| **Zibak v New York City Tr. Auth.** |
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| 2026 NY Slip Op 31766(U) |
| April 21, 2026 |
| Supreme Court, New York County |
| Docket Number: Index No. 450631/2020 |
| Judge: Richard Tsai |
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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **HON. RICHARD TSAI** **PART** **21**

***Justice***

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FARHA ZIBAK,

Plaintiff,

- v -

THE NEW YORK CITY TRANSIT AUTHORITY and JOHN DOE,

Defendants.

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**INDEX NO.** 450631/2020

**MOTION DATE** 09/10/2024

**MOTION SEQ. NO.** 004

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document numbers (Motion 004) 59-74, 77, 80-85, 87

were read on this motion to/for JUDGMENT – SUMMARY.

In this action for personal injuries arising out of the use of a motor vehicle, defendant New York City Transit Authority (NYCTA) now moves for summary judgment dismissing the complaint on the grounds that plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102 (d). Plaintiff opposes the motion.

## BACKGROUND

The complaint alleges that, on March 12, 2018, plaintiff was a passenger on bus #1266, and plaintiff was injured while exiting the bus (*see* defendants' Exhibit A in support of motion, complaint ¶12 [NYSCEF Doc. No. 63]).

At her deposition, plaintiff testified as follows: on Mach 12, 2018, she was about nine months pregnant with her second child, Marielle (*see* defendants' Exhibit F in support of motion, plaintiff's EBT at 35, lines 11-13; at 36, lines 5-23 [NYSCEF Doc. No. 70]). Plaintiff boarded an M15 Select Bus at 96th Street and "York, 2nd Ave" to head to 24th Street and Second Avenue (*id.* at 39, lines 12-21; at 40, lines 11-18). At 24th Street and Second Avenue, as plaintiff was walking off the bus,

> "The bus driver was pulling out the wheelchair ramp. He realized I was walking while he was pulling up the wheelchair ramp to open it up.
>
> And then he realized that he automatically wanted to close it, but it closed on my foot. The wheelchair ramp closed on my foot in between the wheelchair ramp and the floor of the bus" (*id*. at 42, lines 1-7).

At her continued deposition, plaintiff testified that the wheelchair lift made contact with her toe and her shin—"It scraped the whole – like the whole front of it" (*see*

defendant's Exhibit G in support of motion, plaintiff's continued EBT, at 15, lines 6-18]). Plaintiff was worried about her baby, "because I fell, almost fell" (*id.* at 19, lines 2-3). Plaintiff stated that she went to E.R. at New York Presbyterian Hospital (*id.* at 19, lines 11-21). According to plaintiff, Labor and Delivery said that her baby should be okay (*id.* at 21, lines 6-7). Plaintiff stated that they bandaged up her foot and suggested that she keep the foot elevated, not carry heavy things, stay off her feet, and put ice (*id.* at 22, lines 15-19). Plaintiff testified that she did not receive any other treatment for the alleged injuries she sustained from this accident (*id.* at 24, lines 15-20).

Plaintiff testified that her child was born one week after the accident (plaintiff's EBT at 37, lines 1-3).

According to the bill of particulars, plaintiff suffered a bruised right shin and a cut on right big toe (*see* Exhibit C in support of motion, bill of particulars ¶ 12 [NYSCEF Doc. No. 65]). At her continued deposition, plaintiff stated that she had a scar as a result of this accident (*see* plaintiff's continued EBT at 24, lines 21-23). When asked, "Where is your scar?", plaintiff responded, "My toe nail never grew back straight" (*id.* at 24, lines 24-25).

According to plaintiff, when she uses her foot for the pedal for the high speed drill that she uses in her dental work, "[s]ometimes when I put a lot of pressure on it, it hurts me" (*see* plaintiff's continued EBT, at 31, lines 14-21). Plaintiff testified that this occur "[M]aybe once a week" (*id.* at 31, lines 17-18).

Plaintiff testified that, at the time of the accident, she was attending NYU Dental School as a full time student (plaintiff's EBT, at 31, line 15 through 32, line 10). According to plaintiff, the accident caused her to miss "maybe one month to two months" of dental school (*id.* at 32, lines 14-18).

## DISCUSSION

> "To prevail on a motion for summary judgment, the movant must make a prima facie showing by submitting evidence that demonstrates the absence of any material issues of fact. Once that initial showing has been made, the burden shifts to the opposing party to show there are disputed facts requiring a trial. All facts are viewed in the light most favorable to the non-moving party" (*Nellenback v Madison County*, 44 NY3d 329, 334 [2025] [internal citations omitted]).

As a threshold matter, the parties do not dispute that the serious injury threshold applies to this case (*see New York City Tr. Auth. v Physical Medicine & Rehab of N.Y. PC*, 158 AD3d 568, 569 [1st Dept 2018] [a plaintiff injured by the lift device of a bus when she boarded the bus involved the "use or operation" of a motor vehicle within the meaning of Insurance Law § 5104 (a)]).

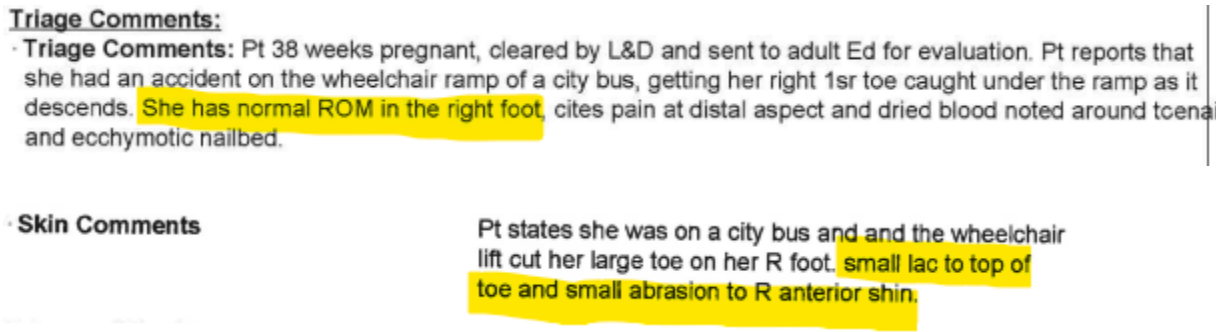
Of the nine categories of "serious injury" listed in the statutory definition (*see* Insurance Law § 5102 [d]), only four are potentially relevant here:

(1) permanent consequential limitation of use of a body organ or member;
(2) significant limitation of use of a body function or system;
(3) significant disfigurement; and
(4) 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 (90/180-day category).

**"Permanent consequential" or "Significant" limitations of use**

On summary judgment, the defendant meets the prima facie burden under these categories by demonstrating that, as a matter of law, the plaintiff cannot establish at least one of these three elements which plaintiff must ultimately prove to prevail at trial. That is, the defendant meets the prima facie burden by establishing that: (1) there is no objective evidence of injury (*Aquino v Alvarez*, 162 AD3d 451, 451 [1st Dept 2018]); (2) the plaintiff has normal ranges of motion in the allegedly injured body parts, with no objective evidence of disability or permanency (*Peart v Carreras*, 227 AD3d 479, 479 [1st Dept 2024]; *Rosado v Haidara*, 224 AD3d 577, 577 [1st Dept 2024]); or (3) the alleged injuries were not causally related to the accident (*Ledesma v Rodriguez*, 217 AD3d 453 [1st Dept 2023]).

Here, the NYCTA met its prima facie burden that there is no objective evidence of injury. The medical records from New York Presbyterian Hospital state, in relevant part:


Triage Comments:
· **Triage Comments:** Pt 38 weeks pregnant, cleared by L&D and sent to adult Ed for evaluation. Pt reports that she had an accident on the wheelchair ramp of a city bus, getting her right 1sr toe caught under the ramp as it descends. She has normal ROM in the right foot, cites pain at distal aspect and dried blood noted around toenail and ecchymotic nailbed.

· **Skin Comments**

Pt states she was on a city bus and and the wheelchair lift cut her large toe on her R foot. small lac to top of toe and small abrasion to R anterior shin.

(*see* defendants' Exhibit D2 in support of motion [NYSCEF Doc. No. 67], at 10, 12 of 22 [emphasis added]). Minor bruises are insufficient to make out a prima facie case of "serious injury within the meaning of Insurance Law § 5102 (d) (*Peel v Jordan*, 202 AD2d 485, 485 [2d Dept 1994]). Although defendants did not submit an affirmation from an expert who had examined plaintiff, "subjective pain cannot form the basis of a serious injury" (*Canner v Diamond*, 187 AD3d 1127 [2d Dept 2020]).

In opposition, plaintiff submits an affirmation from a podiatrist, Dr. Ernest L. Isaacson (*see* plaintiff's Exhibit B in opposition [NYSCEF Doc. No. 85]). Dr. Isaacson opines that, because plaintiff is still in pain after the accident, plaintiff "has sustained a permanent and consequential limitation to the tissues and bone of her right toe and that this is a permanent and consequential limitation to that organ and system" (*id.* ¶ 8). According to Dr. Isaacson, plaintiff lacks full range of motion of the big toe because pressure exerted upon the toe causes pain (*id.* ¶ 9).

Plaintiff fails to raise a triable issue of fact warranting denial of summary judgment. As the NYCTA's counsel points out, a big toe is not an organ of the human body; the tissues of the foot are not a body system. As discussed above, "[p]laintiff's subjective complaints of pain, in the absence of corroborating objective medical evidence, is insufficient to establish a serious injury under Insurance Law § 5102(d)" (*Ortiz v City of New York*, 198 AD3d 603, 604 [1st Dept 2021]). Dr. Isaacson's findings do not constitute objective medical evidence because he is relying on plaintiff's own complaints of pain. Additionally, minor, intermittent pain is insufficient to establish serious injury under these categories (*Huther v Sickler*, 21 AD3d 1303, 1304 [4th Dept 2005]; *Stadier v Findley*, 148 AD2d 600 [2d Dept 1989]).

Thus, summary judgment dismissing so much of plaintiff's claims of serious injury based on the categories of permanent consequential limitation of use or significant limitation of use of a body function or system is granted.

**Significant Disfigurement**

> "For an injury to constitute a significant disfigurement within the meaning of Insurance Law § 5102(d), a 'reasonable person viewing' the injury would have to 'regard' it as 'unattractive' or 'objectionable,' or as 'the object of pity' or 'scorn,' and the disfigurement must also be causally related to the subject accident" (*Knight v M & M Sanitation Corp*., 122 AD3d 683, 684 [2d Dept 2014]; *Sidibe v Cordero*, 79 AD3d 536 [1st Dept 2010]).

Here, defendants did not meet their prima facie burden for summary judgment dismissing plaintiff's claim of serious injury under this category. Defendants did not submit any records or photographs depicting the appearance of the toenail of plaintiff's big toe.

Summary judgment dismissing plaintiff's claims of serious injury under the category of significant disfigurement is therefore denied.

**90/180-day category**

"Under Insurance Law § 5102 (d), an injury must be 'medically determined' to qualify under the 90/180–day category, meaning that the condition must be substantiated by a physician. Additionally, the condition must be causally related to the accident" (*Damas v Valdes*, 84 AD3d 87, 93 [2d Dept 2011] [internal citations omitted]).

> "In order to establish prima facie entitlement to summary judgment under this category of the statute, defendant must provide medical evidence of the absence of injury precluding 90 days of normal activity during the first 180 days following the accident. However, we have previously held that a defendant can establish prima facie entitlement to summary judgment on this category without medical evidence by citing other evidence, such as the plaintiff's own deposition testimony or records demonstrating that he or she was not prevented from performing all of the substantial activities constituting customary daily activities for the prescribed period" (*Elias v Mahlah*, 58 AD3d 434, 435 [1st Dept 2009] [citations omitted]).

Here, plaintiff testified that she missed a month or two of school as a result of the accident. The ability to return to school supports a legitimate inference that plaintiff must have been able to perform at least most of her usual and customary daily activities (*see e.g. Hernandez v Adelango Trucking*, 89 AD3d 407, 408 [1st Dept 2011] [plaintiff missed less than six days of school, which refuted his 90/180-day claim]; *Zamore v Peralta*, 50 AD3d 423, 424 [1st Dept 2008] [plaintiff was able to return to school within 10 days]; *Copeland v Kasalica*, 6 AD3d 253, 254 [1st Dept 2004] [plaintiff missed only a month of school]; *cf. Jackson v Doe*, 173 AD3d 505, 506 [1st Dept 2019] [plaintiff returned to work full-time within two months]; *Correa v Saifuddin*, 95 AD3d 407 [1st Dept 2012]).

Plaintiff failed to raise a triable issue of fact as to whether she suffered a serious injury under the 90/180-day category. Although plaintiff's counsel argues that the fact that plaintiff had to retake a course raises an issue of fact under the 90/180-day category, plaintiff testified that she had to retake the course "because I missed that week. Specific courses have specific guidelines" (*see* plaintiff's continued EBT, at 28 lines 8-9).

Therefore, summary judgment dismissing plaintiff's claims of serious injury under the 90/180-day category is granted.

Although plaintiff's claims of serious injury under the categories of permanent consequential limitation of use, significant limitation of use of a body function or system, and the 90/180-day category are dismissed, "if 'a jury determines that plaintiff has met the threshold for serious injury, it may award damages for all of her injuries causally related to the accident,' even those that do not meet the serious injury threshold" (*De Diaz v Klausner*, 223 AD3d 461, 462 [1st Dept 2024] [citations omitted]).

## CONCLUSION & ORDER

It is **ORDERED** that defendant New York City Transit Authority's motion for summary judgment is **GRANTED IN PART TO THE EXTENT THAT** plaintiff's claims of serious injury under the categories of permanent consequential limitation of use, significant limitation of use of a body function or system, and the 90/180-day category are dismissed; and it is further

**ORDERED** that defendant New York City Transit Authority's motion for summary judgment is otherwise denied; and it is further

**ORDERED** that the remainder of the action shall continue.

**ENTER:**


**4/21/2026**
**DATE**

**RICHARD TSAI, J.S.C.**

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| **CHECK ONE:** | | **CASE DISPOSED** | | | [X] | **NON-FINAL DISPOSITION** | |
| | | **GRANTED** | [ ] | **DENIED** | [X] | **GRANTED IN PART** | [ ] **OTHER** |
| **APPLICATION:** | | **SETTLE ORDER** | | | | **SUBMIT ORDER** | |
| **CHECK IF APPROPRIATE:** | | **INCLUDES TRANSFER/REASSIGN** | | | | **FIDUCIARY APPOINTMENT** | [ ] **REFERENCE** |