

**Gueye v Roessler**

2018 NY Slip Op 30877(U)

May 8, 2018

Supreme Court, New York County

Docket Number: 159002/15

Judge: Adam Silvera

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**SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY  
PRESENT: Hon. Adam Silvera Part 22**

**MOUSSA GUEYE,**

**Plaintiff,**

**-against-**

**GUSTAVO ROESSLER,**

**Defendant.**

**DECISION/ORDER**

**INDEX NO. 159002/15  
MOTION SEQ. NO. 002**

**ADAM SILVERA, J. :**

In this personal injury/negligence action, defendant Gustavo Roessler (Roessler) moves for summary judgment to dismiss the complaint (motion sequence number 002). For the following reasons, this motion is denied.

**BACKGROUND**

On March 12, 2014, plaintiff Moussa Gueye (Gueye) was injured in an automobile accident when the taxicab he was driving was struck by Roessler’s car at the intersection of Broadway and West 79<sup>th</sup> Street in the County, City and State of New York. *See* notice of motion, exhibit A (complaint), ¶¶ 1-21.

At his deposition on September 14, 2016, Gueye specifically stated that he was traveling southbound in the left lane of Broadway with two passengers, and had stopped at the intersection for a red light. Gueye further stated that, after the light turned green, he moved into the intersection, at which point Roessler’s car hit his cab at high speed from the left, and propelled the cab across both lanes of Broadway, where it impacted with the railing of the subway station on the corner of West 79<sup>th</sup> Street. *See* notice of motion, exhibit E at 15, 24-25, 27-28. Gueye said

that the impact caused his left knee to hit the cab's dashboard "hard." *Id.* at 26-27. Gueye also said that the police soon arrived, and called an ambulance that transported him to the emergency room of St. Luke's Roosevelt Hospital, where he complained of pain in his lower back, neck and knee, was X-rayed, given painkillers and eventually released. *Id.* at 28-29, 35-40. Gueye noted that he had previously experienced back pain in a different part of his lower back, and averred that he had visited a different location of St. Luke's Roosevelt hospital within approximately a year or a year and a half prior to the accident, and that he was given painkillers for the pain at that visit. *Id.* at 29-34. Gueye noted, though, that the lower back pain that he experienced after the accident was different from the lower back pain that he had experienced previously. *Id.* at 30. Gueye finally noted that he eventually returned to work, but that his back pain worsened, and that he eventually underwent back surgery to attempt to alleviate it. *Id.* at 68, 75-80.

Gueye was treated by two doctors after his accident; first, by physical medicine and rehabilitation specialist Dr. Ali Guy (Dr. Guy); and second, by orthopedist and surgeon Dr. Angel Macagno (Dr. Macagno). *See* Gatti affirmation in opposition, exhibit A (Gueye aff) at 1-3 (pages not numbered). Dr. Guy's report states that he examined Gueye on March 19, 2014, shortly after the accident, and noted decreased ranges of motion in Gueye's neck, back and left leg. *Id.*; exhibit B. Dr. Guy's report contained assessments of "multiple traumatic injuries" and "internal derangement of [the] left knee [with a] patella contusion/PCL sprain," as well as the need to "rule out cervical [and] lumbar" disc bulges and radiculopathy, and concluded that Gueye should abstain from working until receiving medical clearance, and instead begin a course of treatment that included painkillers, physical therapy and acupuncture. *Id.* Gueye states that he continued this course of treatment for approximately four months until he was cut off by no-fault insurance. *Id.*; exhibit A at 2 (pages not numbered). Gueye also states that he returned to work

approximately three weeks after the accident out of financial necessity. *Id.* Gueye finally states that Dr. Guy also sent him for MRIs. *Id.* The results of those MRIs, which were included along with Roessler's moving papers, set forth impressions of lumbar disc bulges, herniations and stenosis. *See* notice of motion, exhibit J.

Gueye has submitted three reports from Dr. Macagno: 1) a summary report of Gueye's August 31, 2016 back surgery; 2) a narrative report prepared after Gueye's May 22, 2017 visit for treatment; and 3) a final 2017 expert's affidavit. *See* Gatti affirmation in opposition, exhibits C, D, E. Dr. Macagno's surgical summary includes "preoperative diagnoses" of "mechanical lower back pain with radiculopathy [and] L4-L5 disc disease with central canal stenosis;" and "postoperative diagnoses" of "mechanical lower back pain with radiculopathy [and] L4-L5 disc disease with central canal stenosis and instability." *Id.*, exhibit E. Dr. Macagno's narrative report first recites that he reviewed both Gueye's original 2014 MRIs and later MRIs and X-rays that he himself ordered in 2016, and notes that they all confirmed the presence of "L4-L5 retrolisthesis with central canal stenosis," and that the later MRIs also showed disc herniation. *Id.*, exhibit D. Dr. Macagno's narrative report also recorded a physical examination that disclosed decreased ranges of motion in several portions of Gueye's lumbar spine. *Id.* Finally, Dr. Macagno's narrative report contained assessments of "post lumbar fusion, instrumentation and decompression after motor vehicle accident" with "low back pain" and "other intervertebral disc disorders," and the conclusion that "the current problem is causally related to this accident." *Id.* Dr. Macagno's expert's affidavit contains the findings that Gueye "has a 33% range of motion restriction in all planes of movement in his lumbar spine," that "as a result of the accident of March 12, 2014, [Gueye] suffered serious and consequential injuries to his lower back including intervertebral disc disorder, lumbar with lower back pain and arthrodesis status." *Id.*, exhibit C.

Dr. Macagno's expert's affidavit also contains the conclusions that "the accident of March 12, 2014 was the cause of [Gueye's] injuries," that "his previous isolated incidents of occasional lower back pain was not the cause for his injuries and his need for surgery," and that "his injuries and limitations are permanent," and his "restrictions and limitations are serious and significant."

*Id.*

Finally, Gueye has presented a photograph of his lower back, dated August 2, 2017, that depicts his surgical scar there. *See* Gatti affirmation in opposition, exhibit F.

In opposition to the foregoing, Roessler has presented two independent medical examination reports by Dr. Afshin Razi (Dr. Razi). *See* notice of motion, exhibits G, I. Dr. Razi's first report, dated November 11, 2016, states that he reviewed Gueye's 2014 emergency room records and X-rays and Dr. Macagno's surgical summary, but no MRIs. *Id.*, exhibit G. Dr. Razi's first report noted the presence of Gueye's surgical scar and decreased ranges of motion in his lumbar spine, as well as findings of lumbar spine herniations, bulges and stenosis, but concluded with the observations that "without the appropriate documentation, I am unable to comment on the actual diagnostic findings or the condition that necessitated [Gueye's] surgical intervention," and "it appears that [Gueye] had chronic lower back pain prior to the alleged accident." *Id.* Dr. Razi's second report, dated March 24, 2017, noted a slightly decreased range of motion in Gueye's lumbar spine, recited that he had reviewed all of Gueye's more recent MRIs, X-rays and treatment records. *Id.* Dr. Razi's first report found that Gueye had "a preexisting, degenerative process and underlying disease [in his lumbar spine] that predates the alleged accident of March 12, 2014," and concluded that "the surgical intervention . . . was done to address [Gueye's] preexisting degenerative disc disease/back pain," and ascribed the decreased range of motion to that surgery. *Id.*, exhibit I. Roessler has also presented Gueye's March 12, 2014 emergency room

records from Mt. Sinai West Hospital (formerly St. Luke's Roosevelt Hospital). *Id.*, exhibit J. These state that Gueye was "complaining of left knee pain and lower back pain" after the accident, and note that he had "a history of lower back pain [that] he attributes to driving a taxi [and] for which he takes Motrin." *Id.* The emergency room records also note that the X-ray of Gueye's left knee did not disclose any fracture, and record that he was discharged with a prescription for diazepam. *Id.*

Gueye commenced this action on July 31, 2015 by filing a summons and complaint that sets forth one cause of action for negligence, which includes the allegation that he suffered a statutorily defined "serious injury." *See* notice of motion, exhibit A. Roessler filed an answer with affirmative defenses on October 28, 2015. *Id.*, exhibit B. Now before the court is Roessler's motion for summary judgment to dismiss the complaint (motion sequence number 002).

#### DISCUSSION

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. *See e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *Sokolow, Dunaud, Mercadier & Carreras v Lacher*, 299 AD2d 64, 70 (1<sup>st</sup> Dept 2002). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *See e.g. Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 (1<sup>st</sup> Dept 2003).

Roessler's motion seeks summary judgment to dismiss the complaint on the ground that Gueye did not suffer a statutorily defined "serious injury." Insurance Law § 5102 (d) provides, as follows:

“‘Serious injury’ means a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; 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 *Toure v Avis Rent A Car Sys.* (98 NY2d 345 [2002]), the Court of Appeals held that the:

“plaintiff's proffered evidence raises issues of material fact as to whether he sustained a ‘permanent consequential limitation of use of a body organ or member’ or a ‘significant limitation of use of a body function or system.’

“For these two statutory categories, we have held that ‘[w]hether a limitation of use or function is ‘significant’ or ‘consequential’ (i.e., important ...) relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part.’ While [plaintiff's doctor's] affirmation does not ascribe a specific percentage to the loss of range of motion in plaintiff's spine, he sufficiently describes the ‘qualitative nature’ of plaintiff's limitations ‘based on the normal function, purpose and use of the body part.’ [Plaintiff's doctor] further attributes the limitations in plaintiff's physical activities to the nature of the injuries sustained by opining that plaintiff's ‘difficulty in sitting, standing or walking for any extended period of time and his inability to lift heavy boxes at work are a natural and expected medical consequence of his injuries.’

“We cannot say that the alleged limitations of plaintiff's back and neck are so ‘minor, mild or slight’ as to be considered insignificant within the meaning of Insurance Law § 5102 (d). As our case law further requires, [plaintiff's doctor's] opinion is supported by objective medical evidence, including MRI and CT scan tests and reports, paired with his observations of muscle spasms during his physical examination of plaintiff. Considered in the light most favorable to plaintiff, this evidence was sufficient to defeat defendants' motion for summary judgment.”

98 NY2d at 352-353 (internal citations omitted). Here, Gueye asserts that his lower back condition may be considered a “serious injury” in the categories of: 1) permanent consequential limitation of use of a body organ or member; 2) significant limitation of use of a body function or system; and/or 3) disfiguring scar. *See* Gatti affirmation in opposition at 4 (pages not

numbered). Roessler raises several arguments as to why these categories are unavailable.

With respect to the category of “permanent consequential limitation,” Roessler argues that “there is no evidence of any causally related limitation of use of any body organ or member nor is there evidence of permanency.” *See* notice of motion, Rathje affirmation, ¶ 45. This is not so. Dr. Macagno’s 2017 expert’s affidavit sets forth findings of both “causality” and “permanency.” *See* Gatti affirmation in opposition, exhibit C. Although Dr. Razi’s second report makes contrary findings, this only gives rise to an issue of fact as to whether Gueye’s condition may be considered a “serious injury” of the “permanent consequential limitation” category. It does *not* mean that Gueye has presented no evidence to support his reliance on this category. He has clearly done so, and thereby borne his burden of proof in opposing this motion. Therefore, the court rejects Roessler’s argument, and finds that the “permanent consequential limitation” category of “serious injuries” is available as a basis for Gueye’s claim.

With respect to the category of “significant limitation of use,” Roessler raises a number of arguments. First, Roessler argues that “there is no evidence of any causally related significant limitation of use to a body function or system.” *See* notice of motion, Rathje affirmation, ¶ 47. As was discussed above, this argument is belied by Gueye’s submissions from Dr. Macagno. *See* Gatti affirmation in opposition, exhibits C, D, E. Therefore, this argument also fails.

Next, Roessler argues that “allegations of range of motion limitations, without a detailed recitation of the objective tests that revealed said limitations, is insufficient” to demonstrate that an injury was “serious.” *See* notice of motion, Rathje affirmation, ¶ 48. To support this argument, Roessler cites the 2001 decision of the Appellate Division, First Department, in *Toure v Avis Rent A Car Sys.* (284 AD2d 271 [1<sup>st</sup> Dept 2001]) that was overturned by the Court of Appeals in 2002 (98 NY2d 345). In its decision, the Court of Appeals squarely held that “an expert’s



designation of a numeric percentage of a plaintiff's loss of range of motion can be used to substantiate a claim of serious injury." 98 NY2d at 350 (internal citation omitted). Here, Dr. Macagno plainly opined that "Gueye has a 33% range of motion restriction in all planes of movement in his lumbar spine." See Gatti affirmation in opposition, exhibit C. This evidence clearly satisfies the standard enunciated by the Court of Appeals in *Toure*. Therefore, the court reject's Roessler's argument.

Roessler further argues that a plaintiff's injuries, which consisted of "a herniated disc and bulging discs . . . did not, in and of themselves, constitute serious injury." See notice of motion, Rathje affirmation, ¶ 53. To support this argument, Roessler cites a quantity of 1999 decisions by the Appellate Division, Second Department. *Id.* In opposition, Gueye cites the recent decision by the Appellate Division, First Department in *Angeles v American United Transp., Inc.* (110 AD3d 639, 640 [1<sup>st</sup> Dept 2013]), which holds that medical findings of bulging or herniated discs, even when unaccompanied by contemporaneous range of motion findings, constitute sufficient evidence for a plaintiff to raise a triable issue of fact as to whether he/she has suffered a "serious injury", which represents the current state of the law in the First Department. Thus, Roessler's argument fails.

Next, Roessler argues that "a physician's affidavit . . . is insufficient . . . when the physician fails to account for the neck and back injuries sustained by [a] plaintiff in a prior accident." See notice of motion, Rathje affirmation, ¶ 54. Here, however, it is clear that Dr. Macagno acknowledged Gueye's preexisting back problems in his expert's affidavit, and also specifically concluded that his current back injuries are unrelated to those problems. See Gatti affirmation in opposition, exhibit C. Therefore, Roessler's argument is belied by the evidence.

Finally, Roessler argues that "a doctor's affidavit is . . . insufficient if it fails to explain a

two-year gap between post-accident medical treatment and the most recent examination,” and also asserts that Gueye has failed to offer “‘some reasonable explanation’ for terminating treatment.” *See* notice of motion, Rathje affirmation, ¶¶ 55, 57. This is often referred to as a “gap in treatment” or “cessation of treatment” argument. Gueye correctly argues that it is well settled that a plaintiff can rebut either argument by demonstrating a denial of no-fault insurance benefits, and notes that he has done so. *See* Gatti affirmation in opposition at 11 (pages not numbered); exhibit A (Gueye aff in opposition) at 2 (pages not numbered). *See e.g., Browne v Covington*, 82 AD3d 406 (1<sup>st</sup> Dept 2011). Therefore, Roessler’s “gap in treatment/cessation of treatment” argument also fails. Thus, the court concludes that the “significant limitation of use” category of “serious injuries” is available as a basis for Gueye’s claim.

Roessler additionally argues that Gueye’s injuries may not be considered “serious” under the category of “medically determined injury or impairments which prevent a plaintiff from performing substantially all of their usual and customary daily activities within 90 and 180 days of their accident.” *See* notice of motion, Rathje affirmation, ¶ 61. However, Gueye does not rely on this category of “serious injury” as a basis for his claim. Therefore the court discount’s Roessler’s argument.

Finally, neither Roessler’s moving or reply papers address the “disfiguring scar” category of “serious injuries,” even though Gueye has presented photographic evidence that he has sustained one. *See* Gatti affirmation in opposition, exhibit F. Therefore, the court deems that Roessler has conceded this point, and finds that the “disfiguring scar” category of “serious injuries” is also an available basis for Gueye’s claim.

Accordingly, having found that Gueye has borne his burden of demonstrating triable issues of fact as to whether his back injuries fall within one or more of three statutory categories

of "serious injuries," Roessler's motion is be denied.

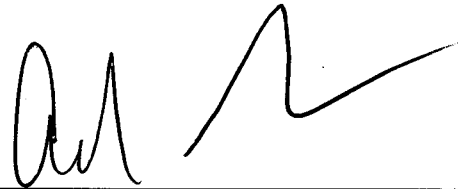
DECISION

ACCORDINGLY, it is

ORDERED that the motion, pursuant to CPLR 3212, of defendant Gustavo Roessler (motion sequence number 002) is denied in its entirety.

Dated: May 8, 2018

ENTER:

A handwritten signature in black ink, appearing to read 'AS', written over a horizontal line.

Hon. Adam Silvera, J.S.C.