

Weerts v Diagana

2022 NY Slip Op 34396(U)

December 22, 2022

Supreme Court, New York County

Docket Number: Index No. 159110/2019

Judge: James G. Clynnes

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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. JAMES G. CLYNES PART 22M

Justice

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ALAIN M. WEERTS,

Plaintiff,

- v -

DAUODA DIAGANA, MANDE LIMO-SERVICE
CORPORATION

Defendant.

-----X

INDEX NO. 159110/2019

MOTION DATE 05/31/2022

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49

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

Upon the foregoing documents and following oral argument, it is ordered that Plaintiff's motion for summary judgment on liability, for summary judgment on the grounds that Plaintiff sustained a serious injury under Insurance Law 5102 (d) and for Special Trial Preference pursuant to CPLR 3403 (a) (4) Is granted.

Plaintiff seeks recovery for injuries allegedly sustained as a result of a July 6, 2018 accident between pedestrian Plaintiff and a motor vehicle operated by defendant Dauoda Diagana and owned by defendant Mande Limo Service Corporation (collectively Defendants). On November 12, 2021, the Court put forth an Order precluding Defendant driver, Dauoda Diagana from testifying at trial and submitting an affidavit in motion practice, as he failed to appear for an EBT, and precluding Defendants to offer any evidence, both at trial and in motion practice, required pursuant to the Order dated July 1, 2021.

Plaintiff's Motion for Trial Preference Based Upon Age

As an initial matter, upon the foregoing documents, Plaintiff's motion for an order granting Plaintiff a trial preference based on Plaintiff's age is granted without opposition. Plaintiff is over seventy years of age. The note of issue has been filed. It is ordered that Plaintiff's counsel shall within 15 days from entry of this order, serve a copy of this order with notice of entry on Defendants and upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who is hereby directed to place this case on the trial calendar at the head of said calendar except for actions in which a preference was previously granted.

Plaintiff's Motion for Summary Judgment on Liability

As to the issue of summary judgment on liability, it is hereby ordered that Plaintiff's motion pursuant to CPLR 3212 for summary judgment on liability in favor of Plaintiff and against Defendants is granted.

A plaintiff in a negligence action moving for summary judgment on the issue of liability must establish, prima facie, that the defendant breached a duty owed to the plaintiff and that the defendant's negligence was a proximate cause of the alleged injuries (*Maniscalco v NY City Tr. Auth.*, 95 AD3d 510 [1st Dept 2012]). To be entitled to summary judgment on the issue of liability, a plaintiff is not required to demonstrate the absence of fault on her part. (*Carlos Rodriguez, Appellant, v City of NY, Respondent.*, 31 NY3d 312 [2018]). Nor is she required to establish that defendant's conduct was the sole proximate cause of the accident. (*Simmons v Bergh*, 192 AD3d 547 [1st Dept 2021]). A violation of a standard of care imposed by the Vehicle and Traffic Law constitutes negligence per se. (see *Van Gaasbeck v Webatuck Cent. Sch. Dist.*, 21 NY2d 239 [1967]; see also *Flores v. City of New York*, 66 AD3d 599 [1st Dept 2009]). Pursuant to Vehicle and Traffic Law (VTL) 1146, a driver has a statutory duty to use due care to avoid colliding with

pedestrians on the roadway, as well as a common-law duty to see what should be seen through the proper use of his senses. (*Martinez v WE Transp. Inc.*, 161 AD3d 458 [1st Dept 2018]).

Here, Plaintiff established his prima facie entitlement to summary judgment on the issue of liability through his deposition testimony, in which he avers that he crossed the street within the crosswalk, and that before stepping off the curb and into the crosswalk, Plaintiff looked at the pedestrian light and it was green, in his favor. Plaintiff's submission makes out a prima facie case of negligence, and the burden shifts to Defendants to raise a triable issue of fact (VTL 1146; *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]; *Rodriguez v City of New York*, 31 NY3d 312 [2018]). Defendants' opposition papers, which include the attorney affirmation, the police report, and Defendants' Motor Vehicle Accident Report (MV-104), fail to raise a triable issue of fact. Plaintiff could not have avoided the accident given his testimony that he noticed the car for a very brief moment before being struck (*see Kirchgaessner v Hernandez*, 40 AD3d 437 [1st Dept 2007]). Thus, Plaintiff's motion for summary judgment is granted in favor of Plaintiff as against Defendants on the issue of liability.

Plaintiff's Motion for Summary Judgment Serious Injury

Plaintiff also established his entitlement to judgment as a matter of law on the issue of whether Plaintiff's alleged injuries satisfy the serious injury threshold within the meaning of Insurance Law 5102 (d) by submitting testimony that he was struck on the right side of his body and fell to his left side, contemporaneous hospital records showing fractures within his right knee, and Dr. Stuart Hershon's affirmation from the Independent Medical Exam (IME) he performed on Plaintiff on November 15, 2021, in which he stated that the fractures were a direct result of the July 6, 2018 accident. A fracture constitutes a serious injury under Insurance Law 5102 (d) (*Elias v Mahlah*, 58 AD3d 434 [1st Dept 2009]; *Joyce v Lacerra*, 41 AD3d 236 [1st Dept 2007]).

Defendants contend that the unaffirmed hospital records submitted by Plaintiff are insufficient to meet a prima facie entitlement to summary judgment, as they are not in admissible form (*Grasso v Angerami*, 79 NY2d 813 [1991]). However, even without the unaffirmed hospital reports, by relating Plaintiff's injuries to the subject accident, Plaintiff's doctor establishes that Plaintiff has met the threshold under Insurance Law 5102 (d) that Plaintiff suffered a serious injury as a result of the accident (*Williams v Perez*, 92 AD3d 528, 529 [1st Dept 2012]; *Perl v Meher*, 18 NY3d 208 [2011]). Defendants failed to raise a triable issue of fact, by not providing any conflicting medical evidence upon which this Court can rely. Accordingly, based on the foregoing it is hereby

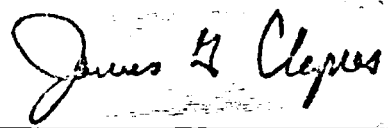
ORDERED that Plaintiff's motion for an order granting Plaintiff a trial preference based on Plaintiff's age is GRANTED without opposition; and it is further

ORDERED that Plaintiff's motion for summary judgment on the issue of liability is GRANTED; and it is further

ORDERED that Plaintiff's motion for summary judgment on the issue of threshold injury under Insurance Law 5102 (d) is GRANTED; and it is further

ORDERED that within 30 days of entry, movant shall serve a copy of this Decision and Order upon Plaintiff with notice of entry.

This constitutes the Decision and Order of the Court.



JAMES G. CLYNES, J.S.C.

12/22/2022
DATE

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