SHORT FORM ORDER

INDEX No. 05-2175
CAL. No. 06-01376-MV

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

P R E S E N T :

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 10/18/06
ADJ. DATE 12/27/06
Mot. Seq. # 006 - MotD
007 - XMD

----------X
DOMINICK TELESCO and BOXWOOD ASSOCIATES, INC.,

Plaintiffs,

- against -

COUNTRY IMPORTED CAR CORP., RAYMOND DAVINO, VAV CLASSICS and MERCEDES BENZ USA, LLC,

Defendants.
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Upon the following papers numbered 1 to 29 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 14; Notice of Cross Motion and supporting papers 15 - 23; Answering Affidavits and supporting papers 24 - 26; Replying Affidavits and supporting papers 27 - 29; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (006) by defendant VAV Classics for summary judgment dismissing plaintiffs' complaint on liability grounds and on the grounds that plaintiff Dominick Telesco did not sustain a "serious injury" as defined in Section 5102 of the Insurance Law, is determined as set forth below; and it is further

ORDERED that this cross motion (007) by plaintiffs for an order granting them partial summary judgment on liability grounds, determining that plaintiff Dominick Telesco need not plead or prove that he sustained a "serious injury," precluding defendant VAV Classics from offering any evidence pertaining to plaintiff Dominick Telesco's injuries pursuant to CPLR 3126, and imposing costs and sanctions against defendant VAV Classics pursuant to Uniform Rules of Trials Courts (22 NYCRR) § 130-1.1, is denied as set forth below.

This is an action to recover damages for, among other things, personal injuries allegedly sustained by the plaintiff Dominick Telesco as a result of a single motor vehicle accident that occurred on Upper Seven Ponds Road at or near its intersection with Mill Farm Lane, Southampton, New York on August 3, 2003. The accident allegedly happened when the left front wheel of the plaintiffs' Mercedes Benz S-500 came off while he was driving, causing the vehicle to tilt and continue forward on its left front wheel rotor and three other wheels. Plaintiffs also allege Mr. Telesco sustained severe trauma to his left foot, ankle, and leg on when he allegedly strenuously pressed his feet on the car's brake pedal in an effort to avoid an impact with another motor vehicle. Furthermore, the complaint alleges that Mr. Telesco's personal corporation, Boxwood, sustained property damage to the subject vehicle and other related pecuniary harm arising from the loss of use of the vehicle.

The gravamen of the complaint is that defendants Country, Davino and VAV negligently repaired plaintiffs' car after a prior July 2003 accident and that their actions and/or inaction, in turn, caused mechanical failures of the vehicle which resulted in the second accident. The complaint also sounds in products liability and breach of warranty/strict liability against defendant Mercedes. By way of background, this action, originally commenced in Supreme Court, County of New York under Index No. 04-109817, was subsequently transferred to this Court, by order dated December 23, 2004 of the Hon. Milton A. Tingling, J.S.C. Thereafter, by stipulation dated May 25, 2005 and filed with the Office of the Suffolk County Clerk on June 7, 2005, the plaintiffs and defendant Mercedes purportedly discontinued this action with prejudice as to Mercedes. The Court notes, however, that said stipulation is not binding on the other defendants as it was not signed by the attorneys of record for all parties as required by CPLR 3217 (a) (2). Notwithstanding the defective stipulation, the note of issue which was filed with the Office of the Suffolk County Clerk, states that the nature of this action is a "tort" based upon "motor vehicle negligence." Moreover, plaintiff's counsel avers in his personal affirmation, which is attached to the note of issue, that the case proceeds as a "Motor Vehicle Personal Injury Action."

Defendant VAV now moves for summary judgment dismissing the claims against it on the grounds that Mr. Telesco did not sustain a "serious injury" as defined in Section 5102 of the Insurance Law, and on the grounds that it did not breach its duty to the plaintiffs. Defendant VAV also moves to strike the complaint on the basis that it was never given the opportunity to inspect the plaintiff's vehicle. Defendant contends that there is no proof that it breached its duty to the plaintiffs. Secondly, defendant argues that plaintiffs cannot prove that Mr. Telesco's injuries were proximately caused by the accident. Thirdly, defendant argues that Mr. Telesco did not sustain a "serious injury" as defined in Insurance Law § 5102 (d). Fourthly, defendant asserts that plaintiffs failed to produce the subject vehicle for inspection by VAV, and that it was prejudiced.

Plaintiffs cross move for partial summary judgment on the basis that plaintiff Telesco need not plead or prove that he sustained a "serious injury" as defined in Section 5102 of the Insurance Law, and on liability grounds. Plaintiff also cross moves for an order pursuant to CPLR 3126 precluding VAV from offering any evidence pertaining to Mr. Telesco's alleged injuries on the grounds that it did not furnish a report from defendant's examining medical expert, and imposing costs and sanctions against defendant VAV pursuant to Uniform Rules of Trials Courts (22 NYCRR) § 130-1.1. Plaintiffs contend that plaintiff Telesco's injuries were proximately caused by defendant VAV's negligence, which in turn, proximately caused the accident. Secondly, plaintiffs assert that they need not plead or prove that

plaintiff Telesco sustained a "serious injury" as defined in Insurance Law § 5102 because VAV is not a "covered person" as defined by Insurance Law § 5102 (j). Thirdly, plaintiff argue that defendant VAV should be precluded from offering any evidence pertaining to plaintiff Telesco's injuries because defendant allegedly failed to furnish discovery as required by the Stipulation and Order of this Court dated March 16, 2006 (Pines, J.).

At the outset, the branch of defendant VAV's motion that pertains to discovery and which was not included in the notice of motion (*see*, CPLR 2214 [a]), and the branch of plaintiffs' cross motion that is for an order of preclusion pursuant to CPLR 3126, which are each unsupported by affirmations of good faith, are both denied as procedurally and substantively deficient (*see*, Uniform Rules for Trial Cts [22 NYCRR] § 202.7 [a]; ***Zorn v Bottino***, 18 AD3d 545, 794 NYS2d 659 [2d Dept 2005]; ***Hegler v Loews Roosevelt Field Cinemas, Inc.***, 280 AD2d 645, 720 NYS2d 844 [2d Dept 2001]; ***Barnes v NYNEX, Inc.***, 274 AD2d 368, 711 NYS2d 893 [2d Dept 2000]). The parties are strongly encouraged to make a determined effort to resolve their discovery disputes expeditiously and without additional motion practice.

Moreover, as the note of issue in this action was filed on June 7, 2006, any motion for summary judgment made after October 5, 2006 was untimely (*see*, CPLR 3212 [a]). As the plaintiffs' cross motion was not made until November 9, 2006, the date that it was served, the branch of their motion which is for an order granting them partial summary judgment is denied as untimely. Furthermore, plaintiffs have not demonstrated good cause for the delay, and the court may not deem that good cause exists (*see*, ***Miceli v State Farm Mut. Auto. Insur. Co.,*** 3 NY3d 725, 786 NYS2d 379 [2004]; ***Rivers v City of New York***, 2007 NY Slip Op. 1716 [2d Dept 2007]; ***Bressingham v Jam. Hosp. Med Ctr.***, 17 AD3d 496, 793 NYS2d 176 [2d Dept 2005]). However, plaintiffs' claim that section 5102 of the Insurance Law is not applicable in this case has been treated as opposition to defendant VAV's timely motion.

Mr. Telesco testified that he is the president and CEO of plaintiff Boxwood Associates, Inc., which is the titled owner of the subject 2003 Mercedes S-500 vehicle. During a prior accident in July 2003, he was sideswiped while driving his Mercedes. After inquiry by him, Ray Davino of Country advised him to take the car directly to VAV for the cosmetic repair of the resulting scratches. On August 2, 2003, Mr. Davino notified him that his car was ready to be picked up from Country in connection with the work performed by VAV. He picked up his car from Country on Saturday, August 2, and then drove it a few miles to the Southampton Inn. While driving, he noticed that the dashboard suspension light was still on, however, he did not notice any other problems with the car. The following day, while driving his car three or four miles to his daughter's house he noticed a loud thumping noise from the front end of the car. He pulled over but could not determine the source of the noise. After driving at a reduced speed for a few more minutes, he felt the car vibrating and noticed that the noise became louder. The left front wheel then came off and his car swerved into incoming traffic in a tilted position. At that point, he steered the vehicle to the right to avoid an accident and jammed his feet down on the brake pedal, however, his vehicle did not strike anything and its air bags did not deploy. He then exited his vehicle and noticed that the left front lug nuts which had fallen off were lying in the roadway.

Mr. Vatter testified that he is the owner of VAV, an auto body and paint repair shop located in

Southampton. VAV infrequently performs mechanical work. Instead, VAV refers Mercedes' brand cars back to Mercedes' dealerships for mechanical work. In July 2003, VAV received business referrals for body work from Country which is located about one-half mile away. Mr. Telesco brought the car in to VAV for repairs on or about July 28, 2003 to repair some body damage to his Mercedes automobile from a sideswipe incident. On August 2, 2003, Vatter drove the vehicle to Country after the completion of its work and payment by Telesco. When Mr. Telesco brought the car into his shop, Mr. Vetter noticed that the car was not level. During the course of repairs, his employee, Norman Terry, took the left front wheel off to check for suspension damage and to add a splash shield. Mr. Vatter was not present when Mr. Terry placed the removed wheel and lug nuts back on Telesco's car, however, several employees were allegedly present when Vatter performed a check. Vatter further testified that it is his usual practice to personally inspect each car including its lug nuts whenever wheels are removed and put back on customer's vehicles. It is also his usual practice to test drive cars for a few miles after they are completed. Furthermore, it is his company's usual practice to tighten lug nuts with hand wrenches to about 90 foot pounds of torque. Lastly, Mr. Vatter testified that he noted that Telesco's car had a suspension problem and that he personally informed Mr. Telesco that the vehicle should not be driven.

Raymond Davino testified that he is a service advisor at Country and has been employed there for the past four and one-half years. One of his job duties is to act as a liaison between clients and technicians, and another is to field calls from customers. His first contact with Mr. Telesco was on July 8, 2003. Mr Telesco walked into the dealership and told Mr. Davino of his car's suspension problem. At that time, one of Country's service technicians made repairs to the vehicle's left, rear level control valve. On or about July 15, Mr. Telesco brought his car back a second time, and repairs were again made to the airmatic suspension. Although the steering was observed to be off-center, this problem was not repaired as it was determined to be caused by an accidental impact to the left front wheel and fender. At that time, Mr. Davino informed Mr. Telesco that repairs due to accidental damage were not covered by the warranty, and that, in any event, Country did not perform alignment or body work. Instead, he recommended that Mr. Telesco take the car to VAV. Sometime after July 15, he was informed by Mr. Vatter that there was a problem with the air suspension and that the vehicle was dropping down on one side, and when Mr. Vatter brought the car back to Country on August 2, he observed that it was tilted to the left. According to Mr. Davino, since Mr. Telesco brought his car in to Country that day at about 10:42 a.m. and informed him that he wanted it returned to him by 12:00 or 1:00 p.m., he advised his dispatcher of the time constraints. To his knowledge, Country did not make any repairs to Mr. Telesco's car which required the removal of any wheels, and later that day, Mr. Telesco's car was returned to VAV by Country for a final cleaning. On that day, he also advised Mr. Telesco by telephone that the vehicle was not safe to drive because of the problem with its airmatic suspension. In response, Mr Telesco told him that he was going to pick-up and drive the car anyway. He also told Mr. Vatter that the air suspension had not been repaired. Sometime thereafter, Mr. Vatter drove the car from Country's lot back to his shop. According to Mr. Davino, the Telesco vehicle was safe to drive the short distance from his dealership to VAV because the suspension was at its normal riding height. He opined that the car would be difficult to steer and that the tire would rub the inside of its wheel-well if the suspension were to fail, but that this would not make "a tire" come off. Mr. Davino further testified, however, that a wheel could fall off the lug nuts which are used to secure it are not sufficiently tightened.

Michael Teller testified that he has been employed by Country as a technician for about five

years, and that he became an "A" technician in 2001. He first worked on Mr. Telesco's vehicle on July 8, 2003 in connection with an airmatic malfunction light. After he made repairs to the suspension system, he took the vehicle for a test drive. While he initially determined that the problem had been fixed, he subsequently noticed that a dashboard light remained activated indicating that there was a remaining functional problem. According to Mr. Teller, the suspension has a built in "fail safe" system that enables each shock absorber to sustain sufficient air pressure to prevent a complete collapse. On July 15, he worked on Mr. Telesco's vehicle again in connection with the airmatic light coming on and he performed the necessary repairs. After he cleared the fault codes in the car's computer, he noted that there were no additional problems with the airmatic suspension. Although he did not recall if the vehicle was "tilted" when he first observed it, he observed that it pulled slightly to the right and opined this was due to Mr. Telesco's accident. He did not perform any work to correct the steering because he was not authorized to do so. On August 2, 2003, he worked on Mr. Telesco's car a third time, but did not recall seeing the vehicle unlevel during this visit. On that date, he took the car for a test drive and performed diagnostics, but no repair codes indicated by the computer. No additional work was performed and no parts were removed as he was instructed by his dispatcher that Mr. Telesco wanted the car back to him the same day. Mr. Teller further testified that he worked on Mr. Telesco's car by himself during all three visits, and that, in every instance, he was never required to, nor did he ever remove any of the vehicle's wheels.

Timothy S. Lowery testified that he has been employed by Mercedes in Montvale, New Jersey, as an analysis engineer for the past two years. He conducted an inspection of Mr. Telesco's vehicle on or about November 23, 2004 in connection with one of the car's wheels. He inspected and photographed various parts of the car; however, he did not test drive it, nor did he examine the airmatic suspension. During his inspection, he observed some insignificant damage to the left front of the vehicle as well as a damaged tire in the trunk, but noted that four of the wheel's lug nuts had no damage. After being shown the alleged fifth lug nut by plaintiffs' counsel, he opined: that it showed significant damage to the end of the threading; that it was damaged when it came off the vehicle rather than when it had been installed; and that it would be impossible for this damaged nut to be threaded on a wheel stud in its damaged condition. Additionally, he opined that neither the problems with the car's airmatic suspension, nor the related repairs caused or contributed to the wheel coming off plaintiffs' vehicle. Furthermore, he opined: that it was possible for a wheel could come off its studs if the lug nuts had not been sufficiently tightened to 100 foot pounds; that this was likely to occur after about ten miles of driving; and that the improper tightening of lug nuts would be the only thing that would cause a wheel to come off a car. Lastly, he opined that if the airmatic suspension is unlevel, it could cause a vehicle to be unsafe depending on the severity of the problem, but it would not cause a wheel to come off the vehicle.

The branch of defendant VAV's motion for summary judgment dismissing plaintiffs' complaint on liability grounds is denied. Whereas here, there are disputed issues of fact and credibility regarding the parties' differing versions of the events surrounding the accident, including, but not limited to, whether the lug nuts on the left front wheel of the plaintiffs' vehicle were properly tightened by defendants, whether Mr. Telesco knew, or should have known that the vehicle was unsafe to drive, and whether the plaintiff's ankle injuries were proximately caused by the accident, summary judgment is inappropriate (*see generally*, ***Sadowski v Long Island R. Co.***, 292 NY 448, [1944]; *cf.* ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). The fact that the plaintiffs' vehicle had a continuing

problem with its airmatic suspension does not, by itself, change the premise that issues of fact and credibility are for a jury's resolution.

The branch of defendant VAV's motion for summary judgment dismissing plaintiffs' complaint on the ground that Mr. Telesco did not sustain a "serious injury" as defined in section 5102 of the Insurance Law is denied. Pursuant to Insurance Law § 5104 (a), in an action by one "covered person" against another covered person, the plaintiff cannot recover for noneconomic injury unless he or she has sustained a "serious injury" as defined in section 5012 (d) of the Insurance Law. A "covered person" is defined as a "pedestrian injured through the use or operation of, or any owner, operator or occupant of, a motor vehicle *** ; or any other person entitled to first party benefits" (Insurance Law § 5102 [j]). Mr. Telesco is a covered person within the meaning of section 5102 (j), but defendants are not (*see*, ***Caruana v Oswego County Bd. of Coop. Educ. Servs.***, 26 AD3d 857, 809 NYS2d 750 [4th Dept 2006]; ***Hill v Metropolitan Suburban Bus Auth.***, 157 AD2d 93, 555 NYS2d 803 [2d Dept 1990]). Thus, Mr. Telesco is not subject to the no-fault insurance law under the facts presented (*see*, Insurance Law 5102 [a]).

Lastly, the branch of plaintiffs' cross motion for an order imposing costs and sanctions against defendant VAV is denied. The Court finds that defendant VAV's motion which is based, in part, upon legal theory did not rise to the level of "frivolous conduct" as contemplated by court rules (*see*, Uniform Rules for Trial Cts [22 NYCRR] § 130-1.1 [a]; CPLR 8303-a (*see*, ***Agostini v Sobol***, 304 AD2d 395, 757 NYS2d 555 [1st Dept 2003]; ***Juron & Minzner, P.C. v State Farm Ins. Co.,*** 303 AD2d 463, 756 NYS2d 428 [2d Dept 2003]; ***In re Christopher,*** 280 AD2d 546, 720 NYS2d 391 [2d Dept 2001]).

Dated: APR 10 2007

J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION