

Brooks v Thiam
2024 NY Slip Op 35430(U)
April 12, 2024
Supreme Court, Bronx County
Docket Number: Index No. 21700/2020E
Judge: Bianka Perez
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 14**

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EDITH BROOKS,
Plaintiff,
-against-
MADOU THIAM AND TELMO ORTIZ,
Defendants.

Index No. 21700/2020E
Hon. Bianka Perez
Justice Supreme Court

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The following were read on this motion (Mot. Seq. 1) submitted on **November 16, 2023**.

Notice of Motion - Exhibits and Affidavits Annexed	NYSCEF No(s). 16-27
Answering Affidavit and Exhibits	NYSCEF No(s). 32-33
Reply Affidavit and Exhibits	NYSCEF No(s). 34-35

Upon the foregoing papers, plaintiff moves, pursuant to CPLR §§3212, 3403(a)(4) and 3042(d), for an Order: 1) granting summary judgment on the issue of liability 2) granting summary judgment on grounds that plaintiff has sustained a “serious injury” as defined by Section §5102(d) of the New York State Insurance Law as a matter of law 3) granting plaintiff a special trial preference due to the plaintiff’s age and 4) and striking the Answer of defendants in its entirety for failing to produce their taxi driver/owner clients for depositions. Defendants oppose.

Plaintiff commenced the instant action to recover for injuries she allegedly sustained in a motor vehicle accident that occurred on November 22, 2019 at the intersection of Lenox Avenue with 139th Avenue, New York County, New York. Plaintiff was utilizing a wheelchair within the crosswalk with the walk signal in her favor when the vehicle owned by Defendant Telmo Ortiz and operated by Defendant Madou Thiam struck Plaintiff.

The proponent of a summary judgment motion has the burden of submitting evidence in admissible form demonstrating the absence of any triable issues of fact and establishing entitlement to judgment as a matter of law (*Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Only when the movant satisfies its prima facie burden will the burden shift to the opponent “to lay bare his or her proof and demonstrate the existence of triable issues of fact” (*Alvarez*, 68 NY2d at 324; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Chance v Felder*, 33 AD3d 645, 645-646 [2d Dept 2006]).

Summary Judgment Liability

In her deposition, plaintiff avers that she crossed the street with the walk sign in her favor and that she had looked both ways before crossing the street (NYSCEF Doc. #24, Pg. 17). Plaintiff further states that she first saw defendant’s vehicle in motion when she was in the middle of crosswalk stating, “I was approximately in the middle of the crosswalk, I observed the yellow cab...the front of the yellow cab made contact with my foot --leg” (*Id.* at 19-21).

A pedestrian with a steady walk signal in his or her favor may cross the intersection and should be given the right of way by vehicular traffic (see *Counihan v. J. H. Werhelovsky's Sons, Inc.*, 5 A.D.2d 80, 80 [1st Dept. 1957]). In this case involving an accident between a motor vehicle and a pedestrian, the plaintiff established her prima facie entitlement to summary judgment in her favor by demonstrating that the defendant motorist was negligent in failing to yield the right of way to her while she was crossing the street, within the crosswalk, with the pedestrian walk signal in her favor (see 34 RCNY § 4-03[a][1][i]; *Beamud v. Gray*, 45 A.D.3d 257 [1st Dept. 2007]).

In opposition, defendant failed to submit any non-negligent explanation for this accident and each opposing defendant submits only an attorney affirmation. A mere “attorney’s affirmation that is not based upon personal knowledge is of no probative or evidentiary significance,” and is thus incapable of raising a triable issue of fact (*Warrington v Ryder Truck Rental, Inc.*, 35 A.D.3d 455, 456 [2d Dept. 2006]).

Summary Judgment Threshold

Plaintiff also moves for summary judgment on the basis that she sustained a “serious injury” as defined by Section §5102(d) of the New York State Insurance Law. The role of the court is to determine whether bona fide issues of fact exist, and not to resolve issues of credibility (see *Knepka v. Tollman*, 278 A.D.2d 811 [4th Dept. 2000]). The moving party must tender evidence sufficient to establish as a matter of law that there exist no triable issues of fact to present to a jury (see *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 [1986]). Summary judgment is the procedural equivalent of a trial (see *Mendoza v Highpoint Associates, IX, LLC*, 83 AD3d 1 [1st Dept 2011]). It is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (see *Rotuba Extruders Inc., v Ceppos*, 46 NY2d 223 [1978]). The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, presenting sufficient evidence, in admissible form, to eliminate any material issues of fact from the case (see *Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see *Winegrad, supra* at 853).

Here, Plaintiff alleges she sustained a serious injury, specifically a fracture, within the meaning of the Insurance Law § 5102[d]. To support her motion for summary judgment, Plaintiff submits an unaffirmed and uncertified copy of her Harlem Hospital records and her sworn affidavit. While the treatment records submitted indicate that Plaintiff fractured her left ankle, the records are unaffirmed and are therefore inadmissible (see *Gilphilin v. Ware*, 205 A.D.2d 353 [1st Dep. 1994]); see also *Cinelli v. Greyhound Lines*, 211 A.D.3d 571 [1st Dept. 2022]; *Sanchez v. Oxin*, 157 A.D.3d 561, 563 [1st Dept. 2018]; *Malupa v. Oppong*, 106 A.D.3d 538, 539 [1st Dept. 2013]). Even if certified, the treatment records submitted by Plaintiff “failed to establish prima facie that the fracture was caused by the subject accident,” (*Alexander v. Gordon*, 95 A.D.3d 1245, 1247 [2d Dept. 2012]; see also *Degachi v. Faridi*, 215 A.D.3d 733, 734 [2d Dept. 2023]). Accordingly, plaintiff has failed to make a prima facie showing that she sustained a serious injury as defined by Section §5102(d) of the New York State Insurance Law.

Additionally, Plaintiff states in her affidavit that she was in a rehabilitation facility for more than three months following her discharge from the hospital after the subject accident (NYSCEF Doc. #20). However, Plaintiff failed to submit objective medical evidence to support her “90-180-day” injury claim (*DeJesus v. Paulino*, 61, A.D.3d 605, 607 [1st Dept. 2009]). “Under Insurance Law 5102(d), an injury must be ‘medically determined’ to qualify under the 90/180-days category, meaning the condition must be substantiated by a physician,” (*Damas v. Valdes*, 84 A.D.3d 87, 93 [2d 2011]). Further, Plaintiff must “submit evidence to show causation,” (*Chawdhury v. 3511 Systems Inc.*, 193 A.D.3d 541 [1st Dept. 2021]; see also *Damas v. Valdes*, 84 A.D.3d at 93). Plaintiff’s statement alone, without physician corroboration of a “medically determined injury,” is not sufficient to raise a triable issue of fact under the 90/180-day category, (*Sigona v. New York City Transit Authority*, 255 A.D.2d 231 [1st Dept. 1998]). As Plaintiff submitted no admissible medical records or reports, plaintiff’s “90/180 day” injury claim is dismissed.

Since movant has failed to establish prima facie entitlement to summary judgment, the opposition need not be considered.

Trial Preference

Plaintiff also moves for trial preference. In support of this branch of her motion, Plaintiff Edith Brooks submits her a copy of her driver’s license which indicate that she was born in 1950, making her over 70 years of age (NYSCEF Doc. #27). The mandatory language of CPLR 3403(a)(4) provides for a trial preference in any action where, as here, a party has reached the age of 70 (*see Tylel v. Battery Beer Distributors, Inc.*, 194 AD2d 330, 330 [1st Dept. 1993]).

Striking Defendants’ Answer/Precluding Defendants’ Testimony

Plaintiff also seeks to strike Defendants’ answer, or in the alternative, issue a conditional Order precluding defendants from testifying at the time of trial if they not appear for deposition by date certain.

This Court notes that the Affirmation of Good Faith submitted by movant does not claim that any in-person or telephonic conferences took place prior to filing the motion as required by 22 NYCRR 202.20-f (b).

If necessary, a further discovery conference may be requested upon written application demonstrating that all good faith efforts have been exhausted to resolve the issue(s) without court intervention. The application shall identify the good faith efforts undertaken and highlight specific point(s) of contention that require judicial resolution.

Accordingly, it is hereby

ORDERED, that Plaintiff’s motion for summary judgment on the issue of liability is granted, it is further

ORDERED, that the Clerk of the Court is directed to enter judgment on liability as against Defendants,

it is further

ORDERED, that Plaintiff’s motion for an Order pursuant to CPLR’ § 3212 granting summary judgment on the issue of “serious injury” pursuant to Insurance Law 5102(d) is denied, and it is further

ORDERED, that the branch of Plaintiff’s motion seeking trial preference is granted, it is further

ORDERED, that the branch of Plaintiff’s motion seeking to strike Defendants’ answer or preclude their testimony is denied.

This constitutes the decision and order of the Court.

Dated: April 12, 2024


Hon. _____
BIANKA PEREZ, J.S.C.

1. CHECK ONE.....

☐ CASE DISPOSED IN ITS ENTIRETY X CASE STILL ACTIVE

2. MOTION IS.....

GRANTED ☐ DENIED X GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE.....

☐ SETTLE ORDER ☐ SUBMIT ORDER X TRANSFER

☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT