

**Klar v Markowitz**

2026 NY Slip Op 31443(U)

April 8, 2026

Supreme Court, Kings County

Docket Number: Index No. 514263/2021

Judge: Anne J. Swern

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This opinion is uncorrected and not selected for official publication.

At an IAS Trial Term, Part 75 of the Supreme Court of the State of New York, Kings County, at the Courthouse located at 360 Adams Street, Brooklyn, New York on the 8<sup>th</sup> day of April 2026.

P R E S E N T: HON. ANNE J. SWERN,  
J.S.C.

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LEAH KLAR,

*Plaintiff,*

*-against-*

ZALMEN MARKOWITZ AND ESTHER MARKOWITZ,

*Defendants.*

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**DECISION & ORDER**

Index No.: 514263/2021

Calendar Nos.: 21 & 22

Return Date: 2/26/2026

Motion Seq. No.: 8

*Recitation of the following papers as required by CPLR 2219 (a):*

**NYSCEF  
Papers Numbered**

Notice of Motion, Attorney Affirmation in Support, Supporting Exhibits, Affirmation in Opposition, Counter Statement of Plaintiff’s Statement of Material Facts, and Plaintiff’s Reply.....149-155, 176-183

*Upon the foregoing papers, the decision and order of the Court is as follows:*

This is a motion by plaintiff LEAH KLAR (“plaintiff”) pursuant to CPLR section 3403 (a) (4) requesting a special trial preference based upon age, and pursuant to CPLR section 3212 and New York State Insurance Law section 5102 (d) granting partial summary judgment on serious injury grounds.

**Special Preference**

Plaintiff asserts that she is entitled to a special trial preference based upon age pursuant to CPLR § 3403 (a) (4) because she has reached at least seventy (70) years of age.<sup>1</sup> According to

<sup>1</sup> CPLR § 3403 (a) (4) states the following: Preferred cases. Civil cases shall be tried in the order in which notes of issue have been filed, but the following shall be entitled to a preference: in any action upon the application of a party who has reached the age of seventy years.

plaintiff's New York State driver's license, plaintiff was born on October 29, 1954; she is seventy-one (71) years old. As such, plaintiff's motion pursuant to CPLR § 3403 (a) (4) for a special trial preference based upon age is granted.

### **Serious Injury Threshold**

Plaintiff commenced this action by Summons and Complaint seeking to recover for serious personal injuries sustained in a motor vehicle accident that occurred on December 8, 2020. According to the verified bill of particulars, plaintiff sustained injuries to the right arm/shoulder. According to the Independent Medical Examination (IME) by Dr. Dorothy Scarpinato, M.D. ("Dr. Scarpinato"), the following body parts were examined: cervical spine, right shoulder, left shoulder, bilateral wrists/hands, bilateral elbows, thoracolumbar spine, bilateral hips, bilateral knees, and bilateral ankles/feet. Normal degrees of motion were reported for each body part, except the right shoulder.<sup>2</sup> Plaintiff's right shoulder range of motion demonstrates multiple significant limitations when compared to normal values, including forward elevation and abduction each reduced by 50%, internal rotation reduced by 50%, backward elevation reduced by 25%, and external rotation reduced by approximately 22%. These quantified restrictions, particularly those exceeding 20% and especially the 50% losses, constitute objective evidence of a significant limitation of use under New York Insurance Law § 5102 (d) (*see Dugel v Green*, 84 NY2d 795 [1995], which states that 20% permanent loss of use of a body part can be deemed significant). Moreover, in the IME, Dr. Scarpinato asserts that there is a causally related orthopedic disability noted upon the physical examination performed.

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<sup>2</sup> Range of motion of the right shoulder revealed forward elevation to 90 degrees (180 degrees normal), backward elevation to 30 degrees (40 degrees normal), abduction to 90 degrees (180 degrees normal), adduction to 45 degrees (45 degrees normal), external rotation to 70 degrees (90 degrees normal), and internal rotation to 20 degrees (40 degrees normal).

Defendants, in their opposition, dispute that there is a causal connection between this accident and plaintiff's fracture. Plaintiff alleged that defendants' own examining doctor, Dr. Scarpinato, prepared a report admitting a causally related fracture was sustained in the accident, and that plaintiff's right humerus was fractured in the accident. However, defendants assert that plaintiff is mistaken that Dr. Scarpinato is defendants' examining physician. Upon information and belief, defendants assert that Dr. Scarpinato performed the no-fault IME; that Dr. Scarpinato's report was addressed to D&D Associates (*see* NYSCEF Doc No. 180); and that defendants' orthopedic expert is Dr. Bradley D. Wiener ("Dr. Wiener").

According to the Independent Orthopedic Evaluation performed on plaintiff on July 8, 2025, by Dr. Wiener, the causality of plaintiff's injury was questioned. Dr. Wiener stated the following:

"The claimant reports that she was the restrained, backseat passenger, seated along the passenger's side of a motor vehicle, involved in a frontal impact accident on December 8, 2020. As a consequence of the accident, the claimant reports that she struck her right shoulder against the passenger's side door. ***This does not appear consistent with the basic laws of physics.*** Following the accident, she presented to an urgent care facility, and she claims that she was "frightened" at the urgent care center. She alleges that because she was "frightened," she provided a history that she slipped outside and fell, with injury to the right shoulder. X-ray studies were obtained, which demonstrated a comminuted fracture of the right proximal humerus, and for which she was placed in a sling."

Plaintiff's motion pursuant to CPLR section 3212 and New York State Insurance Law section 5102 (d) granting plaintiff partial summary judgment on serious injury grounds is denied (*Perl v Meher*, 18 NY3d 208, 217 [2011]). A report by a biomechanical engineer (*see* NYSCEF Doc No. 181), in addition to defendants' IME, reveals that there is a dispute as to whether plaintiff's fracture was related to the subject car accident. Where the parties' experts disagree, a question of fact exists as to whether plaintiff meets the no-fault threshold because the Court

cannot resolve the experts' credibility upon a motion for summary judgment (*Id.*; see *Rappaport v Sear Roebuck*, 28 AD3d 449 [2d Dept 1992]).

The Court has considered the parties remaining arguments and finds same to be without merit.

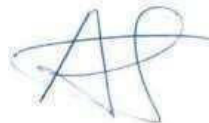
Accordingly, it is hereby

ORDERED that plaintiff's motion pursuant to CPLR section 3403 (a) (4) granting a special trial preference in this case based upon plaintiff's age is GRANTED; and it is further

ORDERED that plaintiff's motion pursuant to CPLR section 3212 and New York State Insurance Law section 5102 (d) granting plaintiff partial summary judgment on serious injury grounds is DENIED.

This constitutes the decision and order of the Court.

ENTER:



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**Hon. Anne J. Swern, J.S.C.**

**Dated:** 4/8/2026