

**Ngawang v Anna & Diana Cab Corp.**

2020 NY Slip Op 31247(U)

May 7, 2020

Supreme Court, New York County

Docket Number: 154354/2017

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  
NEW YORK COUNTY**

**PRESENT: HON. ADAM SILVERA** PART **IAS MOTION 22**

*Justice*

-----X

TENZIN NGAWANG,

INDEX NO. 154354/2017

Plaintiff,

MOTION DATE 5/06/2020

- v -

MOTION SEQ. NO. 002 + 003

ANNA & DIANA CAB CORP. AND "JOHN DOE" (NAME  
BEING FICTITIOUS),

**DECISION + ORDER ON  
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 54, 55, 56, 57, 58

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

Before the Court is motion sequence 002 and 003. In motion sequence 002 defendant Anna & Diana Cab Corp. moves for summary judgment pursuant to CPLR 3212 to dismiss the Complaint of plaintiff Tenzin Ngawang on the grounds that plaintiff has failed to demonstrate that plaintiff has suffered a "serious injury" as defined under Section 5102(d) of the Insurance Law. In motion sequence 003 plaintiff moves for summary judgment on the issue of liability as against defendant and to dismiss defendant's First Affirmative Defense of comparative negligence.

This matter stems from a motor vehicle incident, which occurred September 23, 2016, in front of 24 East 17<sup>th</sup> Street when a yellow taxi owned by Anna & Diana Cab Corp. struck plaintiff Tenzin Ngawang, which allegedly led to plaintiff's serious injury.

**Motion Sequence 002 "Serious Injury"**

Defendant's motion to dismiss plaintiff's complaint for failure to demonstrate a "serious injury" 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”]).

Defendant alleges that plaintiff has failed to demonstrate the existence of a “serious injury” as defined under Section 5102(d) of the Insurance Law. Defendant alleges that the injuries plaintiff is seeking relief for are not causally related to the underlying accident and is a result of degenerative changes. Defendant attaches the deposition the medical report of Dr. Barbara Freedman in support of their motion (Mot Exh F).

The June 28, 2019, report of Dr. Freeman concludes that plaintiff has a normal range of motion in the cervical spine and states “the above range of motion findings of the cervical spine are within normal ranges for this individual” (Mot, Ex F at 5). Dr. Freeman does not list what the normal ranges of motion for the cervical spine should be. The Appellate Division, First Department, has consistently held that “[t]he report of the doctor...is deficient because he...failed to indicate what the normal range of motion would be” (*Nagbe v Minigreen Hacking Group*, 22 AD3d 326, 327 [1st Dept 2005]). Thus, the Court deems Dr. Freeman’s report as

deficient and defendant has failed to meet its burden and defendant's motion for summary judgment on the issue of "serious injury" is denied.

### Liability

Plaintiff's motion for summary judgment on the issue of liability and to dismiss defendant's First Affirmative Defense of comparative negligence is granted. Violation of the Vehicle and Traffic Law ("VTL") constitutes negligence per se (*See Flores v City of New York*, 66 AD3d 599 [1st Dep't 2009]). VTL 1128(a) states:

A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety.

Plaintiff submits his deposition in which he testified that he was riding his scooter in the bike lane when defendant's vehicle hit his handle bar and caused plaintiff to hit the ground (Mot 003, Exh G at 19-20, 31-33, 36). Plaintiff has made a prima facie demonstration of defendant's negligence for the underlying accident. The driver of defendant's vehicle has been precluded from offering testimony as per this Court's Order dated September 27, 2019 (*id.*, Exh B). Absent opposition on the motion, plaintiff's motion on the issue of liability in favor of plaintiff as against defendant and to dismiss defendant's First Affirmative Defense of comparative negligence is granted.

Accordingly, it is

ORDERED that defendant's motion, motion sequence 002, for summary judgment to dismiss plaintiff's Complaint on the grounds that plaintiff allegedly has not sustained a "serious injury" as defined in 5102 of the Insurance Law is denied; and it is further

ORDERED that plaintiff's motion, motion sequence 003, for summary judgment on the issue of liability against defendant is granted; and it is further

ORDERED that the branch of plaintiff's motion, motion sequence 003, for summary judgment to dismiss defendant's First Affirmative Defense of comparative negligence is granted; and it is further

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

This constitutes the Decision/Order of the Court.



<u>5/07/2020</u>			<u>ADAM SILVERA, J.S.C.</u>	
<b>DATE</b>				
<b>CHECK ONE:</b>	<input type="checkbox"/>	<b>CASE DISPOSED</b>	<input checked="" type="checkbox"/>	<b>NON-FINAL DISPOSITION</b>
	<input type="checkbox"/>	<b>GRANTED</b>	<input type="checkbox"/>	<b>GRANTED IN PART</b>
			<input type="checkbox"/>	<b>OTHER</b>
<b>APPLICATION:</b>	<input type="checkbox"/>	<b>SETTLE ORDER</b>	<input type="checkbox"/>	<b>SUBMIT ORDER</b>
<b>CHECK IF APPROPRIATE:</b>	<input type="checkbox"/>	<b>INCLUDES TRANSFER/REASSIGN</b>	<input type="checkbox"/>	<b>FIDUCIARY APPOINTMENT</b>
			<input type="checkbox"/>	<b>REFERENCE</b>