

**Cohen v 945-79th Street, LLC**

2008 NY Slip Op 32733(U)

September 3, 2008

Supreme Court, Richmond County

Docket Number: 101182/07

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND PART DCM 3**

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**Index No.: 101182/07  
Motion No.: 1, 2**

**LOUIS COHEN,**

*Plaintiff,*

*against*

**DECISION & ORDER**

**HON. JOSEPH J. MALTESE**

**945-79TH STREET, LLC., ANASTASIS GEORGIAOIS  
AND DSV INC. and AMANE ELGERUSHI,**

*Defendants.*

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**The following items were considered in the review of this motion for summary judgment:**

<b><u>Papers</u></b>	<b><u>Numbered</u></b>
<b>Notice of Petition and Affidavits Annexed</b>	<b>1</b>
<b>Answering Affidavits</b>	<b>2</b>
<b>Replying Papers</b>	<b>3</b>
<b>Notice of Cross Motion</b>	<b>4</b>
<b>Exhibits</b>	<b>Attached to Papers</b>

**Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:**

Defendants, DSV, Inc. and Amane Elgerushi (“movants”), seeks an order granting summary judgment and dismissal of the plaintiff’s complaint and any cross-claims pursuant to CPLR §§3211 and 3212 or, in the alternative, granting summary judgment due to plaintiff’s failure to meet the threshold requirements for a “serious injury” pursuant to Insurance Law §5102. Defendants, 945-79th Street, LLC and Anastasis Georgiaois (cross-movants) make a cross-motion for summary judgement by way of submitting an affirmation in support of the motion filed by the movants’ attorney, Raven & Kolbe, LLP.

This action arises out of a motor vehicle accident that occurred on February 1, 2007 at the intersection of 10<sup>th</sup> Avenue and 77<sup>th</sup> Street in Brooklyn, New York. Plaintiff, a driving instructor, Louis Cohen, was a passenger in the vehicle owned by the defendant, DSV, Inc. and operated by a student driver Amane Elgerushi. The plaintiff was hired by DSV, Inc (d/b/a Sunset Driving School) to provide

driving instruction to the moving defendant and working in this capacity when the accident occurred. As a result of the accident, plaintiff alleges that he suffered personal injuries.

Tenth Avenue is a two-way street that runs north and south and 77<sup>th</sup> Street, which runs eastbound is a one-way street with one lane of travel. Traffic on 77<sup>th</sup> Street is controlled by two stop signs (one on each corner) and a road marking that says “STOP” in white lettering. The moving defendant, Amane Elgerushi, was traveling northbound and co-defendant Anastasis Georgiaois, was traveling eastbound on 77<sup>th</sup> Street when the accident occurred.

The vehicle in which plaintiff was a front seat passenger was equipped with one steering wheel and dual brakes, in which plaintiff had direct access to the vehicle’s brakes. Plaintiff testified that the speed limit on 10<sup>th</sup> Avenue is 25 miles per hour and that he did not notice anything unusual about the way the moving defendant was driving and that she did not go in excess of the 25-mile-per-hour speed limit. Plaintiff further testified that this was a broadside impact and did not see the other vehicle before the impact. Co-defendant, Anastasis Georgiaois, however, testified that he did stop his vehicle before entering the intersection with 10<sup>th</sup> Avenue. Georgiaois also testified that he stopped quick, took a quick look, and saw there was no one coming and proceeded.

The movants, DSV, Inc and Amane Elgerushi claim that the co-defendant, Anastasis Georgiaois failed to yield the right-of-way after stopping at a stop sign in violation of Vehicle and Traffic Law §1142(a). Furthermore, movants claim that Louis Cohen acknowledged that it was his duty to keep a proper lookout of oncoming traffic since the moving defendant was a relatively inexperienced, unlicensed student driver. Since plaintiff and the co-defendant have not established any material issues of fact as to the negligence of the moving defendants, the moving defendants claim they are entitled to judgment as a matter of law.

In the alternative, the movants and cross-movants argue that summary judgment should be granted because plaintiff’s fail to meet the threshold requirements for a “serious injury” pursuant to Insurance Law §5102.

In opposition, plaintiff claims that summary judgment should be denied because the plaintiff has the affirmative evidence by way of the plaintiff's own deposition and the movant Amane Elgerushi's deposition that he properly supervised the unlicensed driver while she was driving on the day of the accident and that he exercised reasonable care to supervise and instruct her. Therefore, plaintiff argues that there are questions of fact regarding liability for the accident

### Discussion

A motion for summary judgment must be denied if there are "facts sufficient to require a trial of any issue of fact."<sup>1</sup> Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. "Moreover, the parties competing contentions must be viewed in a light most favorable to the party opposing the motion."<sup>2</sup> Summary judgment should not be granted where there is any doubt as to the existence of a triable issue or where the existence of an issue is arguable.<sup>3</sup>

Here, the moving defendants' motion for summary judgment is granted. Although plaintiff argues that he was not negligent and that he exercised reasonable care to supervise and instruct the defendant student, he has not offered a single fact that the student driver, Amane Elgerushi, was in anyway negligent for the accident. In fact, plaintiff claims that he they were "broad-sided" by the accident and that Elgerushi was going the legal speed limit and that he observed nothing unusual about the way she was driving. Based on the deposition testimonies of the parties, summary judgment must be granted as a matter of law to the movants, DSV Inc. and Amane Elgerushi.

However, the defendants and cross-movants, 945-79th Street, LLC and Anastasis Georgiaois' motion for summary judgment, is denied. There are issues of fact as to Mr. Georgiaois' alleged failure

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<sup>1</sup>CPLR §3212[b].

<sup>2</sup>*Marine Midland Bank, N.A., v. Dino, et al.*, 168 AD2d 610 [App Div 2<sup>nd</sup> Dept 1990].

<sup>3</sup>*American Home Assur. Co., v. Amerford Intl. Corp.*, 200 AD2d 472 [App Div 1<sup>st</sup> Dept 1994].

to come to a complete stop before entering the intersection and whether he failed to yield the right-of-way in violation of Vehicle and Traffic Law §1142(a).

Next, defendants, 945-79th Street , LLC and Anastasis Georgiaois makes a cross-motion for summary judgment pursuant to Insurance Law §5102. A serious injury must be a personal injury, "[W]hich results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitutes such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment."<sup>4</sup>

The serious injury threshold set forth in Insurance Law §5104(a) can only be established under these categories.<sup>5</sup> Thus, the mere fact that one has been injured, even seriously, does not establish that a "serious injury" has been sustained.<sup>6</sup> Rather, a plaintiff must show that he or she sustained a personal injury, i.e., bodily injury, sickness or disease,<sup>7</sup> that results in one of the nine serious injury threshold categories.<sup>8</sup>

It is important to keep in mind the policies underlying the enactment of the No-Fault Law and the law's structure when litigating no-fault related issues. Courts have consistently held that the No-Fault

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<sup>4</sup>Insurance Law §5102 [d].

<sup>5</sup>*Coon v. Brown*, 192 AD2d 908 [3rd Dept 1993]; *Daviero v. Johnson*, 88 AD2d 732 [3rd Dept 1982].

<sup>6</sup>*Jones v. Sharpe*, 98 AD2d 859 [3rd Dept 1989], *aff'd* 63 NY2d 645 [1984].

<sup>7</sup>11 NYCRR §65-2.1[e].

<sup>8</sup>*See, Van Norstrand v. Regina*, 212 AD2d 883 [3rd Dept 1995].

Law must be interpreted to fulfill the policies the legislature had in mind.<sup>9</sup> It is for the court to decide in the first instance whether a plaintiff has made a *prima facie* showing of “serious injury”.<sup>10</sup>

After reviewing the submissions, the court denies the cross-movants’ motion for summary judgment. The defendants failed to make a *prima facie* showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d).<sup>11</sup> Plaintiff has provided the sworn report by Dr. Walter F. Pizzi that he suffered a left shoulder sprain and fracture of his left humerus which were causally related to the accident. Furthermore, Dr. Pizzi states that his exam revealed plaintiff’s left shoulder abduction had a range of motion of 150 degrees, while the normal range of motion is 180 degrees. Therefore, defendants 945-79th Street, LLC and Anastasis Georgiaois’ motion for summary judgment is denied.

Accordingly, it is hereby:

ORDERED, that defendants, DSV, Inc. and Amane Elgerushi’s motion for summary judgment and dismissal of the plaintiff’s complaint and any cross-claims pursuant to CPLR §§3211 and 3212 is granted; and it is further

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<sup>9</sup>*See, Oberly v. Bangs Ambulance*, 96 NY2d 295 [1991]; *Scheer v. Koubek*, 70 NY2d 678 [1987]; *Maida v. State Farm*, 66 AD2d 852 [2d Dept 1978].

<sup>10</sup>*See, e.g., Licari v. Elliott*, 57 NY2d 230, 237.

<sup>11</sup>*See, Tchjevaskaia v. Chase*, 15 AD3d 389.

ORDERED, that defendants, 945-79th Street, LLC and Anastasis Georgiaois' motion for summary judgment, is denied; and it is further

ORDERED, that all remaining parties appear at JCP on October 6, 2008 for trial.

ENTER,

DATED: September 3, 2008

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Joseph J. Maltese  
Justice of the Supreme Court