

**Rojas v Xingtao Liu**

2008 NY Slip Op 33320(U)

December 3, 2008

Supreme Court, Nassau County

Docket Number: 019531/06

Judge: Daniel R. Palmieri

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SHORT FORM ORDER

Scan

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU

Present:

HON. DANIEL PALMIERI  
Acting Justice Supreme Court

HENRY ROJAS,

TRIAL TERM PART: 48

Plaintiff,

INDEX NO.: 019531/06

-against-

MOTION DATE: 9-2-08  
SUBMIT DATE: 11-3-08  
SEQ. NUMBER - 001

XINGTAO LIU,

Defendant.

The following papers have been read on this motion:

- Notice of Motion, dated 7-25-08.....1
- Affirmation in Opposition, dated 9-24-08.....2
- Reply Affirmation, dated 10-30-08.....3

This motion by defendant Xingtao Liu for an order pursuant to CPLR 3212 and Insurance Law §§ 5104(a), 5102(d), granting him summary judgment dismissing the complaint against him on the ground that the plaintiff did not suffer a "serious injury" as required by Insurance Law §5104(a) and defined by Insurance Law § 5102(d) is denied.

The plaintiff in this action seeks to recover damages for personal injuries he sustained in a motor vehicle accident on April 18, 2006. The defendant seeks summary judgment dismissing the complaint on the ground that the plaintiff did not sustain a "serious injury" as required by Insurance Law § 5104(a) and defined by Insurance Law §5102(d).

"On a motion for summary judgment pursuant to CPLR 3212, the proponent 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." *Sheppard-Mobley v King*, 10 AD3d 70, 74 (2d Dept. 2004), *aff'd. as mod.*, 4 NY3d 627 (2005), *citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986); *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). "Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." *Sheppard-Mobley v King*, *supra*, at p. 74; *Alvarez v Prospect Hosp.*, *supra*; *Winegrad v New York Univ. Med. Ctr.*, *supra*. Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact. *Alvarez v Prospect Hosp.*, *supra*, at p. 324. The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference. *See, Demishick v Community Housing Management Corp.*, 34 AD3d 518, 521 (2d Dept. 2006), *citing Secof v Greens Condominium*, 158 AD2d 591 (2d Dept. 1990).

In this action, the plaintiff alleges that as a result of the accident, he suffered disc herniations with impingement at L4-5 and L5-S1; cervical and lumbosacral sprain/strain with radiculopathy; lumbar myofascial derangement, bilateral shoulder sprain; and restriction of motion to the cervical and lumbosacral spine and shoulders, which he characterizes as a permanent consequential limitation of use of a body function or system; a significant limitation of use of a body function or system; and, a medically determined injury or impairment of a non-permanent nature which prevented him from performing substantially all of the material acts which constituted his usual and customary daily activities for not less

[\* 3 ]  
than 90 days during the 180 days immediately following the accident. Insurance Law § 5102(d). Simply put, he alleges that he sustained injuries to his neck, left shoulder and lower back. At his examination-before-trial, the plaintiff testified that he missed work sporadically during the month-and-a-half following his accident.

In support of his motion, the defendant has submitted the affirmation of Harold Kozinn, M.D., a Diplomate of the American Board of Orthopaedic Surgery and C. M. Sharma, M.D., a Diplomate of the American Board of Psychiatry and Neurology, both of whom examined the plaintiff personally on March 20, 2008.

Dr. Kozinn affirms to having reviewed the plaintiff's Emergency Room records; the x-ray of the plaintiff's cervical and lumbar spines which showed no evidence of fracture or subluxation; the MRI of the plaintiff's lumbar spine dated June 5, 2006 performed by Dr. Shapiro; the nerve conduction survey performed by Dr. Visram; the report by Dr. De Moura of the NY Spine Institute; the reports of Dr. Visram; and the plaintiff's "Progress Notes."

He affirms that he examined the plaintiff personally on March 20, 2008 and affirms that the Straight Leg Raising, Laseque and Patrick's tests were negative. After specifically setting forth the normal ranges of motion and those displayed by the plaintiff, he found that the plaintiff had a full range of motion in his cervical spine and shoulders and a very slight limitation in his lumbosacral spine: While the normal range of motion of forward flexion is 80 degrees, the plaintiff had only 70 degrees. He diagnosed the plaintiff with a lumbosacral sprain and opined that no further treatment was indicated.

Dr. Sharma affirms to having reviewed the reports of Dr. Visram and Dr. De Moura; the report of the nerve conduction survey; the report of the MRI of the plaintiff's lumbar

[\* 4 ]  
spine; and the reports of the plaintiff's cervical and lumbar spine x-rays. Dr. Sharma noted that the plaintiff had surgery on his lumbar spine prior to the accident from which he had fully recovered. After examining the plaintiff, Dr. Sharma concluded that the plaintiff exhibited subjective cervical and lumbar pain and that his neurological examination was normal.

The defendant also established that the plaintiff did not suffer a medically determined injury or impairment that prevented him from performing substantially all of the material acts which constituted his usual and customary daily activities for at least 90 out of the 180 days immediately following his accident by presentation of his work record. *See, Camacho v Dwelle*, 54 AD3d 706 (2<sup>nd</sup> Dept. 2008), citing *Bartley v Trans Car & Limo*, 41 AD3d 624 (2<sup>nd</sup> Dept. 2007).

In view of the foregoing, the Court finds that the defendant has demonstrated his entitlement to summary judgment, thereby shifting the burden to the plaintiff to establish the existence of a material issue of fact.

The plaintiff may rely on reports which the defendant's expert either relied upon or noted. *Smeja v Fuentes*, 54 AD3d 326 (2<sup>nd</sup> Dept. 2008), citing *Kearse v New York City Transit Authority*, 16 AD3d 45 (2<sup>nd</sup> Dept. 2005) and *Zarate v McDonald*, 31 AD3d 632 (2<sup>nd</sup> Dept. 2006). Nevertheless, in opposing the motion, the plaintiff must submit objective medical evidence of an injury based upon a recent medical examination that is causally related to the accident. *Toure v Avis Rent A Car Sys.*, 98 NY2d 345 (2002); *see also, Grossman v Wright*, 268 AD2d 79, 84 (2<sup>nd</sup> Dept. 2000). Furthermore, a significant lapse of time between the cessation of medical treatments and the examination conducted by

plaintiff's expert to satisfy this requirement must be adequately explained. *Grossman v Wright, supra*, at p. 84, citing *Smith v Askew*, 264 AD2d 834 (2<sup>nd</sup> Dept. 1999).

In opposition, the plaintiff faults the defendant's experts for not adequately addressing the plaintiff's medical history as is reflected in the reports reviewed by them, for example, his history of disc herniations. However, standing alone, that failure is of no consequence. *See, Kearse, v New York City, supra; see also, Meely v 4 G's Truck Renting Co., Inc.*, 16 AD3d 26 (2<sup>nd</sup> Dept. 2005). Plaintiff also faults the defendant's expert for not setting forth the tests he performed to evaluate the plaintiff's range of motion, but he has done so: More specifically, he affirms that "Straight Leg Raising, Laseque and Patrick's test" were negative bilaterally. The plaintiff's argument that the defendant's expert's finding of full range of motion is not adequate to establish that the plaintiff did not suffer a significant limitation of movement because it does not address let alone negate the plaintiff's history of limitations as reflected in his medical records fails as well. The defendant's expert found that whatever limits in his range of motion the plaintiff had suffered had resolved in less than two years after the accident.

In addition, however, the plaintiff has submitted the affirmation of Dr. Visram, who examined him on September 22, 2008. He notes that the MRI of plaintiff's lumbar spine of June 5, 2006 revealed a central herniation at L4/5, with extension of disc into the neuroforaminal bilaterally/grade III impingement; and a right foramina herniation at L5/S1, creating impingement on the nerve root. He associates the plaintiff's injuries with the subject motor vehicle accident. He explains that range of motion testing using goniometry

revealed an 82 degree range of motion in plaintiff's lumbar flexion, with 90 degrees being normal; a 26 degree range of motion in plaintiff's lumbar extension with 30 degrees being normal; a 22 degree range of motion in plaintiff's right lateral bending with 25 degrees being normal; a 56 degree range of motion in plaintiff's cervical flexion with 60 degrees being normal; a 47 degree range of motion in plaintiff's cervical extension with 50 degrees being normal; a 73 degree range of motion in plaintiff's left cervical rotation with 80 degrees being normal; a 74 degree range of motion in plaintiff's right cervical rotation with 80 degrees being normal; a 37 degree range of motion in plaintiff's left cervical lateral bending with 45 degrees being normal; and, a 40 degree range of motion in plaintiff's right cervical lateral bending with 45 degrees being normal.

Dr. Visram diagnosed the plaintiff as suffering from post-traumatic lumbar spine disc herniation at L4/5, with myofascial pain; post-traumatic lumbar radiculopathy, as per electrodiagnostic studies; post-traumatic cervical spine sprain and strain, with myofascial pains; and post-traumatic left shoulder sprain and strain, with persistence of pain. In opposition to this motion, Dr. Visram opines that plaintiff's injuries "are the sole reason he is unable to regain full range of motion and why his daily living activities have been greatly reduced." He states that the plaintiff "has problems playing sports, sitting or standing for prolonged periods, difficulty lifting and playing with his son, Nicholas, age three, carrying items up and down stairs and household chores including grocery shopping." He opines that the plaintiff's "injuries have caused a partial permanent impairment in the use of his neck and lower back." Based upon his examination of plaintiff in conjunction with his review of his imaging studies, it is his impression that plaintiff sustained cervical and lumbar

musculoskeletal and radicular pain syndromes and lumbar disc herniations and that in light of the chronic nature of the plaintiff's injuries and clinical symptoms, he has sustained a permanent partial disability causally related to the accident. He described these injuries as significant in light of the range of motion tests and described the plaintiff's prognosis as poor. Dr. Visram explains that plaintiff ended his treatment in September 2006 because physical therapy stopped helping him. The plaintiff has further explained that his no-fault benefits had terminated and that he could not afford further treatment.

Based upon the foregoing, the Court finds that the plaintiff has rebutted the defendant's *prima facie* showing, and has established the existence of a material issue of fact as to whether he suffered a significant limitation of use of a body function or system.

This shall constitute the Decision and Order of this Court.

DATED: December 3, 2008

**TO: Kenneth M. Mollins, Esq.**  
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**Russo & Apoznanski**  
**By: Susan J. Mitola, Esq.**  
**Attorneys for the Defendant**  
**875 Merrick Avenue**  
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ENTER



HON. DANIEL PALMIERI  
Assistant County Justice

**ENTERED**

DEC 05 2008  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE