

McCants-Doughty v Mercedes Benz of Smithtown

2023 NY Slip Op 32353(U)

July 13, 2023

Supreme Court, New York County

Docket Number: Index No. 156981/2021

Judge: James G. Clynes

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

PRESENT: HON. JAMES G. CLYNES PART 22M

Justice

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RUTH MCCANTS-DOUGHTY,	INDEX NO. <u>156981/2021</u>
Plaintiff,	MOTION DATE <u>07/08/2022</u>
- v -	MOTION SEQ. NO. <u>001</u>

MERCEDEZ BENZ OF SMITHTOWN, JUAN E. ROMERO,
ROCK POSITANO

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 38, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59

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

Upon the foregoing documents, Plaintiff's motion for summary judgment on the issues of liability and serious injury in favor of Plaintiff and against Defendant is decided as follows:

Plaintiff seeks recovery for injuries allegedly sustained as a result of a February 7, 2020 motor vehicle accident in which plaintiff pedestrian was struck by a motor vehicle owned by Defendants Mercedes Benz of Smithtown and Rock Positano, and operated by Juan E. Romero. Plaintiff's Bill of Particulars alleges injuries to Plaintiff's left leg within the categories of serious injury under Insurance Law 5102 (d).

Plaintiff's Motion for Summary Judgment on Liability

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 (*Rodriguez v City of NY*,

31 NY3d 312 [2018]). 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]). Defendants' opposition papers fail to raise an issue of fact sufficient to preclude summary judgment on liability in favor of Plaintiff and against all three Defendants. The motion of Plaintiff's motion seeking summary judgment on liability in favor of Plaintiff and against Defendants Mercedes Benz of Smithtown, Juan E. Romero, and Rock Positano is granted.

Plaintiff's motion seeks summary judgment on the issue of liability in favor of Plaintiff and against Defendants Mercedes Benz of Smithtown, Juan E. Romero and Rock Positano. Plaintiff's submission establishes prima facie negligence by Defendants by showing that Plaintiff, a pedestrian crossing the street within the crosswalk and with the pedestrian control signal in her favor was struck by the left turning vehicle owned by Mercedes Benz of Smithtown and operated by Juan E. Romero during the course of his employment by Defendant Rock Positano.

Plaintiff's Motion for Summary Judgment Serious Injury

Plaintiff's motion for an order granting summary judgment in favor of Plaintiff finding that Plaintiff has sustained a serious injury is denied.

In order to satisfy their burden under Insurance Law 5102, a plaintiff must meet the "serious injury" threshold (*Toure v Avis Rent a Car Sys.*, 98 NY2d 345 [2002]).

Here, Plaintiff alleges to have suffered injuries to her leg. In support, Plaintiff attaches the affirmation of Dr. Arnold Goldman, the certified X-Rays from the Department of Radiology of New York Presbyterian Hospital, and an unaffirmed X-Ray report.

It is well settled that evidence submitted in support of a motion for summary judgment must be in admissible form (*Pagano v Kingsbury*, 182 AD2d 268, 270 [2d Dept 1992]). A witness may be qualified as an expert based upon long observation, actual experience and/or study. No precise rule has been formulated and applied as to the exact manner in which such skill and experience must be acquired (*Meiselman v Crown Hgts. Hosp.*, 285 NY 389 [1941]). The Court is required to assess a witness' qualifications as an expert based upon his professional background, training, study, and experience. Unaffirmed or uncertified medical reports and records are normally inadmissible on a motion for summary judgment, they may be considered if they are not the sole basis for the Court's determination (*see CPLR 2106, Clemmer v Drah Cab Corp.*, 74 AD3d 660, 660 [1st Dept 2010]).

Here, Dr. Goldman has not submitted a copy of his curriculum vitae. However, attached to Dr. Goldman's affirmation are his treatment notes, within which he set forth the various medical tests conducted and reviewed, on his professional letterhead, containing his name with post-nominal letters, his specialty, and office address. The general rule in New York is that an expert cannot base an opinion on facts he did not observe, and which were not in evidence, and that the expert testimony is limited to facts in evidence, as is the case here (*Rosa v GMC*, 226 AD2d 213 [1st Dept 1996]; *Allen v Uh*, 82 AD3d 1025 [2d Dept 2011]). Accordingly, Dr. Goldman's report will be considered in support of this motion.

Dr. Goldman, Plaintiff's treating orthopedic surgeon, first examined Plaintiff for this accident on February 13, 2020. Despite outlining the range of motion for Plaintiff's alleged injured

areas, and objective tests, Dr. Goldman’s submission makes no mention of Plaintiff’s previous accident and does not find that any of Plaintiff’s injuries were exacerbated or aggravated by the subject accident. Plaintiff alleges in her supplemental Bill of Particulars that the subject accident aggravated and/or exacerbated preexisting conditions. However, Dr. Goldman’s findings failed to establish that the limitations noted by him were caused by the subject accident and not the prior accident or pre-existing injuries. As Plaintiff fails to establish causation as a matter of law, she fails to meet her prima facie burden under Insurance Law 5102 (d).

Since Plaintiff failed to meet her prima facie burden, it is unnecessary to consider whether the Defendant’s opposition papers were sufficient to raise a triable issue of fact (*Winegrad v NY Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Accordingly, it is

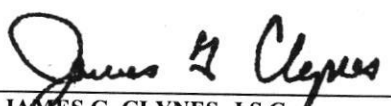
ORDERED that Plaintiff’s motion for summary judgment on liability in favor of Plaintiff and against Defendants Mercedes Benz of Smithtown, Juan E. Romero, and Rock Positano is granted; and it is further

ORDERED that Plaintiff’s motion for summary judgment on the grounds that Plaintiff has satisfied the serious injury threshold under Insurance Law 5102 (d) is denied; and it is further

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

This constitutes the Decision and Order of the Court.

7/13/2023
DATE


JAMES G. CLYNES, J.S.C.

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