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| D'Appolonia v Ceballo |
| 2018 NY Slip Op 32501(U) |
| September 24, 2018 |
| Supreme Court, Westchester County |
| Docket Number: 56412/2015 |
| Judge: William J. Giacomo |
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To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.**

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PATRICK L. D'APPOLONIA, JR.,
Plaintiff,

Index No. 56412/2015

– against –

Sequence No. 6

DANIEL A. CEBALLO, TOYOTA MOTOR CORP.,
TAKATA CORPORATION A/K/A TK HOLDINGS INC.
AND "JOHN DOE",
Defendants.

DECISION & ORDER

In an action to recover damages for personal injuries, the defendant Toyota Motor Corp. moves for summary judgment pursuant to CPLR 3212 dismissing the complaint insofar as asserted against it:

Papers Considered

1. Notice of Motion/Affirmation of Steven R. Kramer, Esq./Exhibits A-W; Supplemental Affidavit filing unredacted copies/Affidavit of Robert M. Landis;
2. Affirmation of Robert F. Zerilli, Esq./Exhibits A-G;
3. Reply Affirmation of Steven R. Kramer, Esq./Exhibits A-B.

Factual and Procedural Background

On April 20, 2012, plaintiff was traveling eastbound on Yonkers Avenue when he swerved over the double yellow line and struck a vehicle operated by Daniel Ceballo which was traveling westbound on Yonkers Avenue. Plaintiff was operating a 2011 Toyota RAV4 while Ceballo was operating a 2006 Chevrolet Cobalt. The front driver and passenger airbags of Ceballo's Cobalt deployed. However, the airbags in the RAV4 did not deploy. An arbitrator found plaintiff 90% at fault for the accident and Ceballo 10% at fault. As a result of the accident, plaintiff sustained bilateral meniscus tears, sinus tarsi syndrome in the left ankle, exacerbation of the right shoulder, and a bone chip in the left elbow.

D'Appolonia v. Ceballo, Index No. 56412/2015

Plaintiff commenced this action against Ceballo, Toyota Motor Corp., Takata Corporation a/k/a TK Holdings Inc. and "John Doe". The action was subsequently discontinued against Ceballo and Takata Corporation.

The complaint insofar as asserted against Toyota alleges that plaintiff's injuries would have been prevented or mitigated if the front air bags in the RAV4 deployed upon impact. The complaint further alleges that the failure of the airbag to deploy was the result of defective construction and design and inadequate warnings.

Toyota moves for summary judgment dismissing the complaint on the grounds that the front driver air bag of the 2011 RAV4 was not defective and functioned properly by not deploying in the accident. Toyota argues that the accident did not generate sufficient acceleration to warrant deployment of the air bag. Toyota further argues that even if the front driver air bag had deployed, plaintiff's injuries would not have been prevented.

Toyota submits an accident reconstruction expert affidavit of Steve M. Bailo who has a Bachelor's degree in mechanical engineering and a Master's degree in engineering mechanics. Bailo's investigation revealed that at initial contact, the RAV4 and the Chevy Cobalt were aligned offset from each other, thus, contact was isolated to the left front corner of each vehicle. As a result, there was a minimal amount of frontal engagement or overlap. Both vehicles continued forward after initial contact resulting in the left front tires and wheels engaging each other. According to Bailo, the minimal amount of frontal engagement or overlap orientation between the two vehicles is confirmed by the post collision damage photographs. As the vehicles separated, the Cobalt continued generally forward while being shifted slightly rightward as it moved to its final resting position. The RAV4 continued generally forward while being shifted slightly rightward and rotating counterclockwise as it moved to its final rest position.

Bailo explained that with a full engagement vehicle to vehicle collision, the vehicles reach synchronous velocity and will both move in generally the same direction and at the same speed following maximum engagement. By contrast, in this collision, the vehicles did not reach synchronous velocity. Each vehicle continued to move in their opposite, forward directions following maximum engagement. Therefore, Bailo classified this collision as a side-swipe collision which is less severe than if the vehicles had engaged with more of a frontal overlap.

Bailo attests that based on the accident reconstruction scene drawings and his conservation of momentum analysis¹, the RAV4 was traveling approximately 14 mph and the Cobalt was traveling approximately 18.6 mph upon initial contact. Following the impact, the vehicles separated with the RAV4 continuing forward at approximately 4.6 mph and the Cobalt continuing forward approximately 4.7 mph. As a result of the left front side-swipe impact, the RAV4 experienced a change in velocity, or Delta-V, of

¹ Bailo explains that the conservation of energy and conservation of momentum analyses are based on the engineering principle that, in a collision event, both energy and momentum are conserved. The amount of energy and momentum prior to, and following a collision, are equal.

D'Appolonia v. Ceballo, Index No. 56412/2015

approximately 11.8 mph with a principle direction of force acting on the vehicle from approximately 18 degrees to the left of center. Utilizing these impact results, the longitudinal change in velocity was approximately 11.2 mph where the lateral change in velocity was approximately 3.6 mph.

Bailo attests that Delta-V, or change in velocity, represents the reduction in vehicle velocity experienced by the RAV4 as a result of impacting the Cobalt. He explains that Delta-V is generally used to describe the crash severity experienced by a vehicle during a collision, in other words, a greater Delta-V represents a higher severity crash environment. The principle direction of force represents the angular direction that the Delta-V vector is acting on the RAV4 of approximately 14 mph with a principle direction of force acting on the vehicle from approximately 3 degrees to the left of center. According to Bailo, the accident reconstruction momentum analysis results illustrate that the Cobalt experienced a higher Delta-V crash as compared to the RAV4. The reason for the difference in crash severity during the same collision is directly related to the relative weights of the vehicles. Bailo attests that vehicle specification data for the RAV4 and the Cobalt were utilized to obtain the curb weight of both vehicles. Bailo utilized a curb weight of 3,560 lbs for the RAV4 and a curb weight of 2,991 lbs for the Cobalt, which is consistent with the difference in Delta-V or crash severity.

Toyota also submits, under seal, an affidavit of Robert M. Landis, an automotive engineer employed as a design and technical analysis engineer in Toyota's technical analysis group. Landis has been employed by Toyota since 1998 and an engineer in the automotive industry since 1987. Landis has been involved in the analysis of several hundred traffic collisions, including frontal collisions, for the evaluation of crash safety performance and occupant protection analysis. He has become knowledgeable about Toyota Supplemental Restraining Systems (SRS) including the design, testing, manufacture and certification of various Toyota vehicle air bag systems including the 2011 RAV4.

According to Landis, the 2011 Toyota RAV4 was certified by Toyota as complying with all US Federal motor vehicle safety standards at the time of manufacture, including safety standard 208 applicable to occupant crash protection and front air bag system performance. The 2011 RAV4 is equipped with an SRS airbag system including a front air bag system. The primary restraint systems are the vehicle seatbelts.

The air bag system uses electronic sensors and computer algorithms to evaluate the driver's seat position, the driver's seatbelt use, and the crash severity, to determine how and whether the air bag will deploy. The front air bag system is designed to help reduce the likelihood of certain injuries in severe frontal crashes. Landis states that air bag systems cannot prevent all injuries. Air bags must deploy very quickly to be effective and therefore, can create a risk of injury to out-of-position occupants who are too close to a deploying bag. Toyota conducted numerous tests to determine when air bags were likely to provide a benefit and designed the air bags in the 2011 RAV4 to deploy in those

D'Appolonia v. Ceballo, Index No. 56412/2015

severe collisions where they are likely to help reduce the risk of death or serious injury. He cautioned that air bags are never intended to deploy in all collisions.

Landis further states that the air bag system of a vehicle is designed for the particular model taking into account curb weight and vehicle configuration. Toyota conducted extensive testing of the front air bag system of the 2011 RAV4, including crash testing at different angles and different speeds. Through such testing and decades of experience in designing and assessing the performance of front air bag systems, Toyota determined the threshold levels when the front driver air bag of the 2011 RAV4 should deploy and not deploy. With respect to the 2011 RAV4, the must-fire threshold for a crash into a fixed barrier that does not move or deform is 16 mph for a head-on crash and 20 mph for an oblique frontal crash. This data is based on Toyota air bag sensor engineering report attached to the affidavit and exchange during discovery.

Landis evaluated performance of the front driver air bag system of plaintiff's 2011 RAV4 by reviewing, inter alia, the applicable Toyota air bag testing documents, videos and photographs of the vehicles, and salvage and insurance documents. Landis opines that whether the front air bag deploys during a crash is dependent on the response of the sensing system to the longitudinal deceleration inputs of the sensors over the duration of the impact. The response is influenced by the angle of impact, severity of impact, structure of the vehicle, nature of the object struck, and other factors. Landis states that it is important to note that the principal direction of force and change in velocity over time can be inferred from the direction, magnitude, and structural properties of the displaced body and structure of the post-crash vehicle.

Landis states that post-crash photos of the 2011 RAV4 establish that the frontal component of the crash was very low, which is consistent with the vehicle not sustaining any observable structural front-end damage. The vehicle was impacted in the left front wheel and left front door area. Toyota's accident reconstruction expert Steven M. Bailo calculated the RAV4's resultant change of velocity (Delta V) as 11.8 mph, which is below the 16 mph threshold needed for front driver air bag deployment of the 2011 RAV4. Accordingly, Landis opines that the 2011 RAV4 front driver air bag system was not defective and properly did not deploy because the crash did not meet the front driver air bag deployment criteria. The crash was not severe enough to warrant front driver air bag deployment.

Toyota also submits a biomechanical engineer expert affidavit of Kathleen Rodowicz, PH.D., P.E., a registered professional engineer in the state of Maryland. Rodowicz has extensive experience in analyzing mechanisms of injury to the human body within the context of motor vehicle accidents.

Radowicz notes that on May 9, 2012, an MRI of plaintiff's left knee was performed and on November 29, 2012, an MRI of the right knee was performed. Plaintiff was noted to have bilateral meniscal tears. Rodowicz attests that given the nature of the impact, as determined by Bailo's accident reconstruction analysis, photographs of the accident

D'Appolonia v. Ceballo, Index No. 56412/2015

depicting the position of the driver's seat, plaintiff's size and stature, as reported in the medical records, and plaintiff's use of his seatbelt, any contact between plaintiff's knees and the knee bolster area (interior vehicle structure located below the steering column) of the vehicle would have been glancing in nature and inconsequential. She notes that there is no indication that plaintiff sustained a forceful knee contact as there is no notation of bruising, laceration or abrasion to the knees. According to Rodowicz, the loading in plaintiff's knees during the accident was less than loading associated with daily activities such as walking, jogging, and going up and down stairs. The accident did not provide a mechanism for acute, bilateral meniscal injury to plaintiff's knees. Meniscus tears are also attributed to degenerative processes that occur chronically over time. Rodowicz attests that based on biomechanical symmetry, plaintiff's medical records, testimony, biomechanical literature, the pathologies identified in plaintiff's knees including the bilateral meniscal tears are chronic in nature and not causally related to the accident.

Rodowicz further attests that the pathologies in plaintiff's right shoulder are chronic and degenerative in nature, consistent with his prior history of shoulder injury, and not related to the accident. Moreover, there is no evidence that plaintiff sustained a left ankle injury from the accident. He first reported pain below his left knee on August 1, 2012, more than three months after the accident. An MRI of the left tibia/fibula was performed on August 15, 2012, and an X-ray of August 17, 2012, demonstrated no fracture.

Rodowicz opines that airbags are pyrotechnic devices that deploy in occupant space. Field accident data demonstrates that although airbags may be effective in mitigating serious or greater injuries to the head and torso during certain accidents, airbags may cause minor and moderate injuries to vehicle occupants. It has also been shown that air bags are not effective in reducing the risk of injury to the extremities and may actually increase the risk of extremity injury during an accident. Rodowicz states that air bags have been associated with an increased risk of moderate or greater lower extremity injury to belted occupants during frontal impacts and an increased risk of upper and lower extremity injury to belted occupants during frontal accidents comparable to the instant case. Rodowicz attests that had the front driver air bag deployed during the accident, plaintiff would have been at risk for additional injuries of comparable or greater nature. Field accident data indicates that belted occupants, with and without air bags, in comparable crashes, have a very low likelihood of serious or greater injury. Rodowicz opines that the medical findings to plaintiff's knees, left ankle, and right shoulder, with the exception of possible swelling, were not caused by the accident and would not have been prevented had plaintiff's frontal air bag deployed during the accident.

In opposition, plaintiff argues that Toyota failed to demonstrate entitlement to judgment as a matter of law. Plaintiff argues that Bailo's expert affidavit is speculative and unsupported by a proper foundation. Plaintiff argues that Toyota's expert improperly characterized the accident as a "side swipe"; that the expert did not attach crush measurement, stiffness coefficients, or quantitative formulations; and used an erroneous curb weight of 3,560 lbs in contrast to the curb weight of 3,408 lbs listed on the title

D'Appolonia v. Ceballo, Index No. 56412/2015

certificate and product information sheet for plaintiff's 2011 RAV4. Plaintiff also argues that his injuries would likely have been prevented, particularly the injury to his shoulder, had the front driver air bag deployed. Plaintiff argues that Toyota's biomechanical engineer expert is not qualified to offer opinions on plaintiff's injuries.

Plaintiff submits the affidavit of Anthony Racioppo, a licensed motor vehicle inspector and ASE certified master automobile and truck technician. Racioppo avers that he has over twenty-five years of experience investigating motor vehicle accidents with the New York City Police Department and has undergone extensive training and testing in the areas of accident reconstruction and investigation.

Racioppo states that the accident between the vehicles in question was a head-on, off-set collision and not a side swipe. He states that the basis for this characterization is derived from the post-impact photographs of the vehicles. According to Racioppo, both vehicles had extensive damage to the drive side fender and the leading edges of both bumpers were crushed. The interlocking of wheels caused counterclockwise rotation of the RAV4 on its vertical axis. Moreover, Racioppo states that the photograph shows the distance between the leading edges of both vehicle's front left wheel are less than two or three feet. The lack of post-impact travel, according to Racioppo, contradicts the characterization of the collision as a side-swipe. Racioppo agreed, however, that both vehicles sustained fender damage and no full-frontal bumper impact. He states that the full contact of each vehicle's wheels constituted a significant frontal impact. After analyzing the photographs of the accident, Racioppo submitted his own drawing of the contact between the vehicles which this Court finds depicts left front corner to left front corner impact.

Racioppo also challenges Bailo's conservation of momentum analysis in that he states that Bailo failed to provide data such as crush measurements, stiffness coefficients or any quantitative formulations. Racioppo states that there were no measurement schematics depicting crush depths and with the limited data available it would be improper to perform such an analysis to any degree of scientific certainty.

Racioppo opines that Bailo accounts for the difference in crash severity by comparing each vehicle's curb weight. Bailo used a weight for the RAV4 of 3,560 lbs, however, Racioppo states that the actual title certificate states the weight of the RAV4 was 3,408 lbs.

Racioppo states, with a reasonable degree of accident reconstruction certainty, that the data produced by Bailo was flawed and formed a less than sound basis for the opinions set forth by Toyota engineer Robert Landis. He further opines that the injuries sustained by plaintiff are consistent with the type of injuries that a properly deployed air-bag would likely prevent, particularly the injury to plaintiff's shoulder.

Annexed to plaintiff's opposition is, inter alia, the certificate of title for the RAV4 and copies of uncertified medical records.

D'Appolonia v. Ceballo, Index No. 56412/2015

In reply, Toyota argues that Racioppo is a police accident investigator, not an engineer, and is not qualified to offer an expert opinion in accident reconstruction, air bag system performance, and injury mechanics. Even considering Racioppo's opinion, Toyota argues that the opinion is speculative. Toyota further argues that its biomechanical engineer expert is qualified.

Toyota submits an affirmation of Bailo in further support of its motion for summary judgment. Bailo attests that he has analyzed numerous collisions during his career with varying levels of side-swipe representation. Collisions where the opposing vehicles scrape side body panels and exchange a minimal amount of momentum and other circumstances, such as in this case, where there was a significant but not complete exchange of momentum, are characterized as side-swipe collisions. He further states that the phrasing used to classify the collision does not change the momentum analysis utilized to arrive at a conclusion for vehicle speeds and vehicle change in velocities.

Bailo further attests that contrary to Racioppo's affidavit, crush measurements or stiffness values are not used for a momentum analysis. Momentum is the product of the vehicle mass (weight) and speed (velocity) and is an analysis approach that is commonly used in accident reconstruction.

Bailo also opines that the VIN decode created by his software incorrectly identified the RAV4 as having a six-cylinder engine. Bailo states that he agrees with Racioppo that the RAV4 involved in the accident was equipped with a four-cylinder engine. The description of the Cobalt remained accurate. Bailo attests that using the curb weight of 3,408 lbs for the RAV4 listed on the certificate of title and the curb weight of 2,893 lbs for the Cobalt listed in the the abstract of title, yields an increase of only .6 mph in the change in velocity experienced by the RAV4 in the collision. Therefore, the recalculated Delta-V is 12.4 mph.

Bailo explains that utilizing these impact results, the longitudinal Delta-V was approximately 11.8 mph whereas the later Delta-V was approximately 3.6 mph. As a result of the left front side-swipe impact, the Cobalt experienced a Delta-V of approximately 14.6 mph with a principle direction of force acting on the vehicle from approximately 3 degrees to the left of center. The accident reconstruction momentum analysis illustrates that the Cobalt experienced a higher Delta-V crash as compared to the RAV4. The reason for the difference is directly related to the weight of the vehicles which is consistent with the difference in crash severity.

Rodowicz also submits an affidavit in further support of Toyota's motion for summary judgment. Rodowicz attests that the application of biomechanics to questions of injury causation, including post hoc determination of injury causation, is used regularly by non-physician scientists and engineers in academic settings with national scientific institutions and academies, and such application enjoys broad acceptance within the scientific community. Rodowicz states that she is not a medical doctor and does not offer any medical opinions. Whereas medical doctors are trained to diagnose and treat injuries,

D'Appolonia v. Ceballo, Index No. 56412/2015

her opinions are based upon her biomechanical expertise in understanding how the structures of the human body respond to forces and loads. To analyze a specific accident scenario from a biomechanical perspective, she utilizes physics and what has been learned from crash testing to determine occupant kinematics during an accident and her understanding of biological properties, composition, and tolerances of the structures of the human body to determine if the forces and loads created in a specific scenario result in a mechanical environment that is consistent with potential for a specific injury. This analysis, Rodowicz explains, differs considerably from a medical doctor's practice which is focused on diagnosing and treating injuries.

Discussion

The proponent of a motion for summary judgment 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 (*see Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d at 853).

"Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see Zuckerman v City of New York*, 49 NY2d at 562). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to defeat a prima facie showing of entitlement to summary judgment (*see Zuckerman v New York*, 49 NY2d at 562).

"The function of the court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist" (*Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]; *see Dykeman v Heht*, 52 AD3d 767, 768 [2d Dept 2008]). Additionally, in determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmovant (*see Pearson v Dix McBride*, 63 AD3d 895 [2d Dep't 2009]; *Brown v Outback Steakhouse*, 39 AD3d 450, 451 [2d Dept 2007]).

Toyota has a duty to produce a product that does not unreasonably enhance or aggravate a user's injuries (*see Alami v Volkswagen of Am., Inc.*, 97 NY2d 281, 287 [2002] citing *Bolm v Triumph Corp.*, 33 NY2d 151, 159 [1973]; *Rainbow v Albert Elia Bldg. Co.*, 79 AD2d 287 [4th Dept 1981]). Proceeding under a "second collision" theory, in this action plaintiff contends that as a result of the primary collision with the Ceballo vehicle, plaintiff suffered secondary impacts with the car's interior triggering defendant's liability if the failure of the vehicle's airbag to properly deploy is found to be an unreasonably dangerous latent design defect which enhanced or aggravated his injuries (*Alaimo v General Motors Corp.*, 32 AD3d 627, 628 [3d Dept 2006] quoting *Bolm v Triumph Corp.*, 33 NY2d at 158).

D'Appolonia v. Ceballo, Index No. 56412/2015

Toyota demonstrated its entitlement to judgment as a matter of law through the submission of the expert affidavits of Baiolo, Landis, and Rodowicz (*see Figueroa v Gallagher*, 20 AD3d 385, 386 [2d Dept 2005]). These experts concluded that initial contact between the two vehicles were offset from each other and therefore, there was minimal amount of frontal engagement or overlap. According to Landis, the 2011 Toyota RAV4 was certified by Toyota as complying with all US Federal motor vehicle safety standards applicable at the time of manufacture, including safety standard 208 applicable to occupant crash protection and front air bag system performance. The evidence demonstrates that the resultant change of velocity from the collision was below the threshold required for front driver air bag deployment of the 2011 RAV4. Toyota demonstrated, as a matter of law, that the 2011 RAV4 front driver air bag system was not defective and properly did not deploy upon the crash with the Cobalt. Moreover, Toyota demonstrated, as a matter of law, that air bag deployment would not have mitigated the injuries to plaintiff's knees, right shoulder, and left ankle.

In opposition, plaintiff failed to raise a triable issue of fact. Plaintiff's purported expert affidavit failed to raise an issue of fact that the air bag should have deployed as a result of the collision (*see Figueroa v Gallagher*, 20 AD3d 385 [holding that the proof submitted in opposition to General Motors' motion for summary judgment was inadequate to raise a triable issue of fact with respect to any design defect. In any event, even if there was a design defect, it would not have been the proximate cause of any enhanced injuries sustained by the plaintiffs]). Moreover, plaintiff's expert does not have the background or qualifications to support his one-sentence opinion that the injuries sustained by plaintiff are consistent with the type of injuries that a properly deployed air bag would likely prevent. In any event, this opinion is entirely conclusory and speculative and not supported with any factual or scientific basis.

Contrary to the plaintiff's contention, the education, background, experience, and areas of specialty of Rodowicz, Toyota's biomechanical engineer, rendered her qualified to provide expert opinion that the deployment of the airbag would not have prevented plaintiff's injuries (*see Vargas v Sabri*, 115 AD3d 505 [1st Dept 20134] [holding that the fact that a biomechanical engineer lacked medical training did not render him unqualified to render an opinion as an expert that the force of the subject motor vehicle accident could not have caused the injuries allegedly sustained. The expert's stated education, background, experience, and areas of specialty, rendered him able him to testify as to the mechanics of injury]; *Plate v Palisade Film Delivery Corp.*, 39 AD3d 835 [2d Dept 2007] [holding that the Supreme Court erred in determining that the defendants' biomechanical engineering expert was not qualified to testify regarding whether the force of the impact in the accident could have caused a serious injury or exacerbated a preexisting injury to the plaintiff's cervical spine and in precluding that testimony as it could have affected the amount of the damages awarded]; *Valentine v Grossman*, 283 AD2d 571 [2d Dept 2001] [finding that during trial, defendants called two biomechanical engineers. At plaintiff's request, a *Frye* hearing was conducted. The Court held that excluding the testimony of

D'Appolonia v. Ceballo, Index No. 56412/2015

the second expert on relevancy grounds was improper as the testimony was relevant and the exclusion of the evidence could not be deemed harmless]).

Accordingly, Toyota Motor Corp.'s motion for summary judgment dismissing the complaint insofar as asserted against it is GRANTED and the complaint is dismissed.

Dated: White Plains, New York
September 24, 2018



HON. WILLIAM J. GIACOMO, J.S.C.