

**Yubini v Chase Manhattan Auto Fin. Ctr.**

2013 NY Slip Op 30234(U)

February 1, 2013

Sup Ct, Richmond County

Docket Number: 104644/08

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.: 104644/08  
Motion No.: 003**

**ALDO YUBINI,**

*Plaintiff*

**DECISION & ORDER**

**HON. JOSEPH J. MALTESE**

*against*

**CHASE MANHATTAN AUTO FINANCE CENTER,  
JEANETTE ROSADO, and  
THE CITY OF NEW YORK,**

*Defendants*

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

<u>Papers</u>	<u>Numbered</u>
<b>Notice of Motion and Affidavits Annexed</b>	<b>1</b>
<b>Affirmation in Opposition</b>	<b>2</b>
<b>Memorandum of Law in Opposition</b>	<b>3</b>
<b>Affirmation in Reply</b>	<b>4</b>
<b>Exhibits</b>	<b>Attached to Papers</b>

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The defendants, Jeanette Rosado and Chase Manhattan Auto Finance Center, the owner of Rosado's vehicle move for summary judgment dismissing the plaintiff's complaint arguing: 1) that Rosado, the driver, was not liable for the vehicular accident; and 2) that the plaintiff failed to sustain a "serious injury" as that term is defined by Insurance Law § 5102(d). The motion is denied.

**Facts**

On May 2, 2008, the plaintiff, Aldo Yubini, a police officer, was a passenger in a police van operated by his partner, Police Officer Nicholas Norris. At the time of the accident both

police officers were on duty. Norris and the plaintiff were in the parking lot of the Barnes & Noble book store located at 2245 Richmond Avenue, Staten Island, New York when they received a call over the radio to respond to a “1010 call” concerning a suspicious vehicle or male.

Richmond Avenue is a major thoroughfare on Staten Island. At this particular intersection the eastbound side consists of four driving lanes, one left turn lane and a parking lane; the southbound side consists of four driving lanes and one parking lane. Without activating the police van’s emergency lights or siren, Officer Norris proceeded westbound and attempted to make an illegal left turn on to the southbound side of Richmond Avenue after crossing the four eastbound lanes. The defendant maintains that the traffic signal displayed a green light in her favor. However, the plaintiff and Police Officer Norris maintain that the green light was in favor of their vehicle. The defendant, Rosado’s vehicle struck the police van as it attempted to complete the illegal left turn as she proceeded southbound on Richmond Avenue.

The plaintiff submitted to physical examinations by doctors selected by the defendants. The plaintiff was examined by Dr. Daniel Feurer, a neurologist, and Dr. John Denton, an orthopedist. Dr. Feurer’s affirmed report shows that the plaintiff sustained a 5 degree loss in flexion in his lumbar spine, but was within normal range with respect to all other range of motion tests. The remainder of the report demonstrated a normal neurological examination.

The range of motion tests performed by Dr. Denton demonstrate that the plaintiff displayed normal ranges of motion, but for a decrease of ten degrees in his left shoulder’s internal rotation. Dr. Denton concluded that, “Based on clinical findings of today’s examination, there is evidence of mild residual loss of motion of the left shoulder, however there is no functional disability.”

The defendants move for summary judgment dismissing the plaintiff’s complaint arguing 1) that the plaintiff did not sustain a “serious injury” as that term is defined by Insurance Law § 5102(d); and 2) that the plaintiff bears no liability for this accident.

## Discussion

A motion for summary judgment must be denied if there are “facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). 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>1</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>2</sup> As is relevant, summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law.<sup>3</sup> On a motion for summary judgment, the function of the court is issue finding, and not issue determination.<sup>4</sup> In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion.<sup>5</sup>

### *Liability*

The defendant, Rosado’s argument that she could not be liable must be rejected. The defendant failed to demonstrate an entitlement to judgment as a matter of law, as there is a question of fact concerning the color of the light at the time of the accident. Consequently, this

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<sup>1</sup> *Marine Midland Bank, N.A., v. Dino, et al.*, 168 AD2d 610 [2d Dept 1990].

<sup>2</sup> *American Home Assurance Co., v. Amerford International Corp.*, 200 AD2d 472 [1<sup>st</sup> Dept 1994].

<sup>3</sup> *Rotuba Extruders v. Ceppos.*, 46 NY2d 223 [1978]; *Herrin v. Airborne Freight Corp.*, 301 AD2d 500 [2d Dept 2003].

<sup>4</sup> *Weiner v. Ga-Ro Die Cutting*, 104 AD2d 331 [2d Dept 1984]. *Aff’d* 65 NY2d 732 [1985].

<sup>5</sup> *Glennon v. Mayo*, 148 AD2d 580 [2d Dept 1989].

issue must be tried before a jury.<sup>6</sup> The fact that the plaintiff's vehicle was in the intersection while making an illegal left turn would not have a bearing if the defendant's vehicle was subject to a red traffic light signal. Given the fact that there is an issue concerning which motorist had the red light at the time of the accident, this court will not evaluate the plaintiff's position that Police Officer Norris could have availed himself of VTL § 114-6 that authorizes certain emergency vehicles involved in emergency operations to disregard certain ordinary rules of driving.

### *Threshold*

A defendant can establish that the plaintiff's injuries are not serious within the meaning of Insurance Law §5102(d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim. Where defendant's motion for summary judgment properly raises an issue as to whether a serious injury has been sustained, it is incumbent upon the plaintiff to produce evidentiary proof in admissible form in support of his or her allegations.<sup>7</sup> The burden, in other words, shifts to plaintiff to come forward with sufficient evidence to demonstrate the existence of an issue of fact as to whether he or she suffered a serious injury.<sup>8</sup> 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>9</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. Here, the defendants met their burden demonstrating that the plaintiff did not sustain a "serious injury." Therefore, it is now incumbent on the plaintiff to come forward with evidence that he sustained a "serious injury."

In opposition to the defendants' motion, the plaintiff submits the affirmation of Ali Guy,

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<sup>6</sup> *Figueroa v. Kozminsky*, 59 AD2d 521 [2d Dep't. 1977].

<sup>7</sup> *See, Kordana v. Pomellito*, 121 AD2d 783, appeal dismissed, 68 NY2d 848.

<sup>8</sup> *See, Gaddy v. Eycler*, 79 NY2d 955; *Grossman v. Wright* 268 AD2d 79 [2<sup>nd</sup> Dept 2000].

<sup>9</sup> *Id.*

M.D., a diplomate of the American Board of Physical Medicine and Rehabilitation; and the affirmed medical records of Joseph Giovinazzo, M.D., an orthopedic surgeon. Contrary to the assertions of the defendant that the Appellate Division, Second Department's decision in *Gerardi v. Verizon N.Y., Inc.*<sup>10</sup> precludes the use of expert affirmations after the filing of the Note of Issue and Certificate of Readiness, a later decision by that court determined that failing to disclose experts prior to the filing of the Note of Issue and Certificate of Readiness does not divest the court from considering an expert affirmation or affidavit in the context of a timely filed summary judgment motion.<sup>11</sup> Consequently, the court is free to consider the affirmation of Dr. Guy.

Dr. Guy affirms that the plaintiff suffers from significant range of motion deficits, which he attributes to the motor vehicle accident in question. The medical records provided by Dr. Giovinazzo make no reference to any additional left shoulder injury occurring in June 2009. Consequently, the plaintiff's credibility and Dr. Guy's opinion must be evaluated by a jury.

Accordingly, it is hereby:

ORDERED, that the defendants' motion for summary judgment is denied; and it is further

ORDERED, that the parties shall return to DCM Part 3, 130 Stuyvesant Place, 3<sup>rd</sup> Floor on **Monday, February 25, 2013 at 9:30 a.m.** for a Pre-Trial Conference.

ENTER,

DATED: February 1, 2013

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Joseph J. Maltese  
Justice of the Supreme Court

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<sup>10</sup> 66 AD3d 960 [2d Dep't. 2009].

<sup>11</sup> *Rivers v. Birnbaum*, 102 AD3d 26 [2d Dep't. 2012].