

**Contreras v Benitez**

2007 NY Slip Op 30389(U)

February 23, 2007

Supreme Court, Suffolk County

Docket Number: 0004014

Judge: Joseph Farneti

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SUPREME COURT - STATE OF NEW YORK  
**I.A.S. TERM, PART 37 - SUFFOLK COUNTY**

PRESENT:

**HON. JOSEPH FARNETI**  
**Acting Justice Supreme Court**

\_\_\_\_\_  
JOSE CONTRERAS and MARIA GUZMAN,

Plaintiffs,

-against-

JUAN C. BENITEZ and NELSON H. GARCIA,

Defendants.  
\_\_\_\_\_

**ORIG. RETURN DATE:** SEPTEMBER 13, 2006  
**FINAL SUBMISSION DATE:** JANUARY 18, 2007  
**MTN. SEQ. #:** 001  
**MOTION:** MG

**ORIG. RETURN DATE:** SEPTEMBER 13, 2006  
**FINAL SUBMISSION DATE:** JANUARY 18, 2007  
**MTN. SEQ. #:** 002  
**CROSS-MOTION:** MG

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Upon the following papers numbered 1 to 8 read on this motion and cross-motion  
**FOR SUMMARY JUDGMENT DISMISSING PLAINTIFF GUZMAN'S COMPLAINT**  
Notice of Motion and supporting papers 1-3; Notice of Cross-motion and supporting papers  
4, 5; Answering Affidavits and supporting papers 6, 7; Replying Affidavits and supporting  
papers 8.

The Court has before it a motion of plaintiff, JOSE CONTRERAS,  
and a cross-motion of defendants, JUAN C. BENITEZ and NELSON H. GARCIA,  
both seeking an Order, pursuant to CPLR 3212, granting summary judgment

dismissing the complaint with respect to plaintiff, MARIA GUZMAN, on the grounds that plaintiff GUZMAN failed to sustain a "serious injury" as that term is defined by Insurance Law § 5102(d). Defendants' cross-motion incorporates by reference all of the facts, proof, exhibits, testimony, law and arguments contained in the motion-in-chief, and joins in the application for dismissal of plaintiff GUZMAN's complaint. Plaintiff GUZMAN has filed an affirmation in opposition, and plaintiff CONTRERAS has filed a reply affirmation in response thereto. Accordingly, the Court has considered the foregoing submissions in rendering the within decision and Order.

This is an action for personal injuries allegedly sustained by plaintiffs as a result of a motor vehicle accident that occurred on November 25, 2004. Plaintiff CONTRERAS was operating the motor vehicle and plaintiff GUZMAN was a passenger. That vehicle came in contact with a vehicle operated by defendant BENITEZ and owned by defendant GARCIA.

After the action was commenced by summons and complaint dated March 9, 2005, defendants joined issue by serving an Answer with Counterclaim dated July 11, 2005. The counterclaim was asserted against plaintiff CONTRERAS alleging that if plaintiff GUZMAN sustained the injuries in the manner alleged, such injuries were caused in whole or in part by the culpable conduct of plaintiff CONTRERAS. Thereafter, plaintiff CONTRERAS served an answer to the counterclaim dated August 4, 2005, along with various discovery demands, including a demand for a verified bill of particulars. Plaintiff GUZMAN served a bill of particulars, dated November 18, 2005, which alleged that she suffered the following injuries as a result of the accident: Joint effusion of the right knee; cervical sprain/strain; thoracic sprain/strain; and lumbar sprain/strain. Each injury was alleged to be permanent and to have resulted in severe and significant residual disabilities. Plaintiff GUZMAN also claimed to have aggravated any and all pre-existing injuries or conditions as a result of the accident.

Plaintiff GUZMAN appeared for a deposition on March 9, 2006, and was thereafter physically examined, on or about April 21, 2006, by VARTKES KHACHADURIAN, M.D. and MATHEW M. CHACKO, M.D., who were designated by defendants. After conducting objective tests on plaintiff GUZMAN, the doctors found, as indicated by their sworn reports, that plaintiff had no clinical or MRI evidence of herniated disc, radiculitis, or radiculopathy, resolved. In addition, the doctors' reports indicate that there was no evidence of ongoing orthopedic or neurological disabilities related to the subject accident; that plaintiff GUZMAN had

returned to a “pre-accident state”; and that she was “capable of performing normal activities of daily living.” Based upon these findings, the movants argue that plaintiff GUZMAN has not satisfied the “serious injury” threshold, as that term is defined in Insurance Law § 5102(d). The movants contend that plaintiff GUZMAN suffered nothing more serious than joint effusion and sprains and strains. The Court notes that reports of MRI’s of plaintiff GUZMAN’s lumbar and cervical spine, performed on or about January 25, 2005, approximately two months after the accident, revealed a “normal study.” Further, a report of an MRI of plaintiff GUZMAN’s right knee, performed on or about February 23, 2005, approximately three months after the accident, revealed only “trace joint effusion and menisci and ligaments intact.”

In opposition, plaintiff GUZMAN argues that her deposition testimony reveals that she missed three months of work as result of the accident; that when she returned to work she still needed help with her work; that she continues to be unable to pick up her infant child; and that she needs help with household chores such as food shopping. Further, plaintiff GUZMAN argues that the examining doctors, while concluding that her symptoms had resolved, confirmed that she had a causally related injury from the subject accident. Plaintiff relies on her own testimony that she was out of work for 90 of 180 days following the accident, and therefore has met the standard of “serious injury” as set forth by Insurance Law § 5102(d). Plaintiff GUZMAN annexed an affidavit from NICHOLAS MARTIN, D.C., a chiropractor who treated plaintiff after the accident and then again in conjunction with the instant opposition, who describes her continuing symptomology as a result of the accident.

In reply, plaintiff CONTRERAS refutes the contention that plaintiff GUZMAN was out of work for 90 of out the first 180 days immediately following the accident, as she failed to submit proof in admissible form to support her contention. Further, plaintiff CONTRERAS alerts the Court that plaintiff GUZMAN has admitted that she has not sustained a herniation or bulge in a disc in either her cervical or lumbar spine as a result of the accident. Further, plaintiff CONTRERAS argues that plaintiff GUZMAN does not address or refute the findings of her own treating neurologist, DAVID W. RABINOVICI, M.D., who indicated that plaintiff GUZMAN did not sustain any medically determined injury or impairment as a result of the accident. In addition, plaintiff CONTRERAS submits that any self-serving subjective statements made during depositions with respect to inability to perform activities following the accident, without supporting medical evidence, is insufficient as a matter of law to defeat the instant motions.

Moreover, plaintiff CONTRERAS contends that plaintiff GUZMAN failed to explain why she was treated by NICHOLAS MARTIN, D.C. in January 20, 2006, and then not again until August 21, 2006, shortly after service of the within application to dismiss.

New York's No-Fault Insurance Law precludes recovery for any "non-economic loss, except in the case of serious injury, or for basic economic loss" arising out of the negligent use or operation of a motor vehicle (Insurance Law § 5104[a]). As recognized by the Court of Appeals, the "legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries" (*Dufel v Green*, 84 NY2d 795 [1995]; see also *Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Licari v Elliott*, 57 NY2d 230 [1982]). The Legislature also intended that the issue of whether a plaintiff sustained a "serious injury" could be determined by the courts as a matter of law on a motion for summary judgment (see *Licari v Elliott*, 57 NY2d 230, *supra*).

Insurance Law § 5102(d) defines "serious injury" as "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 order to recover under the "permanent loss of use" category, the plaintiff must demonstrate a total loss of use of a body organ, member, function or system (*Oberly v Bangs Ambulance*, 96 NY2d 295 [2001]). To establish a permanent consequential limitation or a significant limitation of use, the medical evidence submitted by a plaintiff must include objective, quantitative evidence with respect to diminished range of motion or a qualitative assessment, based on objective findings, comparing the plaintiff's present limitations to the normal function, purpose and use of the affected body, organ, member or function (see *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, *supra*). "Whether a limitation of use or function is 'significant' or 'consequential' . . . 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" (*Dufel v*

*Green*, 84 NY2d 795, *supra*; see *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, *supra*). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (see *Licari v Elliott*, 57 NY2d 230, *supra*). Further, subjective claims of pain and limitation of movement must be verified by objective medical findings that are based on a recent examination of the plaintiff (see *Ali v Vasquez*, 19 AD3d 520 [2005]; *Batista v Olivo*, 17 AD3d 494 [2005]; *Grossman v Wright*, 268 AD2d 79 [2000]).

A movant seeking summary judgment on the ground that a plaintiff's negligence claim is barred under the No-Fault Insurance Law bears the initial burden of establishing a *prima facie* case that the plaintiff did not sustain a "serious injury" (see *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, *supra*; *Gaddy v Eyer*, 79 NY2d 955 [1992]; *Pagano v Kingsbury*, 182 AD2d 268 [1992]). A movant also may establish entitlement to summary judgment using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (see *Fragale v Geiger*, 288 AD2d 431 [2001]; *Vignola v Varrichio*, 243 AD2d 464 [1997]; *Torres v Micheletti*, 208 AD2d 519 [1994]; *Pagano v Kingsbury*, 182 AD2d 268, *supra*). Once a movant meets this burden, the plaintiff must present proof in admissible form showing that a serious injury exists or demonstrate an acceptable excuse for failing to meet the requirement of tender in admissible form (*Gaddy v Eyer*, 79 NY2d 955, *supra*; *Pagano v Kingsbury*, 182 AD2d 268, *supra*; *Grasso v Angerami*, 79 NY2d 813 [1991]; see generally *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Gong v Joni*, 294 AD2d 648 [2002]; *Romano v St. Vincent's Med. Ctr.*, 178 AD2d 467 [1991]; *Comms. of the State Ins. Fund v Photocircuits Corp.*, 2 Misc 3d 300 [Sup Ct, NY County 2003]).

In the case at bar, the movants' submissions were sufficient to establish that plaintiff GUZMAN did not sustain serious injury to her back or right knee as a result of the accident (see *Hernandez v DIVA Cab Corp.*, 22 AD3d 722 [2005]; *Khan v Hamid*, 19 AD3d 460 [2005]; *Luckey v Bauch*, 17 AD3d 411 [2005]). The burden, therefore, shifted to plaintiff GUZMAN to raise a triable issue of fact, and she failed to present competent medical evidence substantiating her claim that her injuries prevented her from performing substantially all of her normal activities for not less than 90 days out of the 180 days immediately following the accident, and her allegations that she was unable to work or perform her other usual daily activities after the accident are insufficient to establish a triable issue of fact (see *McConnell v Ouedraogo*, 24 AD3d 423 [2005]; *Gousgoulas v Melendez*, 10 AD3d 674 [2004]; *Sainte-Aime v Ho*, 274 AD2d 569 [2000]). Accordingly, it is

**ORDERED** that this motion of plaintiff, JOSE CONTRERAS, and cross-motion of defendants, JUAN C. BENITEZ and NELSON H. GARCIA, seeking an Order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint with respect to plaintiff, MARIA GUZMAN, on the grounds that plaintiff GUZMAN has failed to sustain a "serious injury" as that term is defined by Insurance Law § 5102(d), are hereby **GRANTED**.

The foregoing constitutes the decision and Order of the Court.

Dated: February 23, 2007

  
HON. JOSEPH FARNETI  
Acting Justice Supreme Court