

<b>Rodriguez v Auto-Chlor Sys. of N.Y. City, Inc.</b>
2024 NY Slip Op 34997(U)
July 12, 2024
Supreme Court, New York County
Docket Number: Index No. 153863/2021
Judge: James G. Clynnes
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JAMES G. CLYNES PART 22M

Justice

-----X

MARIA E. RODRIGUEZ,

Plaintiff,

- v -

AUTO-CHLOR SYSTEM OF NEW YORK CITY, INC., RYKA
NORMIL

Defendant.

-----X

INDEX NO. 153863/2021

MOTION DATE 05/13/2024

MOTION SEQ. NO. 002

DECISION + ORDER ON
MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 34, 35, 36, 37, 38, 39, 40, 41,
44, 45, 46, 47, 48, 49, 50, 51, 52

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, the motion by Defendants for summary judgment and
dismissal of Plaintiff's Complaint is decided as follows:

Plaintiff seeks recovery for injuries allegedly sustained as a result of a December 31, 2020
motor vehicle accident between Plaintiff pedestrian and a vehicle owned by Defendant Auto-Chlor
System of New York City, Inc. and operated by Defendant Ryka Normil.

The Court notes that Defendants do not attach Plaintiff's Bill of Particulars to their motion,
but they incorporate it into the record by reference. Plaintiff's Bill of Particulars alleges that
Plaintiff sustained injuries to her right shoulder for which surgery was required on May 17, 2021,
injuries to her left shoulder, specifically severe pain with limited range of motion, tenderness, and
muscle spasm, radiating pain, loss of power and difficulty performing tasks, and permanent
disability of left shoulder. Plaintiff's Bill of Particulars indicates that she underwent manipulation
under anesthesia for her right shoulder. Plaintiff's Bill of Particulars also indicates injury to her
right wrist, left ankle, and cervical spine and lumbosacral spine, specifically disc herniation and
disc bulge. Plaintiff's Bill of Particulars indicates that she went to the Emergency Department at

Bellevue Hospital on December 31, 2020 and to the Fifth Avenue Surgery Center on May 17, 2021, but does not state that she was ever admitted to the hospital or Surgery Center. Plaintiff asserts that she was confined to bed for two days after her right shoulder surgery and confined to her home from December 31, 2020 to the present.

Defendants contend that Plaintiff is the sole proximate cause of the subject accident.

Defendants further contend that Defendant Driver was operating his vehicle in a responsible and prudent manner and that Plaintiff violated VTL 1111 and 1151. VTL 1151 (b) provides that: No pedestrian shall suddenly leave a curb or other place of safety and walk or run into the path of a vehicle which is so close that it is impractical for the driver to yield.” Defendants contend that Plaintiff left a place of safety and walked into the path of a vehicle. Defendants contend that the testimony of Defendant Normil along with the affidavit of non-party witness, Joseph Nasca, prove that Plaintiff caused the accident. Defendant Normil testified that he was stopped at the red light behind a truck at the intersection of West 28th Street and 6th Avenue for about 15 seconds, he saw the light change from red to green, had his turn signal illuminated, the truck in front of him approached the intersection and waited for pedestrians to cross for about 10 seconds, then completed a right turn, Defendant Driver looked right and straight to check for pedestrians, it was clear, and he began making his turn, he completed about 75 percent of the right turn when he heard a light thud from the passenger’s side of his vehicle, he stopped, put the vehicle in park, got out and looked around his vehicle when he found Plaintiff sitting on the ground. Defendant Driver testified that he did not see Plaintiff at any time before the impact.

Nonparty witness Joseph Nasca avers in an affidavit signed on April 19, 2022, that he was in his vehicle on West 28th Street waiting for a parking spot, was directly in front of Defendants’ vehicle; behind him, he observed a work van that was in the process of turning right onto West 28th Street from 6th Avenue, the crosswalk was clear when the van started its turn; when the van

had almost completed the turn, a female pedestrian walked into the street and walked directly into the van; the van was completely stopped at the time of the collision because Nasca's vehicle was stopped in front of him, and the female pedestrian walked into the rear passenger panel of the van and then fell to the ground.

Defendants point to *DiCocco v Ctr. for Dev. Disabilities, Inc.*, 264 AD2d 803 [2d Dept 1999], where the decedent crossed a five-lane thoroughfare with no marked pedestrian crosswalk violating VTL 1152 (a) and 1151 (a), the Second Department found that the plaintiff failed to present sufficient evidence that the driver of the vehicle that hit decedent failed to operate his vehicle in a reasonable and prudent manner under the circumstances presented to him by the decedent's actions. However, the *DiCocco* case is distinguishable from the facts herein, in which it is undisputed that Plaintiff entered the roadway within a marked crosswalk with the pedestrian signal in her favor.

Defendants also submit select medical records of Plaintiff, Plaintiff's examination before trial testimony, the transcript of Justin Rodriguez, and the IME reports of Dr. Neil S. Roth.

Dr. Roth, an orthopedic surgeon, examined Plaintiff on November 17, 2022, and then after Plaintiff underwent a left ankle surgery on December 2, 2022, Dr. Roth reviewed the additional reports to determine if his opinion changed from the initial exam report and provided an addendum.

Dr. Roth measured Plaintiff's range of motion with a goniometer and a measuring tape and compared measurements to normal values as accepted by the American Medical Association and the American Academy of Orthopedic Surgeons. Dr. Roth reported that Plaintiff had normal range of motion in her left and right shoulders, cervical spine, lumbar spine, left ankle, and right and left wrists. Dr. Roth also reported negative orthopedic tests and degenerative changes in the subject areas. He noted that there is no evidence of any acute nature to her diagnostic findings nor her examination. Dr. Roth concluded that Plaintiff was disabled prior to the alleged accident and has

not had any further disability as a result of this alleged incident, nor will she require any treatment in the future due to this alleged incident.

In his addendum, Dr. Roth reported that his opinion has not changed that Plaintiff would not require any treatment in the future to her left shoulder, right shoulder, cervical spine, lumbar spine, left ankle, right wrist, or left wrist as a result of this alleged incident. Dr. Roth further reported that there was no evidence that Plaintiff necessitated any surgical intervention to her left ankle as she has chronic degenerative findings based on her degenerative changes and her weight. Moreover, he reported that Plaintiff did not require any of the surgical interventions that she underwent to her left shoulder, her right shoulder, her lumbar spine, and her left ankle.

Plaintiff testified that she has difficulties walking, lifting her arm, taking a shower, cooking, and cleaning. Plaintiff further testified that her daughter comes to do all the work at home.

Justin Rodriguez, Plaintiff's son, testified that he lived with Plaintiff prior to and after the accident and assisted with basic household tasks, and after the accident, Plaintiff was not able to go to her community meetings, do laundry, lift heavy objects, or shower independently, and that he physically helped her get to her medical appointments.

In opposition, Plaintiff contends that she was a pedestrian lawfully within the crosswalk and had the right of way when she was struck by Defendants' vehicle. Plaintiff submits an affidavit of nonparty witness Joseph Nasca signed on November 29, 2022, in which he avers that he did not see the actual impact between Plaintiff and Defendants' vehicle, but he heard it and saw the Defendants' vehicle stopped in the crosswalk.

Plaintiff also submits the narrative reports of Dr. Thomas S. Mathew and Dr. Narayan Paruchuri.

Dr. Mathew examined Plaintiff on January 8, 2021 and measured her range of motion using a handheld goniometer with normal ranges based on values published by the NYS Division of

Disability Determination, NYS Workers' Compensation Guidelines for Determining Impairment, 2018 and the Manual of Structural Kinesiology, 2012. Dr. Mathew reported limitations in Plaintiff's range of motion as to her cervical spine, lumbar spine, right and left shoulders, right wrist, right and left knees, and right ankle. Dr. Mathew also reported positive orthopedic tests including Spurling's test and Hawkin's test. Further, Dr. Mathew notes that the absence of prior trauma at these subject areas, with the exception of the knees, suggests that the cervical and lumbar disc pathologies and nerve injuries, bilateral shoulder tears, right wrist tears and left ankle tears did not pre-exist the subject accident. Dr. Mathew notes that Plaintiff did have prior bilateral knee replacements, but this most recent accident exacerbated her bilateral knee symptoms. Dr. Mathew concluded that Plaintiff's injuries are permanent in nature and are a direct result of the subject accident.

Dr. Paruchuri, radiologist, conducted an MRI review of Plaintiff's right and left shoulders, cervical spine, lumbar spine, left ankle, and right wrist. As to the right and left shoulders, Dr. Paruchuri reported full-thickness tears of the supraspinatus tendon with retraction to the medial third humeral head. As to the cervical spine, Dr. Paruchuri reported disc bulges and herniations and at C6-C7, a left paracentral herniation with anterior thecal sac impingement. As to the lumbar spine, Dr. Paruchuri reported disc bulges and herniations with straightening of the lumbar lordosis indicative of muscle spasm. As to the left ankle, Dr. Paruchuri noted partial thickness tear and a longitudinal tear of the peroneus brevis tendon beginning at the level of the lateral malleolus and extending to the peroneal tubercle. As to the right wrist, Dr. Paruchuri noted an extensive tear of the scapholunate ligament, a full-thickness tear of the triangular fibrocartilage complex, and high-grade cartilage loss. Dr. Paruchuri concluded that Plaintiff sustained trauma as a result of the subject motor vehicle accident.

In reply, Defendants contend that Plaintiff fails to raise a triable issue of fact. Defendants contend that nonparty witness Nasca's November 29, 2022 affidavit does not contract the April 19, 2022 affidavit. Defendants further contend that Plaintiff has not submitted evidence that proves that any serious injury was caused by the accident, as opposed to preexisting conditions.

Defendants' motion for summary judgment and dismissal of Plaintiff's Complaint is denied. 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, 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 New York*, 49 NY2d 557, 560 [1980]). In instances where a defendant asserts that the evidence reveals a preexisting injury or a degenerative condition, the plaintiff must present evidence to the contrary (*Brewster v FTM Servo, Corp.*, 44 AD3d 351 [1st Dept 2007]).

Defendants have failed to establish prima facie entitlement to summary judgment on the issue of liability, as he failed to exercise due care in accordance with VTL 1146 (a) and failed to yield to the right of way of Plaintiff in accordance with VTL 1111 (a) (1) (*Miranda v Century Waste Servs., LLC*, 210 AD3d 590 [1st Dept 2022]).

Defendants have, however, met their initial burden of establishing that Plaintiff did not sustain serious injuries as a result of the accident under Insurance Law 5102 (d) (*Perez v Rodriguez*, 25 AD3d 506 [1st Dept 2006]). In opposition, Plaintiff raised an issue of fact as to whether she sustained a serious injury.

However, with respect to the 90/180 days category of serious injury, Plaintiff supplies the Court with no competent medical evidence demonstrating that Plaintiff was unable to perform

substantially all of her normal activities for at least 90 of the first 180 days as a result of the accident (*Elias v Mahlah*, 58 AD3d 434, 435 [1st Dept 2009]). Plaintiff’s subjective complaints of pain and limitation, without more, do not rise to the level of a “serious injury” within this category of Insurance Law 5102 (d).

By relating Plaintiff’s injuries to the accident, Plaintiff’s expert reports raise triable issues of fact as to whether Plaintiff sustained a serious injury under Insurance Law 5102 (d) (*Williams v Perez*, 92 AD3d 528, 529 [1st Dept 2012]; *Perl v Meher*, 18 NY3d 208 [2011]; (*Lee Yuen v Arka Memory Cab Corp.*, 80 AD3d 481 [1st Dept 2011])). Thus, Defendants’ motion is denied except as to 90/180 days claim. Accordingly, it is

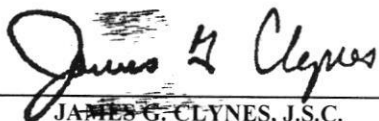
**ORDERED** that the branch of Defendants’ motion for summary judgment on the issue of liability and dismissal Plaintiff’s Complaint is DENIED; and it is further

**ORDERED** that the branch of Defendants’ motion for summary judgment on the grounds that Plaintiff did not sustain a serious injury under Insurance Law 5102 (d) is DENIED except as to the 90/180 days claim; 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.

7/12/2024  
DATE

  
JAMES G. CLYNES, J.S.C.

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