Pirolo v Like Kind & Quality Auto Parts, Inc.
2008 NY Slip Op 30842(U)
March 19, 2008
Supreme Court, Suffolk County
Docket Number: 0022962/2006
Judge: Martin J. Kerins
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

COPY

INDEX No. 06-22962

SUPREME COURT - STATE OF NEW YORK
IAS PART 12 - SUFFOLK COUNTY

PRESENT:

Hon. MARTIN J. KERINS
J.S.C.

MOTION DATE 1-3-08
ADJ. DATE 1-31-08
Mot. Seq. # 001 - MG
002 - XMD

----------X

DENISE PIROLO,

Plaintiff,

- against -

LIKE KIND & QUALITY AUTO PARTS, INC. and DAVID STROHMEYER,

Defendants.

----------X

ROBERT T. ACKER, P.C.
Attorney for Plaintiff
544 Broadway, Suite 201
Massapequa, New York 11758

MARTIN, FALLON & MULLE
Attorneys for Defendants
100 East Carver Street
Huntington, New York 11743

Upon the following papers numbered 1 to 29 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 11 ; Notice of Cross Motion and supporting papers 12 - 18 ; Answering Affidavits and supporting papers 19 - 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 unopposed motion (001) by plaintiff for an order granting her partial summary judgment on the basis that defendants bear sole liability for the accident is granted, and the case is to proceed to a determination of damages; and it is further

ORDERED that this cross motion (002) by defendants for an order granting them summary judgment on the basis that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is denied.

This is an action to recover damages for serious injuries allegedly sustained by plaintiff Denise Pirolo as a result of a motor vehicle accident which occurred on Sunrise Highway near the intersection of North Clinton Avenue in Lindenhurst, Town of Babylon, New York on February 21, 2006. The accident allegedly happened when the four-car carrier owned by defendant Like Kind & Quality Auto Parts, Inc. and operated by defendant David Strohmeyer impacted the vehicle operated by plaintiff. Plaintiff now moves for an order granting her partial summary judgment on the basis that defendants bear sole liability for the accident. Defendants cross move for an order granting them summary

judgment on the basis that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d).

Turning to the threshold issues, Insurance Law § 5102 (d) defines "serious injury" as "a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment."

In order to recover under the "permanent loss of use" category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance Inc.***, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system" categories, either a specific percentage of the loss of range of motion must be ascribed or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]).

It is for the court to determine in the first instance whether a prima facie showing of "serious injury" has been made out (***Tipping-Cestari v Kilhenny***, 174 AD2d 663, 571 NYS2d 525 [2d Dept 1991]). The initial burden is on the defendant "to present evidence, in competent form, showing that the plaintiff has no cause of action" (***Rodriguez v Goldstein,*** 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once defendant has met the burden, plaintiff must then, by competent proof, establish a prima facie case that such serious injury exists (***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]). Such proof, in order to be in a competent or admissible form, shall consist of affidavits or affirmations (***Pagano v Kingsbury,*** 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). The proof must be viewed in a light most favorable to the nonmoving party, here, the plaintiff (***Cammarere v Villanova,*** 166 AD2d 760, 562 NYS2d 808 [3d Dept 1990]).

Plaintiff claims in her bill of particulars that she sustained, inter alia, trauma to her cervical, thoracic and lumbar spine with a limitation of motion; cervical spine disc herniations; thoracic and lumbar spine disc bulges; supraspinatus tendinosis of the right shoulder; post-concussion syndrome; and post-traumatic stress disorder. Plaintiff also claims that she was totally disabled from the date of the accident until October 15, 2006, and that she has been partially disabled since October 16, 2006. Additionally, plaintiff claims that she was out of work for approximately seven and one-half months as well as confined to her home/bed for three months. The Court construes these allegations to mean that plaintiff claims that she sustained a serious injury in the categories of a permanent consequential limitation, a significant limitation and a non-permanent injury. Initially, the Court notes that the report of Dr. Stubel is deficient to the extent that he attempts to rely upon the unsworn diagnostic reports of

another physician which were not submitted (*see, **Shay v Jerkins,*** 263 AD2d 475, 692 NYS2d 730 [2d Dept 1999]; ***Merisca v Alford***, 243 AD2d 613, 663 NYS2d 853 [2d Dept 1997]), to the extent, however, that he relied upon his own observations and testing results, his opinion was considered.

Defendants failed to make a prima facie showing that plaintiff did not sustain a serious injury in the category of a significant limitation (*see*, ***Friedman v Albert***, 44 AD3d 897, 843 NYS2d 523 [2d Dept 2007]; ***Litz v F. J. Gray & Co.***, 39 AD3d 490, 835 NYS2d 227 [2d Dept 2007]). While Dr. Pearl opined that plaintiff's decreased range of motion in the cervical and lumbar spine was subjective, his findings of a 40 degree deficiency in cervical flexion, a 35 degree deficiency in cervical lateral rotation and a 20 degree deficiency in lumbar flexion, combined with his acknowledgment of causally related spinal injuries, raise triable issues of fact. Additionally, whereas Dr. Pearl considered 80 degrees to be the normal range of lateral cervical flexion, Dr. Stubel considered 45 degrees to be the normal, thus raising additional issues of fact (*see*, ***Sanon v Moskowitz***, 44 AD3d 926, 843 NYS2d 510 [2d Dept 2007]). Further, Dr. De La Chapelle's opinion that there was no psychiatric disability or permanency is contradicted by Dr. Stubel's opinion that there was some "psychological overlay" in plaintiff's condition in that she reported panic attacks (*see*, ***Krayn v Torella***, 40 AD3d 588, 833 NYS2d 406 [2d Dept 2007]; ***Brandt-Miller v McArdle***, 21 AD2d 1152, 801 NYS2d 834 [3d Dept 2005]).

Defendants also failed to make a prima facie showing that plaintiff did not sustain a serious injury in the category of a medically determined injury or impairment of a non-permanent nature within the meaning of Insurance Law § 5102 (d) (*see*, ***DeVille v Barry***, 41 AD3d 763, 839 NYS2d 216 [2d Dept 2007]). Specifically, defendants' moving papers do not adequately address plaintiff's claim, set forth in her bill of particulars, that she was out of work for about seven and one-half months, or that she was confined to her home/bed for about three months. In this regard, defendants' examining physicians, who conducted their examinations of the plaintiff more than one and one-half years after the accident occurred, did not relate any of their findings to this category of serious injury for the period of time immediately following the accident (*see*, ***Jensen v Nicmanda Trucking, Inc.***, 47 AD3d 769, __NYS2d __ [2d Dept 2008]). In any event, Dr. Stubel recorded plaintiff's claim that she had lost about seven months from work subsequent to the accident (*see*, ***Nembhard v Delatorre***, 16 AD3d 390, 791 NYS2d 144 [2d Dept 2005]). Since defendants failed to meet their initial burden of establishing a prima facie case with respect to at least one category of serious injury alleged by plaintiff, it is unnecessary to consider whether they met their burden as to the other categories of serious injury, or whether plaintiff's papers in opposition to the motion are sufficient to raise a triable issue of fact (*see*, ***Zamaniyan v Vrabeck***, 41 AD3d 472, 835 NYS2d 903 [2d Dept 2007]; ***Kolios v Znack***, 237 AD2d 333, 655 NYS2d 443 [2d Dept 1997]).

Turning to the issue of liability, "[w]hen a driver of an automobile approaches another automobile from the rear, he or she is bound to maintain a reasonably safe rate of speed and control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle" (***Bucceri v Frazer***, 297 AD2d 304, 305, 746 NYS2d 185 [2d Dept 2002]). Further, drivers have a "duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident" (***Johnson v Phillips***, 261 AD2d 269, 270, 690 NYS2d 545 [1st Dept 1999]). A rear-end collision establishes a prima facie case of negligence on the part of the driver of the rear vehicle, and imposes a duty upon him or her to explain how the accident occurred (*see*, ***Reid v Rayamajhi***, 17 AD3d 557, 795 NYS2d 56 [2d Dept

2005]). In instances where the driver of the offending vehicle lays blame for the accident on brake failure, it is incumbent upon that party to present evidence demonstrating that the brake failure was unanticipated and that reasonable care had been exercised to keep the brakes in good working order (*see*, ***Vidal v Tsitsiashvili***, 297 AD2d 638, 747 NYS2d 524 [2d Dept 2002]; ***Reid v Rayamajhi***, 17 AD3d 557, *supra*).

By her submissions, plaintiff established, prima facie, her entitlement to judgment as a matter of law (*see*, ***Elgendy v Pipel***, 303 AD2d 446, 755 NYS2d 896 [2d Dept 2003]). Plaintiff testified that her vehicle was hit in the rear by the vehicle operated by defendant Strohmeyer, and that her vehicle was subsequently pushed sideways a distance by defendants' "big truck." In this case, while defendant Strohmeyer testified at his examination before trial that his brakes failed, his testimony is silent as to whether the brake failure was unanticipated, and there is insufficient information in the record of what measures were taken in the past to insure adequate brakes (*see*, ***Stanisz v Tsimis***, 96 AD2d 838, 465 NYS2d 592 [2d Dept 1983]). Furthermore, while defendant Strohmeyer testified that the brakes were checked after a prior failure, he admitted that he was unaware if any repairs were actually made to vehicle (*see*, ***Reid v Rayamajhi***, 17 AD3d 557, *supra*; *compare*, ***Hubert v Tripaldi***, 307 AD2d 692, 763 NYS2d 165 [3d Dept 2003]; ***Schuster v Amboy Bus Co.***, 267 AD2d 448, 700 NYS2d 484 [2d Dept 1999]). Moreover, in the course of his deposition, defendant Strohmeyer admitted that he saw plaintiff's vehicle prior to the impact, but not before he had applied his brakes (*see*, ***Stanisz v Tsimis***, 96 AD2d 838, *supra*). In any event, defendants failed to oppose this motion or otherwise come forward with evidence showing that the alleged brake problem was unanticipated and that they exercised reasonable care to keep them in good working order (*see*, ***Elgendy v Pipel***, 303 AD2d 446, *supra*; ***Hollis v Kellog***, 306 AD2d 244, 761 NYS2d 253 [2d Dept 2003]). As defendants have failed to raise a triable issue of fact, plaintiff is entitled to summary judgment on the issue of defendants' negligence (*see*, ***O'Callaghan v Flitter***, 112 AD2d 1030, 493 NYS2d 28 [2d Dept 1985]).

Accordingly, plaintiff is granted partial summary judgment on liability grounds and the case is to proceed to a determination of damages. Counsel for the parties are reminded to appear for the compliance conference scheduled for March 27, 2008 at which time the court can determine if discovery is complete and when a note of issue may be filed, and upon filing the note of issue, plaintiff is directed to serve a copy of this order with notice of its entry upon the Calendar Clerk of this Court. Upon such service, the Calendar Clerk is directed to place this matter on the Calendar Control Part Calendar for the next available trial date for an assessment of damages.

Dated: March 19, 2008
RIVERHEAD, NY

J.S.C.

___ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION