SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU

Present: HON. ZELDA JONAS
Justice

TRIAL/IAS PART 19

LORRAINE PRIMROSE,

Plaintiff,

Index No. 7661/02

- against -

Sequence No. 9
Motion Date: February 4, 2005

MICHAEL P. BRESLIN, OGDEN BROS. COLLISION, INC., NICK RENDA, LISA A. RENDA, and LEE D. ORR,

Defendants.

The following papers read on this motion:

Notice of Motion. 1
Affirmation in Opposition 2
Reply Affirmation 3
Memoranda of Law . . . . . 4 - 5

Motion by defendant, Lee D. Orr, for an order pursuant to CPLR 3212 granting him summary judgment dismissing the complaint as against him is denied.

Plaintiff commenced this action to recover damages for personal injuries allegedly sustained in a three-car, chain-reaction accident on October 14, 1999.

The following pertinent facts of the case are set forth in our short form order dated June 1, 2004: "Plaintiff was a passenger in the vehicle driven by defendant Orr (Vehicle #1) when it was struck in the rear by the vehicle driven by defendant Nick

Renda (Vehicle #2) which ha[d] been struck in the rear by a tow truck owned by defendant Ogden Bros. and driven by defendant Breslin (Vehicle #3)."

In support of his motion for summary judgment, defendant Orr asserts that this Court has already determined that the vehicles operated by defendants Renda and Orr were non-negligent because their vehicles were stopped at a red traffic light prior to the impact between Renda's vehicle and defendant Breslin's vehicle. In other words, defendant Orr argues that the sole cause of the accident was the negligence of defendants Breslin and Ogden.

In opposition, plaintiff, an innocent passenger, contends that defendant breached its duty of care by allowing plaintiff to occupy a seat which was broken and in a state of disrepair. Plaintiff also claims that the seat belt which she was using also caused her to sustain injuries as it failed to remain in a constant state of tension.

At his examination before trial, defendant Orr testified, in pertinent part, as follows:

> "You want me to tell everything, right? I pulled up to the light and I stopped. I'm going north. Southbound is a Nassau County police car. I'm going north, he going south. He's on the other side of the light. When all of a sudden, boom. Something hit me in the back. My car shook and I saw [Lorraine] like hit the door, because I knew the seat, the right that lever up there was broke on that car." (Orr's EBT, page 18) (emphasis added)

Defendant further testified that the front leg of the bucket seat was broken (*id.* at p. 21) and that he never told Lorraine that the "seat moved back and forth" (*id.* at p. 22).

It is well settled that the proponent of a summary judgment motion must make a *prima facie* showing by submitting evidentiary facts sufficient to establish his entitlement to judgment as a matter of law (*Winegrad v. New York University Medical Center,* 64 N.Y.2d 851, 853; *Zuckerman v. City of NY,* 49 N.Y.2d 557, 562; *Republic National Bank of New York v. Zito*, 280 A.D.2d 657). A failure to make that showing requires the denial of summary judgment motion, regardless of the adequacy of the opposing papers (*Ayotte v. Gervasio,* 81 N.Y.2d 1062, 1063). Further, the court's task is one of issue finding rather than issue determination (*Kriz v. Schum,* 75 N.Y,2d 25) and not to resolve issues of credibility. (*See, Ferrente v. American Lung Association,* 90 N.Y.2d 623.)

It is equally true that summary judgment in negligence will rarely be awarded as the question of negligence is usually an issue to be resolved by a trier of fact (*Ugarriza v. Schmieder,* 46 N.Y.2d 471, 474; *Andre v. Pomeroy*, 35 N.Y.2d 361). Indeed, the Court of Appeals has cautioned "that even in those negligence cases in which 'the facts are conceded there is often a question as to whether the defendant or the plaintiff acted reasonably under the circumstances'" (*id.* at page 364).

Under the facts at bar, defendant Orr has not tendered proof in evidentiary form establishing his entitlement to judgment as a matter of law dismissing the complaint. Contrary to defendant Orr's contention, we cannot conclude as a matter of law that defendant Orr acted reasonably under the circumstances. A question of fact exists as to the comparative fault, if any, of defendant Orr, particularly where, as here, defendant

Orr admitted that the passenger seat was broken at the time of the accident (*see e.g., Boston v. Dunham,* 274 A.D.2d 708 [3rd Dept. 2000]).

Accordingly, defendant Orr's motion for summary judgment is denied.

Dated: 3/3/05

J.S.C.

ENTERED

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COUNTY CLERK'S OFFICE