

Vega v Cisse
2024 NY Slip Op 35229(U)
January 19, 2024
Supreme Court, Queens County
Docket Number: Index No. 715278/2019
Judge: Claudia Lanzetta
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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.

Decision and Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE CLAUDIA LANZETTA

IA PART 16

A.J.S.C.

-----X
XIMENA VEGA,

Index No. 715278/2019

Motions Submitted: March 6, 2023

Motions Assigned: Oct. 30, 2023

Motion Seq. No.'s: 4, 5 & 6

Plaintiff,

- against -

HAROUNA CISSE, MLYNA CAB COPORATION,
STEVEN PEREZ, JEISON GARCIA, MARCO R.
MENDEZ and MIDRE CONTRACTING CORP.,

Defendants.

-----X
The following EF numbered papers were read on these separate motions by defendants pursuant to CPLR §3212 for summary judgment dismissing plaintiff's complaint on the ground that plaintiff's alleged injuries fail to meet the serious injury threshold requirement of Insurance Law §5102(d), and other defendants' motions for summary judgment based on liability.

	<u>Papers Numbered</u>
Notice of Motion, Affirmation, Exhibits (<i>seq. 4</i>).....	EF 54-66
Affirmation in Support.....	EF 67-68
Affirmation in Opposition, Exhibits.....	EF 100-113
Affirmation in Reply.....	EF 148-151
Notice of Motion, Affirmation, Exhibits (<i>seq 5</i>).....	EF 71-80
Affirmation in Opposition, Exhibits.....	EF 114-116
Reply Affirmation.....	EF 135
Affirmation in Opposition, Exhibits.....	EF 136-141
Reply Affirmation.....	EF 147
Notice of Motion, Affirmation, Exhibits (<i>seq 6</i>).....	EF 81-98
Affirmation in Opposition, Exhibits.....	EF 117-131
Affirmation in Opposition, Exhibits.....	EF 142-146
Reply Affirmation (<i>corrected</i>).....	EF 134

Upon the foregoing papers, as well as a conference/oral argument, it is ordered that these motions are decided as follows:

Defendants, Harouna Cisse and Mlyna Cab Corporation's motion for summary judgment on the ground that plaintiff's alleged injuries fail to meet the serious injury threshold requirement

of Insurance Law §5102(d), as joined by defendants Marco R. Mendez and Midre Contracting Corp. is denied inasmuch as movants failed to meet their *prima facie* burden with respect to same (*see generally* *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 352 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 956-57 [1992]; *Licari v Elliot*, 57 NY2d 230, 237-38 [1982]). The doctors' reports submitted by defendants, that of Dr. William Walsh and of Dr. Darren Fitzpatrick, are inconsistent. Dr. Walsh's impression after physical examination on June 29, 2022, was that injuries to the cervical, thoracic, and lumbar spine, as well as the right shoulder and elbow, and left knee were "resolved" (*see* Def's Exh. G, EF 63), whereas Dr. Fitzpatrick, in examining plaintiff's MRI films of her cervical and lumbar spine, and right shoulder, found no evidence of traumatic injury and minimal disc bulging resultant of age-related degeneration (*see* Def's Exh. H, EF 64). The MRIs were performed less than two weeks post-accident.

It is incongruous for the latter physician to find no traumatic injury and the former to indicate resolution of sustained injuries thereby implicitly acknowledging causation (*see McGee v Bronner*, 188 AD3d 1033, 1035 [2d Dept 2020]). Further, Dr. Fitzpatrick's degenerative findings were "too equivocal" to satisfy defendants' burden (*see Luigi v Avis Cab Co., Inc.*, 96 AD3d 809 [2d Dept 2012]) especially considering plaintiff's relative youth (27 years old) at the time of the accident (*see e.g. June v Akhtar*, 62 AD3d 427, 428 [1st Dept 2009] *citing* *Coscia v 938 Trading Corp.*, 283 AD2d 538 [2d Dept 2001]; *De La Cruz v Hernandez*, 84 AD3d 652 [1st Dept 2011]). As movants failed to meet their burden, the court need not consider opposition and whether plaintiff raised any triable issues of fact (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *see also Che Hong Kim v Kossof*, 90 AD3d 969 [2d Dept 2011] *citing Reynolds v Wai Sang Leung*, 78 AD3d 919, 920 [2d Dept 2010]) and the burden never shifted to plaintiff to explain any gap in treatment (*see Wickman v Kastavis*, 217 AD3d 905, 906 [2d Dept 2023]; *see also Cortez v Nugent*, 175 AD3d 1383, 1384 [2d Dept 2019] *citing generally Pommells v Perez*, 4 NY3d 566, 572 [2005]).

Next considered are the separate motions by defendants, Steven Perez and Jeison Garcia, and Marco R. Mendez and Midre Contracting Corp., (hereinafter "Midre"), for summary judgment on the grounds that they have no liability for the accident underlying this action.

This matter involves a three-car accident at an intersection controlled by a traffic light. Plaintiff was a passenger in the vehicle owned by defendant Jeison Garcia and operated by defendant Steven Perez. That vehicle was pushed into a third vehicle owned by defendant Midre and operated by defendant Marco R. Mendez after the initial collision with the vehicle owned by defendant Mlyna Cab Corporation, (hereinafter "Mlyna"), and operated by defendant Harouna Cisse. When considered in its totality, deposition testimony, including that of plaintiff, demonstrates that the vehicles owned and operated by the Garcia, Perez, Mendez, and Midre defendants proceeded into the intersection with the green light in their favor. Further, that defendant driver Cisse has no recollection of the light's color at the subject intersection, or of the happening of the accident.

"A defendant moving for summary judgment in a negligence action has the burden of establishing, *prima facie*, that he or she was not at fault in the happening of the subject accident. An accident can have more than one proximate cause, and although it is generally

for the trier of fact to determine the issue of proximate cause, it may be decided as a matter of law where only one conclusion may be drawn from the established facts.

A driver who enters an intersection against a red traffic light in violation of Vehicle and Traffic Law §1110(a) [and §1111] is negligent as a matter of law. The operator of a vehicle with the right-of-way is entitled to assume that others will obey the traffic laws requiring them to yield, but a driver traveling with the right-of-way may nevertheless be found to have contributed to the happening of the accident if he or she did not use reasonable care to avoid the accident. Nevertheless, a driver with the right-of-way who only has seconds to react to a vehicle which has failed to yield is not comparatively negligent for failing to avoid the collision” (*Kirby v Lett*, 208 AD3d 1174, 1175 [2d Dept 2022] [internal citations omitted]).

Here, the defendants Perez and Garcia established their prima facie entitlement to judgment as a matter of law by virtue of the deposition testimony highlighted above. The Garcia/Perez and Mendez/Midre vehicles proceeded through the intersection with a green light when the Cisse/Mlyna vehicle entered the intersection against a red traffic light, and that Cisse’s conduct was the sole proximate cause of the accident (*see e.g. Kirby v Lett, supra; see also Angelillo v Guerin*, 219 AD3d 556, 557-558 [2d Dept 2023]; *Chen v Heart Transit, Inc.*, 143 AD3d 945, 946 [2d Dept 2016]; *Joaquin v Franco*, 116 AD3d 1009, 1009-1010 [2d Dept 2014]). Efforts in the opposition to raise issues of comparative fault by virtue of the defendant Perez’ failure to avoid the collision are insufficient. The testimony of the parties, again, when read collectively and in its entirety, establish that defendant Perez only had seconds to react prior to impact, (*see e.g. Kirby v Lett, supra; see also Angelillo v Guerin, supra; Jeong Sook Lee-Son v Doe*, 170 AD3d 973, 975 [2d Dept 2019]; *Joaquin v Franco, supra*), that the Mlyna/Cisse vehicle was “very near”, “very close to... impacting”, and “already on top of”, (*see EF 77 and 89 at pgs. 33-35*), the Garcia/Perez vehicle when observed. Non-party Daniel Garcia testified that there were no warnings prior to impact, no horns honking or brakes screeching, and that he observed the Mlyna/Cisse vehicle coming towards him very fast, he shouted a profanity, and the vehicle in which he was a passenger (Perez/Garcia) was hit; all of which happened in seconds, (*see EF 90 at pgs. 53-54*). Finally, defendant driver Perez testified that “there was really nothing to do” to avoid the accident, (*see EF 75 and 91 at pg. 68*). Remaining arguments regarding the conceivability of what the parties could have seen are speculative and, likewise, fail to raise a triable issue of fact as to any alleged comparative negligence (*see Angelillo v Guerin, supra*).

Similarly, defendants Mendez and Midre established their prima facie entitlement to judgment as a matter of law (*see above*). Much like Perez, driver Mendez demonstrated that he only had seconds to react prior to impact. He testified that 1-2 seconds elapsed from the time he heard the loud noise, (the initial impact between the Perez/Garcia and Cisse/Mlyna vehicles), until he felt an impact to his vehicle. He also stated that he tried to veer to the left and the impact to his vehicle was light, (*see EF 92 at pgs. 22-26*). Further, there is nothing in the submissions to even suggest that the accident was caused in any way by any negligence on the part of the Mendez/Midre defendants; *i.e.*, there is no proof that Mendez “operated his vehicle improperly or engaged in any conduct which helped bring about... the collision” (*Biddy v Vanmaltke*, 67 AD3d 845, 846 [2d

Dept 2009]; *see generally Lapadula v Sang Shing Kwok*, 295 AD2d 406 [2d Dept 2002]; *Yusupov v Supreme Carrier Corp.*, 240 AD2d 660 [2d Dept 1997]).

In light of the above, defendants Cisse and Mlyna's motion, as joined by defendants Mendez and Midre, for summary judgment and to dismiss plaintiff's complaint on a failure to sustain a threshold injury basis is denied, and defendants Perez/Garcia and Mendez/Midre's separate summary judgment motions on liability are granted, all claims and cross-claims are hereby dismissed as against these moving defendants (Perez/Garcia and Mendez/Midre) only.

Dated: January 19, 2024
Queens, New York



Claudia Lanzetta, AJSC

