

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE LAWRENCE V. CULLEN IA Part 6
Justice

	x	Index
CANDECE BECKFORD,		Number <u>15096</u> 2006
Plaintiff,		Motion
-against-		Date <u>February 5,</u> 2008
RICHARD JAMES CASTRO, et al.,		Motion
Defendants.		Cal. Numbers <u>1, 2, 3</u>
	x	Motion Seq. Nos. <u>3, 4, 5</u>

RICHARD JAMES CASTRO,
Third-Party Plaintiff,
-against-
SHAWANEQUA C. EDWARDS, et al.,
Third-Party Defendants.

x

The following papers numbered 1 to 40 read on this motion by defendant/third-party plaintiff Richard James Castro pursuant to CPLR 3212 for summary judgment dismissing the complaint on the ground that the plaintiff did not sustain a "serious injury" as defined by Insurance Law § 5102(d); on the motion by third-party defendant Jose Pacheco s/h/a Jose Pachero pursuant to CPLR 3212 for summary judgment dismissing the complaint predicated upon the absence of liability as a matter of law; on the motion by third-party defendants Pablo Muinos and Rex Realty, Inc. pursuant to CPLR 3212 for summary judgment dismissing the complaint based upon the absence of any liability as a matter of law; on the cross motion by third-party defendants Pablo Muinos and Rex Realty, Inc. pursuant to CPLR 3212 for summary judgment dismissing the complaint on the ground that the plaintiff did not sustain a "serious injury" as defined by Insurance Law § 5102(d); on the cross motion by third-party defendant Jose Pacheco s/h/a Jose Pachero pursuant to CPLR 3212 for summary judgment dismissing the complaint on the ground that the plaintiff did not sustain a

"serious injury" as defined by Insurance Law § 5102(d); and on the cross motion by defendants John J. Fox and Michael Fox pursuant to CPLR 3212 for summary judgment dismissing the complaint on the ground that the plaintiff did not sustain a "serious injury" as defined by Insurance Law § 5102(d) and on the issue of liability.

	Papers <u>Numbered</u>
Notices of Motion - Affidavits - Exhibits	1-12
Notices of Cross Motion - Affidavits - Exhibits ..	13-24
Answering Affidavits - Exhibits	25-32
Reply Affidavits	33-40

Upon the foregoing papers it is ordered that the motions and cross motions are determined as follows:

This is a negligence action to recover money damages for injuries allegedly suffered as a result of a motor vehicle accident. The subject accident occurred on September 27, 2006. The accident occurred on the Grand Central Parkway in Queens, New York. The plaintiff, the defendants and the third-party defendants were involved in a series of motor vehicle accidents.

The plaintiff testified that she was the operator of a 1995 Toyota Camry. The plaintiff testified that while driving on the Grand Central Parkway, she came upon a prior three-car accident. She then gradually brought her vehicle to a stop. There were then three impacts to her vehicle. About a minute after stopping her motor vehicle, she was struck in the passenger side of her vehicle by a SUV. The second impact, took place about 20 to 30 seconds after the first impact, occurred when her vehicle was struck in the rear by either a DEC or Department of Health truck. The third impact, which was with a car, was also in the rear and took place about 20 to 30 seconds after the second impact.

Third-party defendant Pacheco testified at his examination before trial that he was the operating a Ford F450 dump truck with a water trailer attached to the back of the truck. Pacheco testified that one impact with his vehicle occurred, and this occurred after he had been stopped for about 30 seconds. Pacheco stated that he was struck in the rear of the trailer by a small white sedan. He further testified that his truck did not move even an inch in any direction as a result of this impact.

Third-party defendant Muinos testified that he was involved in an accident that occurred on the Grand Central Parkway in September 2005. Third-party defendant Rex Realty is the owner of the truck that Muinos was operating. Muinos testified that he was operating a Ford F350 truck and came to a complete stop at the scene of a prior accident where there was a car flipped over on the side of the road and a couple of other cars were damaged. He testified that the vehicle he was operating was then impacted in the area of the driver side mirror by an Arrow Security Car. He further testified that there were no other contacts with his vehicle.

The defendant Michael Fox testified that he was the operator of a two-door white Hyundai Accent owned by his father, defendant John J. Fox. Michael Fox stated that he was involved in an accident on the Grand Central Parkway. He testified that he impacted one vehicle, a van or a truck with a trailer attached to it. Prior to colliding with the vehicle, Michael Fox testified that he made contact with a guard rail.

The defendant/third-party plaintiff Castro testified that he was the owner and operator of a 1998 tan/gold Nissan Pathfinder. He testified that he was involved in an accident on the Grand Central and there were three impacts to his vehicle. The first impact was with a car and was with the rear driver side of his vehicle. He did not know who the owner or operator of that vehicle was, but knew it was a car. The next impact occurred when his vehicle struck a guard rail. After hitting the guard rail, Castro testified that his vehicle came to a stop. Castro testified that the third impact then occurred when his vehicle was struck in the rear by a car. He further testified that he did not recall the vehicle that struck his vehicle, but knew that it was a car.

The defendants John J. Fox and Michael Fox, the defendant/third-party plaintiff Richard James Castro, and the third-party defendants Pablo Muinos, Rex Realty, Inc. and Jose Pacheco all move for summary judgment dismissing the complaint on the ground that the plaintiff did not sustain a serious injury. The issue of whether plaintiff sustained a serious injury is a matter of law, to be determined in the first instance by the court (see Licari v Elliott, 57 NY2d 230 [1982]). The burden is on the defendant to make a prima facie showing that plaintiff's injuries are not serious (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]). By submitting the affidavits or affirmations of medical experts, who through objective medical testing conclude that plaintiff's injuries are not serious within the meaning of Insurance Law § 5102(d), a defendant can meet his or her

prima facie burden (see Margarin v Krop, 24 AD3d 733 [2005]; Karabchievsky v Crowder, 24 AD3d 614 [2005]).

In support of his motion, the defendant/third-party plaintiff Castro and the defendants John J. Fox and Michael Fox submitted the verified bill of particulars, the affirmed orthopedic report of Harvey Fishman, M.D., the affirmed neurological report of Chandra M. Sharma, M.D., and the plaintiff's deposition testimony. The defendant/third-party plaintiff Castro also submitted the affirmed radiological report of Stanley M. Sprecher, M.D. The third-party defendants Pacheco, Muinos and Rex Realty all join in the arguments put forth by the defendant/third-party plaintiff Castro. The report of Dr. Fishman detailed the objective range of motion testing that he performed on areas where the plaintiff complained of pain, compared the plaintiff's range of motion to normal and concluded that the plaintiff did not suffer from a permanent injury. The report of Dr. Sharma outlined the objective testing conducted and found that the plaintiff had full range of motion in her spine, and the plaintiff had a normal neurological examination, suffered no neurological limitations and did not have a permanent injury. Dr. Sprecher stated in his report that he reviewed the plaintiff's MRI and found that there were no post-traumatic abnormalities attributable to the accident. The defendants' evidence was sufficient to make a prima facie showing that the plaintiff did not sustain a serious injury (Pommells v Perez, 4 NY3d 566 [2005]; Zhang v Wang, 24 AD3d 611 [2005]). Additionally, the admission by the plaintiff that she only missed one and a half weeks of school and started a new job a month and a half after the accident undermined her claim that her injuries prevented her from performing substantially all of the material acts constituting her customary daily activities during at least 90 out of the first 180 days following the accident (see Kouros v Mendez, 41 AD3d 786 [2007]; Hasner v Budnik, 35 AD3d 366 [2006]).

The burden, thus, shifted to plaintiff to demonstrate the existence of a triable issue of fact as to whether she sustained a serious injury (see Gaddy v Eyler, 79 NY2d 955 [1992]). In opposition, the plaintiff submitted her own affidavit, the affirmation of neurologist, Dr. Deepika Bajaj, the affirmation of Russell L. Miller, M.D., the affidavit of her treating chiropractor, John P. Russo, D.C., and the affidavit of the manager of Excel Imaging, attaching a copy of the plaintiff's MRI reports. The affirmation Dr. Bajaj detailed the objective testing she performed at multiple examinations that showed the plaintiff had a decreased range of motion in her lumbar spine. The affidavit of Dr. Russo detailed the objective testing performed both contemporaneous with the accident and at a recent examination and showed that the plaintiff had a decreased range of motion. The

plaintiff's submissions were sufficient to raise a triable issue of fact as to whether she suffered a serious injury (see Ali v Agboglo, 14 AD3d 580 [2005]; Williams v New York City Tr. Auth., 12 AD3d 365 [2004]; Acosta v Rubin, 2 AD3d 657 [2003]; Savitt v Wente, 277 AD2d 217 [2000]).

Turning next to the motions for summary judgment on the issue of liability, the defendants John J. Fox and Michael Fox, and the third-party defendants Jose Pacheco, and Pablo Muinos and Rex Realty each submitted the deposition testimony of the parties involved in the accident. The deposition testimony established that their vehicles did not come into contact with the plaintiff's vehicle or the defendant/third-party plaintiff's vehicle (see Gaige v Kepler, 303 AD2d 626 [2003]). The movants, thus, established their prima facie entitlement to summary judgment dismissing the complaint and the third-party complaint (Alvarez v Prospect Hosp., 68 NY2d 320 [1986]; Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]).

The plaintiff does not oppose the motion of the third-party defendants Pacheco or the motion of third-party defendants Pablo Muinos and Rex Realty. The third-party plaintiff failed to submit any evidence that raised a triable issue of fact. The submission of the police report of the accident does not raise a triable issue of fact as the report is inadmissible (see State Farm Mut. Auto Ins. Co. v Langan, 18 AD3d 850 [2005]). The police officer who drafted the report did not witness the accident. Furthermore, the defendant/third-party plaintiff admitted in his deposition that he did not speak to the police officer regarding how the accident occurred.

In opposition to the motion of the defendants Michael Fox and John J. Fox, the defendant/third-party plaintiff Richard James Castro and the plaintiff have failed to offer any evidence to raise a triable issue of fact as to the liability of the defendants John J. Fox and Michael Fox. The defendant/third-party plaintiff's argument that because he did not know which vehicles came into contact with his vehicle warrants the denial of the summary judgment motion is without merit. Mere speculation, unsupported by any evidence, that it was the vehicle operated by the defendant Michael Fox that came into contact with the vehicle operated by the third-party plaintiff is insufficient to defeat the summary judgment motion (see Platt v Wolman, 29 AD3d 663 [2006]; Sirico v Beukelaer, 14 AD3d 549 [2005]; Baker v Staria, 6 AD3d 639 [2004]).

Accordingly, the motion by the defendant Richard James Castro, the cross motion by third-party defendant Jose Pacheco, the cross motion by third-party defendants Pablo Muinos and Rex Realty,

Inc. and the branch of the cross motion by the defendants John J. Fox and Michael Fox for summary judgment dismissing the complaint on the grounds that the plaintiff did not sustain a serious injury is denied. The motion by defendants John J. Fox and Michael Fox is granted and the complaint is dismissed against those defendants. The motion by third-party defendants Pablo Muinos and Rex Realty, Inc., is granted and the third-party complaint against those defendants is dismissed. The motion by third-party defendant Jose Pacheco is granted and the third-party complaint is dismissed against him.

Dated: May 2, 2008

LAWRENCE V. CULLEN, J.S.C.