

<b>Guadalupe v KSCP Logistic Corp.</b>
2026 NY Slip Op 31086(U)
March 16, 2026
Supreme Court, Kings County
Docket Number: Index No. 519937/2022
Judge: Ingrid Joseph
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At an IAS Term, Part 83, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 16<sup>th</sup> day of March, 2026.

P R E S E N T:

HON. INGRID JOSEPH,

Justice.

-----X

IRIS GUADALUPE,

Plaintiff,

Index No.: 519937/2022

-against-

**AMENDED  
DECISION & ORDER**

KSCP LOGISTIC CORP.,

Mot. Seq. Nos. 2-3

Defendant.

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The following e-filed papers read herein:

NYSCEF Doc Nos.

**Mot. Seq. No. 2**

Notice of Motion/Affirmation in Support/Statement of Material Facts/Exhibits.....	52 – 62
Affirmation in Opposition/Exhibits.....	97 – 103
Reply Affirmation.....	104

**Mot. Seq. No. 3**

Notice of Motion/Affirmation in Support/Exhibits/	
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This action arises out of a motor vehicle accident that occurred on March 15, 2022. At the time of the accident, Plaintiff Iris Guadalupe (“Plaintiff”) was a front seat passenger in a vehicle parked behind Defendant Bryan Medina Batista’s (“Batista”) delivery truck. Plaintiff alleges that as Defendant reversed his vehicle, which was owned by his employer Defendant KSCP Logistic Corp. (“KSCP”), he struck Plaintiff’s vehicle. As a result of the accident, Plaintiff alleges that she sustained serious injuries to her right shoulder, cervical spine and lumbar spine. In her Bill of Particulars, Plaintiff claims she sustained permanent scarring and suffered serious injuries resulting in (i) a permanent loss of use; (ii) permanent consequential limitation of use; (iii)

significant limitation of use; and (iii) the inability to perform substantially all of the material acts which constitute her usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident. In addition, Plaintiff asserts that she sustained economic loss in excess of \$50,000.

In Motion Seq. No. 2, Plaintiff moves for an order: (a) pursuant to CPLR 3212, granting her summary judgment on the issue of liability; (b) pursuant to CPLR 3211 (b), striking KSCP's affirmative defenses related to her culpable conduct, failure to wear a seatbelt, emergency doctrine, and failure to mitigate damages; and (c) pursuant to CPLR 3212 (c), setting the matter down for an inquest on damages. In Motion Seq. No. 3, KSCP moves for an order, pursuant to CPLR 3212, dismissing (i) Plaintiff's claims against it in their entirety on the grounds that she did not sustain a serious injury under Insurance Law § 5012 (d) and (ii) Plaintiff's claims for economic loss in excess of basic economic loss.

The Court will briefly address Plaintiff's motion (Mot. Seq. No. 2). It is undisputed that an accident occurred when Batista backed into Plaintiff's parked vehicle. In its opposition to the motion, KSCP argued that the accident would not have occurred if Plaintiff's *husband* had not illegally parked at a bus stop and parked too close to the rear of the truck. "The right of the plaintiff, as an innocent passenger, to summary judgment is not 'restricted by potential issues of comparative negligence' which may exist as between [the two drivers]" (*Jung v Glover*, 169 AD3d 782, 783 [2d Dept 2019]). Here, Plaintiff's husband is not named as a party and KSCP has not asserted that Plaintiff was in any way responsible for the accident. Accordingly, the Court finds that Plaintiff established entitlement to partial summary judgment on the issue of liability. However, Plaintiff only demonstrated entitlement to dismissal of those affirmative defenses alleging culpable conduct or comparative negligence on her part.<sup>1</sup>

The Court will next discuss KSCP's motion seeking dismissal on the basis that Plaintiff did not sustain a "serious injury."<sup>2</sup> Whether a claimed injury falls within the statutory definition of "serious injury" is a question of law for the Court (*Licari v Elliot*, 57 NY2d 230 [1982]). The

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<sup>1</sup> In her motion, Plaintiff merely stated that the affirmative defenses of emergency doctrine, failure to wear a seatbelt or failure to mitigate damages should be dismissed, without proffering any arguments in support. Moreover, failure to wear a seatbelt and failure to mitigate damages are relevant to the issue of damages, not liability (*see Spier v Barker*, 35 NY2d 444, 450 [1974]).

<sup>2</sup> KSCP asserts that the record is devoid of evidence Plaintiff sustained any scarring as a result of the accident. KSCP admittedly only addresses Plaintiff's claims of permanent loss of use, permanent consequential limitation of use, significant limitation of use, and 90/180 (*see* NYSCEF Doc No. 77, at 3).

movant bears the initial burden of establishing, by the submission of evidentiary proof in admissible form, a prima facie case that a party has not suffered a serious injury proximately resulting from the subject motor vehicle accident (*Toure v Car Sys., Inc.*, 98 NY2d 345 [2002]; *Gaddy v Eycler*, 79 NY2d 955 [1992]). The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [2016]).

In support of its motion, KSCP submits (1) reports of independent medical examinations performed by (a) Dr. Steven Schneider, a chiropractor retained by the no-fault carrier, (b) Dr. Matthew Mendez-Zfass, an orthopedic surgeon, and (c) Dr. Marc Chernoff, an orthopedic surgeon; and (2) the biomechanical analysis report by Dr. Kevin Toosi. Dr. Scheider's examinations of Plaintiff on July 25, 2022, and April 26, 2023, revealed normal ranges of motion. Dr. Mendez-Zfass examined Plaintiff on May 17, 2023, and found that Plaintiff exhibited decreased range of motion in her lumbar spine and right shoulder. On May 30, 2024, Dr. Chernoff's examination of Plaintiff's cervical extension, flexion and lateral rotation revealed decreased range of motion. Based on his analysis, Dr. Toosi opined that Plaintiff's injuries cannot be reasonably attributed to the subject accident.

KSCP further asserts that Plaintiff injured the same body parts in three prior accidents that occurred in 2015, 2016 and 2017. However, when compared to treatment records from these prior accidents, KSCP argues that Plaintiff's cervical spine, lumbar spine and right shoulder range of motion now have either full or nearly full range of motion. In addition, KSCP argues that Plaintiff initially treated for approximately five months and stopped treatment because she felt better. According to KSCP, Plaintiff has proffered no explanation for why she failed to pursue any further treatment after this five-month period.

The Court first considers the issue of proximate cause. First, KSCP argues that they have presented Plaintiff's treatment records related to her three prior accidents, establishing that Plaintiff's injuries are all pre-existing. Second, KSCP relies on the report from Dr. Toosi to argue that the subject accident did not cause Plaintiff's injuries. The Court is not persuaded. As an initial matter, none of Plaintiff's medical records are affirmed or certified (*see* NYSCEF Doc Nos. 73-76) and Dr. Toosi's report is unaffirmed. Accordingly, these documents cannot be considered by the Court (*see Loadholt v NY City Tr. Auth.*, 12 AD3d 352, 352 [2d Dept 2004]). In addition, in her Bill of Particulars, Plaintiff alleged exacerbation and aggravation of pre-existing conditions.

Even though KSCP was in possession of Plaintiff's prior treatment records, they were not provided to their experts, who did not address Plaintiff's past medical history. Accordingly, "[s]ince the defendant[] failed to establish that the alleged injuries . . . were not caused or exacerbated by the accident, the burden never shifted to the plaintiff to raise a triable issue of fact regarding causation or to explain any gap in treatment" (*Prado v Town/Village of Harrison*, \_\_\_AD3d\_\_\_, 2025 NY Slip Op 06881, \*2 [2025]).

The Court next turns to the permanent loss of use category. "In order to qualify as a serious injury within the meaning of the no-fault statute, a 'permanent loss of use' must be total" (*Albury v O'Reilly*, 70 AD3d 612, 612 [2d Dept 2010], citing *Oberly v Bangs Ambulance*, 96 NY2d 295, 297, 751 NE2d 457, 727 NYS2d 378 [2001]). Upon measuring Plaintiff's ranges of motion, KSCP's experts recorded movement, which is contrary to a complete and total loss of use. Accordingly, the Court finds that KSCP met their prima facie burden as to this category. In opposition, Plaintiff failed to raise an issue of fact.

The Court now addresses the permanent consequential limitation of use or significant limitation of use categories. KSCP's experts Dr. Mendez-Zfass and Dr. Chernoff offered conflicting opinions regarding Plaintiff's spine. While Dr. Mendez-Zfass found decreased range of motion in Plaintiff's lumbar flexion, Dr. Chernoff's opinion after examination of the lumbar spine was that Plaintiff had normal range of motion. With respect to the cervical spine, Dr. Mendez-Zfass did not note any limitation, but Dr. Chernoff did. In addition, Dr. Mendez-Zfass opined that Plaintiff exhibited decreased range of motion in her right shoulder.<sup>3</sup> Dr. Mendez-Zfass's conclusions that the range of motion findings are "subjective," and that Plaintiff's complaints were "not supported by objective findings" are contradictory since the range of motion was measured using a goniometer, "an objective test instrument" (*Mitchell v A & A Tr., Inc.*, 230 AD3d 1238, 1239 [2d Dept 2024]). Therefore, the Court finds that KSCP has not met its prima facie burden establishing that Plaintiff did not sustain a serious injury under the permanent consequential limitation of use or significant limitation of use categories.

With respect to the 90/180 category, the Court finds that KSCP also has not met its prima facie burden. At her deposition, Plaintiff testified that she was confined to her home for four months (Pl tr at 64, lines 21-25; at 65, lines 2-13). Dr. Chernoff's report notes that Plaintiff was out of work for two months following the accident (NYSCEF Doc No. 70). Plaintiff's deposition

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<sup>3</sup> Dr. Chernoff did not examine Plaintiff's right shoulder (*see* NYSCEF Doc No. 70).

transcripts are devoid of any lines of questioning about her limitations within six months immediately after the accident (see *Jong Cheol Yang v Grayline NY Tours*, 186 AD3d 1501, 1501-1502 [2d Dept 2020]). Moreover, KSCP’s experts did not address 90/180 (see *Marshall v Inst. for Community Living, Inc.*, 50 AD3d 975, 976 [2d Dept 2008]). Accordingly, KSCP failed to eliminate any issues of fact as to the 90/180-day category (see *Menezes v Khan*, 67 AD3d 654, 655 [2d Dept 2009]; see also *Quinones v Ksieniewicz*, 80 AD3d 506, 506 [1st Dept 2011]).

Since KSCP failed to establish, prima facie, that Plaintiff did not sustain a serious injury under the permanent consequential limitation of use, significant limitation of use, and 90/180 categories, it is unnecessary to consider Plaintiff’s opposition (see *Winegrad*, 64 NY2d at 853).

The Court now turns to the portion of KSCP’s motion seeking to dismiss Plaintiff’s claim for economic loss. “The no-fault law defines ‘basic economic loss’ (Insurance Law § 5102 [a]) as ‘[a]ll necessary expenses incurred for: (i) medical, hospital ... [and] surgical ... services’ (*id.* § 5102 [a] [1] [i]) as well as loss of earnings from work” (*Hernandez v Merchants Mut. Ins. Co.*, 206 AD3d 978, 979 [2d Dept 2022]). KSCP asserts that Plaintiff has not sustained economic loss in excess of basic economic loss. In support, KSCP asserts that in her Bill of Particulars, Plaintiff does not allege lost earnings, and at her deposition she admitted that she incurred no-out-of-pocket expenses. Plaintiff does not address this portion of KSCP’s motion in her opposition. Thus, KSCP’s motion seeking dismissal of Plaintiff’s claims for economic loss is granted.

Accordingly, it is hereby

ORDERED, that the portion of Plaintiff’s motion for summary judgment on the issue of liability against KSCP is granted; and it is further

ORDERED, that the portion of Plaintiff’s motion seeking to strike KSCP’s affirmative defenses is granted only to the extent that the affirmative defenses alleging culpable conduct or comparative negligence are stricken; and it is further


ORDERED, that the Defendant KSCP’s motion for summary judgment is granted only to the extent that Plaintiff’s claims of permanent loss and for economic loss in excess of basic economic loss are dismissed.

All other issues not addressed herein are either without merit or moot.

This constitutes the decision and order of the Court.

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HON. INGRID JOSEPH, J.S.C.  
Hon. Ingrid Joseph  
Supreme Court Justice

KINGS COUNTY CLERK'S OFFICE

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