

Belon v Liberty Lines Tr., Inc.
2021 NY Slip Op 33564(U)
February 18, 2021
Supreme Court, Westchester County
Docket Number: Index No. 68774/2018
Judge: Joan B. Lefkowitz
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SUPREME COURT: STATE OF NEW YORK
IAS PART WESTCHESTER COUNTY
PRESENT: HON. JOAN B. LEFKOWITZ, J.S.C.

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.

-----X
BEATRIZ BELON,

DECISION & ORDER

Plaintiff,

Index No: 68774/2018

-against-

Motion Return Date:

LIBERTY LINES TRANSIT, INC., JOSE L. MEJIA,
WILFRID JEAN and COUNTY OF
WESTCHESTER,

December 18, 2020

Sequence Nos. 1, 2, and 3

Defendants.
-----X

The following papers (NYSCEF document nos. 30-94; 96-103) were read on: (1) the motion by the defendant, Wilfrid Jean, for an order granting summary judgment dismissing the complaint insofar as asserts a cause of action against him upon the grounds that plaintiff did not sustain a serious injury within the meaning of Insurance Law 5102 (d) and that he was not the proximate cause of plaintiff's injuries (sequence no. 1); (2) the motion by the defendants, Liberty Lines Transit, Inc., Jose Mejia, and County of Westchester, for an order granting summary judgment dismissing the complaint insofar as asserts a cause of action against them upon the grounds that plaintiff did not sustain a serious injury within the meaning of Insurance Law 5102 (d) (sequence no. 2); and (3) the cross-motion by the plaintiff for an order granting plaintiff summary judgment on the issues of liability and serious injury (sequence no. 3).

Sequence No. 1

Notice of Motion-Affirmation-Exhibits (A-H)-Memorandum of Law
Affirmation in Opposition (by plaintiff)-Exhibits (1-9)
Reply Affirmation-Exhibits (A-F)

Sequence No. 2

Notice of Motion-Affirmation-Exhibits (A-G)
Affirmation in Opposition (by plaintiff)-Exhibits (1-9)
Reply Affirmation

Sequence No. 3

Notice of Cross-Motion-Affirmation-Exhibits (1-11)
Affirmation in Opposition (by defendants, Liberty, Mejia, and County of Westchester)

Reply Affirmation-Exhibits (12-14;¹)

Upon reading the foregoing papers, it is

ORDERED the motion (sequence no. 1) by the defendant, Wilfrid Jean, is denied; and it is further

ORDERED the motion (sequence no. 2) by the defendants, Liberty Lines Transit, Inc., Jose L. Mejia, and County of Westchester, is denied; and it is further

ORDERED the branch of the cross-motion (sequence no. 3) by the plaintiff for an order granting summary judgment on the issue of liability is granted, and plaintiff is awarded partial summary judgment on the issue of liability, and the liability as between the defendants shall be decided by the jury at trial; and it is further

ORDERED the remaining branch of the cross-motion (sequence no. 3) for an order granting plaintiff summary judgment on the issue of serious injury is denied; and it is further

ORDERED this matter is hereby referred to the Settlement Conference Part for a settlement conference. Due to the COVID-19 public health emergency, the Clerk of the Settlement Conference Part shall notify the parties of the date, time, and method of the settlement conference.

Plaintiff sues to recover monetary damages for personal injuries allegedly sustained in a motor vehicle accident that occurred on August 28, 2017, on Ferris Avenue and New Street in White Plains, New York. The accident allegedly occurred when a bus owned by the defendants, County of Westchester and Liberty Lines Transit, Inc., and operated by the defendant, Jose L. Mejia (collectively, the Westchester defendants), and in which plaintiff was a passenger, ran a red light and collided with a taxi cab operated by the defendant, Wilfrid Jean (Jean).

Following the completion of discovery, defendant Jean moves (sequence no. 1) for an order granting summary judgment dismissing so much of the complaint as asserts a cause of action against him upon the grounds that plaintiff did not sustain a serious injury within the meaning of Insurance Law 5102 (d) and that he is not the proximate cause of plaintiff's alleged injuries. The Westchester defendants move (sequence no. 2) for an order

¹ NYSCEF doc. no. 95 e-filed as exhibit "4" to plaintiff's reply papers purports to be a "Liberty Lines Bus Incident Report". Upon review, however, this exhibit instead contains responses to various discovery demands. This exhibit was returned to plaintiff's counsel by the clerk's office for correction and re-filing but counsel never corrected the error. Accordingly, the court has not considered this exhibit in rendering this decision.

granting summary judgment dismissing so much of the complaint as asserts a cause of action against them upon the grounds that plaintiff did not sustain a serious injury within the meaning of Insurance Law 5102 (d). The plaintiff cross-moves (sequence no. 3) for an order granting summary judgment in her favor on the issues of liability and serious injury.

Motion by the Defendants for Summary Judgment

Sequence Nos. 1 and 2

Serious Injury

On a motion for summary judgment the court's function is to determine whether triable issues of fact exist or whether judgment can be granted to a party on the proof submitted as a matter of law (*see* CPLR 3212 [b]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). In determining the motion, the court must view the evidence in a light most favorable to the nonmovant and is obliged to draw all reasonable inferences in the nonmovant's favor (*see Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]; *Stukas v Streiter*, 83 AD3d 18, 22 [2d Dept 2011]). Such a motion may be granted only if the movant tenders sufficient evidence in admissible form demonstrating, *prima facie*, the absence of triable issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If that burden is met, the burden of going forward shifts to the opponent of the motion to produce evidentiary proof in admissible form establishing the existence of material issues of fact requiring a trial (*see Zuckerman*, 49 NY2d at 562). "Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it should only be employed when there is no doubt as to the absence of triable issues" (*Owens v City of New York*, 183 AD3d 903, 906 [2d Dept 2020] [internal quotation marks omitted]).

Whether a claimed injury meets the statutory definition of a serious injury is a question of law which may properly be decided by the court on a motion for summary judgment (*see Licari v Elliott*, 57 NY2d 230, 235 [1982]). A party moving for summary judgment under Insurance Law 5102 (d) must establish a *prima facie* case that the non-movant has not suffered a serious injury within the meaning of Insurance Law 5102 (d) (*see Gaddy v Eyles*, 79 NY2d 955, 956-57 [1992]; *Macchio v Ndukwu*, 114 AD3d 647, 647 [2d Dept 2014]). Insurance Law 5102 (d) defines "serious injury" as:

"a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or 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 or impairment.”

In her bill of particulars, plaintiff alleged that she suffered serious injuries to her left foot and ankle as a result of the accident. Plaintiff alleged serious injuries under the permanent loss, permanent consequential limitations, and significant limitation categories of Insurance Law 5102 (d). Plaintiff further alleged that she was prevented from performing her usual and customary daily activities for at least 90 out of 180 days following the accident.

In support of their motion, the Westchester defendants and Jean contend, among other things, that plaintiff has not suffered a serious injury within the meaning of Insurance Law 5102 (d). They proffer, among other things, the affirmation of Scott V. Haig, M.D., an orthopedic surgeon. Dr. Haig conducted a physical examination of the plaintiff on July 2, 2020. Based thereon, and upon the review of the records in this matter including the bill of particulars, police accident report, and a radiology report dated June 28, 2020, Dr. Haig opined, within a reasonable degree of medical certainty, that plaintiff is not disabled, her prognosis is good, she does not require physical therapy, and that there is no sign of any contusion to the left foot. Based thereon, defendants assert that summary judgment dismissing the complaint is warranted.

In opposition, plaintiff proffers the affirmation of Louis C. Rose, M.D., an orthopedist. In his affirmation, Dr. Rose outlines his treatment of plaintiff beginning August 8, 2018, and continuing through September 30, 2020. Dr. Rose notes his findings from range of motion testing, an MRI evaluation taken July 6, 2018, which revealed a distal posterior tibial tendinosis, and prior medical records. Based thereon, Dr. Rose opined, to a reasonable degree of medical certainty, that plaintiff’s injuries to the left foot and ankle, which Dr. Rose affirms are casually related to the subject accident, are permanent in nature and causes plaintiff significant limitation of the use of her left foot and ankle.

Generally, where conflicting affidavits and other contradictory evidence is submitted, summary judgment is not appropriate (*see Webar, Inc. Capra*, 212 AD2d 594, 596 [2d Dept 1995]; *Epstein v Scally*, 99 AD2d 713, 714 [1st Dept 1984]). The reasoning is that conflicting expert opinions raise credibility issues that can only be resolved by the trier of fact (*Roca v Perel*, 51 AD3d 757, 759 [2d Dept 2008]; *Pearson v Dix McBride, LLC*, 63 AD3d 895, 895 [2d Dept 2009]). Here, defendants and plaintiff have proffered competing medical affirmations thereby precluding summary judgment on the issue of whether plaintiff sustained serious injuries to her left foot and ankle under Insurance Law 5102 (d). Accordingly, defendants’ motions are denied.

Liability

Defendant Jean moves for an order granting him summary judgment dismissing the complaint insofar as asserted against him upon the grounds that he was not the proximate cause of the accident. This portion of Jean's motion is denied.

Viewing the evidence in the light most favorable to the non-movant, and drawing all reasonable inferences in the non-movant's favor, factual issues regarding the happening of the collision between Jean's taxi cab and the bus preclude a finding, as a matter of law, that Jean was not a proximate cause of the accident (*see Kalland v Hungry Harbor Assoc., LLC*, 84 AD3d 889, 889-890 [2d Dept 2011]). Accordingly, this branch of Jean's motion is denied.

Motion by the Plaintiff for Summary Judgment

Sequence No. 3

Serious Injury

As explained above, in light of the competing medical expert affirmations, this branch of plaintiff's cross-motion is denied.

Liability

Plaintiff established her *prima facie* entitlement to judgment as a matter of law on the issue of liability by demonstrating that she was an innocent passenger on the bus when the collision occurred and she did not contribute to the happening of the collision (*see Medina v Rodriguez*, 92 AD3d 850, 850-851 [2d Dept 2012]). Accordingly, the burden of going forward shifted to defendants to raise a triable issue of material fact (*see Zuckerman v City of New York*, 49 NY2d 557, 560, 562 [1980]).

In opposition, defendants failed to raise a triable issue of material fact on the issue of plaintiff's liability for the accident (*see CPLR 3212 [b]; cf. Yant v Mile Sq. Transp., Inc.*, 89 AD3d 492, 492 [1st Dept 2011]). Accordingly, plaintiff is awarded partial summary judgment on the issue of liability. At trial, however, the jury shall decide liability as between the defendants.

E N T E R,

Dated: White Plains, New York
February 18, 2021

Joan B. Lefkowitz

Digitally signed by Joan B. Lefkowitz
DN: CN=Joan B. Lefkowitz, E=jllefkowi@nycourts.gov
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HON. JOAN B. LEFKOWITZ, J.S.C.