as follows:

-----X

ROSA GILLECE,

Plaintiff,

-against-

Index No. 152364/2018

SEAN CAB CORP and DAVOD BOATENG

Defendants

-----X

And it is further;

ORDERED that the branch of plaintiff's motion for summary judgment on the issue of liability as against defendants in favor of plaintiff is granted;


ORDERED that the branch of plaintiff's motion granting summary judgment to plaintiff on the issue of threshold in that plaintiff suffered a fractured bone is denied; and it is further

ORDERED that within 30 days of entry of this order plaintiffs shall serve a copy, with notice of entry, upon all parties, the County Clerk (Basement of 60 Centre) and the Clerk of Trial Support (Room 148 of 60 Centre), who shall mark their records to reflect the amendment to the caption; and it is further

ORDERED that all discovery is complete, and plaintiff is directed to file Note of Issue on or before December 23, 2019.

This constitutes the Decision/Order of the Court.

11/21/19
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 type="checkbox"/>	DENIED
<input type="checkbox"/>	SETTLE ORDER	<input checked="" type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
		<input type="checkbox"/>	FIDUCIARY APPOINTMENT
		<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: