

Francese v Modern Kitchen & Bath Designs Inc.

2025 NY Slip Op 33351(U)

September 5, 2025

Supreme Court, New York County

Docket Number: Index No. 151217/2018

Judge: James G. Clynes

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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 22

Justice

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TECLA G FRANCESE,

Plaintiff,

- v -

MODERN KITCHEN & BATH DESIGNS INC., MODERN
KITCHEN & BATH DESIGN CENTER INC., EVAGELOS
SAKKAS

Defendant.

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INDEX NO. 151217/2018
MOTION DATE 05/03/2024
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, it is ordered that Plaintiff's motion for an Order granting summary judgment in Plaintiff's favor and against Defendants on the issues of liability and serious injury and dismissing Defendants' affirmatives defenses as to culpable conduct (First Affirmative Defense) and serious injury (Third Affirmative Defense) is decided as follows.

Plaintiff seeks recovery for personal injury sustained as a result of a January 26, 2018 motor vehicle accident involving Plaintiff pedestrian and a vehicle owned and operated by Defendants at the intersection of West 66th Steet and West End Avenue in New York County.

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (see Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]; Andre v Pomeroy, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must present a prima facie case of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact, and the failure

to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see CPLR 3212 [b]; *Smalls v AJI Industries, Inc.*, 10 NY3d 733 [2008]; *Alvarez*, 68 NY2d at 324). Once a prima facie showing has been made, however, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution or tender an acceptable excuse for the failure to do so; mere expressions of hope are insufficient to raise a genuine issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Plaintiff's motion for summary judgment on liability

Plaintiff's submission, which includes the examination before trial testimony of Plaintiff pedestrian, Defendant driver, and a nonparty witness who was at the accident scene, but did not witness the accident, and surveillance video of the incident, established prima facie negligence by Defendants by demonstrating that Plaintiff was crossing West End Avenue at its intersection with West 66th Street within the crosswalk and with the pedestrian control signal in her favor when Defendants' vehicle while making a left turn failed to yield to the Plaintiff pedestrian and struck Plaintiff pedestrian on her right side from the rear (VTL 1111, VTL 1146, *Shin v Ljulja*, 2019 AD3d 1238, 1238 [1 Dept 2023]).

A Plaintiff who is struck by a vehicle that approaches from behind and to the right after turning left into the crosswalk where it struck Plaintiff, may not be held comparatively negligent based on a theory that she could have seen and avoided the vehicle through the exercise of ordinary care (*Shin v Ljulja*, 219 AD3d 1238, 1238 [1 Dept 2023], citing *Quintavaille v Perez*, 139 AD3d 182, 187 [1st Dept 2016])

Defendants' attorney affirmation in opposition contends that Plaintiff failed to establish prima facie negligence by Defendants because she failed to present proof that she looked for

approaching traffic before she began to cross, but does not raise an issue of fact sufficient to preclude summary judgment on liability in favor of Plaintiff and against Defendants. A pedestrian who has the right of way is entitled to anticipate that motorists will obey the traffic laws that require them to yield (*Lu v Saia*, 123 AD3d 813, 814 (2d Dept 2014); *Namismak v Martin*, 244 AD2d 258 (1st Dept., 1997); *Perez v Brux Cab Corp.*, 251 AD2d 157 (1st Dept., 1998). There is no evidence of culpable conduct by Plaintiff. Therefore, the Court grants the portion of Plaintiff's motion seeking summary judgment on liability in favor of Plaintiff and against Defendants and dismissing Defendants' First Affirmative Defense of culpable conduct by Plaintiff.

The video depicting the incident clearly shows that the Defendant driver did not yield the right of way to Plaintiff, a pedestrian. The video shows that Defendants' vehicle, while making a left turn into the crosswalk from behind Plaintiff, struck Plaintiff on the right side. The video shows that Defendants' vehicle did not slow or stop in the intersection before making the left turn and striking Plaintiff pedestrian, which contradicts Defendant driver's testimony that Plaintiff jumped in front of his truck a split second before impact.

Plaintiff's motion for summary judgment on serious injury

Plaintiff submitted prima facie evidence that she sustained a displaced left zygomatic fracture of her facial bones as a result of this motor vehicle collision through the affidavit of Nolan Kagetsu, M.D., containing the CT Report of the Facial Bones performed on the date of the incident January 26, 2018 (see NYSCEF Doc # 46, Exhibit "L" of Plaintiff's Affirmation in Support, dated May 3, 2024). Certified radiology records that Plaintiff's alleged injuries were sustained as a result of the motor vehicle accident, specifically facial fractures, which satisfy the serious injury threshold within the meaning of Insurance Law 5102 (d) and 5104. It is undisputed that Plaintiff sustained facial fractures as a result of the accident. Defendant's opposition papers do not address

and therefore concede that Plaintiff's alleged injuries satisfy the serious injury threshold within the meaning of Insurance Law 5102 (d) and 5104.

Therefore, the Court grants the portion of Plaintiff's motion seeking dismissal of Defendants' Third Affirmative Defense, which contends that Plaintiff's alleged injuries fail to satisfy the serious injury threshold within the meaning of Insurance Law 5102 (d) and 5104.

Plaintiff's motion is granted in its entirety. Accordingly, it is

ORDERED that Plaintiff's motion for summary judgment in favor of Plaintiff and against Defendants on the issue of liability is granted; and it is further

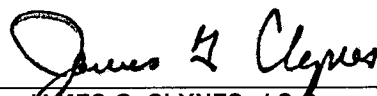
ORDERED that Plaintiff's motion for summary judgment in favor of Plaintiff and against Defendants on the issue of whether Plaintiff's injuries satisfy the serious injury threshold within the meaning of Insurance Law 5102 (d) and 5104 is granted; and it is further

ORDERED that Plaintiff's motion for an order dismissing Defendants' First Affirmative defense alleging culpable conduct by Plaintiff and Third Affirmative Defense alleging Plaintiff's injuries fail to satisfy the serious injury threshold are granted and those affirmative defenses are dismissed; and it is further

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

This constitutes the Decision/Order of the Court.

9/5/2025
DATE


JAMES G. CLYNES, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: