**SHORT FORM ORDER**

**SUPREME COURT OF THE STATE OF NEW YORK**

**PRESENT: HON. DANIEL MARTIN**
**Acting Supreme Court Justice**

**TRIAL/IAS, PART 31**
**NASSAU COUNTY**

**BARBARA WILLIAMS.**

**Plaintiff.**

***- against -***

**Sequence No.: 004 & 005**
**Index No.: 017953/05**

**MICHAEL R. MILLER, M.D., UMC MEDICAL CONSULTANTS, P.C. and RICHARD C. MEOLI, D.C.**

**Defendants.**

**The following named papers have been read on this motion:**

| | Papers Numbered |
|---|---|
| Notice of Motion and Affidavits Annexed | X |
| Notice of Cross-Motion and Affidavits Annexed | X |
| Answering Affidavits | X |
| Replying Affidavits | X |

This motion by the defendant Richard C. Meoli, D.C., and cross-motion by the defendants Michael R. Miller, M.D. and UMC Medical Consultants, P.C., for an order pursuant to CPLR 3212(a) granting them leave to file summary judgment motions and an order pursuant to CPLR 3212 granting them summary judgment dismissing the complaint is determined as provided herein.

The first issue which must be addressed is whether the moving defendants' motions for summary judgment may be considered. Although the Preliminary Conference order dated September 14, 2006, provided that a motion for summary judgment must be made within 90 days of the filing of the Note of Issue, that requirement was modified by this court's Certification Order dated August 2, 2007, which required that such a motion be made within 60 days of the filing of the Note of Issue. A Note of Issue was filed on October 1, 2007. Defendant Meoli's original motion for summary judgment was made in accordance with the Preliminary Conference order, i.e., within 90 days of the filing of the Note of Issue and defendants Miller and UMC Medical Consultant's cross-motion was made on January 17, 2008, a few weeks late. After defense counsel learned of the Certification Order's amendment to the time limits

for seeking summary judgment at oral argument on January 24, 2008, the original motion and cross-motion were withdrawn so that the defendants' applications could be amended to include applications for extensions of time in which to seek summary judgment.

"The merits of an untimely motion for summary judgment may be considered by the court only if the movant demonstrates 'good cause for the delay in making the motion–a satisfactory explanation for the untimeliness.' " Crawford v. Liz Claiborne, Inc., 45 A.D.3d 284 (1st Dept. 2007), quoting Brill v. City of New York, 2 N.Y.3d 648, 652 (2004). Where a movant makes a motion for summary judgment after the expiration of a court-ordered deadline which is shorter than the 120-day deadline set forth in CPLR 3212(a), a demonstration of good cause for the delay is still required. Mizell v. Eastman & Bixby Redevelopment Co., LLC, 34 A.D.3d 770 (2nd Dept. 2006), citing Miceli v. State Farm Mut. Auto. Ins. Co., 3 N.Y.3d 725 (2004).

Defense counsel for defendant Meoli has established that their original summary judgment motion was made in accordance with the time limit set forth in this court's Preliminary Conference Order; that they were not served with a copy of this court's Certification Order; nor did they otherwise acquire knowledge of the change in the time in which summary judgment motions could be made until after their original motion was made. Defendant Meoli has demonstrated good cause for his delay in seeking summary judgment and he is granted leave to move for summary judgment beyond the limits set forth in this court's Certification Order. See, McFadden v. 530 Fifth Ave. RPS III Assoc., LP, 28 A.D.3d 202, 203 (1st Dept. 2006) (movants lack of knowledge that Note of Issue was filed constituted good cause); see also, Vila v. Cablevision of NYC, 28 A.D.3d 248 (1st Dept. 2006); (confusion as to expiration of time period constituted good cause); Cooper v. Hodge, 13 A.D.3d 1111 (4th Dept. 2004) (plaintiff and defense counsel's confusion re court ordered deadline constituted good cause); but see, Crawford v. Liz Claiborne, Inc., supra, at p. 275, (counsel's lack of awareness of local court rules does not constitute good cause).

While defense counsel for defendants Miller and UMC Medical Consultants, P.C. have established that they, too, had no knowledge of the reduction of the time in which summary judgment applications could be made, their original motion was late even under the more generous time constraints set forth in this court's Preliminary Conference Order. Moreover, their untimely "cross motion" is actually a "motion," since it does not seek relief against the moving party. CPLR 2215; Mango v. Long Island Jewish-Hillside Medical Center, 123 A.D.2d 843 (2nd Dept. 1986). Nevertheless, "an untimely motion or cross-motion for summary judgment may be considered by the court where, as here, a timely motion for summary judgment was made on nearly identical grounds." Grande v. Peteroy, 39 A.D.3d 590 (2nd Dept. 2007); see also, Ellman v. Village of Rhinebeck, 41 A.D.3d 635 (2nd Dept. 2007), *lv den.*, 9 N.Y.3d 812 (2007); Boehme v. A.P.P.L.E., 298 A.D.2d 540 (2nd Dept. 2002); Miranda v. Devlin, 260 A.D.2d 451 (2nd Dept. 1999); compare, Bressingham v. Jamaica Hosp. Med. Ctr., 17 A.D.3d 496 (2nd Dept. 2005). The issues raised by defendants Miller and UMC Medical

Consultants, P.C. are already properly before the court pursuant to the defendant Meoli's motion. The identical nature of the grounds of these motions provides the requisite "good cause" required by CPLR 3212(a) to allow defendants Miller and UMC Medical Consultants' untimely motion. Grande v. Peteroy, supra; compare, Bickelman v. Herrill Bowling Corp., 49 A.D.2d 578, (2nd Dept. 2008). In fact, this court in any event has the discretion in deciding the motion to search the record and award summary judgment to a non-moving party. Grande v. Peteroy, supra; see, also, Ellman v. Village of Rhinebeck, 41 A.D.3d 635 (2nd Dept. 2007); Bressingham v. Jamaica Hosp. Med. Ctr., supra; Boehme v. A.P.P.L.E., supra; Miranda v. Devlin, supra. Defendants Miller and UMC are also granted leave to move for summary judgment beyond the time limit set forth in this court's Certification Order.

The plaintiff in this action seeks to recover damages for personal injuries she allegedly sustained when the chiropractic examining table she went to sit on allegedly lowered. The defendants seek summary judgment dismissing the complaint on the grounds that it was impossible for the plaintiff's accident to have occurred as she has described it thus far. The pertinent facts are as follows:

The plaintiff appeared at the offices of UMC Medical Associates for an Independent Medical Examination by an orthopedist, the defendant Michael C. Miller, M.D., on April 8, 2003. The defendant Richard C. Meoli, D.C. owns the offices and defendant UMC Medical Consultants rented them. At her examination-before-trial, the plaintiff testified that when she "attempted to sit on the adjustable electric chiropractic table, [it] lowered rapidly, causing [her] to fall." She testified that she "sat on the section where people put their head" and she did not attempt to sit on any other part of the table. Plaintiff testified at her examination-before-trial that her bottom made contact with the table for a brief second at the tissue paper area, which, again, is clearly the headrest, and that the table then lowered. She also testified at her examination-before-trial that the part of the table with the sanitary paper on it (the headrest) lowered in some manner and that neither her feet or any part of her body ever made contact with the levers or pedals on the table. It is not disputed that the doctor promptly realigned the table. The plaintiff now attests that:

> "[a]fter [Dr.] Miller entered the room, he faced [her] from the opposite side of the chiropractic table and indicated that [she] should sit on the table. So [she] took a step towards the table, turned [her] back and backed up to sit on the table. As [she] went to sit, the table abruptly moved away from [her] bottom, and [she] fell to the floor onto [her] right hand, knee and leg."

She now attests that she "never stated that only the head portion of the table moved downward and caused [her] to fall" and that "[f]rom [her] perspective and the location where [she] was asked to sit, the table moved away from [her] body."

"On a motion for summary judgment pursuant to CPLR 3212, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." Sheppard-Mobley v. King, 10 A.D.3d 70, 74 (2d Dept. 2004), aff'd. as mod., 4 N.Y.3d 627 (2005), citing Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). "Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." Sheppard-Mobley v. King, supra, at p. 74; Alvarez v. Prospect Hosp., supra; Winegrad v. New York Univ. Med. Ctr., supra. Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact. Alvarez v. Prospect Hosp., supra, at p. 324. The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference. See, Demishick v. Community Housing Management Corp., 34 A.D.3d 518 (2d Dept. 2006), citing Secof v. Greens Condominium, 158 A.D.2d 591 (2d Dept. 1990).

The defendants had the chiropractic table examined by a physical engineer, Grahme Fischer. His examination focused on the head portion of the table because that is where the plaintiff testified at her examination-before-trial she attempted to sit. He explains:

> "The 'head' structure which supported the two slideable pillows was held in position by a friction-lock mechanism with a horizontal pivot. When the friction-lock was manually released, the head-end could be raised or lowered such that it was at an angle with respect to the torso-support region of the table. . . When the weight was resting on the friction-lock mechanism, the head-end of the table could not be moved downward. It was locked until manual release occurred by sliding the circular rod within the rectangular block of metal. . . The only way in which the friction lock can be released by one person is with a deliberate, two-handed action. It cannot be unlocked accidentally."

The physical engineer explains that he conducted two experiments with people sitting on the head portion of the examining table and that there was no measureable downward motion. He explains that in his opinion, to a reasonable degree of engineering certainty, "the only way in which the head-end of the subject table can move downward without deliberate manual release of the friction lock, is by applying downward forces which are so large that they permanently deform the head-end's supporting structures. Should such an event occur, the head-end could not be restored to its horizontal position without replacing the deformed parts." Thus, he concludes to a reasonable degree of engineering certainty that:

> "The head-end supporting structure and mechanism did not

> collapse as a result of Ms. Williams sitting upon it; the head-end could not move downward without a deliberate, and knowledgeable, release of the friction lock; Ms. Williams could not have accidentally, or intentionally, released the friction lock while she attempted sitting down; [and], [t]herefore, the head-end of the chiropractic table did not move as described by Ms. Williams."

It is this court's view that the defendants have not met their burden of proof. While they have established that the chiropractic examining table could not have lowered or moved as a result of the plaintiff's attempt to sit on the headrest area, there is no dispute that the table did lower and the defendants have failed to explain how that happened, or the absence of negligence on their part.

In any event, assuming, *arguendo*, that the defendants have met their burden through the affidavit of the physical engineer by conclusively demonstrating that the accident as described by plaintiff thus far was physically and mechanically impossible (see, Hardy v. Lojan Realty Corp., 303 A.D.2d 457 [2nd Dept. 2003] citing Williams v. Port Authority of New York & New Jersey, 247 A.D.2d 296 [1st Dept. 1998]; Braithwaite v. Equitable Life Assur. Soc. of U.S., 232 A.D.2d 352 [2nd Dept. 1996]; Loughlin v. City of New York, 186 A.D.2d 176, 177 [2nd Dept. 1992], lv to app den. 81 N.Y.2d 704 [1993]) and that the burden shifts to the plaintiff to establish the existence of a material issue of fact, she has met her burden.

Plaintiff maintains that she has never stated that only the headrest area of the table moved. And, she notes that while she testified at her examination-before-trial that no part of her body made "contact with any levers or pedals on the table," that included only the levers and pedals on top of the table but did not include all the levers or pedals associated with the table, such as the ones on the floor underneath the table. Similarly, while she testified that she did not observe levers or foot pedals, she explains that her back was to the table when she attempted to sit down, thus explaining why she herself did not see them. Plaintiff then points out that defendant Meoli testified at his examination-before-trial that there is a foot pedal underneath the headrest that is used to adjust the height of the table and that her companion Ms. Ossi confirmed that fact at her examination-before-trial as well. In addition, pictures depicting the pedal underneath the headrest have been submitted. Moreover, the plaintiff's companion, Carol Ossi, who was in the room when the accident occurred, testified at her examination-before-trial that she told Dr. Meoli that the plaintiff "must have backed up, stepped on the pedal and the table went down" and that Dr. Miller similarly testified at his examination-before-trial that he believed that the plaintiff inadvertently stepped on the pedal that operated the table causing it to drop.

While defendants' expert physical engineer has established that the plaintiff coming in contact with the headrest could not possibly have caused the chiropractic table to collapse, neither he nor the defendants have addressed the possibility which is adequately supported by the evidence that when backing up, the plaintiff inadvertently stepped on a

pedal and caused the table to lower. It is this court's opinion that the alleged inconsistencies between that theory and the plaintiff's testimony at her examination-before-trial have been adequately explained so as to support the existence of an issue of fact requiring denial of the defendants' summary judgment motions.

So Ordered.

A.J.S.C.

**Dated:** May 7, 2008