

**Neilson v Cook**

2022 NY Slip Op 33101(U)

September 13, 2022

Supreme Court, New York County

Docket Number: Index No. 154179/2019

Judge: Leslie A. Stroth

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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. LESLIE A. STROTH

PART

52

Justice

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NICHOLETTE NEILSON,

Plaintiff,

- v -

GARY W. COOK, THE NEW YORK CITY DEPARTMENT OF EDUCATION, THE CITY OF NEW YORK, SIMON PEMEL

Defendant.

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INDEX NO. 154179/2019

MOTION DATE 06/09/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28

were read on this motion to/for

JUDGMENT - SUMMARY

Nicholette Neilson (plaintiff) brings this action against Simon Pemel (defendant), inter alia, for personal injuries sustained in an alleged motor vehicle accident that took place on April 16, 2018. Defendant Pemel now moves for summary judgment to dismiss the complaint against him on the ground that plaintiff fails to meet the serious injury threshold, as required. No party has filed opposition to the motion.

It is a well-established principle that the "function of summary judgment is issue finding, not issue determination." Assaf v Ropog Cab Corp., 153 AD2d 520 (1st Dept 1989) (quoting Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395, 404 [1957]). As such, the proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. Alvarez v Prospect Hospital, 68 NY2d 320 (1986); Winegrad v New York University Medical Center, 64 NY2d 851 (1985). Once such entitlement has been demonstrated by the moving party, the burden shifts to the opposing party 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).

Here, defendant Pemel argues that plaintiff failed to show that she sustained a serious injury pursuant to Insurance Law §5102(d)<sup>1</sup> in that, based upon an independent medical examination by defendant’s doctor, Dr. Richard D. Semble, plaintiff’s ranges of motion are normal, she does not suffer from significant limitation or substantial curtailment of daily activities. (See Exhibit E, NYSCEF doc. no. 26). Additionally, defendant Pemel proffers the medical report of Dr. Scott A. Springer, reviewed plaintiff’s MRI films. Dr. Springer found that plaintiff’s spinal MRI’s revealed preexisting degeneration with no traumatic basis and that there was no traumatic injury to the thoracic, cervical, or lumbar spine. (See Exhibit F, NYSCEF doc. no. 27).

Plaintiff’s deposition transcript reveals that she was employed as a bartender at the time of the accident, continues to work as a bartender as of the date of the instant motion, never received a doctor’s note that stated she was unable to work, engages in volunteer work, has travelled to Hawaii since the accident, and admits to having a gym membership and goes to the gym multiple times a month. (See Exhibit G, NYCEF doc. no. 28).

Therefore, defendant Pemel has established that plaintiff was not prevented from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident. Based

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<sup>1</sup> Insurance Law § 5102 (d) defines serious injury as:

... a personal injury which 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 constitute 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.

upon the doctors' reports and plaintiff's deposition transcript, defendant Pemel has met his initial burden of establishing that plaintiff did not sustain a "serious injury" pursuant to Insurance Law §5102(d). The burden now shifts to plaintiff to raise an issue of fact. Plaintiff has failed to file opposition papers. As such, plaintiff has failed to raise a triable issue of fact sufficient to preclude summary judgment, and defendant Pemel's motion for summary judgment dismissing this action against him is granted.

Accordingly, it is

ORDERED that the motion of defendant Simon Pemel for summary judgment to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

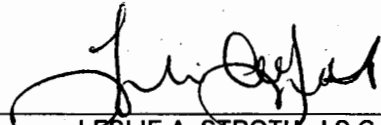
ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on*

Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).

This constitutes the decision and order of the Court.

  
LESLIE A. STROTH, J.S.C.

9/13/2022  
DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	