

At the Jury Coordinating Part of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Borough of Brooklyn, City and State of New York, on the 7th day of October, 2005.

P R E S E N T:

HON. ALLEN HURKIN-TORRES,  
Justice

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JUAN CARLOS CRESPO,

Plaintiff,

- against -

Index No. 46438/02

**DECISION AND ORDER**

ELRAC, INC., and TOMMY GARCIA,

Defendants.

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The following papers numbered 1 to 3 read on this motion:

Papers Numbered

Notice of Motion/Order to Show Cause,	
Affidavits (Affirmations)& Exhibits Annexed	<u>1</u>
Answering Affidavit (Affirmation)	<u>2</u>
Reply Affidavit (Affirmation)	<u>3</u>

Defendants move for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint on the ground that plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102 (d).

Defendants' motion is denied.

In this action, plaintiff claims that he aggravated a pre-existing lower back condition (dating from a 1994 automobile accident) as the result of the June 23, 2002 automobile accident at issue here. It is undisputed that plaintiff underwent a

lumbar laminectomy in February 2004 to relieve the effects of radiculopathy on his lower extremities. In moving for summary judgment, defendants argue that plaintiff's condition was caused solely by the 1994 accident. However, defendants' neurologist states in his April 18, 2004 report that:

This 43 year old man was involved in an accident in June of 2002. He had continued pain in the low back area and left leg which eventually culminated in surgical intervention in February of 2004. His complaints have not abated to any significant extent. There are abnormalities on the neurological examination that are consistent with an S1 nerve root impairment. The history and examination are consistent with a left lumbar radiculopathy in an S1 distribution. The patient had a preexisting injury to the low back area and one of the doctor's notes indicates a previous MRI abnormality which was subsequently asymptomatic. Based on the records in my possession which include normal sensorimotor and reflex function from an orthopedic examination in September 2002 and an MRI from July 2002 that does not show any lateralized abnormalities, I am uncertain as to the precise dating of the patient's neurological deficits.

However, there is a neurologically related disability at this time.

Given that defendants' own neurologist notes the existence of a neurological injury as of April 2004, and could not preclude the June 2002 accident as the cause of that portion of

plaintiff's injury, defendants have failed to meet their initial burden of demonstrating that plaintiff did not suffer a serious injury as a result of the June 2002 accident (see *Gentile v Snook*, 20 AD3d 389 [2005]). Thus, the motion must be denied regardless of the sufficiency of plaintiff's opposition papers on this issue (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). In view of this, I do not reach any other issues raised by defendant's motion.

E N T E R :

  
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HON. ALLEN HURKIN-TORRES J.S.C.  
JUSTICE N.Y.S. SUPREME COURT

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\* Although defendants submitted reports indicating that plaintiff suffered from lumbosacral radiculopathy as the result of the 1994 accident, these were submitted for the first time in their reply papers, and plaintiff did not have an opportunity to address them. Moreover, none of defendants' doctors addressed the significance of this earlier finding of radiculopathy.