

Derisi v Corso

2007 NY Slip Op 30388(U)

March 26, 2007

Supreme Court, Richmond County

Docket Number: 0013569

Judge: Anthony I. Giacobbe

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

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VIRGINIA DERISI,

Plaintiff,

-against-

**ELENA CORSO and
FORD CREDIT TITLING TRUST,**

Defendants.

-----X

TRIAL PART-9

Present:

**HON. ANTHONY I. GIACOBBE
DECISION AND ORDER**

**Index No. 13569/03
Motion No. 004**

The following papers numbered 1 to 3 were used on this motion the 12th day of January, 2007:

	Papers Numbered
Notice of Motion (Affirmation and Memorandum of Law in Support).....	1
Affirmation in Opposition.....	2
Reply Affirmation.....	3

Upon the foregoing papers, the motion of defendant Ford Credit Titling Trust (hereinafter "Ford") is granted, in part, and denied in part, as herein provided.

This matter arises out of a two vehicle accident which occurred on September 14, 2002, in a shopping plaza located in Staten Island, New York. As a result, plaintiff, the operator of one of the vehicles, claims to have sustained extensive personal injuries, including a herniated disc at L4-5 which contacts the left L4 nerve root; a straightening of the normal cervical lordosis, and a partial tear of the ACL in the left knee with joint effusion (*see*, Plaintiff's Verified Bill of Particulars, Ford's Exhibit C). It is further claimed that the foregoing conditions represent "serious injur[ies] in

every respect except death or dismemberment and is expected at the time of the trial to have [caused plaintiff]...economic loss greater than basic economic loss” (*id.* para U).

In support of its motion to dismiss for failure to sustain a “serious injury” as defined in Insurance Law §5102(d) Ford submits, *inter alia*, the December 13, 2002 affirmed report of an orthopedic surgeon, Robert Israel, M.D. (Ford’s Exhibit H), the April 19, 2005 affirmed radiological report of John T. Rigneym, M.D. (Ford’s Exhibit I), the April 21, 2005 affirmed report of a neurologist, Naunihal S. Singh, M.D.(Ford’s Exhibit J), and the April 13, 2005 affirmed report of an orthopedist, Philip K. Keats, M.D. (Ford’s Exhibit K), each of whom opines that plaintiff’s claims of injury are not causally related to the subject accident.¹

In opposition, plaintiff has offered, *inter alia*, the June 27, 2006 affirmed neurological report of Igor Stiler, M.D., whose examination and review of plaintiff’s MRI films led him to conclude that plaintiff sustained “traumatic lumbar radiculopathy with L4-5 left sided disc herniation impinging on the exiting left L4 nerve root; [an] acceleration-deceleration injury of the cervical spine with exacerbation of pre-existing degenerative changes; and traumatic internal derangement of the left knee with exacerbation” (Plaintiff’s Exhibit A). Each of these injuries is said to be causally related to the accident of September 14, 2002.

At the outset, the Court must note that so much of plaintiff’s claim of serious injury as is predicated on the alleged “permanent loss of use of a body organ, member, function or system” (Insurance Law §5102[d]) must be dismissed. The injuries alleged by plaintiff are indisputably not “total” (*see, Oberly v. Bangs Ambulance, Inc.*, 96 NY2d 295 [2001]).

As for the balance of Ford’s motion to dismiss, it is the opinion of this Court that plaintiff has successfully raised a triable issue as to the “seriousness” of his injuries through the affirmation of Dr. Stiler, whose expert opinion was predicated on objective medical evidence in

the form of MRI films and range of motion testing in which plaintiff's observed limitations in movement were quantified and stated as a percentage of "normal" (*see, Toure v. Avis Rent A Car Systems, Inc.*, 98 NY2d 345 [2002]). In addition, Dr. Stiler was able to conclude that the injuries sustained by plaintiff were "causally related to the [subject] accident." It is well established that "conflicting expert opinions may not be resolved on a motion for summary judgment" (*Corbett v. County of Onondaga*, 291 AD2d 886, 887 [4th Dept. 2002], quoting *Williams v. Lucianatelli*, 259 AD2d 1003 [4th Dept. 1999] [internal quotation marks omitted]). Accordingly, so much of Ford's motion as is predicated on plaintiff's alleged failure to sustain a "serious injury" under section 5102(d) of the Insurance Law is denied.

However, the balance of the motion is granted. To the extent that any clarification is required, the Decision and Order of this Court entered on August 24, 2005 awarded plaintiff partial summary judgment on the issue of negligence only (*see generally, Zecca v. Riccardelli*, 293 AD2d 31 [2nd Dept. 2002]).

Finally, that branch of Ford's motion which seeks to strike plaintiff's claim for punitive damages is granted as unopposed.

Accordingly, it is

ORDERED, that the motion of defendant Ford Credit Titling Trust is granted to the extent of (1) severing and dismissing plaintiff's claim for punitive damages, and (2) declaring that this Court's August 24, 2005 Decision and Order was in plaintiff's favor on this issue of negligence only; and it is further

ORDERED, that the balance of the motion is denied; and it is further

ORDERED, that the Clerk enter judgment in accordance herewith.

ENTER,

Dated: March 26, 2007

¹The unsworn chiropractic “affidavit” of Dr. Harvey Orenstein (*see*, Ford’s Exhibit G) does not constitute competent medical evidence (*see* CPLR 2106), and has not been considered by the Court.