

Sum

SHORT FORM ORDER

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

Present:

**HON. DANIEL PALMIERI
Acting Justice Supreme Court**

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**DAPHNA NIR-GOLDBERG, AS ADMINISTRATRIX
OF THE ESTATE OF STEVEN R. GOLDBERG,
DECEASED,**

TRIAL TERM PART: 45

Plaintiff,

-against-

INDEX NO.: 019887/05

**MOTION DATE: 12-14-09
SUBMIT DATE: 1-7-10
SEQ. NUMBER - 002**

**IMPORTED MOTOR CARS OF LONG ISLAND
LTD., NASSAU HEALTH CARE CORPORATION,
CAROLINE KAZIGO, As Administrator of the
Estate of JOSEPH Z. KAZIGO, M.D., Deceased,
JEETINDER SOHOL, M.D., ELIZABETH
CIRINCIONE, M.D., LABROS D.G. ANGUS, M.D.
And NGOC NGUYEN-FAMULARE, M.D.,
Defendants.**

**MOTION DATE: 1-7-10
SUBMIT DATE: 1-7-10
SEQ. NUMBER - 003**

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The following papers have been read on this motion:

- Notice of Motion, dated 11-9-09.....1**
- Affirmation in Partial Opposition, dated 11-20-09.....2**
- Plaintiff's Affirmation in Limited Opposition, dated 11-23-09....3**
- Notice of Cross Motion, dated 12-18-09.....4**
- Affirmation in Opposition, dated 1-4-10.....5**
- Reply Affirmation, dated 12-8-09.....6**

The motion of defendant Imported Motor cars of Long Island, Ltd., (Motor Cars) (Seq. 2) pursuant to CPLR 3212 for summary judgment dismissing the complaint and the cross claims of the co-defendants (Seq. 2) is granted and the complaint and all cross claims

against defendant Motor Cars are dismissed.

The cross motion of plaintiff (Seq. 3) to preclude the remaining co-defendants from raising at trial the issue of fault with respect to Motor Cars is granted, and the co-defendants are precluded from seeking an apportionment of fault or reduction in liability based upon the alleged fault of Motor Cars.

Plaintiff's decedent Steven R. Goldberg died shortly after a one car automobile accident on the Northern State Parkway, which occurred while he was driving an Acura automobile. The Acura had a transmission replacement and related work performed by Motor Cars about two weeks earlier.

In this action, plaintiff sued Motor Cars, alleging that negligence in connection with the repair had a role in causing the accident which brought about his demise. Also named in the complaint as co-defendants are the hospital and physicians who treated decedent or managed his care following the accident, in which it is alleged that their negligence was also responsible for the pain, suffering and death of decedent.

In their answers the co-defendants, all of whom are represented by the same attorney, have interposed affirmative defenses based on CPLR Article 16 and General Obligations Law §15-108, as well as cross claims for contribution against Motor Cars (but not each other), pursuant to CPLR Article 14 – in effect claiming that Motor Cars is liable for its equitable share based on their relative shares of culpability.

On these motions neither plaintiff nor the co-defendants oppose the motion by Motor Cars for summary judgment as to its freedom from fault, and no party has directed the Court to any evidence that would indicate any fault on the part of Motor Cars or any failure on the

part of Motor Cars to make a *prima facie* showing of entitlement to the relief sought.

In their submission on the motion by Motor Cars, the co-defendants “take no position” as to fault, but seek to preserve their rights under CPLR Article 14 (contribution as against Motor Cars), CPLR Article 16 (apportionment and/or limitation of liability) and GOL 15-108 (apportionment). This would enable them to argue to a jury the possible fault of Motor Cars as a basis for reduced liability on their part.

In response, plaintiff has brought on her motion to preclude the co-defendants from preserving their rights as aforesaid.

The co-defendants have not submitted any authority to support their claims of preservation, and have not taken issue with several decisions of courts of coordinate jurisdiction which have denied such rights of preservation to defendants who are similarly situated or who have granted such relief as is now being sought by plaintiff to other plaintiffs who were similarly situated.

This Court finds that the decisions cited below and upon which the Court relies are similar in factual scenario, contain well reasoned analysis and explanations of applicable law, and thus are adopted by this Court. They are also wholly consistent with more general and well-established appellate law holding that upon a grant of summary judgment issues resolved thereby become the law of the case, and cannot be relitigated at trial. *See, KB Operating, LLC v Briggs*, 58 AD3d 689 (2d Dept. 2009); *Dukett v Wilson*, 31 AD3d 865 (3d Dept. 2006); *Rosso v The Beer Garden, Inc.*, 12 AD3d 152 (1st Dept. 2004).

Hence, the motion of Motor Cars is granted and the complaint and all cross claims as to Motor Cars are dismissed.

The plaintiff's motion to preclude the remaining co-defendants from claiming the benefits of CPLR Articles 14 and 16 and GOL §15-108 as relating to Motor Cars also is granted.

The cases and decisions relied on for this decision are hereinafter set forth: *Brooker v. South Nassau Communities Hospital, et al.*, 175 Misc.2d 181, 669 N.Y.S.2d 169 (Sup. Ct., Nassau County, 1998); *Masera v. Romero, M.D., et al*, 2007 WL 2236409, 2007 N.Y. Slip Op. 31467 (Sup. Ct., Suffolk County 2007); *Skrobul v. Brathwaite, M.D., et al.*, 2007 WL 2236511, N.Y. Slip Op. 31914 (Sup. Ct., Suffolk County 2007); *Deangelis v. Farr, M.D., et al*, 2007 WL 3235510, 2007 N.Y. Slip Op. 32628 (Sup. Ct., Suffolk County 2007); *Polak v. Holmes, et al.*, 2007 WL 3235230, 2007 N.Y. Slip Op. 32607 (Sup. Ct., Suffolk County 2007).

This shall constitute the Decision and Order of this Court.

ENTER

DATED: January 8, 2010



HON. DANIEL PALMIERI
Acting Supreme Court Justice

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ENTERED

JAN 20 2010
**NASSAU COUNTY
COUNTY CLERK'S OFFICE**

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