

SHORT FORM ORDER

Present: SUPREME COURT - STATE OF NEW YORK
HON. JOSEPH A. DE MARO

Justice

CHRISTINE ROSENBERG and JOSEPH ROSENBERG,

TRIAL/IAS, PART 13
NASSAU COUNTY

Plaintiffs,

MOTION DATE:
December 6, 2000
INDEX No. 19161/99

-against-

SEQUENCE No. 1, 2

BARRET COMPANY, INC., RICK BARRET and
CRAIG CAPOBIANCO,

Defendants.

The following papers read on this motion:

- Notice of Motion and Supporting Papers (Defendants)
- Notice of Cross-Motion and Supporting Papers (Plaintiffs)
- Affirmation in Opposition (Plaintiffs)
- Affirmation in Opposition (Defendants)
- Reply Affirmation (Defendants)

Motion by defendants for an order pursuant to CPLR 3212 and Insurance Law §5102(d) granting them summary judgment dismissing the complaint is denied.

Cross-motion by plaintiffs for an order pursuant to CPLR 3212(e) granting them partial summary judgment on the issue of liability is granted.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Christine Rosenberg. It is not disputed that on January 8, 1997, while she was stopped at a red light on Sunrise Highway in Bellmore, her automobile was rear-ended by a truck driven by defendant Craig Capobianco. At the time, Capobianco was working for defendant Barret Company, Inc. and operating a truck owned by defendant Rick Barret. Mr. Capobianco admitted at his examination before trial that his foot slipped off the brake pedal and as a result, he rear-ended the Rosenberg vehicle, causing minor damage to her car.

"A rear-end collision with a stopped vehicle creates a prima facie case of liability with respect to the operator of the moving vehicle and imposes a duty of explanation upon him or her (see, Maschka v Newman, 262 AD2d 615; Danza v Longieliere, 256 AD2d 434; Niemiec v Jones, 237 AD2d 267)." (Colonna v Suarez, ___ AD2d ___, 2000 WL 1851904, NYLJ, 12/26/2000, p. 31, col. 1). Mr. Capobianco has not offered a nonnegligent explanation for the collision. The plaintiffs are accordingly entitled to summary judgment on the issue of liability. (Filippazzo v Santiago, ___

AD2d ____, 716 N.Y.S.2d 710; Demenagas v Yan Hok Lai, 275 AD2d 759; Aloia v Stoffel, 273 AD2d 420).

The defendants' motion for summary judgment dismissing the complaint for lack of a serious injury as required by Insurance Law §5104(a) and defined by Insurance Law §5102(d) is denied. After the accident, the plaintiff, who was 26-27 weeks pregnant with twins, experienced premature labor contractions necessitating her hospitalization for one month and constant bed rest until her twins were born several weeks premature on March 20, 1998. Furthermore, following the twins' cesarean birth, plaintiff's bleeding was problematic and a hysterectomy was necessary. Dr. Sidney James Siegel opines in his affirmation that Mrs. Rosenberg's premature labor on January 8, 1997, her condition thereafter and the resultant need for a cesarean section were all causally related to the motor vehicle accident. In addition, there is a question of fact as to whether as a result of the accident, plaintiff was unable to perform substantially all of the material acts which constituted her usual and customary daily activities for 90 of the 180 days immediately following the accident.

Lastly, although untimely under CPLR 3212(a), since plaintiffs' cross-motion was submitted in response to defendants' motion, the Court may still entertain it. (Rosa v R. H. Macy Co. Inc., 272 AD2d 87; Keeley v Berley Realty Corp., 271 AD2d 299; Miranda v Devlin, 260 AD2d 451).

Plaintiffs are awarded summary judgment against defendants on the issue of liability. The issue of assessment of damages shall abide a trial.

A conference shall be held at the 9:30 a.m. calendar call of this IAS Part on April 4, 2001 to ascertain what if any further discovery on the issue of damages may be necessary with a view towards certifying the matter for trial. Only counsel with knowledge of the facts and with authority to negotiate and to stipulate shall appear. This conference shall not be adjourned without consent of the Court.



J.S.C.

Dated: January 22, 2001

ENTERED

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NASSAU COUNTY
COUNTY CLERKS OFFICE