

Izsvak v Shkarov

2021 NY Slip Op 30600(U)

January 15, 2021

Supreme Court, Queens County

Docket Number: 707192/2019

Judge: Tracy Catapano-Fox

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

-----X
CAROLINE IZSVAK and MICHAEL GIALOURIS,

Plaintiffs,

Index No. 707192/2019

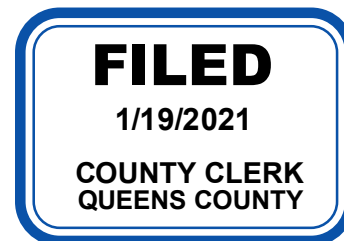
Part 6

-against-

Motion Date: September 21, 2020

ABRAL Z. SHAKAROV, MAS DEVELOPMENT
MANAGEMENT LLC, CITY OF NEW YORK and
NEW YORK CITY DEPARTMENT OF
TRANSPORTATION,

Calendar No.



Defendants.

-----X
The following papers numbered 1 to 17 read on this motion by defendants ABRAL Z. SHAKAROV and MAS DEVELOPMENT MANAGEMENT LLC, for summary judgment and dismissal of plaintiff's Complaint pursuant to CPLR §3212, this cross-motion by plaintiff-on-the-counterclaim Caroline Izsvak for summary judgment and dismissal of plaintiff Michael Gialouris' Complaint, and this cross-motion by defendant CITY OF NEW YORK and NEW YORK CITY DEPARTMENT OF TRANSPORTATION to amend their Answer, convert their cross-claims to a third-party action, and to dismiss the Complaint against defendant NEW YORK CITY DEPARTMENT OF TRANSPORTATION pursuant to CPLR §3211(a)(7).

Papers
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Notice of Motion, Affirmation, Exhibits..... 1-4
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Upon the foregoing papers, and after conference, it is ordered that these motions are determined as follows:

While this matter was submitted on September 21, 2020, it was assigned to this Court on January 4, 2021, when the undersigned began presiding over all Part 6 cases, and now issues the

following decision and Order.

Defendants Abral Z. Shakarov and MAS Development Management LLC's motion for summary judgment and plaintiff-on-the-counterclaim Caroline Izsvak's cross-motion for summary judgment against plaintiff Michael Gialouris pursuant to Insurance Law §5102(d) are denied, as there are issues of fact as to whether plaintiffs sustained a serious injury. Defendant City of New York and New York City Department of Transportation's cross-motion to amend their Answer pursuant to CPLR §3025(b) is granted, but their cross-motion to convert their cross-claims is denied as moot, and their cross-motion to dismiss pursuant to CPLR §3211(a)(7) is denied.

Defendants Abral Z. Shakarov (hereinafter referred to as "Shakarov") and MAS Development Management LLC (hereinafter referred to as "MAS") move for summary judgment that plaintiffs Caroline Izsvak (hereinafter referred to as "Izsvak") and Michael Gialouris (hereinafter referred to as "Gialouris") did not sustain a serious injury within the meaning of Insurance Law § 5102(d). This action arises out of an automobile accident which occurred on April 10, 2018, at the intersection of Grand Avenue and the Queens Midtown Expressway service road in Queens, New York. Plaintiffs filed their Summons and Complaint on or about April 24, 2019, an Answer with counter-claims was filed on May 23, 2019, and a reply to the counter-claims was filed on June 25, 2019.

Defendants Shakarov and MAS presented the pleadings, plaintiffs' Bill of Particulars, plaintiffs' sworn deposition testimony, and the affirmations of Dr. Edward A. Toriello and Dr. Stephen W. Lastig in support of their motion. They allege that plaintiffs' Bill of Particulars allege soft tissue injuries that were not permanent or causally related to the accident. Defendants presented plaintiff Izsvak's deposition testimony, where she stated she was the operator and plaintiff Giaolouris was the passenger in her vehicle when it was struck by defendants' vehicle. She testified that no airbags deployed, and she was not bleeding and did not lose consciousness. She testified she did not sustain cuts or lacerations and refused medical attention from the ambulance called to the scene. Plaintiff Izsvak testified that she went to Dr. Weinstein the next day and was treated by Dr. Weinstein and Dr. Castro. She testified that in July 2018, she had arthroscopic surgery on her right knee, and admitted she had a prior right knee surgery in June 2016. She testified that there was no new scarring, as the surgeon entered the skin in the same location as her prior surgery. Plaintiff Izsvak testified that she ended medical treatment in February 2019 because her medical benefits ended, and she did not anticipate seeking future medical treatment. She testified that she was not working at the time of the motor vehicle accident and was not prohibited from performing any activities at all. However, she testified she was limited in some of her daily activities, as she had difficulty climbing stairs and walking or sitting for long periods of time.

Dr. Toriello presented his affirmation based upon his independent orthopedic examination of plaintiff Izsvak. He found plaintiff Izsvak had full range of motion of her cervical spine, lumbar spine, right shoulder, and right knee, by using objective tests and comparing the percentage of full range of motion with plaintiff's range of motion. Dr. Toriello stated that plaintiff complained of continued pain in her right knee, especially when climbing stairs or walking for long periods of time. He indicated that plaintiff informed him she had been in a prior motor vehicle accident in 2016, in which she injured her neck, lower back right shoulder and right knee but had fully recovered from those injuries on the date of the accident in question. He noted that plaintiff received treatment after the accident for several months and stopped. Dr. Toriello stated he reviewed plaintiff's medical records and Bill of Particulars and determined that plaintiff had resolved cervical strain, right knee contusion/status post right knee arthroscopic surgery and right shoulder contusion, all of which were resolved and not causally related to the accident. Dr. Toriello also found that there were no objective findings to support plaintiff's subjective complaints, and no evidence of an objective disability, as the MRI reports did not show acute findings. Defendants also presented the affirmation of Dr. Steven W. Lastig, who affirmed he is a radiologist who reviewed plaintiff Izsvak's MRI films and found no evidence of acute injury in the cervical spine, no herniations or disc bulges. He found that the MRI films showed disc degeneration that was not causally related to the motor vehicle accident. Dr. Lastig reviewed plaintiff's right knee and found she sustained tears of the body and posterior horn of the medial meniscus. He also reviewed plaintiff's right shoulder X-rays and MRI films, and found no rotation cuff tear, and no causally related injuries.

Defendants also argue that plaintiff Gialouris did not sustain a serious injury and therefore their motion for summary judgment and dismissal should be granted. Plaintiff Gialouris testified at his deposition that upon impact, his shoulder and knees hit the front of the dashboard, but he did not lose consciousness and did not recall if he was bleeding or cut. He testified that he and plaintiff Izsvak parked the car after the accident and walked to their nearby home. He testified that he saw Dr. Weinstein the next day for his injuries and began physical therapy. Plaintiff Gialouris testified that Dr. Castro performed left knee arthroscopy surgery and left shoulder arthroscopy in August 2018. He testified that he stopped medical treatment in 2018 for personal reasons and did not plan to seek further medical treatment. He testified that he had a prior motor vehicle accident in 2005 and another accident after 2005. Plaintiff Gialouris testified he missed six months of work as an Uber driver, but did not make a lost wage claim. He testified that he still feels pain in his knees when sitting down, driving or walking up stairs.

Dr. Toriello presented his affirmation based upon his independent orthopedic medical examination of plaintiff Gialouris, and opined plaintiff had full range of motion in his cervical spine, lumbar spine, shoulders and knees. Dr. Toriello performed a variety of objective tests upon plaintiff, and found negative results, with full range of motion when compared with normal ranges of motion. Dr. Toriello stated that he reviewed plaintiff's MRI reports and determined they showed plaintiff had pre-existing degenerative changes and no causally related injuries. Dr. Toriello opined that plaintiff did not have a permanent orthopedic disability and was not restricted in performing his daily activities. Dr. Lastig also presented an affirmation stating that he reviewed plaintiff's MRI films and x-rays. He opined that plaintiff's cervical and lumbar spine X-rays did not show acute injuries, and plaintiff's left knee X-ray did not demonstrate any joint abnormalities or acute injuries beyond bilateral osteoarthritis. Dr. Lastig stated that plaintiff's left shoulder X-ray did not show any joint abnormalities or acute injury. Dr. Lastig also reviewed plaintiff's MRI of his cervical spine, which showed disc degeneration and annual bulges that are degenerative and not causally related. He reviewed plaintiff's MRI films of his lumbar spine and found that there was disc degeneration at L5-S1, and annual bulging that was degenerative and not causally related to the accident. He also reviewed plaintiff's MRI films of his right knee and opined there was no tear or internal derangement, or findings causally related to the motor vehicle accident.

Based upon the above, defendants argue that plaintiffs did not sustain a serious injury according to Insurance Law §5102(d). Defendants argue that most of plaintiffs' injuries were soft tissue, not permanent, degenerative in nature and not causally related to the accident. They further argue that plaintiffs failed to demonstrate a significant restriction in their daily activities for 90 out of the first 180 days since the accident, and no current significant or permanent restrictions in a body organ, member or function. Finally, defendants argue that plaintiffs' tears of the knees and arthroscopic surgery of the knees, alone, do not constitute a serious injury, and therefore defendants argue they established a prima facie entitlement to summary judgment, which plaintiff failed to rebut with competent, admissible evidence. They argue that except for Dr. Katz's affirmation, plaintiffs' medical evidence is unsworn and inadmissible. They further argue that Dr. Katz's examinations were years after the subject accident and therefore too attenuated to be probative. Defendants further argue that plaintiffs' MRI reports fail to establish a serious injury, as they lack proof of objective tests and medically established serious injury to raise an issue of fact. They further argue that Dr. Katz's affirmations were insufficient to establish a serious injury because he was not plaintiffs' treating physician, he relies on unsworn medical records, and cannot explain plaintiffs' gap in treatment. They argue that plaintiffs' medical evidence fails to address and rebut defendants' doctors finding of degenerative conditions, nor did

the medical records confirm causality with the instant accident.

Plaintiffs oppose defendants' motion and plaintiff-on-the-counterclaim's cross-motion, arguing that there are issues of fact that preclude summary judgment. They rely on defendants' submissions as well as affirmations from Dr. Michael Katz and plaintiffs' medical records in support of their opposition. Plaintiffs argue that both sustained serious injuries to their knees when their knees struck the dashboard due to the strong impact from the accident. Plaintiff Izsvak testified that she continued treatment for several months from 2018 through 2019, when her medical benefits were cut off. She had arthroscopic surgery on her right knee on July 12, 2018 and continues to have limited range of motion in her knee, as demonstrated in Dr. Michael Katz's affirmation. Plaintiff Izsvak's deposition testimony states that she still has knee pain and she is limited in grocery shopping, walking, using stairs, doing laundry, sitting for long periods, all which cause knee pain.

Plaintiff Izsvak submits an affirmation from Dr. Katz, who performed a recent orthopedic examination of plaintiff on August 4, 2020. Dr. Katz asserted plaintiff had complaints of difficulty climbing stairs, walking long distances, going to the supermarket and sitting in the same position caused knee pain. He found permanent injury to plaintiff's right knee, and a reduced range of motion of this knee, stating plaintiff had a 'particularly serious condition relative to the right knee' from her prior accident, which was worsened by this accident, as it caused loss of more plaintiff's meniscus and potential for a total knee arthroplasty in the future. Dr. Katz further opined that plaintiff might need repeated surgery and her right knee condition was causally related to and aggravated by this motor vehicle accident. Dr. Katz also performed objective examinations of plaintiff's neck, shoulder and back but found full range of motion and no permanent injury. Plaintiff Izsvak's Bill of Particulars states that she sustained right knee meniscal tear with internal derangement, tear of the posterior horn or the medial meniscus and lateral meniscus, and arthroscopic surgery of the right knee. It also states she sustained cervical radiculopathy, right shoulder injury with intrasubstance edema and supraspinatus tendon.

Plaintiff Gialouris testified at his deposition that he had two surgeries, left knee arthroscopic surgery on June 14, 2018, and left shoulder arthroscopic surgery on August 9, 2018, and continues to have pain and reduced range of motion as demonstrated by Dr. Katz's examination. Plaintiff Gialouris' deposition testimony states that he has occasional pain in his knee but has no future medical appointments. He stated that he was uncertain whether there were any activities that were impossible to perform, but he was limited in carrying heavy items, walking long distances, or going upstairs, and his knee locks when sitting or driving for long periods of

time. Plaintiff Gialouris' Bill of Particulars states he sustained left knee internal derangement with meniscal tear, medial and lateral meniscus, resulting in arthroscopic surgery. Plaintiff's Bill of Particulars also states that he sustained left shoulder internal derangement with rotator cuff tear, partial tear of the rotator cuff tendon requiring arthroscopic surgery, disc bulges at C2-C3, C3-C4, C4-C5, and a disc herniation at L5-S1 with lumbar radiculopathy, and a right knee sprain, with an interstitial tear and anterior cruciate ligament. Plaintiff Gialouris also submits an affirmation from Dr. Katz, who performed a recent orthopedic examination on him on August 4, 2020. He stated plaintiff complained of continued pain in his back, left knee and left shoulder, occurring when bending forward or sitting for longer periods, walking long distances or standing for long periods. Plaintiff also stated he could not lift heavy items or work overhead without pain to his left shoulder. Dr. Katz stated that his examination demonstrated a reduced range of motion in plaintiff's thoracolumbar spine, using objective tests when compared to normal. He also found reduced range of motion in plaintiff's left shoulder and left knee when compared to normal in performing objective tests. Dr. Katz found a permanent injury in plaintiff's back, left knee and shoulder. He reviewed plaintiff's MRI reports, which demonstrated disc herniation at L5-S1, a meniscal tear of plaintiff's left knee, and supraspinatus tear of plaintiff's left knee. Dr. Katz found plaintiff had limited range of motion in his back, left knee and left shoulder, and opined plaintiff would need lumbar disc decompression surgery in the future due to the disc herniation at L5-S1. He examined plaintiff's neck and right knee, but found full range of motion with no permanent injury. Dr. Katz also found that plaintiff's back, knee and shoulder injuries were causally related to this motor vehicle accident.

Plaintiffs argue that defendants' submissions are insufficient to establish a prima facie case, as Dr. Lustig admitted that plaintiff Izsvak has a tear of the right knee medial meniscus. They argue that the experts give conclusory opinions that do not establish prima facie that plaintiffs did not sustain a serious injury. They further argue that defendants incorrectly assert plaintiff Gialouris' injuries are solely degenerative as plaintiff is 35 years old, and he is too young for his reduced range of motion and documented tears, herniations and bulges to be solely degenerative and not causally related to the accident. Plaintiffs further argue that there is no medical proof presented by defendants that plaintiff Izsvak's injuries are solely caused by the prior motor vehicle accident. Rather, they argue that plaintiffs sustained permanent knee injuries that demonstrate serious injuries under Insurance Law §5102(d). Plaintiffs argue that unsworn medical and radiogram reports can be considered in opposition, as they were initially relied upon by defendants in their moving papers. They argue that plaintiffs' medical records and Dr. Katz's recent examination show documented and quantified restricted range of motion when compared to normal. Based upon the above, plaintiff argues that there are issues of fact that preclude summary

judgment.

Plaintiff-on-the-Counter-Claim Izsvak cross-moved for summary judgment and dismissal of plaintiff Gialouris' Complaint, adopting the arguments and evidence submitted by defendants Shakarov and MAS.

Defendant City of New York also cross-moved, seeking to amend its Answer to include a counter-claim against plaintiff Izsvak, who it argues was operating the vehicle in a negligent manner. Defendant City further argues that its cross-claims against defendants Shakarov and MAS should be converted into a third-party action if this Court were to grant their summary judgment motion, direct a joint trial of the matters, and dismiss the action against defendant New York City Department of Transportation pursuant to CPLR §3211(a)(7). However, it is noted that there was no affirmation or exhibits filed within NYSCED by defendant to support the dismissal application, and therefore the motion to dismiss is denied.

Under the No Fault law, in order to maintain an action for personal injury, a plaintiff must establish that a "serious injury" has been sustained. (*Licari v. Elliot*, 57 NY2d 230 [1982].) In moving for summary judgment, the proponent must tender sufficient evidence to show the absence of any material issue of fact and the right to judgment as a matter of law. (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Winegrad v. New York Univ. v. Medical Center*, 64 NY2d 851 [1985].) In the present matter, defendant has the burden of proving, by submitting competent evidence in admissible form, that plaintiff has not suffered a "serious injury." (*Lowe v. Bennett*, 122 AD2d 728 [1st Dept. 1986], *affirmed*, 69 NY2d 701 [1986].) If a defendant's motion is sufficient to raise the issue of whether a "serious injury" has been sustained, the burden shifts and it is then incumbent upon the plaintiff to produce prima facie evidence in admissible form to support the claim of "serious injury." (*Licari, supra*; *Lopez v. Senatore*, 65 NY2d 1017 [1985].)

Defendants failed to establish a prima facie case of entitlement to summary judgment that plaintiffs did not sustain a serious injury under the 90/180 day category of Insurance Law §5102(d). (*See Hall v. Stargot*, 187 AD3d 996 [2nd Dept. 2020].) Defendants relied on plaintiffs' deposition testimony, which did not eliminate triable issues of fact because the testimony did not compare plaintiffs' pre-accident and post-accident activities during ninety out of the first one-hundred and eighty-days after the motor vehicle accident. They also acknowledge that both plaintiffs had arthroscopic surgery within four months of the accident and did not sufficiently explain why this is not evidence of a medically determined injury. As defendants' evidence did not sufficiently address the claims raised in plaintiffs' Bill of Particulars, defendants failed to establish prima facie

that plaintiffs did not sustain a medically-determined injury that prevented them from performing their usual and customary daily activities for not less than ninety days out of the first one-hundred and eighty-days immediately following the motor vehicle accident. (*See Che Hong Kim v. Kossoff*, 90 AD3d 969 [2nd Dept. 2011].)

Defendants sufficiently demonstrated a prima facie case that plaintiff Izsvak did not sustain a serious injury to her neck, shoulder and back under Insurance Law §5102(d), through review of plaintiff's Bills of Particular and defendants doctors' affirmations. (*See Castillo v. MTA Bus Co.*, 163 AD3d 620 [2nd Dept. 2018]; *Byrd v. J.R.R. Limo*, 61 AD3d 801 [2nd Dept. 2009].) Dr. Toriello reviewed plaintiff Izsvak's medical records and detailed the specific objective tests he performed and the lack of a decrease in range of motion in plaintiff's cervical spine, lumbar spine, and right shoulder. Dr. Toriello found no orthopedic disabilities or restrictions causally related to the accident, and Dr. Lustig found no acute injury of plaintiff's neck, back or shoulder that was causally related to the motor vehicle accident. Based upon the evidence presented, defendants presented competent medical evidence to establish prima facie that plaintiff Izsvak not sustain a serious injury to her neck, back or shoulder under Insurance Law §5102(d). (*See Lambropoulos v. Gomez*, 166 AD3d 952 [2nd Dept. 2018].)

However, defendants failed to demonstrate prima facie that plaintiff Izsvak did not sustain a serious injury to her right knee within the meaning of Insurance Law 5102(d). (*See Alexander v. Gordon*, 95 AD3d 1245 [2nd Dept. 2012].) Dr. Toriello's affirmation states in conclusory terms that plaintiff had full range of motion in her right knee, without specifying the objective tests performed or the comparison of plaintiff's range of motion with full range of motion. (*See Paul v. Weatherwax*, 146 AD3d 792 [2nd Dept. 2017].) Dr. Toriello also acknowledged reviewing the MRI reports which discussed possible undersurface tears of the medial meniscus but did not address or refute these findings and why they do not demonstrate a serious injury. Further, Dr. Lustig reviewed plaintiff Izsvak's MRI films, and found that she had tears of the body and posterior horn of the medial meniscus. Therefore, without considering plaintiff's opposition, defendants failed to eliminate all issues of fact as to plaintiff's serious injury to her right knee.

Defendants sufficiently established a prima facie case that plaintiff Gialouris did not sustain a serious injury to his neck or right knee, as Dr. Toriello performed objective tests that found full range of motion with no orthopedic disability, and Dr. Lustig determined the MRI films and x-rays showed injuries that were degenerative, pre-existing and not causally related to the accident. (*See Romero v. Brathwaite*, 154 AD3d 894 [2nd Dept. 2017].)

However, defendants failed to demonstrate prima facie that plaintiff Gialouris did not sustain serious injuries to his back, left shoulder and knee within the meaning of Insurance Law 5102(d). (*See Hughes v. Cai*, 31 AD3d 385 [2nd Dept. 2006].) Dr. Toriello acknowledged reviewing plaintiff's medical records that show tears in his knee and shoulder yet did not address or refute these findings or explain why they do not demonstrate a serious injury. He also failed to explain why plaintiff's disc herniations at L5-S1 were degenerative in a relatively young person and not causally related to the motor vehicle accident. Dr. Toriello also contended he could not state whether or not these injuries were causally related to the accident, as he merely states that he cannot within a degree of reasonable certainty conclude the injuries were related. Further, Dr. Lustig did not review the MRI films of plaintiff's left shoulder or left knee, based upon the affirmation he submitted, which demonstrated a sprain-interstitial tear anterior cruciate ligament, and possible evidence of an underlying closed flap tear, which demonstrates a serious injury. (*See Bonafede v. Bonito*, 145 AD3d 842 [2nd Dept. 2016].) It is noted that plaintiff Gialouris' prior accidents or issues did not involve injuries to his shoulder, back and knees, and therefore defendants have not sufficiently established prima facie there are no triable issues of fact with regard to plaintiff's serious injuries to his back, left knee and left shoulder, without reviewing plaintiff's opposition papers on this issue.

Plaintiff Izsvak failed to raise a triable issue of fact as to whether she sustained a serious injury to her neck, right shoulder and back. (*See Donadio v. Doukhnych*, 55 AD3d 532 [2nd Dept. 2008].) Plaintiff did not testify at her deposition that she continued to have pain in her neck, back and shoulder, and did not explain any activities that were prevented because of these injuries. Further, Dr. Katz examined plaintiff and found she had full range of motion in her neck, back and shoulder based upon objective testing, and no permanent injuries to these areas. Therefore, plaintiff failed to raise an issue of fact with regard to whether she sustained a serious injury to her neck, back or right shoulder.

Plaintiff Gialouris failed to raise an issue of fact as to whether he sustained a serious injury to his neck or right knee within the meaning of Insurance Law 5102(d). (*See Donadio, supra.*) Plaintiff did not testify to any specific injuries to these areas for which he continued to suffer pain or have limitations in his activities. Further, Dr. Katz examined plaintiff and found he had full range of motion in his neck and right knee based upon objective testing, and no permanent injury to these areas. Therefore, plaintiff failed to raise an issue of fact as to whether he sustained a serious injury to his neck or right knee.

Defendant City of New York's cross-motion to amend its Answer to include a claim against

plaintiff Izsvah is granted. It is well established that leave to amend pleadings shall be freely granted absent a showing of prejudice or surprise to the opposing party, or if the amendment is palpably meritless. (See CPLR § 3025(b); *Lucido v. Mancuso*, 49 AD3d 220 [2nd Dept. 2008]; *Moon v. Long Beach Memorial Hospital*, 173 AD2d 527 [2nd Dept. 1991].) As defendant City demonstrated good cause for the amendment, and plaintiff failed to demonstrate any surprise or prejudice by the amendment, defendant’s motion to amend its Answer is granted pursuant to CPLR §3025(b) and defendant City must e-file its Amended Answer within thirty (30) days from the date of this Order with Notice of Entry. However, defendant City’s motion to convert its cross-claims to a third-party action is denied as moot, as is the motion to dismiss defendant New York City Department of Transportation.

Accordingly, defendants’ motion and plaintiff-on-the-counterclaim’s cross-motion for summary judgment pursuant to Insurance Law §5102(d) is denied as to plaintiffs’ claims under the 90/180 day rule, and granted solely as to plaintiffs’ claims of serious injury to plaintiff Izsvak’s neck, back or shoulder, and plaintiff Gialouris’ neck and right knee, and denied as to the remaining injuries as indicated above. Defendant City of New York’s cross-motion to amend its Answer pursuant to CPLR §3025(b) is granted, and defendant is directed to e-file its amended Answer within thirty (30) days from the date of this Order with Notice of Entry. Defendant City of New York’s cross-motion to convert its cross-claims is denied, and its cross-motion to dismiss is denied. All other applications are denied.

This constitutes the decision and Order of the Court.

Dated: January 15, 2021



Hon. Tracy Catapano-Fox, J.C.C.

