

**Tsamos v Cataldo**

2020 NY Slip Op 35237(U)

May 12, 2020

Supreme Court, Suffolk County

Docket Number: Index No. 615203/2016

Judge: Linda Kevins

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SHORT FORM ORDER

INDEX No. 615203/2016

CAL. No. \_\_\_\_\_

**SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 29 - SUFFOLK COUNTY**

***P R E S E N T:***

**HON. LINDA KEVINS**  
*Justice of the Supreme Court*

MOTION DATE 3-1-19  
ADJ. DATE 1-14-20  
Mot. Seq. # 001 - MG  
Mot. Seq. # 002 - MD

-----X

TANYA TSAMOS,

Plaintiff,

- against -

PETER A. CATALDO; CHRISTINE  
CATALDO; WILLIAM CONLON

Defendants.

-----X

Upon the following papers e-filed and read on these motions for summary judgment: Notice of Motion and supporting papers (mot. seq. 001) by defendant William Conlon, dated January 9, 2019; Notice of Motion and supporting papers (mot. seq. 002) by defendants Christine and Peter Cataldo, dated February 26, 2019; Answering Affidavits and supporting papers to mot. seq. 001 by Cataldo defendants, dated March 18, 2019; Answering Affidavits and supporting papers to mot. seq. 002 by plaintiff, dated August 19, 2019; Replying Affidavits and supporting papers by Cataldo defendants, dated September 9, 2019; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that the motion (seq. 001) by defendant William Conlon for an order granting him summary judgment dismissing the complaint and cross claims against him is granted; and it is further

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**ORDERED** that the motion (seq. 002) by defendants Peter Cataldo and Christine Cataldo for summary judgment dismissing the complaint as against them on the grounds that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) from the subject accident is denied; and it is further

**ORDERED** that counsel for the parties, and if a party has no counsel, then the party, are directed to appear before the Court in IAS Part 29, located at the Alan D. Oshrin Courthouse, One Court Street, Riverhead, New York 11901, on **July 16, 2020 at 9:30 a.m.**, for a Conference, or if the court is still operating remotely due to the COVID-19 health crisis, such appearance shall be held remotely on the same date. Counsel and any parties who are not represented by counsel shall contact the court by email at [Sufkevins@nycourts.gov](mailto:Sufkevins@nycourts.gov) at least five days prior to the date of the scheduled conference to obtain the time and manner of such conference; and it is further

**ORDERED** that if this Order has not already been entered, the movant is directed to promptly serve a certified copy of this Order, pursuant to CPLR §§8019(c) and 2105, upon the Suffolk County Clerk who is directed to hereby enter such order; and it is further

**ORDERED** that upon Entry of this Order, plaintiff is directed to promptly serve a copy of this Order with Notice of Entry upon all parties and to promptly file the affidavits of service with the Clerk of the Court; and it is further

**ORDERED** that due to the current health crisis caused by COVID-19 and the resulting filing restrictions imposed upon the Suffolk County Clerk and the Court, the term “promptly” shall mean within ten days of the rescission of such filing restrictions.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff as a result of a motor vehicle accident which occurred on October 1, 2015 on the westbound side of the Long Island Expressway near exit 41 in the Town of Oyster Bay, New York. The accident allegedly happened when a vehicle owned by defendant Christine Cataldo and driven by defendant Peter Cataldo collided with the rear of a vehicle in which plaintiff was a passenger. The complaint as amplified by the bill of particulars alleges that all of the defendants operated their vehicles in a negligent manner causing the subject accident and its ensuing injuries to plaintiff. Plaintiff further alleges that defendants violated several sections of the Vehicle and Traffic Law.

The action was commenced in September 2016 against the Cataldos and against William Conlon. Conlon served an answer to the complaint dated October 12, 2016, and the Cataldo defendants filed their answer on November 4, 2016. Each answer contains cross claims by defendants seeking indemnification from one another.

Defendant William Conlon now moves for summary judgment dismissing the complaint and cross claims against him on the grounds that he was not a cause of plaintiff’s injuries and was not involved in the subject accident. In support of the motion, Conlon submits copies of the pleadings, a bill of particulars, a police accident report and the transcript of testimony from his deposition. Initially, the Court notes that the police accident report is not certified, and the officer at the scene did not witness the accident, thus, rendering it inadmissible (*see Jiang-Hong Chen v Heart Tr., Inc.*, 43 AD3d 945, 39

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NYS3d 504 [2d Dept 2016]; *Allstate Ins. Co. v Ramlall*, 132 AD3d 617, 17 NYS3d 308 [2d Dept 2015]; *Lacagnino v Gonzalez*, 306 AD2d 250, 760 NYS2d 533 [2d Dept 2003]).

At his deposition, Conlon testified that on the morning of the accidents, he was traveling westbound on the Long Island Expressway in the third lane of travel. He testified that traffic was moderate to heavy, and that the average rate of speed of vehicles on the expressway was 40 m.p.h. Conlon testified that his vehicle was struck in the rear without warning by a vehicle driven by defendant Peter Cataldo. He testified that after the impact, Cataldo passed his vehicle on the left and he was driving in between the HOV lane and the left lane, and that he assumed Cataldo's vehicle would come to a stop. He testified that Cataldo was driving erratically and he did not stop his vehicle, so he closely watched the vehicle and memorized its license plate number. He testified that he kept his eyes on Cataldo's vehicle and observed it hovering between lanes before striking the rear of a vehicle that plaintiff was a passenger in. Conlon testified that he observed the front bumper of the Cataldo vehicle fly off from it, and that a truck stopped in front of the Cataldo vehicle requiring Cataldo to stop his vehicle.

Conlon testified that the police arrived at the scene, that plaintiff was taken by ambulance from the scene of the accident, and that the driver of the vehicle that plaintiff was a passenger in was able to drive the vehicle away from the scene. He testified that there was debris from the bumper of the Cataldo vehicle all over the expressway, and that his own vehicle was damaged and totaled. Conlon testified that when the Cataldo vehicle struck plaintiff's vehicle he was approximately 15 car lengths from the area where it occurred.

It is well settled that a party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d320, 508 NYS2d 923 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Once such a showing has been made, 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, 508 NYS2d 923; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595).

Here, Conlon has established his entitlement to summary judgment by demonstrating that he was not involved in the accident between plaintiff and the Cataldo defendants, and, thus, was not a cause of plaintiff's injuries. Therefore, the burden shifts to the opposing parties to submit proof in admissible form sufficient to raise a triable issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d320, 508 NYS2d 923; *Celestin v 40 Empire Blvd., Inc.*, 168 AD3d 805, 92 NYS3d 319 [2d Dept 2019]). In opposition, the Cataldo defendants submit an affirmation of counsel which lacks probative value (*see Cullin v Spiess*, 122 AD3d 792, 997 NYS2d 460 [2d Dept 2014]), and, is therefore insufficient to raise a triable issue of fact. No opposition has been submitted by plaintiff. Accordingly, Conlon's motion for an order granting him summary judgment dismissing the complaint and cross claims against him is granted.

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The motion (seq. 002) by defendants Peter Cataldo and Christine Cataldo for summary judgment dismissing the complaint as against them on the grounds that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) from the subject accident is denied.

In support of the motion, defendants submit copies of the pleadings, the bill of particulars, transcripts from the parties' deposition testimony, reports by two orthopedists, Dr. Stuart Hershon and Dr. Richard Weiss, who at defendant's request performed physical examinations on plaintiff, and three affirmed reports by Dr. Steven Lastig, a radiologist.

To recover for non-economic loss resulting from an automobile accident, Insurance Law § 5104 requires that a plaintiff establish, as a threshold matter, that the injury he or she suffered was a "serious injury" within the meaning of the statute. Insurance Law § 5102 (d) defines "serious injury" as "a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; 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." The court determines, in the first instance, whether a plaintiff has sustained a serious injury and may maintain an action under the statute (*Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]; *Ammonds v Rodriguez*, 126 AD2d 504, 510 NYS2d 480 [2d Dept 1987]).

The bill of particulars alleges that plaintiff's injuries are serious under each of the above categories. Plaintiff alleges that she suffered disc bulges and herniations at various levels of her cervical spine and lumbar spine, among other things. In a personal injury action, a defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred by the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that plaintiff did not sustain a "serious injury" (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 746 NYS2d 865; *Gaddy v Eycler*, 79 NY2d 955, 582 NYS2d 990 [1992]). Here, defendant submits three affirmed reports created by Dr. Steven Lastig, a radiologist, a sworn report by Dr. Stuart Hershon, an orthopedist, who conducted a physical examination of plaintiff at defendants' request and a medical report by Dr. Richard Weiss, an orthopedist, who conducted a physical examination of plaintiff at defendants' request.

In his report, Dr. Hershon states that he conducted a physical examination of plaintiff at defendants' request on October 9, 2018. He states that plaintiff presented with complaints of pain in her right shoulder and lower back, and that he reviewed the bill of particulars, x-ray reports, Magnetic Resonance Imaging (MRI) reports, hospital records from the emergency department of North Shore Long Island Jewish Health Care System, and notes and reports from various treating health care providers. Dr. Hershon states that he performed a physical examination of plaintiff on her neck, thoracic region and lumbar regions of the spine as well as on both of her shoulders and her right hip. Dr. Hershon states that he palpated the paralumbar muscles and found no spasms nor did plaintiff make any complaints that the areas were tender. He states that he performed range of motion tests using a goniometer, and he provides the numerical values of the range of motion measurements for both shoulders, right hip, cervical spine and lumbar spine with corresponding normal values.

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The report indicates that plaintiff's range of motion for both shoulders, her right hip, and her cervical spine are all normal. With respect to the lumbar spine, his report indicates that the testing of plaintiff's lumbar spine revealed 60 degrees of forward flexion (60 degrees normal), 25 degrees extension (25 degrees normal) and right and left lateral bending to 25 degrees (25 degrees normal). Finally, Dr. Hershon states that "Straight, leg raise is normal (Reider, edition 2, 'The Orthopedic Physical Exam' page 356: In a normal patient, straight-leg raising of 70 to 90 degrees should be possible)." No numerical values are provided to indicate the results of the straight leg test.

Dr. Hershon also states in his report that he conducted a neurological examination of plaintiff but does not indicate which tests he utilized and does not provide complete information. He concludes that plaintiff's cervical, thoracic and lumbar sprains are resolved, as well as sprains in both shoulders and the right hip. He opines that her prognosis is excellent, and that she has no orthopedic disability.

Dr. Richard Weiss, an orthopedist, submits an affirmed report which states that he conducted a physical examination of plaintiff at defendants' request on August 15, 2017. He states that plaintiff presented with complaints of pain in the neck, lower back, right shoulder and right hip. His report is substantially similar to Dr. Hershon's report except for the discussion regarding the lumbar spine. Dr. Weiss states that plaintiff's range of motion of the lumbar spine revealed forward flexion to 50 degrees (60 degrees normal), extension to 20 degrees (25 degrees normal) and right and left lateral bending to 20 degrees (25 degrees normal). Regarding the straight leg raise, Dr. Weiss makes the same conclusory statement that Dr. Hershon makes and fails to provide the results of the test.

Steven Lastig, a radiologist submits affirmed reports regarding the results of plaintiff's MRI of her cervical spine and lumbar spine performed on December 16, 2015 and an MRI of plaintiff's lumbar spine performed on June 16, 2016. All of the reports state that he reviewed the "MRI study" and that "[T]his study was performed at the Redtree Radiology Center." However, it is unclear whether Dr. Lastig reviewed the MRI films or a sworn report of another radiologist, thus, rendering them inadmissible (*see Porto v Blum*, 39 AD3d 614, 833 NYS2d 245 [2d Dept 2007]; *Sherlock v Beyel v Console*, 25 AD3d 636, 811 NYS2d 687 [2d Dept 2006]; *Dioguardi v Weiner*, 288 AD2d 253, 733 NYS2d 116 [2d Dept 2001]). Furthermore, the statements contained in the reports are conclusory and speculative (*see Matott v Ward*, 48 NY2d 455, 423 NYS2d 645 [1979]), and Dr. Lastig does not state that his opinion is made with a reasonable degree of medical certainty, nor can it be ascertained from his reports that they were (*see Kahvejian v Pardo*, 125 AD3d 936, 4 NYS3d 133 [2d Dept 2015]).

Defendants' submissions are insufficient to establish their entitlement to summary judgment on the issue of whether plaintiff sustained a serious injury under either the permanent consequential limitation of use or significant limitation of use categories as a result of the subject accident, as triable issues of fact have not been eliminated. Absent the results of the straight leg raise test or an explanation of the significance of the straight leg raise test and its relation to plaintiff's alleged lumbar disc injuries contained in the bill of particulars (*see Weiss v Durso*, 178 AD3d 880, 111 NYS3d 863 [2d Dept 2019]), this Court cannot determine as a matter of law that plaintiff did not sustain a significant limitation in such area.

As defendants have failed to establish their prima facie entitlement to summary judgment on the issue of serious injury, it is unnecessary to determine whether the opposing papers are sufficient to raise a

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triable issue of fact (*see Singleton v F & R Royal, Inc.*, 166 AD3d 837, 88 NYS3d 81[2d Dept 2018]). Accordingly, the motion by the Cataldo defendants for summary judgment dismissing the complaint against them on the grounds that plaintiff did not sustain a serious injury is denied.

Anything not specifically granted herein is hereby denied.

This constitutes the decision and Order of the Court.

Dated: 5/12/2020



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LINDA KEVINS, JSC

\_\_\_\_\_ FINAL DISPOSITION      X   NON-FINAL DISPOSITION