

Pierce v City of New York
2021 NY Slip Op 31575(U)
May 10, 2021
Supreme Court, New York County
Docket Number: 158657/2017
Judge: Lyle E. Frank
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LYLE E. FRANK **PART** **52**

Justice

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CLAIR PIERCE,

Plaintiff,

- v -

THE CITY OF NEW YORK, NEW YORK CITY
SANTITATION DEPARTMENT, AMERICAN UNITED
TRANSPORTATION INC., ANTOINE DAVIS, GLORIA
VINCESAVILA, ORLANDO HARPER

Defendant.

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INDEX NO. 158657/2017

MOTION DATE N/A, N/A

MOTION SEQ. NO. 002 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 79, 91, 94, 95, 96, 97

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

The following e-filed documents, listed by NYSCEF document number (Motion 003) 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 92, 93

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

This is a personal injury action arising out of injuries allegedly sustained by plaintiff when she was involved in a motor vehicle accident on January 23, 2017. Plaintiff alleges that as a result of the accident, she has sustained serious physical injuries as defined by Insurance Law §5102(d). Defendants move for summary judgment pursuant to CPLR 3212, on the grounds that the evidence establishes the plaintiff has a degenerative condition not casually related to the underlying incident in this action. Defendants, The City of New York, New York City Sanitation Department, American United Transportation Inc., Antoine Davis, Gloria Vincsavila, also move on the grounds that there can be no liability as their vehicles were struck in the rear.

Plaintiff opposes the instant motion on the grounds that defendants have failed to establish a prima facie entitlement to judgment as a matter of law and that there are questions of

fact as to the cause of plaintiff's injuries. Plaintiff also cross-moves for summary judgment on the issue of liability. For the reasons set forth below, defendants' motion is granted, and the complaint is dismissed in its entirety.

"The proponent of a summary judgment motion must make prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case". *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]. Once such entitlement has been demonstrated by the moving party, the burden shifts to the opposing party 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 City of New York*, 49 NY2d 557, 560 [1980].

This action involves the no-fault law, which allows for first party benefits for those parties who can establish serious injuries sustained in vehicular accidents. Section 5102 (d) of the Insurance Law provides the relevant categories:

"... permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or 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 and eighty days immediately following the occurrence of the injury or impairment."

On the date of the accident, plaintiff was a passenger in the vehicle owned by defendant, American United Transportation Inc. (American United), and operated by defendant Gloria Vincsavila. Defendant's, American United, vehicle was the frontmost vehicle of a 3-vehicle collision. Defendants, The City of New York, New York City Sanitation Department and Antoine Davis, collectively referred to as "City", were struck in the rear by defendant Orlando Harper, the force of that collision propelled the City vehicle into the American United vehicle.

Preliminarily, as it is undisputed that the collision was not caused by negligence of defendants, City, American United and Vincsavila, plaintiff's cross-motion for summary judgment on the issue of liability as to those defendants is denied.

After the collision plaintiff was transported to the hospital in an ambulance. While at the hospital "no gross deformities" were found, plaintiff had a full range of motion and she was discharged. Plaintiff testified that prior to the date of the subject accident, the plaintiff had several surgeries for her scoliosis condition.

Here, defendants contend that they have established that plaintiff did not sustain a serious injury pursuant to Insurance Law §5102(d). In support of this position, defendants rely upon the examination of the no-fault acupuncturist, Dr. Roth, the independent medical examination by defendants' doctor and an objective examination by the doctors at Bellevue hospital, that treated plaintiff immediately after the subject accident.

Dr. Roth examined the plaintiff on March 3, 2017 and affirmed that the plaintiff's sprain/strain in the cervical spine and thoracic spine have resolved and found no objective evidence of a disability.

Defendants' doctor, Dr. Elfenbein examined the plaintiff on March 27, 2019 and performed various tests. Dr Elfenbein found plaintiff's range of motion to be normal and that the plaintiff's sprains/strains in the cervical spine, lumbar spine and bilateral shoulders were resolved. Based upon the medical records and doctor's affidavit, and plaintiff's sworn testimony, defendants have met their initial burden of establishing that plaintiff did not sustain a "serious injury" pursuant to Insurance Law §5102(d), and the burden shifts to plaintiffs to raise a triable issue of fact.

In opposition, plaintiff proffers the affirmation of physician, Dr. Kaplan, who treated plaintiff after the subject accident. Dr. Kaplan affirms that within a “reasonable degree of medical certainty that Ms. Pierce sustained the following permanent injuries as a result of the motor vehicle accident that occurred on January 23, 2017: cervical spine derangement; thoracic spine derangement; bilateral shoulder sprain; bilateral shoulder derangement; and post-traumatic headaches.”


Noticeably absent from Dr. Kaplan’s affidavit is any mention of plaintiff’s preexisting condition. Additionally, the affidavit is silent as to what objective tests were used to test plaintiff’s range of motion. The Appellate Division First Department has consistently held that “affirmation of plaintiff’s treating physician... [which fail to] state what objective tests, if any, were used to determine any restriction of motion” is insufficient to create questions of fact to defeat a motion for summary judgment. *Chen v Marc*, 10 AD3d 295, 296 [1st Dept 2004]. Thus, Dr. Kaplan’s affidavit is “deficient because [they] failed to identify the objective tests [...] employed to measure plaintiff’s range of motion”. *Nagbe v Minigreen Hacking Group*, 22 AD3d 326, 326 [1st Dept 2005]. Thus, plaintiff has failed to raise a triable issue of fact sufficient to preclude summary judgment.

Though in light of the above, this Court does not need to reach the issue of whether defendants, City of New York, New York City Sanitation Department, American United Transportation Inc., Antoine Davis, and Gloria Vincsavil would all be entitled to summary judgment as their vehicles were struck in the rear, had the Court reached this issue, the above named defendants would all be entitled to summary judgment as to that issue as well.

Accordingly, it is hereby

ORDERED that all defendants' motions for summary judgment are granted and this action is dismissed; and it is further

ORDERED that the clerk of the Court shall enter judgment accordingly.

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LYLE E. FRANK, J.S.C.

05/10/2021

DATE

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	<input type="checkbox"/> FIDUCIARY APPOINTMENT
				<input type="checkbox"/> REFERENCE