

Schultze v Mahmudur
2022 NY Slip Op 31965(U)
June 21, 2022
Supreme Court, New York County
Docket Number: Index No. 157858/2019
Judge: James G. Clynnes
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JAMES G. CLYNES PART 22M

Justice

-----X

JACQUELINE SCHULTZE,

Plaintiff,

- v -

CHOWDHURY RASHID MAHMUDUR, JOHN B. MARTIN

Defendant.

-----X

INDEX NO. 157858/2019

MOTION DATE 03/02/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER)

Upon the foregoing documents, plaintiff's motion for an order amending the caption; granting summary judgment in favor of the plaintiff and against defendant on the issue of liability and granting summary judgment in favor of plaintiff and against the defendant on the issue of whether the plaintiff sustained a "serious injury" as defined under Section 5102 (d) of the Insurance Law on the ground that plaintiff sustained a fracture as a result of the accident; dismissing all defendant's affirmative defenses is granted without opposition.

Motion to Amend the Caption

As an initial matter, plaintiff's unopposed motion to amend the caption pursuant to a stipulation, dated November 8, 2021, is more properly brought as a motion, pursuant to CPLR 1015, 1021 to substitute "Lisa Grant as the Temporary Executor of the Estate of Jacqueline Schultze, deceased" in place of the deceased plaintiff Jacqueline Schultze; and pursuant to CPLR 3025 (b) to amend the caption as set forth in plaintiff's submission is granted without opposition. There is no dispute that the plaintiff is deceased and that Lisa Grant has been appointed as

temporary executor of the estate of the deceased plaintiff. Defendants' counsel signed a stipulation to amend the caption and does not oppose the instant motion.

Motions for Summary Judgment

Plaintiff's submission which includes, among other things, an affidavit from a non-party witness in which she avers that she observed the defendants' cab strike the plaintiff on her left side causing plaintiff to fall on her right side while plaintiff was crossing within the crosswalk and with the pedestrian control signal in her favor, along with the affirmation of a radiologist, in which he affirms that based upon his review of plaintiff's medical records, including an x-ray of plaintiff's right elbow taken on September 13, 2016, that he would testify to a reasonable degree of medical certainty, that plaintiff sustained a non-displaced posterior radial neck fracture in the subject motor vehicle accident, establish prima facie cases of summary judgment in favor of plaintiff and against the defendants on the issues of liability and the serious injury threshold. Defendants did not submit opposition to the motion and therefore failed to raise any issue of fact sufficient to preclude summary judgment in favor of the plaintiff and against the defendant on the issues of liability and the serious injury threshold.

Dismissal of Defendants' Affirmative Defenses

Although plaintiff's motion does not specifically refer to each of the defendants' affirmative defenses: lack of personal jurisdiction (first); lack of subject matter jurisdiction pursuant to Insurance Law (second); culpable conduct/contributory negligence (third); reduce recovery by amounts received from collateral sources of payment (fourth); collateral estoppel (fifth); failure to mitigate damages (sixth) and offset (seventh), there is no evidence before this court of culpable conduct by the plaintiff and defendant does not oppose the motion. Therefore, the motion to dismiss all affirmative defenses is granted without opposition.

Accordingly, based upon the foregoing, it is hereby

ORDERED that "Lisa Grant as the Temporary Executor of the Estate of Jacqueline Schultze, deceased" is substituted in place of the deceased plaintiff; and it is further

ORDERED that motion to amend the caption is granted without opposition and the action shall bear the following caption:

SUPREME COURT STATE OF NEW YORK
COUNTY OF NEW YORK

LISA GRANT, as the Temporary Executor of the Estate
of JACQUELINE SCHULTZE, Deceased,

Index Number 157858/2019

Plaintiff

-against

CHOWDHURY RASHID MAHMUDUR, and
JOHN B. MARTIN,

Defendants.

And it is further

ORDERED that plaintiff's motion for summary judgment in favor of the plaintiff and against defendants on the issues of liability and the serious injury threshold are granted without opposition; and it is further

ORDERED that plaintiff's motion to dismiss defendants' seven affirmative defenses is granted without opposition and it is further

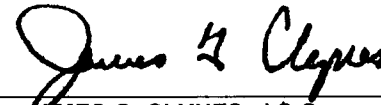
ORDERED that within twenty days of the date of this order counsel for the moving party shall serve a copy of this order with notice of entry upon defendants and upon the County Clerk (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect same; and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address (www.nycourts.gov/supctmanh).

This constitutes the Decision and Order of the Court.

6/21/2022

DATE



JAMES G. CLYNES, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE