

<b>Cruz v Ryder Truck Rental, Inc.</b>
2011 NY Slip Op 34041(U)
June 24, 2011
Supreme Court, Bronx County
Docket Number: 15094/2006
Judge: Alison Y. Tuitt
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[\* 1]

7-14-11

JUL 13 2011

PART 05

- Case Disposed
- Settle Order
- Schedule Appearance

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX:

CRUZ, NOEL

Index No. 0015094/2006

-against-

Hon. ALISON Y. TUITT

RYDER TRUCK RENTAL, INC.,

Justice.

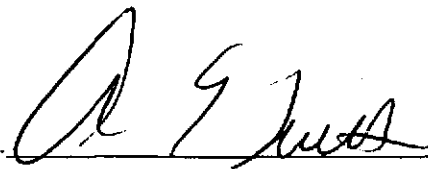
The following papers numbered 1 to 5 Read on this motion, **SUMMARY JUDGMENT DEFENDANT**  
Noticed on **December 10 2010** and duly submitted as No. \_\_\_\_\_ on the Motion Calendar of 2/14/11

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1, 2	
Answering Affidavit and Exhibits	3, 4	
Replying Affidavit and Exhibits	5	
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this *motion and cross motion for summary judgment* are decided in accordance with the annexed memorandum decision dated June ~~24~~ 2011

Motion is Respectfully Referred to:  
Justice: \_\_\_\_\_  
Dated: \_\_\_\_\_

Dated: 6, 24, 11

Hon.   
ALISON Y. TUITT, J.S.C.

NEW YORK SUPREME COURT-----COUNTY OF BRONX

PART IA - 5

NOEL CRUZ,

INDEX NUMBER: 15094/2006

Plaintiff,

-against-

Present:  
HON. ALISON Y. TUITT  
Justice

RYDER TRUCK RENTAL, INC., FELIX RIVERA  
and ALFONSO CESAREO,

Defendants.

The following papers numbered 1 to 4

Read on this Defendants' Motions for Summary Judgment

On Calendar of 2/14/11

Notices of Motion/Cross-Motion-Exhibits and Affirmations 1, 2

Affirmation in Opposition and Exhibits 3

Reply Affirmation 4

Upon the foregoing papers, defendant Felix Rivera's motion and defendants' Ryder Truck Rental, Inc. and Alfonso Cesareo cross-motion for summary judgment on the issue of threshold are consolidated for purposes of this decision. For the reasons set forth herein, defendants' motion and cross-motion are denied.

The within action arises from a motor vehicle accident on June 7, 2005 in which plaintiff alleges he sustained serious injuries. Defendants move for summary judgment on the grounds that plaintiff failed to prove a serious injury as required by §5102(d) of the Insurance Law.

The court's function on this motion for summary judgment is issue finding rather than issue determination. Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1978). The movant must come forward with evidentiary proof

in admissible form sufficient to direct judgment in its favor as a matter of law. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. Stone v. Goodson, 8 N.Y.2d 8, (1960); Sillman v. Twentieth Century Fox Film Corp., *supra*.

In the present action, the burden rests on defendant to establish, by the submission of evidentiary proof in admissible form, that plaintiff has not suffered a serious injury. Lowe v. Bennett, 511 N.Y.S.2d 603 (1<sup>st</sup> Dept. 1986), *aff'd*, 69 N.Y.2d 701 (1986). When a defendant's motion is sufficient to raise the issue of whether a "serious injury" has been sustained, the burden shifts and it is then incumbent upon the plaintiff to produce prima facie evidence in admissible form to support the claim of serious injury. Licari v Elliot, 57 N.Y.2d 230 (1982); Lopez v. Senatore, 65 N.Y.2d 1017 (1985). When a claim is raised under the "permanent consequential limitation of use of a body organ or member", "significant limitation of use of a body function or system," or "a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment," in order to prove the extent or degree of physical limitation, an expert's designation of a numeric percentage of a plaintiff's loss of range of motion is acceptable. Toure v. Avis Rent A Car Systems, Inc., 98 N.Y.2d 345 (2002). In addition, an expert's qualitative assessment of a plaintiff's condition is also probative, provided that: (1) the evaluation has an objective basis and, (2) the evaluation compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system. Toure, *supra*.<sup>1</sup>

In the instant action, defendants move for summary judgment arguing that plaintiff has not suffered a serious injury pursuant to §5102 of the Insurance Law. In his bill of particulars, plaintiff alleges to have sustained, in relevant part, an annular bulge at L5-S1, peripheral annular tear, thecal sac margin flattening, central/right paracentral extruded disc herniation at L4-L5, compression of the anterior thecal sac margin, mass effect upon the traversing right L5 nerve root (confirmed by MRI taken on September 17, 2005); posterior displacement of the posterior longitudinal ligament, longitudinal tear of the posterior horn of the lateral meniscus contacting the superior surface (confirmed by MRI taken on July 14, 2005); central posterior herniation at C3-C4 with intervertebral disc impinging upon the thecal sac, posterior herniation of the C5-C6 intervertebral disc impinging on the anterior aspect of the thecal sac and the underlying cervical spinal cord,

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<sup>1</sup>The Toure decision appears to indicate that claims of neck or back injury resulting from bulging or herniated discs may be considered either under the category of a "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system," as well as the 90/180 day category (Toure v. Avis Rent A Car Systems, Inc., 98 N.Y.2d 345, 352, 774 N.E.2d 1197, 746 N.Y.S.2d 865 [2002].)

straightening of the cervical lordosis (confirmed by MRI taken on July 14, 2005); right knee contusion; small knee joint effusion; cervical radiculopathy; and lumbar radiculopathy.

In opposition to the motions, plaintiff submits his own affidavit and the affirmation of his treating physician, Jeffrey Gross, M.D. Plaintiff's accident occurred on July 7, 2005. Plaintiff testified that after the accident, he felt pain in his knee, back and shoulder but did not go to the hospital immediately after the accident because he was nervous. Plaintiff stated that he sought treatment for the injuries he allegedly sustained in the accident either one, two or three days after the accident. The plaintiff's medical records from Well Being Medical P.C. indicate that plaintiff was treated there on July 7, 2005 by Victor Marini, M.D., at which time he was presented with complaints of radiating neck and lower back pain as well as the left knee. Range of motion testing of plaintiff's cervical spine revealed significant restrictions as follows: extension at 30 degrees (50 degrees is normal); left and right lateral flexion at 20 degrees (40 degrees is normal). Range of motion testing of the lumbar spine also revealed significant restrictions as follows: flexion at 90 (60 normal); extension 20 (30 normal); left and right lateral flexion at 10 (20 normal). Straight leg testing was positive bilaterally. Plaintiff was recommended physical therapy which he commenced immediately thereafter, attending four sessions from July 8, 2005 to July 16, 2005.

Thereafter, plaintiff came under the care of Dr. Gross on July 19, 2005 and presented with complaints of pain and restricted range of motion in the lumbar spine, dorsal spine and right knee with increased pain with walking, standing, lifting and sleeping. Dr. Gross reviewed the plaintiff's MRI reports as well as the records from Well Being Medical P.C. Dr. Gross' objective findings of his physical examination of plaintiff included decreased and painful range of motion of the cervical spine, tenderness and spasms in the bilateral T2-4 muscles; tenderness of the bilateral C4T1 muscles; limited range of motion of the lumbar spine with tenderness and spasm in the bilateral L4S1 muscles and positive right straight leg raising for low back pain. Plaintiff was started on a physical therapy rehabilitation program of three sessions per week and was prescribed pain medication. Dr. Gross states that since plaintiff commenced treatment with him in July 2005, he has continued to oversee the treatment of plaintiff and plaintiff continued to receive physical therapy under his care from July 20, 2005 to August 26, 2009. In addition, Dr. Gross administered many trigger point injections into the trapezii over the years of treatment. Since plaintiff commenced treatment with Dr. Gross, plaintiff has continued to have complaints of pain that ranges from a dull ache to throbbing and radicular pain in his trapezius, scapula and back. Plaintiff has reported difficulty lifting and moving things and has had restriction in his work and home life. Plaintiff has continued to take pain medication.

Dr. Gross most recently examined plaintiff on December 7, 2010 and found positive findings regarding the injuries plaintiff allegedly sustained in the accident. Dr. Gross states that plaintiff continues to complain of pain in the affected areas and continues to have restricted range of motion in his cervical spine

lacking 10 degrees in right and left rotation and 15 degrees in extension. Plaintiff's range of motion in his lumbar spine lacks 10 degrees in flexion, there is tenderness of the L5-S1 muscles and tenderness and spasm of the right trapezius and right rhomboid muscles. Dr. Gross states that the trigger point injections have only provided temporary relief. The three years of continuous treatment has allowed plaintiff to continue to work as a maintenance and mail room person. Dr. Gross further states that plaintiff's conditions are permanent and still require intermittent treatment, trigger point injections, narcotic pain medication despite three years of physical therapy. Dr. Gross finds that plaintiff has a permanent partial disability with range of motion findings abnormal and representing approximately 10 to 30% restrictions which are significant findings. Finally, Dr. Gross states that since further medical treatment or therapy would only be palliative in nature, plaintiff's treatment has been terminated.

Defendants' motion and cross-motion for summary judgment on the issue of serious injury must be denied. Plaintiff has presented evidence which raises issues of fact as to whether he sustained a serious injury. Plaintiff shows contemporaneous objective proof of the limitations sustained as a result of the injury such as an expert's designation of a numeric percentage of loss of range of motion or the extent or degree of physical limitation. See, Lazarus v. Perez, 901 N.Y.S.2d 39 (1<sup>st</sup> Dept. 2010) citing Franchini v. Palmieri, 1 N.Y.3d 536 (2003). See also Vargas v. Ahmed, 837 N.Y.S.2d 654 (1<sup>st</sup> Dept. 2007)(First Department reversing this Court's denial of summary judgment on the issue of serious injury, where plaintiff's physician's affirmation did not indicate that he conducted a physical examination of plaintiff, or any objective tests, contemporaneous with the accident.) Here, the records from Well Being Medical, P.C. show that plaintiff received treatment for his complaints of pain within a short time following the accident and significant restrictions of range of motion in his cervical and lumbar spine was noted. In addition, the MRI's taken of plaintiff's cervical and lumbar spine as well as his right knee indicate objective findings which can be found by a jury to constitute serious injuries.

Defendants contention that the Court must disregard the plaintiff's MRI reports and medical records as they are not in admissible form is without merit. While it is true that unsworn reports are insufficient to defeat a summary judgment motion, the Court may rely on the reports since they were affirmatively relied upon by defendants' examining physician in rendering his opinion that plaintiff did not sustain a serious injury. See, Grasso v. Angerami, 79 N.Y.2d 178 (1991); Toledo v. A.P.O.W. Auto Repair Towing, 762 N.Y.S.2d 495 (1<sup>st</sup> Dept. 2003). In support of a claim that plaintiff has not sustained a serious injury, a defendant may rely either on the sworn statements of the defendant's examining physician or the unsworn reports of plaintiff's examining physician. See, Pagano v. Kingsbury, 587 N.Y.S.2d 692 (2d Dept. 1992). Dr. Alvin M. Bregman makes it clear in his report that he reviewed the same records that defendant now objects to plaintiff using. Moreover, plaintiff here submits the affirmation of his treating physician of over three years and a medical affirmation which is based on a physician's personal examination and observations of the plaintiff is an

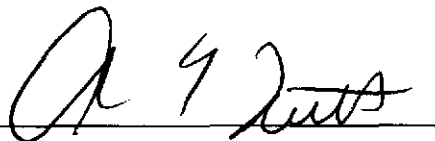
acceptable method to provide a doctor's opinion regarding the existence and extent of a plaintiff's serious injury. O'Sullivan v. Atrium Bus Co., 668 N.Y.S.2d 167 (1<sup>st</sup> Dept. 1998). Insofar as "the evidence adduced by the first-hand observations" of Dr. Gross, "it does not avail defendants that the MRI reports are unsworn". Rice v. Moses, 752 N.Y.S.2d 318 (1<sup>st</sup> Dept. 2002).

Moreover, plaintiff has had a recent physical examination. "In order to raise a triable issue of fact, plaintiff must demonstrate a limitation of range of motion sustained by objective medical findings that are 'based on a recent examination of the plaintiff.'" Thompson v. Abbasi, 788 N.Y.S.2d 48 (1<sup>st</sup> Dept. 2005) quoting Grossman v. Wright, 707 N.Y.S.2d 233 (2d Dept. 2000). Here, plaintiff has shown that he continues to suffer from the injuries he allegedly sustained in the accident. Furthermore, plaintiff has adequately explained the discontinuation of his medical treatment. See, Pommells v. Perez, 4 N.Y.3d 566 (2005). Bent v. Jackson, 788 N.Y.S.2d 56 (1<sup>st</sup> Dept. 2005). The explanation must be substantiated by the medical records in order to be deemed reasonable. For instance, an explanation that further treatment would be futile or merely palliative has been deemed insufficient where based solely upon a plaintiff's own subjective beliefs, uncorroborated by medical evidence. See e.g., McNamara v. Wood, 797 N.Y.S.2d 606 (3d Dept. 2005). Here, both Dr. Gross and plaintiff have provided an adequate explanation.

Accordingly, defendants' motion and cross-motion for summary judgment are denied.

This constitutes the decision and order of this Court.

Dated: June 24, 2011



Hon. Alison Y. Tuitt