

<b>Pasato-Garnica v Lam</b>
2008 NY Slip Op 31011(U)
April 7, 2008
Supreme Court, Richmond County
Docket Number: 0101969/2005
Judge: Joseph J. Maltese
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND DCM PART 3**

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**Index No.: 101969/2005  
Motion No.:005/006**

**LUIS PASATO and  
MARIA PASATO-GARNICA**

*Plaintiffs*

*against*

**DECISION & ORDER**

**SAM POU LAM, and  
KEI SOI LAM,**

**HON. JOSEPH J. MALTESE**

*Defendants*

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The following items were considered in the review of this motion for summary judgment.

<u>Papers</u>	<u>Numbered</u>
<b>Notice of Motion and Affidavits Annexed</b>	<b>1,2</b>
<b>Order to Show Cause</b>	
<b>Answering Affidavits</b>	<b>3</b>
<b>Replying Affidavits</b>	<b>4</b>
<b>Exhibits</b>	<b>Attached to Papers</b>

Defendants' motion pursuant to 22 NYCRR § 202.21(e) striking the action from the calendar; pursuant to CPLR § 3212(a) extending defendants' time to move for summary judgment; and pursuant to CPLR § 3124 directing plaintiff, Luis Pasato to provide responses to items 7 and 8 of defendants' Supplemental Notice for Discovery and Inspection dated December 6, 2006 is granted. Defendants' motion pursuant to CPLR § 3212 and Insurance Law § 5102(d) seeking to dismiss plaintiffs' complaints because plaintiffs have not sustained a "serious injury" is granted in part and denied in part.

**Facts**

This is an action for personal injuries that arises out of a motor vehicle accident that occurred on the Verrazano Narrows Bridge. Plaintiffs alleged that they sustained serious injuries as that term is defined by statute.

Defendants bring two motions before the court. The first motion seeks: 1) to strike the action from the calendar upon the ground that the Certificate of Readiness is incorrect; 2) to extend defendants time to move for summary judgment; and 3) to direct plaintiffs Luis Pasato and Maria Pasator-Garnica to provide responses to discovery demands. Plaintiffs offer no opposition to this motion.

Defendants bring a second motion. In this motion defendants seek a finding of summary judgment in their favor on the issue of damages and for any possible claim of economic loss on the grounds that plaintiffs did not sustain a “serious injury” as that term is defined by Insurance Law § 5102(d). Plaintiff, Luis Pasato opposes this motion while plaintiff Maria Pasator-Garnica does not.

## **Discussion**

### ***Motion Sequence 5***

Neither plaintiff contests defendants arguments contained in their motion. It is the finding of the court that discovery is not complete. As such, the Certificate of Readiness is materially incorrect and shall be struck.

### ***Summary Judgment: Failure to Sustain a “Serious Injury”***

In the case before the court defendants came forward with reports from independent medical exams. Defendants presented sworn statements from Dr. Robert Israel, an orthopedist; and Dr. Kuldip K. Sachdev, a neurologist. Each affirmed statement utilized objective tests and determined that both plaintiffs’ injuries are subjective and that any previous conditions are resolved. Defendants, have sufficiently challenged plaintiffs allegation that they sustained a serious injury.

The plaintiff in such a situation must present objective evidence of the injury. The mere parroting of language tailored to meet statutory requirements is insufficient.<sup>1</sup> Additionally, a plaintiff's subjective claim of pain and limitation of motion must be sustained by verified objective medical findings which are based on a recent examination of the plaintiff.

Defendants argue that the proof proffered by Mr. Pasato in support of his injuries should be disregarded, as the initial medical records are unsworn. Defendants' cite to *Grasso v. Angerami*,<sup>2</sup> to support their argument that Mr. Pasato's unsworn medical reports are inadmissible to demonstrate a "serious injury." Defendants' reliance on this case is misplaced. In that case, defendants had successfully offered evidence that demonstrated plaintiff failed to sustain a "serious injury." It was then incumbent on the plaintiff to offer rebuttal evidence that showed a "serious injury" existed. In that case, plaintiff came forward with an unsworn medical report without any excuse as to why the evidence proffered was not in proper form. The Court held ". . . as plaintiff did not offer any excuse for his failure to provide the medical report in proper form, we need not consider whether proof of serious injury in inadmissible form is sufficient to defeat a motion for summary judgment pursuant to Insurance Law § 5102(d) . . ." <sup>3</sup>

In opposition to defendants' assertions that he did not sustain a "serious injury" as that term is defined by statute, plaintiff, Mr. Pasato submits the affirmed report of Dr. Alexander Berenblit a board certified neurologist. Dr. Berenblit presented objective evidence that demonstrates that plaintiff, Luis Passato, is suffering physical limitations as a direct result of his prior accident. Dr. Berenblit observed limitations of plaintiff, Luis Pasato's range of motion that went beyond his pure subjective assertions that he suffered pain and discomfort. As such plaintiff, Luis Pasato, successfully met his burden to demonstrate the existence of an issue of fact as to whether he suffered a serious injury.

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<sup>1</sup> *Id.*

<sup>2</sup> *See, Grasso v. Angerami*, 79 NY2d 813, [1991].

<sup>3</sup> *Id.*

In contrast plaintiff, Maria Pasato-Garnica, failed to offer any objective evidence to support her claim that she sustained a “serious injury” as that term is defined by statute.

Defendants further assert that both plaintiffs did not sustain injuries that prevented them from performing substantially all of the material acts that constituted their usual and customary daily activities for not less than ninety days during the one hundred eight days immediately following the accident.<sup>4</sup>

Mr. Pasato asserts that as a result of the injuries he sustained he was never able to maintain the two jobs he previously worked. He avers that the injuries he sustained from the accident prevent him from working his night job. Furthermore, he asserts that the injuries he sustained caused him to be unable to perform his primary job at the pre-accident level. He asserts that his diminished physical capacity resulted in a reduction of responsibilities, from operating machinery to placing stickers on clothing. As a result of this limitation Luis Pasato endured a decrease in his hourly wage. Additionally, plaintiff Luis Pasato now must pay others to handle household chores such as lawn maintenance in the summer and shoveling in the winter.

In support of his argument Mr. Pasato submits various medical reports that document the treatment he received for injuries he sustained injuries. Mr. Pasato relies on medical proof based upon an examination that was conducted close to the time the opinion was rendered.<sup>5</sup> A review of these reports demonstrate to that plaintiff sustained injuries that prevented him from performing substantially all of the material acts that constituted his usual and customary daily activities for not less than ninety days during the one hundred eight days immediately following the accident. In addition to Mr. Pasato’s subjective assertions of injury, plaintiff’s motion contains a detailed list of treatment given by Dr. Michael N. Mastoris, a chiropractor, from

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<sup>4</sup> Insurance Law § 5102(d)

<sup>5</sup> See, *Grossman v. Wright, supra; Yamin v. Broughman Bus Transp. Co.*, 220 AD2d 739 [2d Dep’t. 1995]

August 13, 2002 through June 6, 2003. Furthermore, the notes prepared by Dr. Mastoris indicate that these injuries are causally connected to the accident.

Defendants argue that this evidence should be overlooked by the court as it is not in appropriate form. Defendants assert that the medical reports are required to be sworn or affirmed so as to constitute admissible evidence. Defendants assertions are misplaced. While an affirmed or sworn report is required to counter a defendants showing that a “serious injury” was not sustained, a plaintiff need only present the medical record kept in connection with the plaintiff patient to sustain the its burden relating to the 90/180 requirement.<sup>6</sup> As such, Mr. Pasato presented adequate proof to withstand a summary judgment finding.

In contrast, Maria Pasato-Garnica, failed to offer any objective evidence to support her claim that she sustained injuries that prevented her from performing substantially all of the material acts that constituted her usual and customary daily activities for not less than ninety days during the one hundred eight days immediately following the accident as that term is defined by statute.

Defendants final argument is that Mr. Pasato failed to substantiate a four year gap in treatment. In support of this argument defendants cite to *Marshall v. Albano*.<sup>7</sup> Defendants contend that the Appellate Division Second Department held that a gap in treatment of sixteen months without explanation is unacceptable. This court disagrees with that interpretation. Substantial delays between cessation of plaintiff’s medical treatments post-accident and an expert examination must be explained.<sup>8</sup> Similarly, substantial delays between the accident and a physical examination must be explained.<sup>9</sup> The court has held that “serious injury” was not

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<sup>6</sup> *See, Relin v. Brotherton*, 221 AD2d 840 [3d Dep’t. 1995].

<sup>7</sup> *Marshall v. Albano*, 182 AD2d 614 [2d Dep’t. 1992]

<sup>8</sup> *Grossman*, 268 AD2d at 84.

<sup>9</sup> *Smith v. Askew*, 264 AD2d 834, 695 NYS2d 405 [2<sup>nd</sup> Dept 1999].

proven because plaintiff failed to substantiate an eight-year gap between the accident and his examination.<sup>10</sup>

Here, Mr. Pasato avers that the gap in treatment is due Dr. Mastoris' directing him that he had reached a plateau in his treatment and that his injuries were no longer treated with therapy. This court finds this explanation acceptable to withstand a motion for summary judgment.

### Conclusion

A motion for summary judgment must be denied if there are "facts sufficient to require a trial of any issue of fact."<sup>11</sup> Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. "Moreover, the parties competing contentions must be viewed in a light most favorable to the party opposing the motion."<sup>12</sup> Summary judgment should not be granted where there is any doubt as to the existence of a triable issue or where the existence of an issue is arguable.<sup>13</sup> Given the record before this court, it is impossible to state as a matter of law that there are no issues of fact that merit evaluation by a jury.

Accordingly, it is hereby:

ORDERED, that defendants' motion pursuant to 22 NYCRR § 202.21(e) striking the Certificate of Readiness is granted; it is further

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<sup>10</sup> *Id.*

<sup>11</sup> CPLR §3212[b].

<sup>12</sup> *Marine Midland Bank, N.A., v. Dino, et al.*, 168 AD2d 610 [2<sup>nd</sup> Dept 1990].

<sup>13</sup> *American Home Assurance Co., v. Amerford International Corp.*, 200 AD2d 472 [1<sup>st</sup> Dept 1994].

ORDERED, that defendants' motion pursuant to CPLR § 3212(a) extending defendants' time to move for summary judgment is granted; it is further

ORDERED, that defendants' motion pursuant to CPLR §§ 3124 and 3126(2) directing plaintiff, Luis Pasato to provide responses to items #7 and #8 of the defendants' Supplemental Notice for Discovery and Inspection dated December 6, 2006 is granted; it is further

ORDERED, that plaintiff Luis Pasato shall respond to the items in the Notice for Discovery and Inspection stated above within thirty days from the date of this Decision and Order; it is further

ORDERED, that defendants' motion pursuant to CPLR § 3212 for summary judgment against Luis Pasato is denied; it is further

ORDERED, that defendants's motion pursuant to CPLR § 3212 for summary judgment against Maria Pasato-Garnica, is granted and the complaint is hereby severed and dismissed as against defendants Sam Pou Lam and Kei Soi Lam, and the Clerk is directed to enter judgment in favor of said defendants; it is further

ORDERED, that the remainder of this action shall continue; and it is further

ORDERED, that all parties shall report to DCM 3 on **April 16, 2008 at 9:30 A.M.** for a pre-trial conference.

ENTER,

DATED: April 7, 2008

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Joseph J. Maltese  
Justice of the Supreme Court