

Figueroa v Deshield

2024 NY Slip Op 31278(U)

April 10, 2024

Supreme Court, New York County

Docket Number: Index No. 159622/2021

Judge: James G. Clynnes

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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 | INDEX NO. | <u>159622/2021</u> |
| YOUSTIN FIGUEROA, | MOTION DATE | <u>04/19/2023</u> |
| Plaintiff, | MOTION SEQ. NO. | <u>002</u> |

- v -

VINCENT DESHIELD, CREAM-O-LAND DAIRIES, LLC,
CREAM-O-LAND DAIRY

**DECISION + ORDER ON
MOTION**

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 52, 53, 54, 55, 56, 57, 58, 59, 61, 68, 69, 70, 71, 72, 73, 74, 75, 76

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

Upon the foregoing documents, the motion by Plaintiff for summary judgment on the issue of liability and on the grounds that she sustained a serious injury within the meaning of Insurance Law 5102 (d) and to strike Defendants' CREAM-O-LAND DAIRIES, LLC, and CREAM-O-LAND DAIRY, INC. i/s/h/a CREAM-O-LAND DAIRY (Cream-O-Land Defendants) Second, Fourth, and Sixth Affirmative Defenses alleging culpable conduct, comparative negligence, failure to state a cause of action, and personal jurisdiction and Defendant's VINCENT DESHIELD First, Second and Sixth Affirmative Defenses alleging culpable conduct and comparative negligence is decided as follows:

Plaintiff seeks recovery for injuries allegedly sustained as a result of an October 14, 2021 motor vehicle accident between Plaintiff pedestrian and a vehicle driven by Defendant Deshield, a purported employee of the Cream-O-Land Defendants.

In support of her motion, Plaintiff submits a certified amended police report, Plaintiff's examination before trial (EBT) testimony, Plaintiff's affidavit, Defendant Driver's EBT, and Plaintiff's medical records from Elmhurst Hospital.

The certified amended police report identifies the parties and states that video footage shows Defendants' vehicle "taking" a steady red light and striking a female pedestrian, who had the walk signal, in the crosswalk.

Plaintiff testified that she was waiting at the corner of Broadway and Baxter for the light to change for about two minutes, before she stepped off the sidewalk, she looked to her left one time and did not see the truck, she began crossing in the crosswalk with the walk sign in her favor, looking straight ahead, with her cell phone in her pocket and earbuds in her ears listening to techno music, she took two to three steps into the crosswalk before the accident happened. Plaintiff further testified that the next thing she remembers is waking up in the hospital.

In her affidavit, Plaintiff avers that she was a pedestrian crossing in the crosswalk of Broadway at the intersection with Baxter Avenue with the "walk" signal illuminated, she had taken about three steps across the street, when she was suddenly hit by a large truck.

Defendant Driver testified that he was driving a truck for his employer Cream-O-Land Dairies on Broadway, at the intersection with Baxter, going 24 miles per hour, the light was yellow, he looked to the left or right looking for cars, he cruised through the light, it turned red, when the right front part of his vehicle struck the pedestrian. Defendant Driver further testified that the accident was his fault.

Plaintiff's medical records indicate fractures to Plaintiff's left pubic rami.

The Cream-O-Land Defendants oppose Plaintiff's motion. They contend that Plaintiff has failed to submit evidence of Cream-O-Land's involvement in the accident. They further contend

that Plaintiff failed to exercise due care when she did not look for oncoming traffic in all directions before entering the crosswalk and failed to apprehend her surroundings sufficient to prevent the accident when she did not look and was distracted by wearing earbuds and listening to techno music. Accordingly, they contend that the Court should deny that portion of Plaintiff's motion dismissing Defendant's affirmative defense alleging culpable conduct and comparative negligence in that she failed to look for oncoming traffic because she looked left, then stepped off the sidewalk and that she was listening to techno music with her earbuds.

Defendant Deshield also opposes Plaintiff's motion. Defendant Deshield contends that issues of material fact remain as to Plaintiff's culpable conduct and comparative negligence in the alleged accident as she failed to exercise reasonable care in crossing the subject intersection involved in said accident.

Plaintiff has established entitlement to judgment on liability as a matter of law by submitting evidence demonstrating that she was crossing the street within the crosswalk, with a "walk" sign in her favor, when Defendants' vehicle struck her. Defendant Driver had a duty to exercise due care in the operation of his vehicle and avoid colliding into Plaintiff (VTL 1146). Thus, Defendants have failed to raise a triable issue of fact and Plaintiff's motion for summary judgment is granted as to Defendants' liability.

The branch of Plaintiff's motion seeking to dismiss Defendants' affirmative defenses alleging comparative negligence, contributory negligence and culpable conduct of Plaintiff is granted. While pursuant to *Rodriguez v City of New York*, 31 NY3d 312, 330, 76 N.Y.S.3d 898, 101 N.E.3d 366 [2018], a plaintiff is not obliged to demonstrate whether or not it was comparatively negligent in order to be entitled to partial summary judgment on the issue of a defendant's liability, a plaintiff's comparative negligence may be determined in a motion for

summary judgment when the plaintiff has moved for summary judgment to dismiss a defendants' affirmative defense of comparative negligence.

Defendants, here, have failed to proffer any evidence as to Plaintiff's alleged negligence. Here, Plaintiff has met her burden and demonstrated that, as a lawful pedestrian, crossing the street within the crosswalk with the light in her favor, she was free from any contributory negligence and in no way caused the accident (*Bohorquez v MTA Bus Co.*, 2019 NY Slip Op 32912[U] [Sup Ct, NY County 2019]). Defendants' speculative assertion that Plaintiff could have been contributorily negligent for the accident at issue is insufficient to raise a triable issue of fact (*Id.*). Thus, the affirmative defenses alleging comparative negligence, contributory negligence and culpable conduct of Plaintiff are dismissed.

Plaintiff has also established entitlement to judgment as a matter of law on the issue of threshold injury under Insurance Law 5102 (d). A fracture constitutes a "serious injury" under Insurance Law 5102 (d) (*Perez-Hernandez v M. Marte Auto Corp.*, 104 AD3d 489 [1st Dept 2013]; *Baez v Boyd*, 90 AD3d 524 [1st Dept 2011]). The Cream-O-Land Defendants have failed to raise a triable issue of fact. Defendant Deshield does not oppose this branch of Plaintiff's motion. There is no dispute that Plaintiff suffered a fracture as a result of the subject accident. 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 (*Linton v Nawaz*, 14 NY3d 821 [2010]).

Accordingly, it is

ORDERED that the branch of Plaintiff's motion for summary judgment on the issue of liability striking Defendants' CREAM-O-LAND DAIRIES, LLC, and CREAM-O-LAND DAIRY, INC. i/s/h/a CREAM-O-LAND DAIRY (Cream-O-Land Defendants) Second, Fourth, and Sixth Affirmative Defenses alleging culpable conduct, comparative negligence, failure to state

a cause of action, and personal jurisdiction and Defendant's VINCENT DESHIELD First, Second and Sixth Affirmative Defenses alleging culpable conduct and comparative negligence is granted; and it is further

ORDERED that the branch of Plaintiff's motion for summary judgment on the grounds that she sustained a serious injury within the meaning of Insurance Law 5102 (d) is granted; and it is further

ORDERED that within 30 days of entry, counsel for the moving party shall serve a copy of this order with Notice of Entry upon both Defendants.

This constitutes the Decision and Order of the Court.

4/10/2024

DATE

James G. Clynes

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