

Guity v County of Westchester
2019 NY Slip Op 34310(U)
April 18, 2019
Supreme Court, Westchester County
Docket Number: Index No. 53020/2017
Judge: John P. Colangelo
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To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
BERONA GUILTY,

Plaintiffs,

DECISION AND ORDER
Index No. 53020/2017
Motion Sequence 1

-against-

COUNTY OF WESTCHESTER,
LIBERTY LINES TRANSIT, INC.
YERITZA VASQUEZ, JOHN DOE, and
NATIONAL LIABILITY INSURANCE COMPANY,

Defendants.
-----X

COLANGELO, J.

The following papers were read on Plaintiff's Motion for Summary Judgment:
NYSCEF

Notice of Motion- Affirmation of Michael H. Joseph, Esq.,
Memorandum of Law- Exhibits 1-9 23-34

Affirmation in Opposition of Jason M. Bernheimer, Esq.
Exhibits A-D 41-46

Reply Affirmation of Michael H. Joseph, Esq.
Exhibit 1 47-48

This is an action brought by Plaintiff Berona Guity ("Plaintiff") seeking monetary damages through uninsured motorist coverage for personal injuries allegedly sustained in a motor vehicle accident on June 1, 2016 at approximately 8:57 am on the northbound Sprain Brook Parkway in the Town of Greenburgh, Westchester County, New York. At the time of the

accident, Plaintiff was a passenger on a Liberty Lines Transit bus, known as the Bee Line, owned by the County of Westchester, and operated by Yeritza Vasquez. Ms Vasquez was an employee of Liberty Lines Transit, Inc. and as such, was an employee of the County at the time of the accident.

Plaintiff commenced this action on March 7, 2017 by filing a Summons and Verified Complaint against the Defendants County of Westchester, Liberty Lines Transit, Inc., and Yeritza Vasquez (hereinafter "County Defendants"), and John Doe (a fictitious name which represents the identity of an individual whose actual identity is presently unknown), in which she alleged two causes of action. (Pl. Exh. 1). In the first cause of action, Plaintiff alleges that she sustained a "serious injury" as defined by Section 5102(d) of the Insurance Law solely as a result of the carelessness and negligence of the Defendants in the operation, maintenance and control of the of the bus and the vehicle. The second cause of action seeks Uninsured Motorist benefits from Liberty Lines Transit based upon their alleged obligation (policy which was in full force and effect) to provide coverage to Plaintiff, as an insured, who sustained personal injuries in an accident that was caused by an unidentified and/or uninsured motorist. (*Id.*)

Defendants filed their Verified Answer on April 19, 2017, in which they denied the allegations set forth in both counts, and set forth seven Affirmative Defenses and two Cross-Claims against Defendant John Doe, the driver whose vehicle made contact with the bus and fled. The Verified Answer did not assert any Affirmative Defenses to Plaintiff's second cause of action. (Pl. Exh. 2).

It is undisputed that the bus involved in the accident was equipped with an onboard video system that captured the accident. A copy of the video is offered by Defendants in opposition to

Plaintiff's motion. (Defs. Exh. A). Photographs of screenshots from the video are submitted by Plaintiff in support of the instant motion. (Pl. Exh. 5). According to the deposition testimony of Ms. Vasquez, the video surveillance accurately captured the occurrence of the accident and her driving in the minutes leading up to the accident. (Pl. Exh. 4, p. 14, lines 3-8, 20-24). Defendants does not dispute the accuracy of the video depiction of the accident.

The accident occurred as Ms. Vasquez was operating the bus in the center lane of the northbound Sprain Brook Parkway. The photographs (Pl. Exh. 5a-5g) show that at the time the bus driver was under an overpass, there was a vehicle stopped in the left hand lane in front of her. An SUV was in the left hand lane traveling faster than the bus and advancing from the rear of the bus to the front of the bus. The SUV overtakes the bus and has to move into the center lane or hit the stopped vehicle in its path. The SUV crossed into the center lane, and the rear quarter panel of the SUV impacted the rear of the bus, with force sufficient to cause the bus to move to the right. After the impact, Ms. Vasquez brought the bus to the right shoulder of the highway and the driver of the SUV fled the scene.

According to Defendants' counsel, the County Defendants do not dispute that the accident occurred when an unidentified SUV suddenly changed lanes on the Sprain Brook Parkway and by doing so, struck the driver's side front of the Liberty Lines bus. Also undisputed is that the accident constitutes an unidentified hit and run accident, or that the unidentified vehicle bears fault for causing the accident. However, the County Defendants dispute Plaintiff's claim of negligence on their part. (Affirmation of Jason Bernheimer, Esq., ¶6).

The instant motion seeks summary judgment on multiple issues- - the first is that Plaintiff is entitled to Uninsured Motorist ("UM") benefits; the second seeks summary judgment on the

issue of liability as an innocent passenger. The third issue is summary judgment on the serious injury threshold. Defendant opposes summary judgment to Plaintiff on all of the issues.

Summary Judgment

CPLR §3212(b) states in pertinent part that a motion for summary judgment "shall be granted if, upon all of papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party."

In *Andre v Pomeroy*, 35 NY2d 361, 364 (1974), the Court of Appeals held that "[s]ummary judgment is designed to expedite all civil cases by eliminating from the Trial Calendar claims which can properly be resolved as a matter of law . . . when there is no genuine issue to be resolved at trial, the case should be summarily decided, and an unfounded reluctance to employ the remedy will only serve to swell the Trial Calendar and thus deny to other litigants the right to have their claims promptly adjudicated."

It is well established that "[t]he 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 N.Y.2d 851, 853 (1985); *Ayotte v Gervasio*, 81 N.Y.2d 1062, 1063 (1993); *S.J. Capelin Associates, Inc. v. Globe Manufacturing Corp.*, 34 N.Y.2d 338, 341 (1974). *Finkelstein v. Cornell University Medical College*, 269 A.D.2d 114, 117 (1st Dept. 2000). Once the moving party has sustained his burden of making a prima facie showing of entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the

action." *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980).

Failure of the proponent of a motion for summary judgment to make a prima facie showing of entitlement requires denial of the motion, regardless of the sufficiency of the opposing papers. *Winegrad v New York University Medical Center*, 64 N.Y.2d 851, 853 (1985).

Uninsured Motorist Benefits

Plaintiff takes the position that "the deposition testimony and the video evidence squarely establish that the bus, upon which Plaintiff was a passenger, was hit by a driver who fled the scene and could not be identified and that the police immediately responded to the scene of the accident. As such, Plaintiff is entitled to uninsured motorist [UM] benefits." (Pl. Memorandum of Law, p.14).

Plaintiff's claim of entitlement to summary judgment on the UM benefits cause of action rests on the fact that she was injured as a result of a hit and run accident, with an unidentified driver and Liberty Lines was self insured for uninsured motorist benefits. (Pl. Memorandum of Law, p.13). The insurance policy under which Plaintiff attempts to seek uninsured motorist benefits is an Excess Indemnity Policy, number LEB0010164 in effect for the period July 1, 2015 to July 1, 2016. The policy provides excess coverage of \$750,000 above Liberty Lines Transit's self-insured retention of \$250,000. (Defs. Exh. B).

Defendants contend that the Uninsured/Underinsured endorsements in the policy make clear that the policy was intended to provide only the state minimum required coverage (of \$25,000), and that the UM/SUM benefits are to be paid completely within the self-insured retention by Liberty Lines Transit. Defendants take the position that the amount of UM coverage applicable to Plaintiff's claim is only the state minimum of \$25,000. (Bernheimer Aff. ¶11).

Form TRS 661 (05/09) of the policy states “[t]he intent of this policy is to provide the statutory minimum uninsured motorist coverage (UM). . .”

Plaintiff takes the position that while New York State requires a minimum coverage of \$25,000, Defendants opted to provide a self-insured retention of \$250,000 as well as excess coverage above that amount. Based upon the Defendants’ having opted to provide greater than the minimum required, Plaintiff requests that judgment be entered on her uninsured motorist claim and an inquest scheduled with the outer limit of the excess coverage being available to her (Pl. Reply ¶4).

With regard Plaintiff’s UM claim, Plaintiff has failed to make a prima facie showing of entitlement to summary judgment on the amount of UM coverage available to her under Liberty Lines’ insurance policy. While the Liberty Lines policy reflects self-retention of \$250,000, the policy clearly states that the intent of the policy is to provide the statutory minimum uninsured motorist coverage required by New York State. Accordingly, a triable issue of fact exists as to whether Plaintiff has \$250,000 or \$25,000 available coverage.

Summary Judgment on the Issue of Liability

Plaintiff contends that the video and photographs of screen shots from the video, as well as the deposition of Liberty Lines bus driver Vasquez establish that Ms. Vasquez was negligent and had some degree of fault, as did the unidentified driver, for causing the accident. As such, Ms. Vasquez and Liberty Lines Inc. are jointly and severally liable for her injuries. (Pl. Memorandum of Law, p.15). According to Plaintiff, “Ms. Vasquez had adequate warning that the bus she was operating was approaching a stopped or disabled vehicle in the left hand lane in front of her and that she traveled at the maximum possible speed, without making any adjustment

for the stopped vehicle,” citing Vehicle and Traffic Law §1180[a] which imposes a duty upon a driver to drive at a safe rate of speed under existing conditions. (Pl. Memorandum of Law , pp. 15-16). The bus was traveling in the center lane, as the unidentified SUV was approaching from behind in the left lane and heading directly for the disabled or stopped vehicle. Plaintiff cites the testimony of Ms. Vasquez wherein Ms. Vasquez acknowledges that when she first saw the stopped or disabled vehicle in the left lane, she was aware that there was also a vehicle traveling to her left. (Pl. Exh. 4, p. 23, lines 19-23). Ms. Vasquez observed the SUV to be going faster than the bus. (*Id.*, p. 25, lines 24-25; p. 26, lines 2-8). Ms. Vasquez did not brake prior to the collision. (*Id.*, p. 23, lines 24-25; p. 24, line 2). Ms. Vasquez did not keep the SUV on the left under constant observation - - she had to scan her mirrors, and cannot look at one object because there was another car on her right, and she is looking front and side to side. (*Id.*, p. 26, lines 9-16). Ms. Vasquez testified that when she observed the stopped or disabled car, “[she] took [her] foot off the accelerator and put the hazard - - the bus has a retardant, [she thinks] it’s called, and it slowed down the bus.” *Id.*, p. 23, lines 10-18; p. 27, lines 19-23).

Plaintiff argues that Ms. Vasquez was aware of the stopped vehicle, but failed to exercise reasonable care by operating the bus at its maximum speed and failing to brake and account for the stopped vehicle, despite knowing that the rapidly approaching vehicle to her left was going to hit the stopped vehicle or come into her lane. (Pl. Memorandum of Law, p. 17). While Plaintiff acknowledges that although the unidentified SUV was certainly negligent, she maintains that Ms. Vasquez also had some degree of negligence, and the Defendants are jointly and severally liable for all of her injuries. (*Id.*, p. 17).

Defendants point out that Ms. Vasquez testified that she was operating a bus that had a

speed governor that limited her speed to 50 or 55 mph, and that just prior to the accident, she was traveling at the maximum speed set by the governor. (Pl. Exh. 4, p. 13, lines 2-16; p. 15, lines 2-13). According to Ms. Vasquez, the accident occurred when the vehicle in the left lane moved from that lane to the right and hit the bus as the vehicle attempted to enter the center lane. (*Id.*, p. 31, lines 2-11). The back quarter panel of the car hit the front left side of the bus. (*Id.*, p. 31, lines 10-23). The force of the impact caused the bus to move to the right, and Ms. Vasquez regained control of the bus and moved to the right shoulder of the highway. (*Id.*, p. 33, lines 4-9; p. 34, lines 9-21).

Defendants argues that Plaintiff's claims of negligence against County Defendants are nothing more than speculation about what the bus driver should or could have done. (Bernheimer Aff. ¶18). In their view, the video depicting the accident establishes that the unidentified SUV was the sole cause of the accident. (*Id.*).

Plaintiff seeks summary judgment against the Defendants on the issue of liability based upon her claim that Ms. Vasquez was operating the bus at its maximum speed, failed to apply the brakes to account for the stopped vehicle in the left lane and to allow the rapidly approaching SUV, which was on course to either hit the stopped vehicle or come into the center lane, to safely pass into the middle lane.

Given that issues of fact exist as to which vehicle was responsible for the accident, it is not appropriate to grant summary judgment on the issue of liability as against the Defendants. Even as an innocent passenger, Plaintiff is required to make a prima facie showing as to which vehicle(s) were responsible for causing the accident. (*See Buffa v. Carr*, 148 A.D.3d 606 [1st Dept. 2017], citing *Oluwatayo v. Dulinayan*, 142 A.D.3d 113, 119 [1st Dept 2016]). However,

as stated in *Garcia v. Tri-County Ambulette Serv.*, 282 A.D.3d 206, 207 (1st Dept. 2001), CPLR 3212(g) permits the court to limit issues of fact for trial by specifying which facts are not in dispute or are incontrovertible. The right of an innocent passenger to summary judgment on the issue of whether he or she was at fault in the happening of an accident is not restricted by potential issues of comparative negligence as between the drivers of the two vehicles. (*See also Medina v. Rodriguez*, 92 A.D.3d 850, 851 [2d Dept. 2012]).

It is well settled that to prevail on a motion for summary judgment on the issue of liability in a personal injury action, the proponent has the burden of establishing not only that the other party was negligent, but that he or she is free from comparative fault as a matter of law. *Lanigan v. Timmes*, 111 A.D.3d 797 (2d Dept. 2013). In the instant case, while Plaintiff has failed to make a *prima facie* showing of negligence on the part of the Defendants as to the cause of the accident, she has made a *prima facie* showing that she did not engage in any culpable that contributed to the happening of the accident. *Alvarez v. Prospect Hosp*, 68 N.Y.2d 320, 324 (1986). Defendants concede that Plaintiff was an innocent passenger and thus bears no responsibility for the accident.

Accordingly, Plaintiff is entitled to summary judgment on the issue of liability only to the extent that as an innocent passenger, she is deemed free of culpable conduct.

Summary Judgment on the Issue of a Serious Injury under Insurance Law §5102(d)

Insurance Law §5102(d) defines “serious injury” in pertinent part, as (i) 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 for not less than ninety days during the one hundred eighty days

immediately following the occurrence of the injury; (ii) permanent consequential limitation of use of a body organ or member; or (iii) a significant limitation of use of a body function or system.

Plaintiff, as the proponent of a motion for summary judgment, has the burden of making a *prima facie* showing that she suffered a serious injury under one of the foregoing provisions of the Insurance Law, and that the injury was causally related to the accident. In support of her claim, Plaintiff offers the Affirmations of Drs. Louis Rose and Michael Daras (Rose Aff., Dara Aff, Pl. Exhs. 8& 9, respectively).

Dr. Rose is an Orthopedic Surgeon who examined Plaintiff on July 6, 2016 for injuries allegedly sustained as a result of a bus accident in which she was a passenger on June 1, 2016. Dr. Rose examined Plaintiff and observed that she was ambulating with an antalgic gait and had swelling of her knee. The measured range of motion of the right knee was 0-100 degrees of extension-flexion (0-135 is normal), and Plaintiff had tenderness in the knee. (Rose Aff. ¶4). One week later on July 13th, Dr. Rose observed the same gait, swelling in the knee and the same range of motion as in the earlier exam. During this examination, Dr. Rose examined the MRI film of Plaintiff's right knee and recommended surgery based upon his impression that she had an internal derangement of the right knee, with traumatically induced chondromalacia patella and a meniscal tear. (*Id.* ¶5). Dr. Rose performed surgery on August 11th and opined that Plaintiff was totally disabled from her usual vocation following her surgery. (*Id.* ¶6). Dr. Rose examined Plaintiff on August 17, 2016, August 24, 2016, October 5, 2016, May 17, 2017, August 31, 2017, and January 10, 2018.

At the last examination, Plaintiff reported continued right knee pain and difficulty with

activities of daily living, including stair climbing, bending, twisting, squatting, pivoting and kneeling. Plaintiff continued to have an antalgic gait, swelling about the knee and audible clicking. Her range of motion had improved to 0-120 (0-135 is normal), and her right knee strength was 4/5 as opposed to 5/5 for an uninjured knee. (*Id.* ¶12). Dr. Rose opines, within a reasonable degree of medical certainty, that a causal relationship exists between the bus accident and the injuries diagnosed and the limitations identified by him from his examinations of Plaintiff. He further opines, within a reasonable degree of medical certainty, that Plaintiff has permanent restrictions, limitations and weakness with respect to her right knee and has suffered consequential and significant limitation of the use of her right knee. (*Id.* ¶13).

Dr. Daras diagnosed Plaintiff with having herniated discs in the lumbar and cervical, along with lumbar and cervical radiculopathy based upon the history provided by Plaintiff, the physical examinations performed on June 13, 2016, July 25, 2016, September 22, 2016, March 23, 2017, and July 27, 2017. (Daras Aff. ¶9). According to Dr. Daras, Plaintiff has a permanent partial disability, a permanent consequential limitation of her cervical and lumbar peripheral nervous systems and a significant limitation of her back and cervical and lumbar peripheral nervous systems. (*Id.*).

Defendants take the position that Plaintiff failed to meet her burden of establishing as a matter of law that she breached the serious injury threshold, and must prove same at trial in order to allow for a damages award of \$25,000. In support of their position, Defendants have submitted the defense physical examination report Dr. John H. Buckner dated July 17, 2018 (Buckner Aff., Defs. Exh. C) and Dr. Bert R. Heyligers (Heyligers Aff., Defs. Exh.D).

Dr. Buckner examined Plaintiff on July 9, 2018. Plaintiff gave a history of hurting her

neck, back, right thumb, and knee in the accident. He states “[n]otably [Plaintiff] did not contact anything inside the bus other than putting her hand on the seat in front of her.” (Buckner Aff.

¶25). Dr. Buckner’s physical examination revealed that Plaintiff is 5 feet 2 inches tall and 228 pounds with a body mass index of 41.7. He reported that Plaintiff was in no acute distress and her gait was normal. (*Id.*). Dr. Buckner found no objective evidence of cervical spine injury, lumbar spine injury, right shoulder or right knee injury. Plaintiff underwent right knee surgery for tri-compartmental osteoarthritis that was a pre-existing condition and not related to the accident. Plaintiff’s subjective complaints of pain and numbness were not supported by any objective findings upon examination. He opines that there was no disability causally related to the accident. Plaintiff does not require further treatment or testing, and in Dr. Buckner’s opinion, the records do not support that there was ever a need for orthopedic evaluation, treatment or testing. (*Id.*).

Dr. Heyligers reviewed the lumbar MRI film taken on August 5, 2016, the MRI of the right knee taken on July 8, 2016 and the cervical MRI also taken on July 8, 2016. The lumbar MRI showed degenerative disc disease at L4-L5 with associated disc bulging, which are chronic findings that are not causally related to the accident. The knee MRI showed a small joint effusion, tear of the posterior horn and body of the medial meniscus, chronic intrasubstance tear of the ACL and chondromalacia of the patella. He opined that these findings were chronic in nature and not causally related to the accident. With regard to the cervical MRI, Dr. Heyligers found there was multilevel degenerative disc disease with osteophytic ridging throughout the cervical spine. He opined that these findings are degenerative in nature and not causally related to the accident. (*Id.* ¶26).

It is well-settled that as the proponent of a motion for summary judgment on the issue of serious injury, Plaintiff has the burden of making a *prima facie* showing that she suffered a serious injury pursuant to Insurance Law §5102(d) and that the injury was causally related to the accident. *Kapeleris v. Riordan*, 89 A.D.3d 903 (2d Dept. 2011). Defendant argues that Plaintiff failed to establish a breach under the permanent consequential limitation, significant limitation and the 90/180 categories. (Bernheimer Aff. ¶32). The Court cannot ignore the Affirmation of Dr. Rose, who opined that as a result of the accident, Plaintiff has permanent restrictions, limitations and weakness with respect to her right knee, and that she has suffered consequential and significant limitation of the use of her right knee; and the affirmation of Dr. Daras, who opined that Plaintiff was partially disabled and had physical limitations with bending, lifting and prolonged standing. Dr. Daras diagnosed Plaintiff with herniated discs in the lumbar and cervical spine, along with lumbar and cervical radiculopathy. According to Dr. Daras, Plaintiff's injuries have permanence and she has a permanent partial disability, and has sustained a permanent consequential limitation of her cervical and lumbar peripheral nervous systems and a significant limitation of her back and cervical and lumbar peripheral nervous systems.

However, in opposition, Defendants have raised a triable issue of fact as to whether the knee injuries were caused by the accident. Dr. Bruckner opines that there was no disability causally related to the accident, and the records do not support that there was ever a need for orthopedic evaluation, treatment or testing. According to Dr. Heyligers, the findings on the lumbar MRI showed degenerative disc disease with associated disc bulging s Plaintiff's

Dr. Heyligers reviewed the lumbar MRI film taken on August 5, 2016, the MRI of the right knee taken on July 8, 2016 and the cervical MRI also taken on July 8, 2016. The lumbar

MRI showed degenerative disc disease at L4-L5 with associated disc bulging, which are chronic findings that are not causally related to the accident. Similarly, the findings on the MRI of the knee were chronic in nature and not causally related to the accident. With regard to the cervical MRI, Dr. Heyligers found there was multilevel degenerative disc disease with osteophytic ridging throughout the cervical spine. He opined that these findings are degenerative in nature and not causally related to the accident.

Based upon the conflicting medical reports, a triable issue fact exists as to which of Plaintiff's injuries, if any, are causally related to the accident. (*See Elshaarawy v. U-Haul Co. Of Miss.*, 72 A.D.3d 878, 881 [2d Dept. 2010]). Plaintiff's motion for summary judgment on the issue of serious injury under Insurance Law §5101(d) is therefore denied.


Accordingly and based upon the foregoing, it is hereby

ORDERED that Plaintiff's motion for summary judgment is denied, except to the extent that Plaintiff, as an innocent passenger, is deemed free of culpable conduct; and it is hereby

ORDERED that the parties and counsel are directed to appear in the Settlement Conference Part on May 21, 2019 at 9:15 am.

The foregoing constitutes the Decision and Order of the Court.

Dated: April 18, 2019
White Plains, New York


HONORABLE JOHN P. COLANGELO, J.S.C.