

**Roy v Xhudo**

2023 NY Slip Op 33874(U)

October 30, 2023

Supreme Court, New York County

Docket Number: Index No. 452234/2019

Judge: James G. Clynes

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

<p><b>PRESENT: <u>HON. JAMES G. CLYNES</u></b></p> <p style="text-align: center;"><i>Justice</i></p> <p>-----X</p> <p>OHENDRA ROY</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- v -</p> <p>AJDAR XHUDO,</p> <p style="text-align: center;">Defendant.</p>	<p><b>PART</b> <span style="float: right;"><b>22M</b></span></p> <p><b>INDEX NO.</b> <u>452234/2019</u></p> <p><b>MOTION DATE</b> <u>01/09/2023, 01/24/2023</u></p> <p><b>MOTION SEQ. NO.</b> <u>001 002</u></p> <p style="text-align: center;"><b>DECISION + ORDER ON MOTION</b></p>
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The following e-filed documents, listed by NYSCEF document number (Motion 001) 26, 27, 28, 29, 30, 31, 32, 33, 34, 66, 68, 70, 71, 72, 73, 74, 75, 76, 77, 78

were read on this motion to/for

JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 002) 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 67, 69, 79, 80, 81

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents and following oral argument, the motion by Defendant for summary judgment and dismissal of Plaintiff's Complaint on the grounds that Plaintiff fails to meet the serious injury threshold requirement under Insurance Law 5102 (d) (Motion Sequence #1) and the motion by Plaintiff for summary judgment on the issue of liability, finding Plaintiff free from comparative fault, and dismissing Defendant's First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Twelfth, Thirteenth, and Fourteenth Affirmative Defenses (Motion Sequence #2) are decided as follows:

Plaintiff seeks recovery for injuries allegedly sustained as a result of a July 24, 2017 motor vehicle accident between Plaintiff and Defendant. Plaintiff's Bill of Particulars alleges injuries to Plaintiff's right and left shoulder, left knee, lumbar spine, and cervical spine.

Defendant's Motion for Summary Judgment - Serious Injury (Motion Sequence #1)

Movant bears the initial burden to establish that the plaintiff has not sustained a serious injury (*Lowe v Bennett*, 122 AD2d 728 [1st Dept 1986]). When the movant has made such a showing, the burden shifts to the plaintiff to produce prima facie evidence to support the claim of serious injury (*see Lopez v Senatore*, 65 NY2d 1017 [1985]). In instances where a defendant

asserts that the evidence reveals a preexisting injury or a degenerative condition, the plaintiff must present evidence to the contrary (*Brewster v FTM Servo, Corp.*, 44 AD3d 351 [1st Dept 2007]).

Defendants have established prima facie entitlement to summary judgment. Defendants rely on the affirmed reports of Dr. Dana A. Mannor, orthopedic surgeon, Dr. Warren E. Cohen, neurologist, Dr. Jeffrey Warhit, radiologist, and Plaintiff's examination before trial (EBT) testimony.

Dr. Mannor examined Plaintiff on October 13, 2021 and concluded that Plaintiff suffered from a cervical spine sprain/strain, lumbar spine sprain/strain, bilateral shoulder sprain/strain, and bilateral knee sprain/strain that have all been resolved. Dr. Mannor measured Plaintiff's range of motion with a goniometer, compared normal values to AMA Guidelines and found normal range of motion and negative objective tests as to Plaintiff's lumbar spine, right and left shoulders, and right and left knees. As to Plaintiff's cervical spine extension, Dr. Mannor noted limitation of 20 degrees, but attributed it to age and possible arthritis.

Dr. Cohen examined Plaintiff on January 5, 2022. Dr. Cohen measured Plaintiff's range of motion with a goniometer, compared normal values to AMA Guidelines, and found normal range of motion as to Plaintiff's cervical spine and lumbar spine. Dr. Cohen noted no deficit of cranial nerve function, normal motor exam, and normal neurological examination with no objective clinical evidence of radiculopathy. Dr. Cohen concluded that Plaintiff shows no impairment of neurologic function that would impair Plaintiff's ability to participate in activities of daily living and all usual activities, and that from a neurologic perspective, Plaintiff is not disabled.

Dr. Warhit undertook an independent radiological review of the MRIs of Plaintiff's cervical spine taken on October 19, 2017, left knee taken on February 2, 2018, right shoulder taken on February 12, 2018, left shoulder taken on October 9, 2017, lumbar spine taken on March 6, 2018, and the X-Ray of Plaintiff's right hand taken on July 24, 2017. Dr. Warhit reported degeneration and no evidence of traumatic injury to cervical spine, lumbar spine, left knee, no evidence of traumatic injury to right or left shoulders, and no fracture to right hand.

Defendant has met her initial burden of establishing that Plaintiff did not sustain serious injuries as a result of the subject accident under Insurance Law 5102 (d) (*Perez v Rodriguez*, 25 AD3d 506 [1st Dept 2006]).

In opposition, Plaintiff relies on the affirmed MRI reports of Dr. John T. Rigney, radiologist, the certified treatment records from Vallabh Medical P.C., and the affirmed medical report from Dr. Addy Nnsewo.

Dr. Rigney reviewed the MRIs of Plaintiff's cervical spine taken on October 19, 2017, lumbar spine taken on March 6, 2018, left shoulder taken on October 9, 2017, right shoulder taken on February 12, 2018, and left knee taken on February 2, 2018. As to the left shoulder, Dr. Rigney noted no tear, but impingement by the acromioclavicular joint and additional subacromial impingement as well as supraspinatus tendinopathy. As to the right shoulder, he noted impingement by the acromioclavicular joint and additional impingement by the acromion process, thinning of the supraspinatus tendon with tendinopathy and partial thickness tearing, fluid in the subacromial bursa, the subscapularis bursa, and in the biceps tendon sheath. As to the left knee, he reported tearing of the posterior horn of the medial meniscus. As to the lumbar spine, he noted posterior bulges at L3-L4 and L4-L5. As to the cervical spine, he reported posterior bulges at C3-C4, C4-C5, C5-C6, and C6-C7.

The treatment records from Vallabh Medical P.C. detailed visits by Plaintiff on August 31, 2017, October 12, 2017, January 18, 2018, March 8, 2018, May 21, 2018, and August 9, 2018, and concluded each visit that the patient's physical injuries were causally related to the subject accident and will persist for an indefinite period of time affecting the patient's mobility and quality of life. The records also indicate that Plaintiff was advised to avoid strenuous activities.

Dr. Nnsewo examined Plaintiff on September 28, 2022, measured Plaintiff's range of motion with a goniometer, compared measurements to normal values according to New York State Workers' Compensation Board guidelines, and found limitation in range of motion as to cervical spine, lumbar spine, right and left shoulders, and left knee. Dr. Nnsewo reviewed Plaintiff's MRIs and noted posterior bulges in Plaintiff's cervical spine and lumbar spine, partial thickness tearing and fluid in the subacromial bursa, the subscapularis bursa, and in the biceps tendon sheath in Plaintiff's right shoulder, and tearing of the posterior horn of the medial meniscus as to Plaintiff's left knee. Dr. Nnsewo reported that Plaintiff's injuries were causally related to the subject accident.

Plaintiff's submission has raised sufficient triable issues of fact (*Williams v Perez*, 92 AD3d 528, 529 [1st Dept 2012]; *Perl v Meher*, 18 NY3d 208 [2011]; (*Lee Yuen v Arka Memory Cab Corp.*, 80 AD3d 481 [1st Dept 2011])). Although Plaintiff's treating physician did not

expressly reject Defendants' expert's findings of degeneration to Plaintiff's cervical spine, lumbar spine, and left knee, they attributed Plaintiff's injuries to the subject accident, and thus their opinions are entitled to equal weight and are sufficient to raise an issue of fact (*see Lee Yuen v Arka Memory Cab Corp.*, 80 AD3d 481 [1st Dept 2011]).

With respect to the 90/180 days category of serious injury, there is no competent medical evidence demonstrating that Plaintiff was unable to perform substantially all of his normal activities for at least 90 of the first 180 days as a result of the accident (*Elias v Mahlah*, 58 AD3d 434, 435 [1st Dept 2009]). Plaintiff's Bill of Particulars alleges that he was confined to his bed intermittently for approximately one month and home for approximately six months on an intermittent basis. Plaintiff's Bill of Particulars also alleges that he missed nine days of work. In his examination before trial, Plaintiff testified that he was confined to home for "a little less" than 3 months, went back to work part-time, that there are no activities that he is no longer able to do at all, but he has difficulties sitting for long periods of time and raising his hand. The records indicating that Plaintiff was advised not to engage in strenuous activities, is itself inadequate to meet the standard as it refers only generally to strenuous activities and not substantially all of Plaintiff's normal activities. No other medical records indicated that Plaintiff was to avoid certain activities. Plaintiff's submissions are insufficient to establish that his injuries prevented him from performing substantially all of the material acts constituting his usual and customary daily activities for at least 90/180 days immediately following the accident (*Grimes-Carrion v Carroll*, 17 AD3d 296 [1st Dept 2005]). Therefore, Defendant's motion for summary judgment is granted under the 90/180 category only.

#### Plaintiff's Motion for Summary Judgment - Liability (Motion Sequence #2)

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). Once this showing has been made, the burden shifts to the non-moving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution (*Licari v Elliott*, 57 NY2d 230 [1982]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad* at 853 [1985]). In support of his motion, Plaintiff relied, in pertinent part, on the

examination before trial testimony of nonparty Batuka (Ernest) Nasabuyan, Plaintiff, and Defendant.

Nasabuyan testified that at the time of the accident, he was a seat-belted rear passenger riding with his girlfriend in a cab, his girlfriend was sitting behind the driver and was also wearing her seat belt, the driver was driving slowly and not speeding, as they were going through the intersection of Third Avenue and 40<sup>th</sup> Street, the traffic light was green and remained green, the vehicle within which he was a passenger was in the middle of the intersection when the accident occurred, although he does not remember the impact because he lost consciousness.

Plaintiff testified that he was working as a taxi driver at the time of the accident with two passengers in his vehicle, the accident occurred on 40<sup>th</sup> Street and 3<sup>rd</sup> Avenue, Plaintiff was wearing his seat belt, as he approached the intersection, he had a green light, he was driving 20-22 mph looking straight, got to the middle of the intersection, when the front portion of the car was struck with a very heavy impact.

Defendant testified that as he was approaching the intersection of 3<sup>rd</sup> Avenue and 40<sup>th</sup> Street, the light turned from red to green, he drove through the intersection at about 15 mph, his right foot was on the accelerator, when the front part of the yellow cab came into contact with the passenger rear tire of his vehicle causing his vehicle to spin around.

Given the conflicting testimony in support of Plaintiff's motion as to how the subject accident occurred, Plaintiff failed to establish prima facie entitlement to judgment as a matter of law. The motion is denied.

Defendant concedes that the Seventh, Ninth, Twelfth, Thirteenth and Fourteenth affirmative defenses (alleging the superseding acts of third parties, Emergency Doctrine, seatbelt defense, and lack of personal jurisdiction and subject matter jurisdiction, respectively) are unsupported and accordingly were withdrawn. Thus, the branch of Plaintiff's motion to dismiss the Seventh, Ninth, Twelfth, Thirteenth and Fourteenth affirmative defenses is denied as moot.

Accordingly, it is

**ORDERED** that the motion by Defendant for summary judgment and dismissal of Plaintiff's complaint (Motion Sequence #1) is DENIED except as to Plaintiff's claim of serious injury under the 90/180-day category of Insurance Law 5102 (d); and it is further

**ORDERED** that the motion by Plaintiff for summary judgment on the issue of liability, finding Plaintiff free from comparative fault, and dismissing Defendant's First, Second, Third,

Fourth, Fifth, Sixth, Eighth, and Tenth Affirmative Defenses (Motion Sequence #2) is DENIED; and it is further

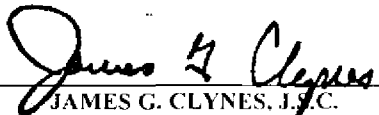
**ORDERED** that Defendant's Seventh, Ninth, Twelfth, Thirteenth and Fourteenth Affirmative Defenses are withdrawn and Plaintiff's motion to dismiss these Affirmative Defenses is denied as moot; and it is further

**ORDERED** that any requested relief not specifically addressed herein has nonetheless been considered; and it is further

**ORDERED** that within 30 days of entry, Plaintiff shall serve a copy of this Decision and Order upon Defendant with Notice of Entry.

This constitutes the Decision and Order of the Court.

10/30/2023  
DATE

  
JAMES G. CLYNES, J.J.C.

<b>CHECK ONE:</b>	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
<b>APPLICATION:</b>	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
<b>CHECK IF APPROPRIATE:</b>	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE