

**Beccaria v Caruana**

2011 NY Slip Op 30082(U)

January 11, 2011

Sup Ct, New York County

Docket Number: 111789-2007

Judge: George J. Silver

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. George J. Silver, Justice

PART 22

BECCARIA, LUISA

vs.

CARUANA, GABRIEL A.

INDEX NO. 111789-2007

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 006

MOTION CAL. NO. \_\_\_\_\_

FOR THE

The following papers, numbered 1 to 6 were read on this motion to/for \_\_\_\_\_

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause — Affidavits— Exhibits	<u>1</u>
Notice of Cross-Motion — Affidavits — Exhibits	_____
Answering Affirmation/Affidavit — Exhibits — <b>FILED</b>	<u>2, 3, 4, 5</u>
Memorandum of Law	
Replying Affirmation/Exhibits	<u>6</u>

JAN 14 2011

Cross-Motion:  Yes  No

NEW YORK COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is hereby

In this action to recover for personal injuries allegedly sustained in a motor vehicle accident, defendants Garha Taramjit ("Taramjit") and Polkos Cab Corp. ("collectively "defendants") move pursuant to CPLR § 3212 for an order dismissing plaintiff Luisa Beccaria's ("plaintiff") complaint on the grounds that defendants are not liable for the accident and that plaintiff did not sustain a serious injury as defined by Insurance Law § 5102 [d]. Alternatively, defendants move to dismiss plaintiff's loss of income claim on the grounds that plaintiff cannot show loss of income with reasonable certainty and that plaintiff lacks standing to make a loss of income claim on behalf of a non-party corporation.

Liability

Vehicle and Traffic Law § 1141 provides that "[t]he driver of a vehicle intending to turn to the left within an intersection or into an alley, private road, or driveway shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close as to constitute an immediate hazard. Defendants, through admissible deposition testimony, demonstrated their prima facie entitlement to judgment as a matter of law by establishing that co-defendant Gabriel A. Caruana ("Caruana") violated Vehicle and Traffic Law § 1141 when he made a left turn directly into the path of defendants' vehicle as defendants' vehicle was legally proceeding into the intersection with the right of way (*Griffin v Pennoyer*, 49

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE  SETTLE/SUBMIT ORDER/JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

AD3d 341 [1<sup>st</sup> Dept 2008]). Since defendants had the right had the right-of-way, Taramjit was entitled to anticipate that Caruana would obey the traffic laws, which required him to yield to defendants' vehicle (*id.*). However, plaintiff's deposition testimony and her averment that defendants' vehicle was traveling approximately one hundred kilometers<sup>1</sup> prior to the collision is sufficient to raise a triable issue of fact as to defendants' comparative negligence. "A lay witness is ordinarily permitted to testify as to the estimated speed of an automobile based upon the prevalence of automobiles in our society and the frequency with which most people view them at various speeds" (*Shpritzman v Strong*, 248 AD2d 524 [2d Dept 1998]). Since a trier of fact could draw a reasonable inference, short of speculating, that Taramjit's speed may have been a factor in the happening of the accident (*Lynch v Dobler Chevrolet, Inc.*, 49 AD3d 509 [2d Dept 2008]), defendants' motion for summary judgment on the issue of liability is denied.

### Serious Injury

Plaintiff alleges in her bill of particulars that as a result of a November 4, 2004 accident, she sustained cranial-facial trauma with residual cervical pain; disorder of the temporomandibular joints on both sides of her face; neuromuscular imbalance of masticating muscles requiring the application of a hard acrylic resin stabilization splint; significant alteration of the C5-6 disc, and post-traumatic nasal deformity.

In support, defendants submit an affirmed report by Dr. John G. Esposito, Jr., who performed a dental examination of plaintiff on October 30, 2008. Dr. Esposito diagnosed plaintiff as having sustained mild capsulitis/myofascial syndrome left TMJ/Masseter muscle area which had resolved. Dr. Esposito found that plaintiff had excellent range of motion with only mild symptomatology and such findings are sufficient to satisfy defendants' *prima facie* burden with respect to plaintiff's alleged temporalmandibular joint dysfunction injury (*see Fusco v Barnwell House of Tires, Inc.*, 16 AD3d 620 [2d Dept 2005]).

Defendants also submit a report by Dr. Julio V. Westerband, who performed an orthopedic examination of plaintiff on October 28, 2008. Dr. Westerband's report is inadmissible as it is not properly affirmed. The attestation at the end of Dr. Westerband's report states in pertinent part "I, Julio V. Wetserband, M.D., being a doctor duly licensed to practice medicine in the State of NY, pursuant to the applicable provisions of the Civil Practice Law and Rules section 2106, hereby affirm that the claimant was examined according to the restricted rules concerning an independent medical examination." CPLR § 2106 requires that a physician's statement to be "affirmed ... to be true under the penalties of perjury" (*Offman v Singh*, 27 AD3d 284 [1<sup>st</sup> Dept 2006]). However, in reply defendants correct this defect in form by submitting a proper affirmation from Dr. Westerband. Dr. Westerband's affirmed report detailing the objective tests performed, finding that plaintiff had full range of motion in her cervical spine, lumbar spine and bilateral shoulders, and concluding that she had a normal orthopedic examination is sufficient to satisfy defendants' burden with respect to plaintiff's alleged cervical injuries (*Yagi v Corbin*, 44 AD3d 440 [1<sup>st</sup> Dept 2007]).

Defendants also contend that Dr. Daniel S. Arick performed a otolaryngology examination of plaintiff on October 29, 2008 and found no evidence of a permanent injury or any residual deficits. However, defendants have not annexed Dr. Arick's report to their motion papers. Therefore, since defendants have failed to satisfy their burden of establishing through competent medical evidence that plaintiff's alleged post-traumatic nasal deformity does not meet the serious injury threshold (*Linton v Nawaz*, 2009 NY Slip Op 3666 [1<sup>st</sup> Dept]), it is unnecessary

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<sup>1</sup> The bill of particulars describes plaintiff, who resides in Italy, as "a world-famous international fashion designer."

to consider plaintiff's opposition to this branch of defendants' motion (*see McClelland v Estevez*, 2010 NY Slip Op 7067 [1<sup>st</sup> Dept]; *Rubin v SMS Taxi Corp.*, 71 AD3d 548, 549 [2010]).

Defendants are, however, entitled to dismissal of plaintiff's claim under the 90/180 day category of Insurance Law § 5102 in light of the allegations in plaintiff's bill of particulars that she was not confined to bed following the accident but was constrained to remain in New York from the date of the accident until November 25, 2004 (*see Hernandez v Rodriguez*, 63 AD3d 520 [1st Dept 2009]). Moreover, plaintiff testified at her deposition that she resumed her duties with her company in January 2005.

#### Loss of Income

In moving to dismiss plaintiff's lost income claim, defendants argue that it is impossible to estimate how plaintiff's fashion designs would be received on a year-to-year basis and that it is pure speculation that plaintiff's attendance at the various trunk shows she missed in November 2004 would have resulted in higher sales. Defendants also argue that plaintiff's salary of approximately €40,000 did not fluctuate as a result of the accident and that her company's revenues actually increased the year of the accident and in successive years. Additionally, defendants contend that the loss of income was solely to plaintiff's corporation, not to her personally, and that she lacks standing to recover for those losses.

Plaintiff's bill of particulars states that during the period following the accident when she was constrained to remain in New York because of her injuries, plaintiff was unable to maintain her appointments with fashion/style media and press marketing directors and was unable to make appearances at several New York fashion related events that were critical to, if not determinative of, her company's business performance and ability to sell and market merchandise for the 2005 spring/summer fashion season. The bill of particulars further states that to the extent plaintiff was able to attend such functions, her effectiveness at such functions was limited as a result of the injuries she allegedly sustained in the accident. Plaintiff's injuries also caused her to cancel appearances at designer shows for Neiman Marcus in Los Angeles and San Francisco. Plaintiff claims that her lost income damages fall within the range of at least \$300,000 to \$500,000. This range is composed of a decline in sales and plaintiff's need to hire interim additional professionals or representatives due to her diminished capacity. The bill of particulars further alleges that plaintiff sustained damages of approximately \$4,000,000 in lost publicity.

In her affidavit, plaintiff avers that she is the name and face of her company, Luisa Beccaria, S.R.L. and that she makes all decisions as to how the business is run. Plaintiff owns 85 percent of the company and because Italian law prohibits her from owning it entirely, her husband's company owns 10 percent and her mother owns 5 percent. Plaintiff claims that her clientele in New York, whom she describes as "affluent women, including many celebrities, who are looking for elegance and a certain kind of luxurious dressing with an exclusive and chic statement," are used to choosing their wardrobes from her personally and are women "who believe it is quite special and unusual to meet the designer, get her advice, and special order from an entire collection rather than just those designs that a retailer chooses." Plaintiff's clients "do not want to shop in a store from a clerk they do not know" but prefer to buy from plaintiff directly with her "personal supervision and advice." According to plaintiff, in her business "image is everything" and since her face was swollen and bruised from the accident, it was impossible for her to work. Because of her appearance following the accident, and because she was in a "severe state of shock" plaintiff did not attend her New York trunk show but attempted to accommodate her New York customers through her assistant, but it was unsuccessful. Plaintiff also contends that she sent her assistant to a trunk show and appearance she was to have attended at the Neiman Marcus stores in Palm Beach and Miami, Florida but that her assistant had a "much different impact and commercial results lower" than the results plaintiff normally attained. Income from

the Florida trip, therefore, was much less than in previous seasons. In addition to her New York trunk show and her California trip, plaintiff also had to cancel the remainder of her appearances in the United States.

Plaintiff claims that in 2003, the year prior to the accident, her company had revenue of €140,298 from New York private sales for the spring/summer 2004, while in 2004 that revenue declined to €29,401. In 2005, revenues increased to €174,580. Plaintiff also claims that the revenue from sales to Neiman Marcus for spring/summer 2005 were only €4,746, whereas the revenue from fall/winter 2004-2005 was €28,339. Plaintiff further contends that while the revenue from her worldwide operation increased, the revenue from her annual trip to New York fell dramatically in 2004.

As an initial matter, plaintiff has standing to sue for lost earnings because her complaint alleges that defendants breached a duty owed to her that is independent of any duty owed to her corporation, i.e., to use reasonable care to avoid causing injury to her (*Behrens v Metropolitan Opera Assn., Inc.*, 18 AD3d 47 [1<sup>st</sup> Dept 2005]).

In tort actions, an injured plaintiff may recover from the defendant all damages directly flowing from and as a natural consequence of the wrongful act, so long as the damages may be ascertained with reasonable certainty (*Steitz v Gifford*, 280 NY 15, 20, 19 NE2d 661 [1939]). Such damages may include past and future lost earnings (*Tassone v Mid-Valley Oil Co.*, 5 AD3d 931 [3<sup>rd</sup> Dept 2004], *lv denied* 3 NY3d 608, 818 NE2d 668, 785 NYS2d 26 [2004]; PJI 2:290) and “[t]he fact that they cannot be measured with absolute mathematical certainty does not bar substantial recovery if they may be approximately fixed” (*Steitz*, 280 NY at 20). Generally, the lost profits of a business owned or operated by an injured plaintiff are not recoverable as lost earnings if the profits depend for the most part on the employment of capital or the labor of others (*Behrens*, 18 AD3d at 50 [internal citations omitted]). Where, however, the lost profits are the direct result of the plaintiff’s inability, because of injuries, to devote his or her personal skill, talent or ability to the business, the decline in profits following the injury is admissible to show the plaintiff’s loss of earning capacity (*id.*).

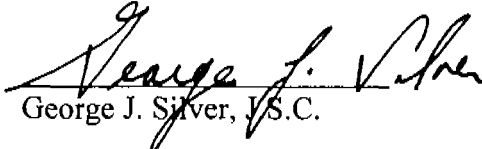
The production of plaintiff’s fashion line no doubt entails an infusion of capital investment and the labor of others, as plaintiff herself concedes in her affidavit when she makes reference to the expenses involved in pre-ordering fabrics and paying a factory in advance so that the factory is prepared to make the clothing once orders are placed. However, plaintiff also avers that her fashion line is not marketed like those of other designers in that she does not rely on high volume distributors or large department stores. Rather, plaintiff claims that she markets her fashion line in New York directly to customers “using her charisma and special appeal” through events and personal appearances organized directly by her retailers and through direct selling via trunk shows. Thus, there is a question as to whether the profits from plaintiff’s fashion line are the direct result of plaintiff’s skill and talent as a marketer or whether the profits depend for the most part on the employment of capital or the labor of others. While defendants contend that plaintiff is merely a “middle-aged woman who designs and oversees the manufacture of clothing” plaintiff’s averments that she is, in essence, the driving sales force at trunk shows and appearances like those she allegedly was unable to attend as a result of the accident raise questions of credibility more appropriate for resolution by a jury than by the court on a motion for summary judgment.

Moreover, the fact that plaintiff’s salary remained constant and that her company’s revenues increased following the accident does not preclude a finding of lost earnings (*Behrens*, 18 AD3d at 51). “The proper test is not whether plaintiff’s salary was reduced for these years, but whether her earnings were reduced because of her injury” (*id.*).

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment is granted to the extent that plaintiff's serious injury claim under the 90/180 day category of Insurance Law § 5102 [d] is dismissed. Defendants' motion is otherwise denied in its entirety; and it is further

ORDERED that defendants are to serve a copy of this order with notice of entry upon all parties within thirty days of entry.

  
George J. Silver, J.S.C.

JAN 11 2011  
Dated:  
New York County

GEORGE J. SILVER  
J.S.C.

**FILED**

**JAN 14 2011**

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