Tornabene v Massias
2022 NY Slip Op 34395(U)
December 15, 2022
Supreme Court, New York County
Docket Number: Index No. 158595/2019
Judge: James G. Clynes
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JAMES G. CLYNES** **PART** **22M**

Justice

----------X

NINA TORNABENE,

Plaintiff,

- v -

MICHAEL JEAN MASSIAS, AMERICAN UNITED TRANSPORTATION

Defendant.

----------X

INDEX NO. 158595/2019

MOTION DATE 07/01/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 57
were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents and following oral argument, Plaintiff's motion for an order granting Plaintiff summary judgment on liability and dismissing Defendants' affirmative defenses of culpable conduct by Plaintiff (Defendant's Second Affirmative Defense) and failure to satisfy the serious injury threshold under Insurance Law 5102 (d) (Defendants' First Affirmative Defense) by Plaintiff is decided as follows:

Plaintiff seeks recovery for personal injuries allegedly sustained in an October 29, 2019, motor vehicle accident between Plaintiff pedestrian and a vehicle owned by American United Transportation and operated by Michael Jean Massias (Massias).

Summary Judgment (Liability)

Plaintiff's affidavit, in which she avers that she was crossing within the crosswalk with the right of way when she was struck by a vehicle making a left turn, causing her to fall to the ground, establishes prima facie negligence by Defendants (*Winegrad v NY Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Garzon-Victoria v Okulo*, 116 AD3d 558 [1st Dept 2014]; VTL 1111, *Garzon-Victoria v Okulo*, 116 AD3d 558 [1st Dept 2014]). Therefore, 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 [1980]).

The examination before trial testimony of the Defendant Driver Massias that he was in the left lane of Columbus Avenue; that he was the first vehicle stopped at the red light at Columbus Avenue and 68th Street; that when the light turned green he began to make a left turn and then stopped his vehicle to allow pedestrians to cross; that his vehicle was not moving at the time of the accident; that he entered the intersection and stopped and waited for all pedestrians to walk; that his vehicle was at a complete stop at the time of the contact between Plaintiff and his vehicle; that his vehicle is equipped with a buzzing warning system that alerts when something is close to the vehicle; that the system did not buzz because the vehicle was stopped at the time of the accident raises sufficient issues of fact to preclude a determination of liability in favor of plaintiff as a matter of law. The question of whether the accident occurred as Defendant Massias described it or whether it occurred as Plaintiff described it raises issues of credibility that should be left to a jury (*see Ramos v. Rojas* 37 A.D.3d 291, 292 [1st Dept 2007]). As such, the portions of Plaintiff's motion seeking summary judgment on liability in favor of Plaintiff and against Defendant, and dismissal of the Defendants' affirmative defense of comparative negligence by Plaintiff is denied.

Summary Judgment (Serious Injury)

Plaintiff's Bill of Particulars alleges she sustained the following injuries: shock, multiple contusions, abrasions, ecchymosis and soft tissue damage of the area of the injuries involved herein; X-rays of the left ankle revealed traumatic avulsion fracture of the lateral malleolus with edema; X-rays of the left elbow revealed non-displaced fracture of head of left radius; elevation of the anterior distal humeral fat pad possibly related to effusion; left ankle subcutaneous edema; left wrist sprain/strain; right hip contusion and strain/sprain; left foot contusion; left foot strain/sprain; left ankle strain/sprain; left knee sprain/strain; right knee sprain/strain; as well as all injuries set forth in the medical records by Craig Dushey, M.D. Plaintiff avers that her injuries meet the serious injury threshold under Insurance Law 5102 (d). Defendant opposes the motion.

Here, Plaintiff alleges several injuries and attaches the certified medical report of orthopedic surgeon, Dr. Peter J. Spohn. Dr. Spohn opined in his report that based on his examination of Plaintiff on May 17, 2022, and of his review of relevant medical records, his impression was that Plaintiff's left elbow had a displaced radial head fracture with healing, left wrist contusion, right hip contusion, aggravation of preexisting osteoarthritis of bilateral knees and left ankle avulsion fracture of the lateral malleolus, which is equivalent of a sprain, now healed. Dr. Spohn concluded that these injuries are causally related to the injuries sustained on October 29, 2018. Dr. Spohn measured Plaintiff's range of motion, using a goniometer pursuant to AMA Guidelines, and reported that Plaintiff's elbows, wrists, hip, ankles, and toes had normal range of motion, but noted a slight limitation in range of motion as to Plaintiff's knees, with the right knee extension/flexion at 0-130 degrees and the left 0-125 degrees, with normal being 0-150 degrees, but does not report whether this limitation is related to Plaintiff's 1995 ACL reconstruction, Plaintiff's 2014 arthroscopic meniscectomy, or Plaintiff's osteoarthritis. Dr. Spohn concluded that Plaintiff "requires no tests or surgical procedures" and that she is "capable of performing activities of daily living without restrictions" (NYSCEF DOC NO. 45). As such, Plaintiff has established prima facie that she sustained a serious injury, except under the 90/180 category, as a fracture constitutes a serious injury under Insurance Law 5102 (d) (*see Baez v Boyd*, 90 AD3d 524 [1st Dept 2011]). Because Plaintiff has established a fracture, she is entitled to recover for all injuries causally related to the accident, including those not meeting the serious injury threshold (*see Linton v Nawaz*, 14 NY3d 821 [2010]; *Rubin v SMS Taxi Corp.*, 71 AD3d 548 [1st Dept 2010]).

In opposition, Defendants raise an issue of fact regarding whether Plaintiff sustained a fracture by submitting an affidavit of Dr. Spohn, in which he avers that he did not review any MRI or X-ray films, any reference to fractures within his report was based solely on what was set forth in the medical records reviewed, and that without reviewing any films himself, he "cannot opine to a reasonable degree of medical certainty that Plaintiff sustained a fracture" (NYSCEF DOC NO. 54). This is sufficient to raise an issue of fact as to whether Plaintiff sustained a "serious injury" within the meaning of Insurance Law 5102 (d) as a result of the accident. Plaintiff's motion for

summary judgment on the grounds that she has satisfied the serious injury threshold under Insurance Law 5102 (d) is denied. Accordingly, it is

ORDERED that Plaintiff's motion for summary judgment on liability is denied; and it is further

ORDERED that Plaintiff's motion to dismiss Defendants' affirmative defense of culpable conduct by Plaintiff (Defendants' Second Affirmative Defense) is denied; and it is further

ORDERED that Plaintiff's motion for summary judgment on the grounds that Plaintiff has satisfied the serious injury threshold under Insurance Law 5102 (d) and dismissal of Defendants' Second Affirmative Defense is denied; and it is further

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

This constitutes the Decision and Order of the Court.

12/15/2022
DATE

James G. Clynes
JAMES G. CLYNES, J.S.C.

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