

Kennedy v Chalal

2024 NY Slip Op 33182(U)

August 5, 2024

Supreme Court, New York County

Docket Number: Index No. 160595/2021

Judge: James G. Clynes

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

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

LYNDA STEWART KENNEDY,
Plaintiff,

- v -

DALJIT CHALAL, NEW YORK CITY TRANSIT AUTHORITY,
METROPOLITAN TRANSPORTATION AUTHORITY, MTA
PARATRANSIT ACCESS-A-RIDE

Defendants.

-----X

INDEX NO. 160595/2021
MOTION DATE 01/01/2024
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 47, 48, 49, 50, 51, 52, 53, 54

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, the motion by Plaintiff Lynda Stewart Kennedy for summary judgment on the issue of liability under CPLR 3212 and on the ground that Plaintiff's injuries do not meet the serious injury threshold under Insurance Law 5102 (d) is decided as follows:

Plaintiff seeks recovery for injuries allegedly sustained as a result of a June 9, 2021 motor vehicle accident between Plaintiff and a taxi owned by Defendants New York City Transit Authority ("NYCTA") and Metropolitan Transportation Authority ("MTA") and operated by Defendant Daljit Chalal ("Defendant Driver") at the intersection of 135th Street and 5th Avenue. The Court notes that this matter has been discontinued with prejudice as to Defendants New York City Transit Authority and Metropolitan Authority pursuant to the Stipulation of Discontinuance dated April 17, 2023 (NYSCEF DOC NO. 46).

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 NY Univ. Med. Ctr.*, 64 NY2d 851 [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 New York*, 49 NY2d 557, 560 [1980]).

Summary Judgment on Liability

In support of Plaintiff’s summary judgment motion on the issue of liability, Plaintiff submits, in pertinent part, her affidavit, a certified police accident report, Defendant Driver’s Report of a Motor Vehicle Accident (“MV-104”), Plaintiff’s 50-H Hearing transcript, Defendant Driver’s response to Plaintiff’s Notice to Admit, and a photograph of Plaintiff’s shoe under the wheel of the subject vehicle.

In her affidavit, Plaintiff avers that she was a passenger in an Access-A-Ride taxi being operated by Defendant Driver. Plaintiff avers that she asked Defendant Driver to drop her off at the corner of 135th Street and 5th Avenue. Plaintiff further avers that as she was stepping out of the taxi, it went into motion and drove onto her left foot which knocked her to the ground. Plaintiff avers that her foot was pinned under the taxi until a passerby helped lift enough of the taxi’s weight off her foot so that it could slip out of her shoe. Plaintiff further avers that Defendant Driver was on a telephone call at the time of the accident and that Plaintiff is a “mature and sensible person and would never try to exit a moving vehicle.”

The certified copy of the police report states that a female was observed lying on the side of the street against the rear passenger side tire of a taxi. The report states that the driver, or “vehicle 1,” stated that he was traveling southbound on 5th Avenue and coming to a complete stop

when his passenger exited the vehicle before the vehicle was in the parked position. The report further states that the passenger stated she was exiting the rear passenger door of the taxi while it was in the parked position when the driver suddenly drove off without her being completely out of the vehicle, and in doing so, drove over her left foot.

Defendant Driver's MV-104 states that "vehicle 1" pulled over to drop off the passenger and did not come to a full parked position when the passenger exited the vehicle and drove over her left foot. The MV-104 is signed at the bottom by Defendant Driver.

In Defendant Driver's response to Plaintiff's Notice to Admit, he admits that he drove over or onto the foot of the passenger that he intended to discharge on 5th Avenue at the intersection of 135th Street.

In Plaintiff's 50-H Hearing, she testified that because the driver was talking on the phone, she tapped on the partition of the taxi to let him know he needed to make a left turn on 5th Avenue and to let her off on the corner of 135th Street. Plaintiff testified that the driver came to a complete stop and that she unhooked her seatbelt and knocked on the partition again and asked the driver to unlock the door because it was locked. Plaintiff testified that she then opened the door, put her left foot down, and went for her cane and pocket book, and while her hand was still on the door with the door open, the car started moving, causing Plaintiff's hand to let go of the door and for Plaintiff to fall to the ground. Plaintiff further testified that at this point, she turned around to see her left foot was trapped under the wheel and that three to four people helped lift the wheel of the vehicle.

In opposition, Defendant Driver submits his affidavit. He contends that there are issues of fact as to liability and that Plaintiff's motion is premature because discovery remains outstanding. In his affidavit, Defendant Driver avers that on June 9, 2022, he was operating a 2022

Toyota during the normal course of his employment during which he picked up a fare in Brooklyn and that she appeared elderly and to need assistance. Defendant Driver avers that he drove the passenger to Manhattan and pulled over on 5th Avenue just south of 125th Street and as he pulled to the curb, the passenger opened the door and began exiting the vehicle before Defendant Driver finished straightening out the vehicle and that when he heard this happen, Defendant Driver put his vehicle in park and ran around to assist the passenger. Defendant Driver further avers that there was a large group at the curb that would not allow him to get close to the passenger and that she was complaining of pain to her foot and 911 was called and an ambulance arrived at the scene, transporting the passenger away.

In reply, Plaintiff contends that the motion is not premature because Defendant Driver offers his own affidavit and Plaintiff did not prevent Defendant from conducting all appropriate discovery. Plaintiff further contends that there are no scenarios where Defendant was not negligent because of the photograph submitted by Plaintiff that shows Plaintiff's shoe trapped under the vehicle's wheel.

Although the parties do not dispute that Plaintiff's foot was run over by the Defendant's vehicle, material issues of fact exist sufficient to preclude a determination of summary judgment on liability in favor of Plaintiff. Defendant Driver's affidavit that states that as he pulled to the curb, Plaintiff opened the door and began to exit the vehicle before he was finished straightening out the vehicle contradicts Plaintiff's testimony that the driver came to a complete stop, opened the door, put her left foot down, with her hand on the door, when the car began to move. The testimony of the parties conflicts as to whether Defendants' vehicle was moving or stopped when Plaintiff opened the door and disembarked. Plaintiff's motion is denied without prejudice to seeking the same relief upon completion of discovery.

Summary Judgment on Serious Injury

Plaintiff also moves for summary judgment on the issue of “serious injury,” alleging she sustained a fracture within the meaning of the Insurance Law. In support, she relies on the independent orthopedic examination conducted by Dr. Marc Silverman and the deposition of Plaintiff.

Plaintiff moves for summary judgment on the issue of “serious injury,” alleging she sustained a fracture within the meaning of the Insurance Law.

Insurance Law 5102 (d) defines the term “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.” When a claim is raised under the permanent loss or limitation of use of a body organ or member, significant limitation of use of a body function or system, or the 90/180 days category, it can be substantiated by a medical experts assigned numeric percentage of the loss of range of motion showing the extent or degree of the plaintiff's physical limitation. An expert may also offer a qualitative assessment, upon an objective basis, of a plaintiff's condition compared to the normal function, purpose and use of the affected body organ, member, function or system (*Toure* at 352; *Lopez*, 65 NY2d 1017; *Ramos v Dekhtyar*, 301 AD2d 428 [1st Dept 2003]). The expert must indicate what objective medical tests s/he

performed to measure the range of motion restrictions (*Lloyd v Green*, 45 AD3d 373 [1st Dept 2007]).

Regarding the 90/180 days category, Plaintiff's Bill of Particulars alleges that she was confined to her bed for two days and to her home for four days following the accident. Plaintiff testified that she was confined to bed and stuck at home for two and four days respectively. This does not meet the 90 days required for the 90/180 category (*see Elias v. Mahlah*, 58 A.D.3d 434 [2009]); (*Rivera v. Lopez-Reyes*, 203 A.D.3d 554 [1st Dept 2022] [finding that Plaintiff's Bill of Particulars stating that he was confined to home for one month after the accident and testimony stating that he began work one month post-accident was sufficient to defeat his 90/180 claim]).

Dr. Marc Silverman evaluated Plaintiff on September 3, 2021. He measured Plaintiff's range of motion with a goniometer and compared his findings to normal values listed in the AMA Guidelines. Dr. Silverman reported moderate soft tissue swelling and tenderness on palpation of the left ankle and foot and reported limitation in range of motion as to Plaintiff's dorsiflexion, plantar flexion, inversion, and eversion.

Dr. Silverman found that Plaintiff had suffered a fracture of the left foot/ankle which requires Plaintiff to still attend ongoing therapy. Additionally, Dr. Silverman says that there is evidence of a moderate orthopedic disability in the left ankle/foot. He states that Plaintiff "has not reached pre-accident status." While she can work and perform all normal activities of daily living, that is tempered with restrictions on prolonged walking and standing.

A fracture constitutes a serious injury under Insurance Law 5102 (d) (*see Elias v. Mahlah*, 58 A.D.3d 434 [1st Dept 2009] [ruling that Plaintiff's serious injury claim is viable with regard to the fracture]). Through Dr. Silverman's report, which concludes that Plaintiff sustained a fracture to her left foot/ankle, Plaintiff has made a prima facie showing that she suffered a serious

injury. Plaintiff testified that her left foot was stuck underneath the wheel of Defendant's car, and Dr. Silverman found fracturing in her left ankle/foot (*see Perez-Hernandez v M. Marte Auto Corp.*, 104 A.D.3d 489 [1st Dept 2013] [finding that Plaintiff submitted testimony that he fell on the left side of his body and medical records show fractures to his left arm entitled him to recover for all injuries related to the accident]). In this case, because Plaintiff established that she sustained a fracture, she is entitled to recover for all injuries related to the accident, including for the injuries not up to the serious injury threshold. (*see Rubin v SMS Taxi Corp.*, 71 A.D.3d 548 [1st Dept 2010] [stating the general principle is that Plaintiff is entitled to recover for all injuries related to the accident]).

In opposition. Defendant has failed to provide evidence that Plaintiff did not sustain fractures to her left foot/ankle, particularly as Defendant's own medical expert points to fractures in the foot/ankle. Neither party disputes that Defendant's vehicle ran over Plaintiff's foot, as such, there is no triable issue of fact as to whether Plaintiff suffered a serious injury under 5102 (d) (*see Perez-Hernandez*). The branch of Plaintiff's motion for summary judgment on the grounds that Plaintiff sustained a serious injury is granted.

Accordingly, it is

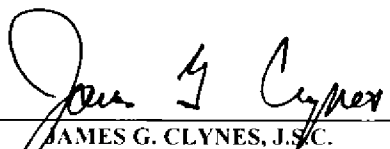
ORDERED that the branch of the motion by Plaintiff Lynda Stewart Kennedy for summary judgment on the issue of liability is denied with leave to seek the same relief upon completion of discovery; and it is further

ORDERED that the branch of Plaintiff's motion for summary judgment on the grounds that Plaintiff's injuries do not meet the serious injury threshold under Insurance Law 5102 (d) is granted; 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.

8/5/2024
DATE


JAMES G. CLYNES, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input checked="" 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