

**Ruisi v Parrott**

2011 NY Slip Op 33153(U)

November 29, 2011

Sup Ct, Nassau County

Docket Number: 13842/09

Judge: Anthony L. Parga

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**SHORT FORM ORDER**

**SUPREME COURT-NEW YORK STATE-NASSAU COUNTY**

**PRESENT:**

**HON. ANTHONY L. PARGA**  
**JUSTICE**

-----X PART 8  
LAWRENCE J. RUISI,

Plaintiff,

-against-

ANDREW L. PARROTT and JOSEPH M. PARROTT,

Defendant.

INDEX NO. 13842/09

**XXX**

MOTION DATE: 10/19/11  
SEQUENCE NO. 001, 002

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Upon the foregoing papers, plaintiff’s motion for partial summary judgment on liability grounds, pursuant to CPLR §3212, is granted to the extent directed below. Defendants’ cross-motion for summary judgment, pursuant to CPLR §3212, on the grounds that the plaintiff did not sustain a “serious injury” within the meaning of New York State Insurance Law §5102(d), is denied to the extent directed below.

The following facts are taken from pleadings and submitted papers and do not constitute findings of fact by this Court.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff, Lawrence J. Ruisi, as a result of a motor vehicle accident which occurred on October 19, 2007, on Cedar Swamp Road, at or near its intersection with Grove Street, Glen Cove, Nassau County, New York.

Plaintiff moves for partial summary judgment on the issue of liability. In support of his motion, plaintiff submits his deposition transcript and the deposition transcript of defendant Andrew L. Parrott. The deposition testimonies of both parties indicate that plaintiff was stopped for a red light at the time that the defendants’ vehicle struck the plaintiff’s vehicle in the rear.

Plaintiff has demonstrated a prima facie showing of entitlement to summary judgment on liability grounds, and the defendants have failed to set forth any non-negligent explanation for the happening of the accident.

A rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence with respect to the operator of the rearmost vehicle, and imposes a duty on the operator of the rearmost vehicle to come forward with an adequate non-negligent explanation for the accident. (*Carman v. Arthur J. Edwards Mason Contracting Co., Inc.*, 71 A.D.3d 813 (2d Dep't 2010)(emphasis added); *Maynard v. Vandyke*, 69 A.D.3d 515 (2d Dep't 2010); *Trombetta v. Cathone*, 59 A.D.3d 526 (2d Dep't 2009); *Ramirez v. Konstanzer*, 61 A.D.3d 837 (2d Dep't 2009); *Garner v. Chevalier Transportation Corp.*, 58 A.D.3d 802 (2d Dep't 2009); *Jumandeo v. Franks*, 56 A.D.3d 614 (2d Dep't 2008); *Johnston v. Spoto*, 47 A.D.3d 888 (2d Dep't 2008); *Harrington v. Kern*, 52 A.D.3d 473 (2d Dep't 2008); *Woods v. Johnson*, 44 A.D.3d 1201 (2d Dep't 2007)). A driver traveling behind another driver has a duty to maintain a safe distance behind the front vehicle, whether it is moving or stopped, to avoid a rear end collision in the event the front vehicle slows down or stops, even suddenly. (N.Y. Veh. & Traf. Law (VTL) §1129(a); *Dicturel v. Dukureh*, 71 A.D. 3d 588 (1<sup>st</sup> Dep't 2010); *Woodley v. Ramirez*, 25 A.D.3d 451 (1<sup>st</sup> Dep't 2006); *Arias v. Rosario*, 52 A.D. 3d 551 (2d Dep't 2008); *Jumandeo v. Franks*, 56 A.D.3d 614 (2d Dep't 2008)). This includes the “duty to see what should be seen and to exercise reasonable care under the circumstance to avoid an accident.” (*DeAngelis v. Kirschner*, 171 A.D.2d 593, 595, 567 N.Y.S.2d 457, 458-59 (1<sup>st</sup> Dep't 1991); *Kachuba v. A & G Cleaning Service, Inc.*, 273 A.D.2d 277 (2d Dep't 2000)). Further, the operator of a motor vehicle does not have a duty to anticipate a rear-end collision due to the negligence of another. (*See, Fiscella v. Gibbs*, 261 A.D.2d 572, 690 N.Y.S.2d 713 (2d Dept. 1999); *Murphy v. Spickler*, 224 A.D.2d 814, 638 N.Y.S.2d 188 (3d Dept. 1996)).

Accordingly, plaintiff's motion for partial summary judgment, on liability grounds only, is granted.

Within defendants' cross-motion for summary judgment, defendants contend that plaintiff's injuries fail to meet the “serious injury” requirements of Insurance Law §5102(d). In support of their cross-motion, defendants rely upon the plaintiff's bill of particulars, plaintiff's deposition transcript, an examination report of orthopedic surgeon, Dr. Isaac Cohen, an examination report of neurologist, Dr. S. Murthy Vishnubhakat, and reports by board certified

radiologist, Dr. Scott Coyne, who reviewed plaintiff's MRI films. Defendant contends that plaintiff did not seek medical treatment from the scene of the accident, but went for treatment one week later. Defendants also contend that plaintiff testified that he missed only ten days from work before returning to work at Credit Suisse.

The defendant submits the report of Dr. Isaac Cohen, a board certified orthopedic surgeon who examined plaintiff at defendant's request on March 30, 2011. Dr. Cohen examined the plaintiff, performed range of motion testing on the plaintiff, and compared those findings to normal findings. Dr. Cohen found that plaintiff had normal ranges of motion in his cervical and lumbosacral spines. Dr. Cohen opined that plaintiff had suffered cervical and lumbosacral sprains, which had resolved. He further opined that plaintiff had no disability, sequelae or permanency related to the accident and that plaintiff is capable of performing his normal daily activities.

The defendant further submits the report of Dr. S. Murthy Vishnubhakat, a board certified neurologist who also examined plaintiff at defendant's request on March 30, 2011. Dr. Vishnubhakat examined the plaintiff, performed range of motion testing on the plaintiff, and compared those findings to normal findings. Dr. Vishnubhakat found that plaintiff had normal ranges of motion in his cervical spine. Dr. Vishnubhakat found that plaintiff had some limitations in the ranges of motion of plaintiff's lumbar spine, but stated that there was no lumbar spine tenderness, paravertebral muscle spasm, or sciatic notch tenderness. When Dr. Vishnubhakat inquired as to why plaintiff has not been able to bend fully forward, he responded that he "is afraid of pain." Dr. Vishnubhakat opined that the MRIs of plaintiff's cervical and lumbar spines showed several areas of degenerative changes. He also opined that plaintiff had a normal neurological examination on March 30, 2011 and had "no evidence of injury to the brain, spinal cord, nerve roots, or the peripheral nerves" as a result of the accident. Dr. Vishnubhakat opined that there were no adverse prognostic indicators, disabilities for daily living, or for his profession as a banker, and that there was no permanency in any of the neural structures as a result of the accident of October 19, 2007.

Lastly, defendants submit the reports of Dr. Coyne relating to his review of plaintiff's cervical spine MRI of February 5, 2008, his soft tissues neck MRI from February 20, 2008, and his lumbosacral spine MRI of February 5, 2008. With respect to plaintiff's cervical MRI film, Dr. Coyne opined that plaintiff had no focal disc herniations and that there were diffuse

degenerative disc changes and multilevel degenerative facet joint changes noted. With respect to plaintiff's soft tissues neck MRI exam, Dr. Coyne opined that plaintiff had a non-traumatic lesion in the right lateral nasopharynx. Dr. Coyne opined that degenerative disc and facet joint changes are chronic and longstanding, preexistent and not causally related to the accident of October 19, 2007. He stated further that "these cervical spine and soft tissue neck MRI examinations demonstrate no evidence of any osseous or soft tissue abnormality or other trauma causally related to the October 19, 2007 accident." With respect to plaintiff's lumbosacral spine MRI, Dr. Coyne opined that there are diffuse degenerative disc changes, with dehydration of disc material, marginal osteophyte formation, diminished disc heights and annular disc bulging. He opined that annular disc bulging is developmentally normal, and that there is no evidence of focal disc herniation. He stated that there are degenerative disc and facet joint changes which are chronic and long-standing, preexistent and causally unrelated to the accident of October 19, 2007.

Contrary to plaintiff's arguments, the defendant has made a prima facie showing of entitlement to summary judgment on the grounds that the plaintiff's injuries do not meet the "serious injury" requirements of Insurance Law §5102(d). (*Tourre v. Avis Rent A Car Sys.*, 98 N.Y.2d 345 (Ct. of App. 2002); *Gaddy v. Eyster*, 79 N.Y.2d 955 (Ct. of App. 2002)). In his opposition, the plaintiff argues that the defendant has failed to make a prima facie showing of entitlement to summary judgment, in part, because defendants' experts fail to address plaintiff's contention that he meets the "ninety out of the first one-hundred eighty day test." The plaintiff, himself, however, testified to missing only ten days from work following the accident. Accordingly, from the evidence submitted, the plaintiff was not limited in his "usual and customary" daily activities for at least 90 days during the 180 days immediately following accident, as he missed only ten days from work at Credit Suisse. (*See, Hemsley v. Ventura*, 50 A.D.3d 1097, 857 N.Y.S.2d 642 (2d Dept. 2008); *Charley v. Goss*, 863 N.Y.S.2d 205 (1st Dept. 2008); *Rodriguez v. Virga*, 24 A.D.3d 650, 808 N.Y.S.2d 373 (2d Dept. 2005); *Onishi v. N & B Taxi Inc.*, 51 A.D.3d 594, 858 N.Y.S.2d 171 (1st Dept. 2008)). The New York State courts have consistently held that where pretrial evidence establishes that the plaintiff was not prevented from performing substantially all the material acts of daily living for less than the requisite 90 days, summary dismissal is warranted. *Charley v. Goss*, 863 N.Y.S.2d 205 (1st Dept. 2008) *Onishi v. N & B Taxi Inc.*, 51 A.D.3d 594, 858 N.Y.S.2d 171 (1st Dept. 2008) *Hemsley v. Ventura*, 50 A.D.3d 1097, 857 N.Y.S.2d 642 (2d Dept. 2008); *Rodriguez v. Virga*, 24 A.D.3d

650, 808 N.Y.S.2d 373 (2d Dept. 2005); *See also, Hemsley v. Ventura*, 50 A.D.3d 1097, 857 N.Y.S.2d 642 (2d Dept. 2008)(although plaintiff testified at deposition that as a result of accident she was confined to her home for two or three months and suffered certain limitations in her activities around home, there was no competent medical evidence indicating that she was unable to perform substantially all of her daily activities). To satisfy the 90/180 category of Insurance Law §5102(d), a plaintiff must be prevented from performing “substantially all” of his customary daily activities, and not merely a few. (See, *Onishi v. N & B Taxi Inc.*, 51 A.D.3d 594, 858 N.Y.S.2d 171 (1st Dept. 2008) (dismissing claim where plaintiff was advised by physicians to refrain from landscaping and heavy lifting and was only somewhat restricted in daily activities); *See also, Hemsley v. Ventura*, 50 A.D.3d 1097, 857 N.Y.S.2d 642 (2d Dept. 2008)).

In support of his opposition to the defendants’ motion, the plaintiff submits a report by one of his treating physicians, Dr. Philip M. Rafiy, dated August 10, 2011. While the Court is cognizant of the fact that CPLR §2106 requires medical doctors to affirm the contents of their affirmations to be true under the penalties of perjury, the Court finds Dr. Rafiy’s August 10, 2011 affirmation to be sufficient. Plaintiff further submits the unsworn and unaffirmed reports of Dr. Rafiy from August 29, 2011, the unsworn and unaffirmed reports of Dr. Joseph Lopez, M.D., and the unsworn and unaffirmed MRI reports of Dr. Diamond and Dr. Tice, which are not in admissible form and shall not be considered by the Court. (See, *Pagano v. Kingsbury*, 182 A.D.2d 268, 587 N.Y.S.2d 692 (2d Dept. 1992); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980); *Kwak v. Villamar*, 71 A.D.3d 762 (2d Dept. 2010)).

Dr. Rafiy performed an examination of the plaintiff on August 10, 2011. At that time, Dr. Rafiy tested plaintiff’s ranges of motion in his cervical and lumbar spines and compared those findings to normal findings. Dr. Rafiy found that plaintiff had limited ranges of motion in both his cervical and lumbar spines. Dr. Rafiy opined that plaintiff sustained injuries to the cervical and lumbar spine as a result of the accident of October 19, 2007 and has “significantly restricted range of motion of the cervical spine in all planes.” He further opined that it is medically probable that the plaintiff will not achieve his pre-accident medical status and will continue to have ongoing restricted ranges of motion of the cervical spine. He opined that the plaintiff will have ongoing severe neck pain and low back pain which will be aggravated by activity, cold or damp days, and changes in barometric pressure. Lastly, Dr. Rafiy opined that the injuries to plaintiff’s cervical and lumbar spines are permanent in nature and are directly causally

related to the subject accident.

The proponent of a summary judgment motion “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.” (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986)). Once the movant has demonstrated a prima facie showing of entitlement to judgment, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of a fact which require a trial of the action. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980)).

Plaintiff has produced evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of this action. (*See, Adetunji v. U-Haul*, 250 A.D.2d 483, 672 N.Y.S.2d 869 (1<sup>st</sup> Dept. 1998); *Brown v. Achy*, 9 A.D.3d 30, 776 N.Y.S.2d 56 (1<sup>st</sup> Dept. 2004)). The report of plaintiff’s doctor, Dr. Rafiy, from August 10, 2011 demonstrates objective evidence of the physical limitations in plaintiff’s cervical and lumbar spines resulting from the within accident and warrants the denial of the defendants’ cross-motion. (*See, Kearse v. New York City Transit Authority*, 15 A.D.3d 45 (2d Dept. 2005)). As the Court of Appeals has recently ruled that contemporaneous quantitative measurements are not a prerequisite to recovery, plaintiff’s failure to demonstrate same herein is not sufficient to warrant the granting of summary judgment against the plaintiff. (*Perl v. Meher*, ---N.E.2d---, 2011 WL 5838721 (N.Y.), 2011 N.Y. slip Op. 08452 (2011)).

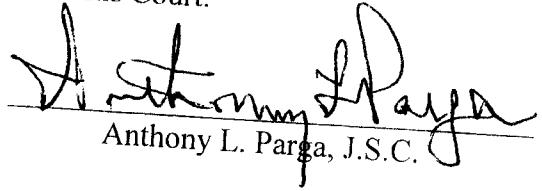
Accordingly, defendants’ cross-motion for summary judgment is denied. If there is any doubt as to the existence of a triable issue of fact, or if a material issue of fact is arguable, summary judgment should be denied. (*Celardo v. Bell*, 222 A.D.2d 547, 635 N.Y.S.2d 85 (2d Dept. 1995); *Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 A.D.2d 572, 536 N.Y.S.2d 177 (2d Dept. 1989)).

With respect to the portion of defendants’ cross-motion which requests an order compelling plaintiff to provide certain outstanding discovery, it is hereby ordered that within twenty (20) days of this Order, plaintiff shall provide to defendants: unrestricted authorizations to obtain plaintiff’s employment records from 2006 to present; authorizations to obtain plaintiff’s Federal Tax Returns and copies of plaintiff’s actual tax returns maintained by the plaintiff for the tax years 2006 to present; authorizations to obtain plaintiff’s long and short term disability file with Met Life; authorizations to obtain plaintiff’s Social security disability file(s), if any; and a

copy of plaintiff's passport(s), including all stamped pages. In the event that plaintiff fails to comply with the above-noted directives, his complaint shall be dismissed upon the submission of an Affirmation of Non-Compliance, on notice, by the Movant.

This constitutes the decision and Order of this Court.

Dated: November 29, 2011

  
Anthony L. Parga, J.S.C.

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**ENTERED**  
DEC 05 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE