

**Niederer v Krasnoff**

2018 NY Slip Op 32509(U)

September 24, 2018

Supreme Court, New York County

Docket Number: 153750/2014

Judge: Adam Silvera

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART IAS MOTION 22

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CHRISTINE NIEDERER,  
  
Plaintiff,

INDEX NO. 153750/2014

- v -

MOTION DATE 08/13/2018

GARY KRASNOFF, GOLDEN TOUCH TRANSPORTATION,  
SAMSON DEMOZ, LEVANA MISRAHI

MOTION SEQ. NO. 002

Defendant.

**DECISION AND ORDER**

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HON. ADAM SILVERA:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 56, 57, 58, 59, 60, 61, 62, 63

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, it is ORDERED that defendants' motion is denied for the reasons set forth below. Before the court is defendants' motion, Motion Sequence 002, for an Order pursuant to CPLR §3212 granting summary judgment in favor of defendants and to dismiss the Complaint of plaintiff Christine Niederer on the grounds that the injuries allegedly sustained by plaintiff do not satisfy the "serious injury" requirement as defined by Insurance Law § 5102(d). Plaintiff opposes the motion and cross-moves for summary judgment on the issue of liability against defendants.

**BACKGROUND**

The suit at bar stems from a motor vehicle accident that occurred on the lower level of the Queensboro Bridge, in the County of Queens, City and State of New York and led to the serious injury of plaintiff Christine Niederer when a taxi cab owned by defendant Levana Misrahi and operated by Samson G. Demoz collided into a stopped transportation bus owned by

Golden Touch Transportation and operated by Gary Krasnoff that was carrying plaintiff Christine Niederer as a passenger.

### DISCUSSION

#### Summary Judgment (Serious Injury)

Defendants' motion for summary judgment, pursuant to CPLR 3212, against plaintiff on the issue of "serious injury" as defined under Section § 5102(d) of the Insurance Law is denied. "The proponent of a summary judgment motion must make a 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 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 City of New York*, 49 NY2d 557, 560 [1980]).

In order to satisfy their burden under Insurance Law § 5102(d), a plaintiff must meet the "serious injury" threshold (*Toure v Avis Rent a Car Systems, Inc.*, 98 NY2d 345, 352 [2002] [finding that in order establish a prima facie case that a plaintiff in a negligence action arising from a motor vehicle accident did sustain a serious injury, plaintiff must establish the existence of either a "permanent consequential limitation of use of a body organ or member [or a] significant limitation of use of a body function or system"]).

Defendants allege that plaintiff has failed to demonstrate the existence of a "serious injury" as defined under Section 5102(d) of the Insurance Law. Defendants claim that plaintiff has admitted to suffering from pre-existing arthritis in her hands, knees and back. Further Defendants note that plaintiff resumed work as a registered nurse after the accident at issue.

Defendants provide the Independent Medical Evaluation of Dr. Vladimir Zlatnik who noted that plaintiff had “certain ranges of motion to be decreased . . . [and] that these decreases were at least partially self-restricted” (Mot at 7, ¶ 14). The Court finds that Dr. Zlatnik’s opinion that the decreases in range in motion were partially self-restricted is conclusory. In order to demonstrate a lack of serious injury, defendants must demonstrate that there is no issue of fact as to plaintiff’s injury. Dr. Zlatnik states that the decreases “were at least partially self-restricted” which leaves the possibility that part of this decrease was due to the incident at issue. Thus, Defendants’ motion contains evidence of a restriction in plaintiff’s range of motion. Thus, defendants have failed to satisfy their burden as a defendant fails to meet its initial burden when one of its examining physicians finds a limited range of motion (Servones v Toribio, 20 AD3d 330 [1st Dep’t 2005] citing McDowall v Abreu, 11 Ad3d 590 [2d Dep’t 2004] [finding that “defendants’ examining doctor found that the plaintiff continued to have restrictions in motion of her lower back . . . in light of this finding by the defendants’ expert, the defendants did not meet their initial burdens”]). Thus, defendants have failed to meet their burden precluding summary judgment.

#### **Summary Judgment (Liability)**

As a preliminary matter, the Court shall address plaintiff’s cross-motion for summary judgment. Under CPLR 3212(a) a motion for summary judgment must be brought within 120 days of filing of the Note of Issue, or a time established by the court. A motion for summary judgment shall not be heard on its merits where no good cause for delay is shown (*Brill v City of New York*, 2 NY3d 648, 651 [2004]). Here, the Case Scheduling Order, dated November 24, 2015, that in this part of the Supreme Court, motions for summary judgment shall be made no later than 60 days after the filing of the Note of Issue. Plaintiff filed the Note of Issue on March 23, 2018, thus the deadline to file motions for summary judgment in this action was May 22,

2018 (*id.*, exh B). Defendants timely filed their motion for summary judgment and plaintiff replied in opposition on June 4, 2018. Plaintiff did not properly cross-move for summary judgment and instead merely labeled her opposition to include a cross-motion for summary judgment. Thus, plaintiff's cross-motion for summary judgment is denied as untimely.

Accordingly, it is

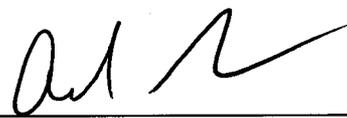
ORDERED that defendants' motion, Motion Sequence 002, for an Order pursuant to CPLR §3212 granting summary judgment in favor of defendants and to dismiss the Complaint of plaintiff is denied; and it is further

ORDERED that plaintiff's cross-motion for summary judgment on the issue of liability against defendants is denied as untimely; and it is further

ORDERED that within 30 days of entry, plaintiff shall serve a copy of this decision/order upon all parties with notice of entry.

This constitutes the Decision/Order of the Court.

9/24/2018  
DATE

  
ADAM SILVERA, 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