

**Watts v Gines**

2020 NY Slip Op 35034(U)

September 1, 2020

Supreme Court, Ulster County

Docket Number: Index No. EF2019-1937

Judge: James P. Gilpatric

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**STATE OF NEW YORK  
SUPREME COURT****ULSTER COUNTY****LAUREN WATTS,****Plaintiff,****- against -****DECISION****Index No.: EF2019-1937****ANDREW GINES,****Defendant.**

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**Supreme Court, Ulster County  
R.J.I. No.: 55-19-01339****Present: James P. Gilpatric, J.S.C.****Appearances:**

MAINETTI & MAINETTI P.C.  
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By: Vincent J. Aceste, Esq.

**Gilpatric, J.:**

This action arises from a motor vehicle accident that occurred on November 7, 2018 at the intersection of State Route 300 and Rock Cut Road in the Town of Newburgh, County of Orange and State of New York, when the plaintiffs' vehicle was allegedly struck by defendant's vehicle while traveling at approximately 35 m.p.h. The plaintiff alleges that she was injured when defendant failed to operate his vehicle in a reasonably safe manner and by causing the plaintiff to become involved in a motor vehicle accident. The plaintiff further alleges that the defendant was negligent,

careless and reckless in the use and control of the aforesaid vehicle. Alleging that plaintiff suffered serious injuries as defined by the New York Insurance Law, plaintiff commenced the instant personal injury action on June 13, 2019. In her complaint, and, later in her bill of particulars, and supplemental bill of particulars, plaintiff alleges that she suffered: (1) a permanent loss of use of a body organ, member, function or system; (2) a permanent consequential limitation of use of a body function or system; (3) a significant limitation of use of a body function or system; and (4) a medically determined injury or impairment of a non-permanent nature which prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than ninety (90) days during the one-hundred eighty (180) days immediately following the injuries. Following joinder of issue, discovery, and the filing of the note of issue, the defendant moves for summary judgment, pursuant to CPLR3212, dismissing the complaint on the grounds that the plaintiff has not sustained serious injuries as defined by Insurance Law § 5102 (d). The plaintiff opposes the motion.

In New York State, a party alleging negligence in a motor vehicle accident may only recover damages for pain and suffering if they have suffered a “serious injury” pursuant to Insurance Law § 5102 (d) (*see* Insurance Law § 5104 [a]; Pommells v Perez, 4 NY3d 566, 570[2005]). As relevant here, a serious injury is defined by Insurance Law § 5102 (d) as:

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.

“As the proponent for the summary judgment motion, defendant ha[s] the initial burden of submitting evidence establishing that plaintiff did not suffer a causally related serious injury as a result of the subject accident” (Foley v Cunzio, 74 AD3d 1603, 1604 [3<sup>rd</sup> Dept 2010] *citing* Toure v Avis Rent A Car Sys., 98 NY2d 345, 352 [2002]; *see* Tubbs v Pallone, 45 AD3d 959, 960 [3<sup>rd</sup> Dept 2007], *lv denied* 10 NY3d 702 [2008]; Tuna v. Babendererde, 32 A.D.3d 574, 575 [3<sup>rd</sup> Dept 2006]). Upon a showing, “[t]he burden then shifts to the plaintiff to present competent medical proof to raise a triable issue of fact” (Tubbs, 45 AD3d at 960).

To meet his initial burden, defendant may present plaintiff's statements, such as at an examination before trial (*see Tuna v. Babendererde*, 32 A.D.3d 574, 575 [3d Dept 2006]), medical records, if they are sufficiently complete and clear, of plaintiff's treating or consulting physicians showing that there is no serious injury (*see Tuna v. Babendererde, supra; Seymour v. Roe*, 301 A.D.2d 991 [3d Dept 2003]), or another doctor's affidavit establishing that there is no causal relationship between the accident and the alleged serious injuries (*see Caron v. Moore*, 301 A.D.2d 942, 944 [3d Dept 2003]; *Seymour v. Roe, supra* at 992, 995 [3d Dept 2003]), or that the alleged injuries do not qualify as a "serious injury" (*see Tuna v. Babendererde, supra*).

Here, the defendant argues that the plaintiff's claimed injuries do not satisfy the "serious injury" threshold requirements of Insurance Law § 5102 (d). In support of the motion and his argument, the defendant has submitted, *inter alia*, a copy of the pleadings, a copy of the plaintiffs' bill of particulars, a copy of the plaintiff's examination before trial testimony, a copy of the accident report, a copy of plaintiff's medical records and, a copy of the affirmed report by John V. Ioia, M.D., PhD., who performed an IME on the plaintiff on March 5, 2020.

Notably, as to Dr. Ioia's IME report, dated March 5, 2020, he took a history of the plaintiff's previous medical complaints and conditions and provided a comprehensive medical examination on the plaintiff and reviewed legal and pertinent submitted medical records, including diagnostic studies (Defendant's Exhibit "M"). Dr. Ioia's report detailed the plaintiff's medical records and test results (Defendant's Exhibit "M").

In his exam of the plaintiff, by visual measurement, Dr. Ioia found, *inter alia*, that said plaintiff's cervical spine demonstrated 60 degrees of active flexion, normal 50 degrees, 30 degrees of dorsal extension, 50 degrees normal, 60 degrees of right and 80 left cervical rotation where 80 degrees or greater is considered normal (Defendant's Exhibit "M"). His report noted that upon examination, Ms. Watts' upper extremities were reported as normal (Defendant's Exhibit "M"). Dr. Ioia also noted that her lumbar spine from a standing position demonstrated 65 to 70 degrees of forward flexion, 65 degrees normal (Defendant's Exhibit "M"). He also noted that Ms. Watts had 20 degrees of dorsal extension, normal 25 degrees (Defendant's Exhibit "M"). Dr. Ioia noted that Ms. Watts' left and right shoulders had 135 degrees of active forward flexion and lateral abduction, normal 180 degrees (Defendant's Exhibit "M"). Dr. Ioia concluded that it is his opinion, Ms. Watts

has a great deal of somatic or subjective complaints with no objective evidence behind them (Defendant's Exhibit "M"). He also concluded that there was minimal loss of work based on this accident as he stated that Ms. Watts chose to separate from work due to family and social issues rather than problems secondary to the accident that is the subject of this litigation (Defendant's Exhibit "M").

In opposition to the defendant's motion, the plaintiff submits and relies, *inter alia*, on the plaintiff's medical records, copies of photographs of the plaintiff's vehicle after the accident, the report by John V. Ioia, M.D., Ph.D., who performed an IME on the plaintiff on March 5, 2020 and, the narrative report of Sathish R. Modugu, M.D., the plaintiff's treating physician, dated July 16, 2020, to rebut the defendant's submissions for dismissal of the action. As to the March 5, 2020 affirmed report of John V. Ioia, M.D. Ph.D., the plaintiff argues that Dr. Ioia's physical examination of the plaintiff found almost a 50% loss of range of motion to her dorsal extension of her cervical spine at "30 degrees out of 50 degrees"(Defendant's Exhibit "M"). The plaintiff also argues that Dr. Ioia documented in his report that the plaintiff's forward flexion and lateral abduction of both her left and right shoulders were measured at 135 degrees while normal is 180 degrees (Defendant's Exhibit "M"). Additionally, the plaintiff submits that the report of Dr. Modugu, the plaintiff's treating physician, indicated that the motor vehicle accident of November 7, 2018 was the cause of the plaintiff's lumbar disc bulges, loss of range of motion in her lumbar and cervical spine and left shoulder, as well as, the positive EMG findings documenting cervical and lumbar radiculopathy (Plaintiff's Exhibit "C"). Dr. Modugu also opined that the plaintiff's limitations of use with respect to her lumbar spine, cervical spine and left shoulder were caused by the November 7, 2018 accident (Plaintiff's Exhibit "C"). Dr Modugu concluded:

Based on the history, physical exam findings, and medical records reviewed, the claimant had temporary total disability for approximately three days after her accident. She then had a partial disability until approximately 09/05/19. The patient continues to have ongoing mild to moderate partial disability associated with her injuries. She has limitations in her ability to do overhead work, push and pull greater than 10 pounds, lift and carry greater than 15 pounds, She has limitations in sitting and standing for greater than 30 minutes at a time without a break to change positions (Plaintiff's Exhibit "C").

Dr. Modugu opined that based on the history, physical exam findings and medical records reviewed, the injuries sustained and diagnostic study findings are causally related to the motor vehicle accident

date November 7, 2018 (Plaintiff's Exhibit "C").

Thus, in any event, the plaintiff has rebutted defendant's attempt to make a *prima facie* showing by the conflicts found in the aforementioned physicians' examinations and reports that provide several observations as objective findings with regard to the permanent consequential, significant limitation categories of serious injury and an injury of non permanent nature which prevented the plaintiff performing substantially all of the material acts which constitute her usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the accident. As such, there are questions of fact regarding whether Ms. Watts sustained a significant limitation and a permanent consequential limitation (Coston v McGray, *supra*; see also Tompkins v Burtnick, 236 AD2d 708 [3<sup>rd</sup> Dept 1997]; Parker v Defontaine-Stratton, 231 AD2d 412, 413 [3<sup>rd</sup> Dept 1996]). Furthermore, a "court, on a summary judgment motion, should not make credibility determinations when competent competing expert opinions are proffered" (Rockefeller v Albany Welding Supply Co., 3 AD3d 753, 756 [3<sup>rd</sup> Dept 2004]).

Additionally, as to the 90/180 category of serious injury, the defendant has failed to present a *prima facie* showing of his entitlement to judgment as a matter of law (see D'Auria v Kent, 80 AD3d 956 [3<sup>rd</sup> Dept 2011]). The plaintiff's own testimony was that after the accident she was unable to continue working in her former capacity at Shelf Tech (Defendant's Exhibit "G", pp 92, Line 23, Pg 93, line 6,). Additionally, the plaintiff's affidavit averred that prior to her car accident, she had no issues working, and in fact, enjoyed her job with Shelf Tech (Plaintiff's Exhibit "D" ¶ 9). She further averred that after her accident, she could not fulfill the physical requirements of her job as it was painful to stand for long periods of time, painful to lift things over her head and over 15 pounds and, overall, she could not keep up with the physical demands of the job (Plaintiff's Exhibit "D" ¶ 10). Simply put, the Court's review of the plaintiff's testimony and her affidavit finds several examples of her inability to perform her work due to her injuries from the automobile accident (Defendant's Exhibit "G", Plaintiff's Exhibit "D"). It is also evident that the IME Report by Dr. Ioia took place well after the first 180 days after the subject accident, and he failed to address **all** [emphasis added] of the objective findings in the plaintiff's medical records that raise a question of fact whether she suffered a non-permanent injury that substantially prevented her from performing her usual and customary daily activities for at least 90 of the first 180 days following the accident

as presented in various medical reports (*see Colavito v Steyer*, 65 AD3d 735, 736 [3<sup>rd</sup> Dept 2009]; *Haack v Kriss*, 47 AD3d 1007, 1009 [3<sup>rd</sup> Dept 2008]; *Ames v Paquin*, 40 AD3d 1379, 1380 [3<sup>rd</sup> Dept 2007]).

Consequently, in view of the Court's findings in the submissions set forth hereinabove, the Court denies the motion for summary judgment dismissing the complaint as a matter of law (*see generally Linton v Nawaz*, 14 NY3d 821, 822 [2010]). Otherwise, the Court has considered the remaining arguments and finds them either unavailing or unnecessary to reach.

Accordingly, it is

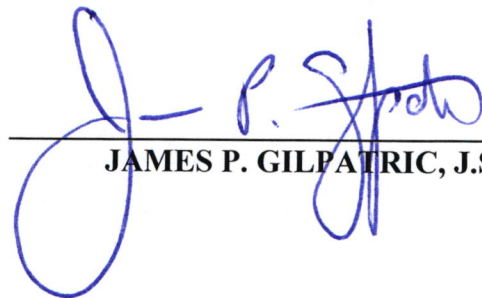
**ORDERED** that Defendant's motion for summary judgment is denied.

This shall constitute the decision of the Court. The original decision and all other papers are being delivered to the Supreme Court Clerk for transmission to the Ulster County Clerk for filing. The signing of this decision shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule regarding notice of entry.

**SO ORDERED!**

**Dated:** September 1, 2020  
Kingston, New York

ENTER,

  
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JAMES P. GILPATRIC, J.S.C.

**Papers considered:**

- 1.) Notice of motion dated June 26, 2020;
- 2.) Affirmation in Support by Vincent J. Aceste, Esq., with exhibits, dated June 29, 2020;
- 3.) Affirmation in Opposition of Michael A. Mainetti, Esq., with exhibits, dated August 6, 2020;
- 4.) Reply Affirmation by Stephen A. Weinberg, Esq., with exhibit, dated August 13, 2020.