

**Romero v Santora**

2007 NY Slip Op 32183(U)

July 17, 2007

Supreme Court, Suffolk County

Docket Number: 0019185/2005

Judge: Robert W. Doyle

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SUPREME COURT - STATE OF NEW YORK  
POST-NOTE MOTION PART - SUFFOLK COUNTY

**PRESENT:**

Hon. ROBERT W. DOYLE  
Justice of the Supreme Court

MOTION DATE 2-28-07  
ADJ. DATE 4-30-07  
Mot. Seq. # 002 MG;CASEDISP

-----X		
JOSE PORTILLO ROMERO,	:	
	:	CANNON & ACOSTA
Plaintiff,	:	Attorneys for Plaintiff
	:	1923 New York Avenue
	:	Huntington Station, NY 11746
- against -	:	
	:	LAW OFFICES OF MICHAEL E.
	:	PRESSMAN
JOANNE SANTORA,	:	Attorneys for Defendant
	:	125 Maiden Lane
Defendant.	:	New York, NY 10028-4956
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Upon the following papers numbered 1 to 29 read on this motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1 - 20; Notice of Cross Motion and supporting papers       ; Answering Affidavits and supporting papers 21 - 27; Replying Affidavits and supporting papers 28 - 29; Other       ; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that the motion by defendant for summary judgment dismissing the complaint is granted.

This action was commenced by plaintiff Jose Romero to recover damages for personal injuries allegedly sustained in a motor vehicle accident that occurred on Fifth Avenue in the Town of Islip on January 5, 2005. Plaintiff alleges that he sustained neck and back injuries when the vehicle he was driving, which was stopped for a red light, was struck in the rear by a vehicle driven by defendant Joanne Santora. More specifically, plaintiff alleges in his bill of particulars that he suffered in the following injuries as a result of the subject accident: herniated disc at level L5-S1; bulging discs at levels C3-C4 and C5-C5; cervical and lumbar radiculitis; and cervical acceleration/ deceleration syndrome. At a deposition conducted on May 11, 2006, plaintiff

testified that he is employed as a laborer for Jacob's Ladder Construction Company, and that he missed 11 days of work due to his injuries.

Defendant now moves for summary judgment dismissing the complaint on the ground that plaintiff is precluded by Insurance Law §5104 from recovering for non-economic loss, as he did not sustain a "serious injury" within the meaning of Insurance Law §5102 (d). Defendant's submissions in support of the motion include copies of the pleadings; a transcript of plaintiff's deposition testimony; medical reports prepared by plaintiff's treating chiropractor, Dr. Mary DiDio, and his treating neurologist, Dr. Rick Singh; and magnetic resonance imaging (MRI) reports regarding plaintiff's cervical and lumbar regions prepared in February 2005. Also submitted by defendant in support of the motion is a sworn medical report prepared by Dr. Noah Finkel. At defendant's request, Dr. Finkel, an orthopedic surgeon, conducted an examination of plaintiff on June 28, 2006, and reviewed various medical records related to plaintiff's alleged injuries.

Dr. Finkel's report states that plaintiff presented with complaints of chronic neck and back pain, as well as an occasional limp. The report states, in relevant part, that plaintiff exhibited full range of motion in his cervical and lumbar regions, with no palpable muscle spasm or tightness, during the physical examination. It states that plaintiff stood erect, with no evidence of asymmetry, and that he moved easily during the examination. The report also states that plaintiff demonstrated full range of motion in his upper and lower extremities; that there was no evidence of muscle atrophy or compression neuropathy; and that there was no evidence of any motor or neurological dysfunction. Dr. Finkel opines that plaintiff suffered cervical and lumbosacral strains as a result of the accident, and that both conditions have resolved. He further concludes that there was no evidence that plaintiff suffers from any ongoing orthopedic dysfunction or disability.

Plaintiff opposes the motion for summary judgment, arguing that the proof submitted by defendant fails to establish prima facie that he did not suffer a "significant limitation of use" in his lumbar spine as a result of the subject accident. Alternatively, plaintiff asserts that medical evidence presented in opposition, namely an affidavit by Dr. Mary DiDio, raises a triable issue of fact as to whether he sustained injury within the "significant limitation of use" category of Insurance Law §5102 (d). The Court notes that although the affirmation by plaintiff's counsel states that a denial of benefits statement from the no-fault carrier, Unitrin Advantage Insurance Company, was included with the opposition papers, no such statement was annexed thereto. In addition, while an affidavit by plaintiff states that he treated with Dr. DiDio until September 2005, Dr. DiDio's affidavit states that plaintiff ceased treatment in July 2005, "because of financial constraints."

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.”

A defendant 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, 746 NYS2d 865 [2002]; *Gaddy v Eycler*, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant's own witnesses, “those findings must be in admissible form, i.e., affidavits and affirmations, and not unsworn reports” to demonstrate entitlement to judgment as a matter of law (*Pagano v Kingsbury*, 182 AD2d 268, 270, 587 NYS2d 692 [2d Dept 1992]). A defendant 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, 733 NYS2d 901 [2d Dept 2001]; *Torres v Micheletti*, 208 AD2d 519, 616 NYS2d 1006 [2d Dept 1994]; *Craft v Brantuk*, 195 AD2d 438, 600 NYS2d 251 [2d Dept 1993]; *Pagano v Kingsbury*, *supra*). Once a defendant meets this burden, the plaintiff must present proof in admissible form which creates a material issue of fact, or demonstrate an acceptable excuse for failing to meet the requirement of tender in admissible form (*Gaddy v Eycler*, *supra*; *Pagano v Kingsbury*, *supra*; see, *Grasso v Angerami*, *supra*; see generally, *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). However, if a defendant does not establish a prima facie case that the plaintiff's injuries do not meet the serious injury threshold, the court need not consider the sufficiency of the plaintiff's opposition papers (see, *Burns v Stranger*, 31 AD3d 360, 819 NYS2d 60 [2d Dept 2006]; *Rich-Wing v Baboolal*, 18 AD3d 726, 795 NYS2d 706 [2d Dept 2005]; see generally, *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]).

Contrary to the conclusory assertions by plaintiff's counsel, the medical evidence presented by defendant establishes prima facie that plaintiff did not suffer a serious injury as a result of the accident (see, *Hasner v Budnik*, 35 AD3d 366, 826 NYS2d 387 [2d Dept 2006]; *Kearse v New York City Tr. Auth.*, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2006]; *Meely v 4 G's Truck Renting Co.*, 16 AD3d 26, 789 NYS2d 277 [2d Dept 2005]; *Abrahamson v Premier Car Rental of Smithtown*, 261 AD2d 562, 691 NYS2d 83 [2d Dept 1999]; *Grossman v Wright*, 268 AD2d 79, 707 NYS2d 233 [2d Dept 2000]). The Court notes that a defendant who submits admissible proof that a plaintiff has full range of motion and suffers no disabilities as a result of the subject accident establishes a prima facie case that the plaintiff did not sustain a serious injury, despite the existence of an MRI report showing a herniated or bulging disc (see, *Kearse v New York City Tr. Auth.*, *supra*; *Meely v 4 G's Truck Renting Co.*, *supra*; *Diaz v Turner*, 306 AD2d 241, 761 NYS2d 93 [2d Dept 2003]). The burden, therefore, shifted to plaintiff to raise a triable issue of fact (see, *Gaddy v Eycler*, *supra*).

A plaintiff claiming injury within the “limitation of use” categories must substantiate his or her complaints of pain with objective medical evidence showing the extent or degree of the limitations of movement and their duration (*see, Laruffa v Yui Ming Lau*, 32 AD3d 996, 821 NYS2d 642 [2d Dept 2006]; *Cerisier v Thibiu*, 29 AD3d 507, 815 NYS2d 140 [2d Dept 2006]; *Meyers v Bobower Yeshiva Bnei Zion*, 20 AD3d 456, 797 NYS2d 773 [2d Dept 2005]). He or she must present medical proof contemporaneous with the accident showing the initial restrictions in movement or an explanation for its omission (*see, Bell v Rameau*, 29 AD3d 839, 814 NYS2d 534 [2d Dept 2006]; *Suk Ching Yeung v Rojas*, 18 AD3d 863, 796 NYS2d 661 [2d Dept 2005]; *Ifrach v Neiman*, 306 AD2d 380, 760 NYS2d 866 [2d Dept 2003]), as well as objective medical findings of limitations that are based on a recent examination of plaintiff (*see, Laruffa v Yui Ming Lau, supra; Murray v Hartford*, 23 AD3d 629, 804 NYS2d 416 [2d Dept 2005], *lv denied* 6 NY3d 713, 816 NYS2d 748 [2006]; *Batista v Olivo*, 17 AD3d 494, 795 NYS2d 54 [2d Dept 2005]; *Kauderer v Penta*, 261 AD2d 365, 689 NYS2d 190 [2d Dept 1999]). In addition, a plaintiff claiming serious injury who ceases treatment after the accident must offer a reasonable explanation for having done so (*Pommells v Perez*, 4 NY3d 566, 574, 797 NYS2d 380 [2005]; *see, Joseph v Layne*, 24 AD3d 516, 808 NYS2d 253 [2d Dept 2005]; *Ali v Vasquez*, 19 AD3d 520, 797 NYS2d 528 [2d Dept 2005]; *Batista v Olivo, supra*).

Plaintiff’s submissions in opposition are insufficient to raise a triable issue of fact. Here, the affidavit by Dr. DiDio improperly relies on unsworn reports of others in concluding that plaintiff suffered significant limitations in spinal function as a result of the accident (*see, Cossentino v Kelly*, \_\_ AD3d \_\_, 2007 WL 1776065 [2d Dept, June 19, 2007]; *Codrington v Ahmad*, \_\_ AD3d \_\_, 2007 WL 1444690 [2d Dept, May 15, 2007]; *Iusmen v Konopka*, 38 AD3d 608, 831 NYS2d 530 [2d Dept 2007]; *Elder v Stokes*, 35 AD3d 799, 828 NYS2d 138 [2d Dept 2006]). For example, Dr. DiDio states in her affidavit that an electromyography test performed in May 2005 revealed cervical and radicular radiculopathy, and that such findings comport with her determination that plaintiff suffers from post-traumatic myofascial pain syndrome. Further, Dr. DiDio’s affidavit states that on February 22, 2005, plaintiff “was sent for spinal range of motion testing using a dual inclinometer,” and details the degrees of movement measured at that time. It states that range of motion testing using a dual inclinometer was performed again in March 2005 and provides the measurements taken, yet does not indicate who performed such testing. Dr. DiDio’s affidavit, therefore, is without probative value on the question of whether plaintiff suffered a serious injury in the accident (*see, Codrington v Ahmad, supra; Elder v Stokes, supra; Bycinthe v Kombos*, 29 AD3d 845, 815 NYS2d 693 [2d Dept 2006]; *Friedman v U-Haul Truck Rental*, 216 AD2d 266, 627 NYS2d 765 [2d Dept 1995]).

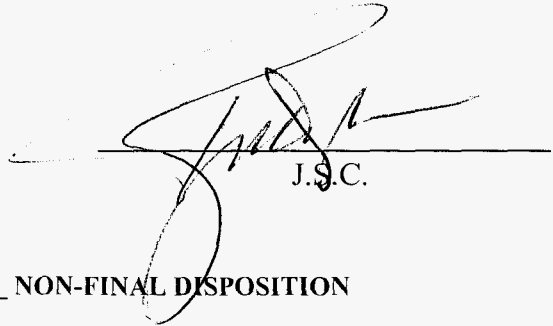
Moreover, plaintiff failed to present competent medical proof contemporaneous with the accident showing significant limitations in spinal movement and the duration of such limitations (*see, Bestman v Seymour*, \_\_ AD3d \_\_, 2007 WL 1776070 [2d Dept, June 19, 2007]; *Borgella v D & L Taxi Corp.*, 38 AD3d 701, 834 NYS2d 199 [2d Dept 2007]; *Zinger v Zylberberg*, 35 AD3d 851, 828 NYS2d 128 [2d Dept 2006]; *Felix v New York City Tr. Auth.*, 32 AD3d 527, 819 NYS2d 835 [2d Dept 2006]; *Li v Woo Sung Yun*, 27 AD3d 624, 812 NYS2d 604 [2d Dept

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2006]) He also failed to provide evidence substantiating his allegations that he was forced to cease medical care just months after the accident, because his no fault benefits were terminated and he lacked the financial means to pay for such care (see, *Pommells v Perez*, supra; *Mohamed v Siffrain*, 19 AD3d 561, 797 NYS2d 532 [2d Dept 2005]; *Neugebauer v Gill*, 19 AD3d 567, 797 NYS2d 541 [2d Dept 2005]; *Villalta v Schechter*, 273 AD2d 299, 710 NYS2d 87 [2d Dept 2000]; *Gomez v Ford Motor Credit Co.*, 10 Misc 3d 900, 810 NYS2d 838 [Sup Ct, Bronx County 2005]; but see, *Francovig v Senekis Cab Corp.*, \_\_ AD3d \_\_, 2007 WL 1776044 [2d Dept, June 19, 2007]). Finally, absent objective medical proof as to the significance or duration of the alleged spinal injuries, plaintiff's self-serving affidavit, which contains allegations of continued lower back pain and restricted movement, is insufficient to defeat summary judgment (see, *Tobias v Chupenko*, \_\_ AD3d \_\_, 2007 WL 1703676 [2d Dept, June 12, 2007]; *Kauderer v Penta*, 261 AD2d 365, 689 NYS2d 190 [2d Dept 1999]; *Rum v Pam Transp.*, 250 AD2d 751, 673 NYS2d 178 [2d Dept 1998]).

Accordingly, summary judgment dismissing the complaint based on plaintiff's failure to meet the serious injury threshold is granted.

Dated:   JUL 17 2007  

  
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J.S.C.

  X   FINAL DISPOSITION      \_\_\_\_\_ NON-FINAL DISPOSITION