

**Rossi v Alhassan**

2007 NY Slip Op 32361(U)

July 24, 2007

Supreme Court, New York County

Docket Number: 0109616/2002

Judge: Deborah A. Kaplan

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

PRESENT: HON. DEBORAH A. KAPLAN  
*Justice*

PART 22

ROSEMARY ROSSI and SALVATORE BROCCADO

INDEX NO. 109616-2002

MOTION DATE 5-30-07

MOTION SEQ. NO. 006

MOTION CAL. NO. 79

- v -

MULLAM ALHASSAN, NOBILITY TAXI CORP.,  
MAHAMAD NIZAM, RAJAI LUFTI and  
FORD MOTOR CORPORATION

MALLAM ALHASSAN

-v-

MAHAMAD NIZAM. RAJAI LUTFI and  
FORD MOTOR CORPORATION

KAPLAN, J.:

**FILED**  
JUL 31 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

In this personal injury action, the defendants Mahamad Nizam and Rajai Lufti move for summary judgment dismissing the complaint on the ground that the plaintiff Mallam Alhassan did not sustain a "serious injury" within the meaning of Insurance Law 5102(d).

At approximately 9:00 a.m. on December 24, 2001, at the intersection of East 79<sup>th</sup> Street and Fifth Avenue in Manhattan, New York, a vehicle driven by Mallam Alhassan and owned by Nobility Taxi Corp. was involved in a front end collision with a vehicle driven by Mahamad Nizam and owned by Rajai Lufti. Lufti leased the vehicle from the Ford Motor Corporation. As a result of this incident, plaintiff claims to have sustained a serious injury to his neck, back, elbow, wrist and knee. Defendants' Nizam and Lufti, now move for summary judgment averring that plaintiff has failed to establish a serious injury as defined by Insurance Law §5102, and as such any recovery should be limited to that provided by No-Fault Insurance.

In support of their motion, the defendants submit the affirmed reports of

Dr. Leon Sultan, a board certified orthopedist and Dr. Daniel J. Feurer, a board certified neurologist. Each of these doctors, performed an Independent Medical Exam (IME) on the plaintiff as part of this litigation. Defendants also proffer the deposition testimony of the plaintiff, as well as the complaint and various other filings.

Dr. Sultan examined the plaintiff on October 23, 2006, after reviewing his prior medical reports, including his MRI films. In his report, Dr. Sultan details the independent tests he employed during his examination as well as the ranges of motion in both Alhassan's lumbar and cervical spine, shoulder, elbow and knee which he states are normal. He concludes that Alhassan does not have any neurological disability or casually related impairment, and finds that the spinal exam he conducted does not correlate to the MRI of the lumbar spine.

Dr. Feurer, who also reviewed plaintiff's medical records, prior to performing his examination on October 30, 2006, discusses in his report, various observations of the plaintiff's mobility and flexibility and concludes that his neurological exam is within normal limits. He performs a number of objective tests and measures plaintiff's range of motion. He concludes that he does not suffer any objective neurological disability or neurological permanency, casually related to the accident. In further support of their motion, the defendants also submit the plaintiff's deposition, discussing his treatment and activities subsequent to the accident, including that he was treated at and released from New York Hospital on the day of the accident and missed approximately five months of work as a taxi cab driver following the accident but is now able to drive between five and six days a week. The defendants also argue that plaintiff ceased active treatment for the injuries alleged some four years ago and as such has an unexplained gap in his care.

In opposition to the motion, the plaintiff submits his affidavit as well as the affirmations of Dr. Lyzette Velazquez, board certified in psychiatry and neurology and Dr. David Stemerman, a radiologist who conducted and interpreted his MRI films. Dr. Velazquez, who first treated plaintiff for the injuries sustained in this accident on January 8, 2002 provides a very detailed report which discusses the numerous independent tests she performed on plaintiff that day and throughout his course of treatment. Dr. Velazquez, recently examined plaintiff in February of 2007, and found significant restrictions in his range of movement in both his cervical and lumbar spines of fifty to sixty percent as compared to the stated

norms. These findings which were objectively measured by use of a goniometer, are similar to the ones made contemporaneously at his first examination, shortly after the accident. She also supports Alhassam's 90/180 claim by indicating that he was medically unable to return to his normal work, while under her care for the first five months following the accident. She also discusses the MRI films, which are in admissible form and attached to the plaintiff's submission as well as Dr. Stemerman's findings. This doctor concludes that plaintiff has restricted ranges of motion in both his cervical and lumbar spine as well as herniated discs, all casually related to the subject accident. Further Dr. Velazquez asserts that plaintiff stopped active treatment based on her assessment that he had reached the maximum medical benefit. She concludes that plaintiff suffers from a permanent disability as a result of the subject accident.

To prevail on a motion for summary judgment, the moving party must produce evidentiary proof in admissible form sufficient to show the absence of any material issue of fact and the right to judgment as a matter of law. See Kosson v Algaze, 84 NY2d 1019 (1995); Alvarez v Prospect Hospital, 68 NY2d 320 (1986); Winegrad v New York Univ. Med Ctr., 64 NY2d 851 (1985); Zuckerman v City of New York, 49 NY2d 557 (1980). Where, as here, a defendant seeks summary judgment on the threshold "serious injury" issue under "No-Fault threshold" issue (Insurance Law § 5102[d]), he or she bears the initial burden of establishing the absence of a "serious injury" as a matter of law. This is because, in enacting Insurance Law §5102(d), the Legislature intended to weed out frivolous claims and limit recovery to significant injuries arising from motor vehicle accidents. See Pommells v Perez, 4 NY3d 566 (2005); Toure v Avis Rent A Car Systems, 98 NY2d 345 (2002); Licari v Elliot, 57 NY2d 230 (1982).

"Where a defendant fails to meet his initial burden of establishing a prima facie case that the plaintiff did not sustain a serious injury, it is not necessary to consider whether the plaintiff's papers in opposition were sufficient to raise a triable issue of fact." Offman v Singh, 27 AD3d 284, 285 (1<sup>st</sup> Dept. 2006); see Winegrad v New York Univ. Med Ctr., 64 NY2d 851 (1985).

However, if the moving party makes the requisite showing, the burden then shifts to the opposing party to come forward with proof in admissible form to raise a triable issue of fact requiring a trial. See Kosson v Algaze, supra; Alvarez v Prospect Hospital, supra; Winegrad v New York Univ. Med Ctr., supra; Zuckerman

v City of New York, supra. The party opposing a motion for summary judgment on the threshold "serious injury" issue must come forward with objective proof of his or her injury to raise a triable issue. See Toure v Avis Rent A Car Systems, supra; Dufel v Green, 84 NY2d 795 (1995). Subjective complaints alone are not sufficient. See Toure v Avis Rent A Car Systems, supra; Gaddy v Eyler, 79 NY2d 955 (1992). However, either "an expert's designation of a numeric percentage of a plaintiff's loss of range of motion" or "an expert's qualitative assessment of a plaintiff's condition" may substantiate a claim of serious injury. See Toure v Avis Rent A Car Systems, supra; Dufel v Green, supra.

In deciding a summary judgment motion, the court must bear in mind that issue finding rather than issue determination is the key to summary judgment. See Sillman v Twentieth Century Fox Film Corp., 3 NY2d 395 (1957). Furthermore, since summary judgment is a drastic remedy which deprives a litigant of his or her day in court, the evidence adduced on the motion must be liberally construed in the light most favorable to the opposing party. See Kesselman v Lever House Restaurant, 29 AD3d 302 (1<sup>st</sup> Dept. 2006); Goldman v Metropolitan Life Ins. Co., 13 AD3d 289 (1<sup>st</sup> Dept. 2004).

Here, the defendants have met their initial burden by producing evidentiary proof in admissible form sufficient to show the absence of any material issue of fact. See Toure v Avis Rent A Car Systems supra; Gaddy v Eyler, supra. However, plaintiff has satisfied his burden by presenting sufficient admissible medical evidence which establishes to create triable issues of fact. Garner v Tong, 27 AD3d 401 (1<sup>st</sup> Dept. 2006); Priviteria v Brown, 28 AD3d 733 (2<sup>d</sup> Dept. 2006); Secore v Allen, 27 AD3d 825 (3<sup>rd</sup> Dept. 2006); DeJesus-Martinez v Singh, 2007 NY Slip Op 50256U, 2007 N.Y. Misc. Lexis 373 (App.Term 1<sup>st</sup> Dept. 2007); Martin v Marquez, 2007 NY SlipOp 50214U, 2007 N.Y. Misc. Lexis 333(App. Term 1<sup>st</sup> Dept. 2007). It is also well settled law that a bulging or herniated disc may constitute a serious injury within the meaning of Insurance Law §5102(d). See Pommels v Perez, 4 NY3d 566 (2005); Nagbe v Mimigreen Hacking Group, Inc., 22 Ad3d 326 (1<sup>st</sup> Dept. 2005); Arjona v Calcano, 7 AD3d 279 (1<sup>st</sup> Dept.2004). Furthermore a CT scan or MRI may constitute objective evidence to support subjective complaints, (see Arjona v Calcano, supra; Lessser v Smart Cab Corp., 283 AD2d 273 (1<sup>st</sup> Dept 2001), so long as plaintiff offers "some objective evidence of the extent or degree of the alleged physical limitations, and their duration, resulting from the disc injury" Arjona v Calcano, supra; see Pommels v Perez, 4

NY3d 566 (2005); Simms v APA Truck Leasing Corp., 14 AD3d 322 (1<sup>st</sup> Dept. 2005). Plaintiff has also sufficiently addressed the gap in his course of treatment by presenting evidence from Dr. Velazquez that after a course of physical therapy, acupuncture and chiropractic adjustments over a period of months he had achieved the maximum medical benefit possible, and that any other treatment would be merely palliative. See Pommells v Perez, Brown, Dunlap, Carasco v Mendez, 4 NY3d 566 (2005); Garner v Tong, *supra*; Neuberger v Gill, 19 AD3d 561 (2d Dept. 2005).

For these reasons and upon the foregoing papers, it is

ORDERED that the defendants motion for summary judgment is denied in its entirety.

The parties are directed to appear for a pre-trial conference in Part 22, Room 136, 80 Centre Street, New York, New York, on September 13, 2007, 9:30 a.m.

This constitutes the Decision and Order of the Court.

**FILED**  
JUL 31 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

July 27, 2007  
Dated: ~~July 20, 2007~~

*Deborah Kaplan*  
Deborah A. Kaplan J.S.C.  
**DEBORAH A. KAPLAN**  
J.S.C.

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Check if appropriate:  DO NOT POST