

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, ALLAN B. WEISS IAS PART 2  
Justice

ERNESTINE L. LONG

Plaintiff

-against-

ZANO INDUSTRIES, INC., JOHN J. PROVENZANO,  
KAREN M. SPENCE, COURTNEY A. SPENCE,  
ADEL M. MINA, PAUL G. CHARLES and  
ROMANE J. LOUIS

Defendant

Index No: 3738/05

Motion Date: 1/31/07

Motion Cal. No.: 17, 18

Motions having calendar numbers 17 & 18 are combined for disposition.

The following papers numbered 1 to 33 read on these motion by defendant, LOUIS, and cross-motions, by defendants, SPENCES, for summary judgment as to liability and motions and cross-motions by defendants, MINA, ZANO INDUSTRIES, INC., JOHN J. PROVENZANO and the SPENCES for summary judgment dismissing the complaint on the grounds that the plaintiff, LONG, has not sustained a serious injury within the meaning of Sections 5102 and 5104 of the Insurance Law.

	<u>PAPERS NUMBERED</u>
Cal.#17 Notice of Motion-Affidavits-Exhibits (MINA)..	1 - 4
Notice of Cross-Motion-Affidavits-Exhibits (SPENCES) .....	5 - 8
Answering Affidavits-Exhibits.....	9 - 10
Answering Affidavits-Exhibits.....	11 - 12
Answering Affidavits-Exhibits.....	13 - 14
Answering Affidavits-Exhibits.....	15 - 16
Replying Affirmation.....	17 - 18
Cal.#18 Notice of Motion-Affidavits-Exhibits (LOUIS)..	19 - 22
Notice of Cross-Motion-Affidavits-Exhibits (PROVENZANO & ZANO INDUSTRIES).....	23 - 26
Answering Affidavits-Exhibits.....	27 - 29
Affirmation in Opposition-Exhibits to all Motions and Cross-motions (LONG).....	30 - 32
Appearances and Letters of Notice to Parties.	33
Upon the foregoing papers it is ordered that these motions	

and cross-motions are denied.

The above captioned action, and three related actions, arise out of an automobile accident involving several automobiles which occurred on June 16, 2004 on the Van Wyck Expressway. The four actions bearing index numbers 1721/05, 3738/05, 20876/05 and 10545/06 were combined for a joint trial of liability by an order, dated July 17, 2006, in the action bearing index number 1721/05. In view of the joint trial order of this court, when the defendant, LOUIS, moved for summary judgment on the issue of liability, the court directed that all parties in the related actions which are still pending be served with the motion to afford all parties an opportunity to participate and be heard on the issue of liability.

The defendants', LOUIS & SPENCEs, motion and cross-motion for summary judgment, as to liability, dismissing the complaint and all cross-claims insofar as they are asserted against the movants is denied.

In support of the respective motions, the defendants submitted the deposition testimony of the plaintiff, LONG, and the defendants, Provenzano and Mina. However, when the motions were made, the depositions of Louis and Spence were scheduled, but not held. After a careful reading of the entire deposition of these parties, which conflict in several ways, and it is impossible to determine how the accident happened. There are numerous issues of fact precluding granting summary judgment including, which car struck which car, how many cars were involved, whether the Long, Louis and Charles vehicles were involved in a separate, earlier accident about which the parties testified or whether they were involved in only the subject accident or both accidents.

It is noted that the affidavit of Louis, was not considered as it was submitted in a sur-reply without any explanation as to why it was not included in his original moving papers (see (Adler v. Suffolk County Water Authority, 306 AD2d 229 [2003]; Drake v. Drake, 296 AD2d 566 [2002])).

The defendant's, MINA's motion, and defendants', ZANO INDUSTRIES, INC. and PROVENZANO, cross-motion for summary judgment dismissing complaint on the grounds that the plaintiff, LONG, has not sustained a serious injury within the meaning of the Insurance Law is denied. The defendants failed to establish, prima facie, that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) (see Toure v. Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v. Eyler, 79 NY2d 955[1992])).

In support of the motion, the defendants submitted the

affirmed reports of their examining orthopedist, Dr. Kerness, and neurologist, Dr. Jayaram, asserting that based upon their examination of the plaintiff on November 9, 2005, 15 months after the accident, their examinations revealed no present disability as a result of the accident. However, both doctor's were aware that the plaintiff missed 3 1/2 months from work as a result of the accident, and neither doctor addressed the plaintiff's claim, set forth in her verified bill of particulars, that she sustained a medically determined injury or impairment of a nonpermanent nature which prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident (see Torres v. Performance Auto. Group, Inc., 36 AD3d 894 [2007]; Lopez v. Geraldino, 35 AD3d 398 [2006]). Moreover, the plaintiff's affidavit, and the affidavit of her treating physician, Dr. Gibbs in which he asserts, inter alia, that the plaintiff's absence from work was medically advised, are sufficient to raise triable issues of fact as to whether the injured plaintiff sustained a medically determined injury which prevented her from performing her usual activities for not less than 90 days during the 180 days immediately following the accident.

The court notes that although the plaintiff also opposed the defendant's, MINA's motion based on "serious injury" as untimely, this claim is without merit. Pursuant to a stipulation, so Ordered by Justice Ritholtz, all motions for summary judgment were to be made returnable no later than October 23, 2006. The defendant's motion which was served on the parties was originally made returnable September 27, 2006. However, because of a mistake in the caption on the Notice of Motion, the defendant was instructed by the motion support office to serve an amended Notice of Motion which contained a new return date, October 25, 2006. In view of the reason for the 2 days delay in this case, there exists sufficient "good cause" to grant leave to move for summary judgment.

The branch of defendants', KAREN M. SPENCE, and COURTNEY A. SPENCE, cross-motions for summary judgment based upon "serious injury" is denied as untimely (CPLR 3212[a]; Miceli v. State Farm Mut. Auto. Ins. Co., 3 NY3d 725 [2004]; Brill v. City of New York, 2 NY3d 648 [2004]; see also Gaines v. Shell-Mar Foods, Inc., 21 AD3d 986[2005]). The defendants' cross-motion was made returnable on November 29, 2006. The defendants do not seek leave to make a late summary judgment motion and do not provide a reasonable explanation to establish "good cause" for the failure to timely move by notice of motion rather than a cross-motion (see Gaines v. Shell-Mar Foods, Inc., supra ). Accordingly, the motion must be denied (Miceli v. State Farm Mut. Auto. Ins. Co.,

supra; Brill v. City of New York, supra; Thompson v. New York City Bd. of Educ., 10 AD3d 650[2004]). This is particularly so in view of the fact that the basis for this motion, the IME reports, were completed in November of 2005.

In contrast, the branch of defendants', SPENCES', motion for summary judgment as to liability, "good cause" exists for granting an extension of time to so move. In view of the order for joint trial of liability, any motion for summary judgment on this ground had to be made when the discovery in the four actions was completed (see Herrera v. Felice Realty Corp., 22 AD3d 723, 724 [2005]; Gonzalez v. 98 Mag Leasing Corp., 95 NY2d 124, 129 [2000]).

Dated: March 5, 2007  
D# 29

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J.S.C.