

Mitchell v Jean

2021 NY Slip Op 32945(U)

February 10, 2021

Supreme Court, Westchester County

Docket Number: Index No. 68634/18

Judge: Linda S. Jamieson

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeal of right (CPLR § 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Disp _____ Dec x Seq. Nos. 1-2 Type SJ

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PRESENT: HON. LINDA S. JAMIESON

-----X

BIANCA MITCHELL,

Index No. 68634/18

Plaintiff,

DECISION AND ORDER

-against-

WILFRID JEAN, WESTCHESTER COUNTY,
WESTCHESTER COUNTY DEPARTMENT OF
TRANSPORTATION, and JOSE L. MEJIA,

Defendants.

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The following papers numbered 1 to 7¹ were read on these motions:

<u>Paper</u>	<u>Number</u>
Notice of Motion, Affirmation and Exhibits	1
Notice of Motion, Affirmation and Exhibits	2
Memorandum of Law	3
Affidavit, Affirmation and Exhibits in Opposition	4
Affirmation and Exhibits in Opposition	5
Reply Affirmation	6
Reply Affirmation and Exhibits	7

There are two motions for summary judgment before the Court in this case involving an accident between a bus, in which plaintiff was a passenger, and a car driven by defendant Jean.

¹The Court disregarded the "supplemental" affirmation filed by defendant Jean, since no party had the opportunity to respond to it. The Court also required plaintiff to revised her papers to comply with the page limits set forth in the Part Rules, which she did.

Both motions seek to dismiss the action on the basis that plaintiff did not suffer a "serious injury." The first motion is filed by all defendants except for defendant Jean (the "Westchester movants"). The second motion is filed by Jean.

Section 5102(d) of the Insurance Law governs car accident cases such as this. That section provides that

"Serious injury" means a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; 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 eighty days immediately following the occurrence of the injury or impairment.

Plaintiff alleges that she suffered serious injuries in that she has a permanent consequential use of a body organ or member, a significant limitation on such use, and she was prevented from performing her usual and customary activities for at least 90 out of the 180 days following the accident. Although it is true, as movants allege, that plaintiff returned to school soon after the accident, in their motions for summary judgment movants fail to make out a prima facie case of a lack of a "serious injury" as a result of the accident. Specifically, Dr. Haig, the orthopedist whose report is submitted by the Westchester movants, states that

"Focus examination of the lumbar spine shows mild tenderness to percussion at the L3 level. Flexion checked with a goniometer is 70 degrees (normal is 90 degrees)." He concludes that despite his finding of this decreased range of motion, plaintiff has low back pain with no "objective, clinical, or radiographic signs." He further concludes - without any discussion - that this pain is chronic and unrelated to the accident, but that plaintiff nonetheless should "see a good physical therapist and obtain a program of home spinal exercise including erector spinae strengthening, abdominal strengthening, and lumbar range of motion to be done daily on a chronic basis." (Both sets of movants' papers also cite to the report of a neurologist, who finds that plaintiff has full range of motion, and no impairments whatever. Neither motion addresses this discrepancy, nor do they explain Dr. Haig's finding.) Movants' doctor himself thus establishes that plaintiff suffered a potentially serious injury. Movants' motions must be denied in their entirety.

Even if they had established their prima facie case, the Court would still deny the motions for summary judgment. This is because plaintiff's own doctor found even more significant decreases in her ranges of motion, as well as other limitations in her functioning. This raises triable issues of fact, which would also require the Court to deny the motion for summary judgment. *Johnston v. Peluso*, 105 A.D.3d 1008, 963 N.Y.S.2d 388


(2d Dept. 2013). See also *Armella v. Olson*, 134 A.D.3d 1412, 1413, 22 N.Y.S.3d 722, 723 (2d Dept. 2015); *Fludd v. Pena*, 122 A.D.3d 436, 436, 997 N.Y.S.2d 14, 15-16 (1st Dept. 2014) ("In opposition, plaintiff raised a material issue of fact. . . . Her treating orthopedist confirmed that she exhibited limitations in range of motion in her lumbar spine when she was examined shortly after the accident and again when she was examined after defendants moved for summary judgment."). It is the job of the jury, not the Court on summary judgment, to assess the credibility of these conflicting expert reports. *Wilcoxon v. Palladino*, 122 A.D.3d 727, 728, 996 N.Y.S.2d 191, 192 (2d Dept. 2014) ("In light of the conflicting expert medical opinions submitted by the parties, the Supreme Court properly denied the defendants' motion for summary judgment dismissing the complaint on the ground that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident.").

The motions are thus denied in their entirety. The parties are directed to contact the Settlement Conference Part to schedule a Settlement Conference.

The foregoing constitutes the decision and order of the

Court.

Dated: White Plains, New York
February 10, 2021


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Justice of the Supreme Court

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