

**Fuller v Garrett**

2020 NY Slip Op 30533(U)

February 26, 2020

Supreme Court, New York County

Docket Number: 154958/2018

Judge: Adam Silvera

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. ADAM SILVERA PART IAS MOTION 22**

*Justice*

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JESSE FULLER,

Plaintiff,

- v -

MATTHEW GARRETT, VENTURE LEASING LLC,

Defendant.

INDEX NO. 154958/2018

MOTION DATE 06/26/2019,  
10/02/2019

MOTION SEQ. NO. 001 002

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 27, 28, 29, 42, 43, 44, 45, 46, 47, 48, 49, 50

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 34, 35, 36, 37, 38, 39, 40, 41, 51, 52, 53, 54

were read on this motion to/for JUDGMENT - SUMMARY.

Before the court is defendants Matthew Garret and Venture Leasing LLC's motion, motion sequence 001, for an Order granting summary judgment in favor of defendants to dismiss the Complaint of plaintiff Jesse Fuller on the grounds that plaintiff has failed to meet the serious injury threshold requirement pursuant to the New York Insurance Law § 5102(d). Plaintiff opposes the motion and moves in motion sequence 002 for an Order pursuant to CPLR § 3212 to grant plaintiff summary judgment on the issue of liability.

This matter stems from a motor vehicle accident which occurred on October 30, 2017 at the intersection of Essex Street and Broome Street in the County, City, and State of New York, when plaintiff Jesse Fuller was a pedestrian within the crosswalk and was struck and allegedly seriously injured by a vehicle owned by defendant Venture Leasing LLC and operated by defendant Matthew Garret.

### Summary Judgment (Serious Injury)

“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”]).

Defendants allege that plaintiff has failed to demonstrate the existence of a “serious injury” as defined under Section 5102(d) of the Insurance Law. Defendants allege that the injuries plaintiff is seeking relief for are not causally related to the underlying accident and are a result of degenerative disc disease. Defendants attach the independent medical report of Dr. Barbara Freeman who examined plaintiff on April 19, 2019 and reviewed plaintiff’s medical records (Mot, Exh D). In her report Dr. Freeman lists the range of motion of plaintiff’s cervical spine but does not list what the normal range of motion for the cervical spine is (*id.* at 4). Dr. Freeman merely lists the range of motion of plaintiff’s cervical spine and states that those “range of motion findings of the cervical spine are within normal ranges for this individual” (*id.* at 4).

The Appellate Division, First Department, has consistently held that “[t]he report of the doctor...is deficient because he...failed to indicate what the normal range of motion would be” (*Nagbe v Minigreen Hacking Group*, 22 AD3d 326, 327 [1st Dept 2005]). The Court deems Dr. Freeman’s report as deficient and defendant has failed to meet its burden. Defendants motion for summary judgment on the issue of “serious injury” is denied.

### Liability

Plaintiff’s motion for summary judgment on the issue of liability in favor of plaintiff as against defendants is granted. 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 1146 places a duty upon motorists to exercise due care in their operation of a motor vehicle and avoid colliding into any pedestrian.

Here, plaintiff testified that she was in a marked crosswalk with the pedestrian traffic light in her favor when she walked into the crosswalk and was struck by defendants’ vehicle (Mot 002, Exh 5 at 23, 24, 26, & 30). Plaintiff has demonstrated that defendant Garrett struck pedestrian plaintiff in violation of the VTL. Plaintiff has made a prima facie showing of defendants’ negligence and the burden shifts to defendants to raise an issue of fact. Defendants’ opposition fails to raise an issue of fact as to the occurrence of the accident. Defendants point to plaintiff’s deposition in an attempt to raise feigned issues of fact as to whether plaintiff was standing at the time of the accident and the speed of defendants’ vehicle during the impact. Thus, defendants have failed to raise a triable issue of fact and plaintiff’s motion for summary judgment is granted as to defendants’ liability.

Accordingly, it is

ORDERED that defendants' motion to dismiss plaintiff's Complaint for failure to demonstrate a serious injury is denied; and it is further

ORDERED that plaintiff's motion for summary judgment on the issue of liability as against defendants is granted; and it is further

This constitutes the Decision/Order of the Court.

2/26/2020

DATE



ADAM SILVERA, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE