

Washington v Jose

2023 NY Slip Op 30029(U)

January 3, 2023

Supreme Court, New York County

Docket Number: Index No. 150208/2021

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

-----X	INDEX NO.	<u>150208/2021</u>
KIMBERLI K. WASHINGTON, SONIA HORN, ALEIYA CHERRY	MOTION DATE	<u>05/17/2022, 11/21/2022</u>
Plaintiff,	MOTION SEQ. NO.	<u>001 003</u>

- v -

JOSSELYN D. JOSE,

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66 were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90 were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, Defendant Josselyn D. Jose’s motion for summary judgment dismissing the Complaint of sole remaining Plaintiff Kimberli K. Washington (Washington) on the ground that the injuries do not satisfy the serious injury threshold under Insurance Law 5102 (d) (Motion Sequence #1) and Plaintiff’s motion for partial summary judgment on the issue of liability in her favor and against the Defendant (Motion Sequence #3) are decided as follows.

Plaintiff seeks recovery for personal injuries allegedly sustained in a February 2, 2020 accident between Plaintiff Pedestrian and a motor vehicle owned and operated by Defendant.

Defendant’s Motion for Summary Judgment Serious Injury (Motion Sequence #1)

Plaintiff’s Amended Bill of Particulars alleges that Washington sustained serious injuries to her lumbar spine that required a procedure, thoracic spine, cervical spine, left leg/ankle, and other injury-related complications that fall within the definition of serious injury outlined in Insurance Law 5102 (d).

The burden rests upon the movant to establish that the plaintiff has not sustained a serious injury (*Lowe v Bennett*, 122 AD2d 728 [1st Dept 1986]). When the movant has made such a showing, the burden shifts to the plaintiff to produce prima facie evidence to support the claim of serious injury (*see Lopez v Senatore*, 65 NY2d 1017 [1985]).

Here, Defendant has failed to establish that Washington did not sustain a serious injury under Insurance Law 5102 (d). Defendant's submission relies on the affirmed report of Dr. Robert S. April, neurologist, who performed an Independent Medical Examination (IME) of Washington on March 16, 2022. Dr. April measured the range of motion of Washington's lumbar and cervical spine three times, passively and actively with reference to an orthopedic goniometer pursuant to the 6th Edition of the AMA Guidelines.¹ Dr. April reported that Washington had a full range of motion of the cervical spine but had a limited range of motion in Washington's lumbar spine, noting flexion 30 degrees (60 normal), extension 25 degrees (25 normal), right lateral bending 25 degrees (25 normal), and left lateral bending 25 degrees (25 normal). Washington's straight leg raising was limited to 30 degrees bilaterally (normal is 60-90). Dr. April concluded that there was no objective evidence to support a resulting injury to the cervical and lumbar spine. While Dr. April opined that the limitation of straight leg raising that is equal bilaterally and is not typical for nerve root compression, noting specifically that the limitation of motion could be considered a subjective finding, fails to adequately explain how this limitation is not causally related to the subject accident. Further, while Dr. April noted that he "defer[s] commenting on the orthopedic injuries to the appropriate specialist" (NYSCEF DOC NO 19), he never examined Washington's thoracic spine or left leg/ankle, which are also alleged to have been seriously injured as a result of the subject accident. In this regard, the Court cannot determine that there are no triable issues of fact that remain as to any serious injuries, since the only doctor for Defendant who physically examined Washington never evaluated the thoracic spine and left leg/ankle (*Staubitz v Yaser*, 41 AD3d 698 [2d Dept 2007]). As Defendant did not meet her prima facie burden, it is not necessary to consider the sufficiency of Washington's papers in opposition (*Calcano v Rodriguez*, 103 AD3d 490 [1st Dept 2013]).

¹ Dr. April also measured the range of motion of Washington's left shoulder, which had full range of motion, however Washington is no longer alleging injury to her left arm/shoulder.

Plaintiff's Motion for Summary Judgment on Liability (Motion Sequence #3)

Plaintiff's motion for summary judgment on the issue of liability in favor of Plaintiff as against Washington 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]).

Here, Washington's EBT testimony in which she testifies that she was walking to the subway from a friend's house with two friends when she got to the corner at the intersection, the walk sign with an outline of a person indicating walk was lit, it was drizzling out and Washington was using an umbrella, Washington looked both ways before crossing and saw no cars, almost made it to the other side of the street when she felt the car hit her leg and heard something hit the hood of the car, establishes a prima facie case of negligence.

In opposition, Defendant argues that Plaintiff's motion is untimely and should therefore be denied. However, as there is still Defendant's pending motion to vacate Plaintiff's Note of Issue and strike this case from the trial calendar, and the parties have been continuously conferencing, there is no prejudice to Defendant.

Defendant's opposition fails to raise a triable issue of fact. In Defendant's EBT, she testified that she was travelling home from work, driving at a slow and steady speed, making a left turn on a green light, when a red car travelling towards her in the opposite direction sped up and came towards her and she accelerated and made contact with one pedestrian who was walking within the crosswalk. This version of events, even viewed in a light most favorable to Defendant, is insufficient to raise an issue of fact as to the existence of a qualifying emergency. Defendant maintains that she was not hit by the red car, and the closest it came to her vehicle was approximately one car length. Further, Defendant's assertion that she did not see Plaintiffs while she was turning also does not excuse Defendant's negligence. Drivers have a "duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident" (*DeAngelis v. Kirschner*, 171 AD2d 593, 595 [1st Dept 1991]). Thus, Defendant has failed to raise

a triable issue of fact and Plaintiffs' motion for summary judgment is granted in favor of Plaintiff as against Defendant on the issue of liability.

Accordingly, it is

ORDERED that Defendant's motion for summary judgment and dismissal of the Complaint based upon the grounds that Plaintiff Kimberli K. Washington has failed to satisfy the serious injury threshold under Insurance Law 5102 (d) is denied; and it is further


ORDERED that Plaintiff's motion for partial summary judgment on the issue of liability in her favor and against the defendant is granted; and it is

ORDERED that any requested relief not specifically addressed herein has nonetheless been considered; and it is further

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

This constitutes the Decision and Order of the Court.

1/3/2023
DATE



JAMES G. CLYNES, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: