

**Tucciarone v Fillius**

2013 NY Slip Op 30410(U)

February 25, 2013

Supreme Court, Richmond County

Docket Number: 101941/11

Judge: Joseph J. Maltese

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

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**Index No.:101941/11  
Motion No.:001, 002,  
003**

**JOYCE TUCCIARONE,**

*Plaintiff*

**DECISION & ORDER**

**HON. JOSEPH J. MALTESE**

*against*

**ASHLEY D. FILLIUS and  
GALINA TEPLITSKAYA,**

*Defendants*

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The following items were considered in the review of the following motions for summary judgment.

<u>Papers</u>	<u>Numbered</u>
<b>Notice of Motion and Affidavits Annexed [Liability](001)</b>	<b>1</b>
<b>Memorandum of Law in Support</b>	<b>2</b>
<b>Affirmations in Opposition</b>	<b>3, 4</b>
<b>Notice of Motion and Affidavits Annexed [Threshold] (002)</b>	<b>5</b>
<b>Notice of Motion and Affidavits Annexed [Threshold] (003)</b>	<b>6</b>
<b>Affirmation in Opposition</b>	<b>7</b>
<b>Affirmations in Reply</b>	<b>8, 9</b>
<b>Answering Affidavits</b>	
<b>Exhibits</b>	<b>Attached to Papers</b>

Upon the foregoing cited papers, the Decision and Order on these Motions is as follows:

The defendants move for an order granting them summary judgment dismissing the plaintiff's complaint arguing: 1) that the defendant, Galina Teplitskaya is not liable; and 2) that the plaintiff did not sustain a "serious injury" as that term is defined in Insurance Law § 5102(d). The motions for summary judgment are denied.

**Facts**

This is an action to recover personal injuries allegedly sustained as a result of a motor vehicle accident on February 10, 2011. The plaintiff was a passenger in a vehicle operated by

Ashley D. Fillius. The accident occurred at the intersection of Hylan Boulevard and Nelson Avenue in Staten Island, New York. The plaintiff was traveling southbound on Hylan Boulevard in the Fillius vehicle. The defendant Taplitskaya vehicle proceeded northbound on the rightmost lane closest to the curb on Hylan Boulevard. While this particular intersection is governed by a traffic light, it does not utilize a left turn arrow. As the Fillius vehicle approached the intersection, it moved into the left turn lane and proceeded to turn left from Hylan Boulevard onto Nelson Avenue. Fillius testified that she did not bring her vehicle to a stop prior to beginning her left turn, but instead slowed her rate of speed. Before the Fillius vehicle completed the turn onto Nelson Avenue, the Taplitskaya vehicle struck the passenger side of the Fillius vehicle propelling the vehicle on to the sidewalk on Nelson Avenue.

Following the accident, the plaintiff was taken to the hospital by ambulance. Hospital records show that the plaintiff indicated that she had pain in her lower back, neck and shoulders. The treating physician at the hospital ordered radiological reviews of the plaintiff's cervical spine.

The plaintiff claims that as a result of this accident she suffered the following injuries: 1) right knee internal derangement and patellofemoral syndrom with MRI confirmed tear of the anterior cruciate ligament with synovitis and chondromalacia necessitating surgical intervention on May 2, 2011; 2) left knee internal derangement and patellofemoral syndrome with MRI confirmed strains of the posterior and anterior cruciate ligaments, chondromalacia, synovial fluid, and a micro-fracture necessitating surgical intervention on August 3, 2011; 3) post-concussive syndrome with post-traumatic headaches; 4) Cervical strain/sprain/myofasciitis with C2-C3, C3 - C4 and C4-C5 bulges; 5) lumbar strain/sprain/myofasciitis with L5-S1 radiculopathy and disc bulges at T12-L1, L1-L2, L2-L3, L3-L4, L4-L5, and L5-S1; 6) right should strain/sprain with supraspinatus tendinosis; and 7) rib contusions.

After being seen at the hospital on the date of the accident the plaintiff did not seek any treatment until March 17, 2011. The plaintiff testified that this delay was due to the fact that she

believed the pain would subside.

### Discussion

A motion for summary judgment must be denied if there are “facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). 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>1</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>2</sup> As is relevant, summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law.<sup>3</sup> On a motion for summary judgment, the function of the court is issue finding, and not issue determination.<sup>4</sup> In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion.<sup>5</sup>

#### *Motion for Summary Judgment Arguing No Liability*

The Vehicle and Traffic Law § 1141 provides that a left-turning vehicle must yield the right-of-way to a vehicle approaching from the opposite direction. Here, Galina Teplitskaya

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<sup>1</sup> *Marine Midland Bank, N.A., v. Dino, et al.*, 168 AD2d 610 [2d Dept 1990].

<sup>2</sup> *American Home Assurance Co., v. Amerford International Corp.*, 200 AD2d 472 [1<sup>st</sup> Dept 1994].

<sup>3</sup> *Rotuba Extruders v. Ceppos.*, 46 NY2d 223 [1978]; *Herrin v. Airborne Freight Corp.*, 301 AD2d 500 [2d Dept 2003].

<sup>4</sup> *Weiner v. Ga-Ro Die Cutting*, 104 AD2d 331 [2d Dept 1984]. *Aff'd* 65 NY2d 732 [1985].

<sup>5</sup> *Glennon v. Mayo*, 148 AD2d 580 [2d Dept 1989].

demonstrated her entitlement to judgment as a matter of law. Based on the facts presented the Fillius vehicle failed to observe the Teplitskaya vehicle and made a left turn directly into the path of an oncoming vehicle.<sup>6</sup> Consequently, the complaint is severed and dismissed as to the defendant Teplitskaya. Therefore, the court will not consider Teplitskaya's cross-motion for summary judgment based on failure to sustain a "serious injury."

*Summary Judgment Failure to Sustain a "Serious Injury"*

Here, Fillius argues that plaintiff's claimed injuries to her knees and head fail to satisfy "serious injury" because they were not contemporaneously complained of at the time of the accident. Hospital records indicate that the plaintiff complained only of pain in her lower back, neck and shoulders. In connection with her stated injuries the hospital ordered x-rays of the plaintiff's cervical spine. The hospital records are devoid of any reference to pain in the plaintiff's knees; nor were any head injuries referenced. During the plaintiff's deposition she testified that she informed the hospital that she had pain in her knees. But no record of this complaint exists.

The attorneys for defendant, Fillius argue that the Court of Appeals holding in *Perl v. Meher*, precludes the consideration of these injuries when determining whether plaintiff sustained a serious injury pursuant to Insurance Law § 5102(d). In *Perl*, the Court of Appeals held that a rule requiring ". . . contemporaneous quantitative measurements a prerequisite to recovery" was specifically rejected.<sup>7</sup> The moving defendants argue that while the Court of Appeals specifically rejected the requirement that an alleged injury must be quantitative measured contemporaneously with the accident, it did not create a requirement that medical proof be submitted that was taken contemporaneously with the accident in order to support a claim

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<sup>6</sup> *See, Agin v. Rehfeldt*, 284 AD2d 352 [2d Dep't. 2001].

<sup>7</sup> *Perl v. Meher*, 18 NY3d 208, 218 [2011].

under Insurance Law § 5102(d).<sup>8</sup>

Here, medical records show that neither knee or head pain were recorded during the plaintiff's admission to the emergency room. Instead, these injuries were first documented during a March 17, 2011 examination by Dr. David Lifshutz. The plaintiff claims that the pain was ongoing from the date of the accident up to and including her appointment with Dr. Lifshutz, but she believed the pain would go away. She further maintains that the knee pain was communicated to the hospital staff, but it was not documented in the medical records. Consequently, an issue of fact exists as to whether these injuries are related to this the accident.

The plaintiff submitted to examinations by the defendant's expert physicians. In particular, the plaintiff was seen by Dr. Steven Sclafani, a board certified orthopedist. Dr. Sclafani concluded that plaintiff showed no decrease in her range of motion, and found that the plaintiff sustained soft tissue injury to her, shoulder, cervical and lumbar spine and bilateral knees. Dr. Sclafani concluded that the medical records and operative reports did not present evidence that the plaintiff sustained significant knee trauma as a result of the accident. Consequently, the defendants met their burden on summary judgment.

In opposition, the plaintiff submits the expert opinion of Dr. David Lifschutz. Dr. Lifschutz maintains that the plaintiff continues to suffer from reduced range of motion in her shoulder and cervical and lumbar spine. In addition, Dr. Lifschutz concludes that the plaintiff's knee injuries were caused by acute trauma to the joint, attributable to the motor vehicle accident, in direct competition with the conclusion of the defense expert. Consequently, issues of fact exist as to whether the plaintiff sustained a "serious injury." The motion for summary judgment based on Insurance Law § 5102(d) made by the defendant, Ashley Fillius, is denied.

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<sup>8</sup> See, *Ranzie v. Abdul-Massih*, 28 AD3d 447, 448 [2d Dep't 2006].

Accordingly, it is hereby:

ORDERED, that the motion for summary judgment made by the defendant, Galina Teplitskaya, on the basis of no liability, is granted, and the complaint is severed and dismissed as to her, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED, that motion for summary judgment made by the defendant, Galina Teplitskaya, on the basis of no “serious injury” sustained was not considered as being moot; and it is further

ORDERED, that the motion for summary judgment made by the defendant, Ashley D. Fillius, on the basis of no “serious injury” sustained is denied; and it is further

ORDERED, that the remaining parties shall return to DCM Part 3, 130 Stuyvesant Place, 3<sup>rd</sup> Floor, on **Monday, March 25, 2013 at 9:30 a.m.** for a Pre-Trial Conference.

ENTER,

DATED: February 25, 2013

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Joseph J. Maltese  
Justice of the Supreme Court