

**Miller v Medina**

2007 NY Slip Op 33905(U)

November 26, 2007

Supreme Court, Nassau County

Docket Number: 4420-06/

Judge: Thomas Feinman

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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK  
COUNTY OF NASSAU**

Present:

**Hon. Thomas Feinman**  
Justice

\_\_\_\_\_  
MARK MILLER,

Plaintiff,

- against -

LESLY Y. MEDINA and JOSE A. ANARIBA  
ULLOA,

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

TRIAL/IAS, PART 22  
NASSAU COUNTY

INDEX NO. 4420/06

MOTION SUBMISSION  
DATE: 10/15/07

MOTION SEQUENCE  
NO. 001

The following papers read on this motion:

Notice of Motion and Affidavits.....	<u>  X  </u>
Affirmation in Opposition.....	<u>  X  </u>
Reply Affirmation.....	<u>  X  </u>

Relief Requested

The defendants move, pursuant to CPLR §3212 for an order granting summary judgment in their favor and dismissing the plaintiff's complaint on the grounds that the plaintiff did not suffer a "serious injury" as defined by Insurance Law §5102(d), and thus, plaintiff's claim for non-economic loss is barred by §5104(a) of the New York Insurance Law. Plaintiff submits opposition. The defendants submit a reply affirmation.

Procedural Background

Plaintiff commenced an action to recover for personal injuries sustained as a result of an automobile accident which occurred on December 31, 2005. The plaintiff alleges injuries including restriction of motion of lumbar and lumbosacral spine, restriction of motion of cervical spine, restriction of motion of the left shoulder, left shoulder rotator cuff tear, disc herniation at L5 - S1, disc bulges at L3 - L4 and L4 - L5 and positive EMG for left L5 - S1 radiculopathy.

On this threshold motion, the defendants submit an affirmed medical examination report of Dr. Leon Sultan, M.D., an orthopedist. Dr. Sultan conducted a physical examination of the plaintiff on April 17, 2007. Dr. Sultan concluded that his physical examination of the plaintiff reveals no objective clinical signs of ongoing disability or functional impairment regarding the subject accident. Dr. Sultan states that comprehensive orthopedic examination of the plaintiff conducted on April 17, 2007 in regard to his thoracolumbar spine, left shoulder and bilateral rib cage reveals that he is orthopedically stable and neurologically intact. Dr. Sultan concludes that plaintiff's examination did not confirm any causally related orthopedic or neurological impairment in regard to plaintiff's motor vehicle accident of December 31, 2005.

Plaintiff submits, in opposition, the affirmed report of Dr. Joseph Gregorace, D.O. Dr. Gregorace conducted a physical examination of the plaintiff on September 25, 2007. Dr. Gregorace found that the plaintiff suffered from objectively determined restriction of the ranges of motion of the cervical spine which constitutes a significant limitation of use of his body functions and motion. Dr. Gregorace concludes the injuries sustained in the accident are significant.

#### Applicable Law

"Serious Injury" is defined in Insurance Law §5102(d) as:

"...[A] personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of 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 constitutes such person's usual and customary daily activities for not less than ninety day during the one hundred eighty days immediately following the occurrence of the injury or impairment."

"A defendant can establish that the plaintiff's injuries are not serious within the meaning of the Insurance Law §5102(d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (*Grossman v. Wright*, 268 AD2d 79). The courts have consistently held a "plaintiff's subjective claim of pain and limitation of motion must be supported by verified objective medical findings". (*Grossman v. Wright*, 268 AD2d 79, *Kauderer v. Penta*, 261 AD2d 365). The threshold question in determining a summary judgment motion on the issue of serious injury focuses on the sufficiency of the moving papers. Once the defendants submit evidence establishing that the plaintiffs did not suffer a serious injury within the meaning of Insurance Law §5102(d), the burden shifts to the plaintiff to produce evidence in admissible form demonstrating the existence of a triable issue of fact. (*Gaddy v. Eyler*, 582 NYS2d 990). The proof shall be viewed in a light most favorable to the non-moving party. (*Cammarer v. Villanova*, 562 NYS2d 808).

When a claim is raised under the “permanent consequential limitation of use of a body organ or member”, or “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 prove the extent or degree of physical limitation, an expert’s designation of a numeric percentage of a plaintiff’s loss of range of motion is acceptable. (*Toure v. Avis Rent A Car Systems, Inc.*, 746 NYS2d 865). An expert’s qualitative assessment of a plaintiff’s condition is also probative provided that the evaluation has an objective basis, and the evaluation compares the plaintiff’s limitations to the normal function, purpose and use of the affected body organ, member, function or system. (*Id.*)

### Discussion

The defendants have met their burden of establishing that the plaintiff has not sustained a serious injury. The defendants’ examining orthopedist, Dr. Sultan, found that his physical examination of the plaintiff revealed that the plaintiff is orthopedically stable and neurologically intact and found no objective clinical signs of ongoing disability or functional impairment regarding the subject accident. As the defendants have met their initial burden of proof, the burden shifts to the plaintiff to provide evidence in admissible form to demonstrate the existence of a triable issue of fact. (*Gaddy v. Eyer*, 582 NYS2d 990).

The plaintiff, in its opposition, has submitted admissible evidence indicating the plaintiff sustained objectively-measured, causally related specifically-quantified limitations of motion in his left shoulder and lumbar spine. (*Molina v. Choi*, 298 AD2d 508). An expert’s designation of a numeric percentage or a plaintiff’s loss of motion can be used to substantiate a claim of serious injury. Here, as in *Toure v. Avis*, 98 NY2d 345, we cannot say that the plaintiff’s claimed limitations are so ‘minor, mild or slight’ as to be considered insignificant.

The defendants, in reply to plaintiff’s opposition, argue that Dr. Gregorace’s affirmation is insufficient because he fails to offer any “plausible explanation” for plaintiff’s gaps in treatment. However, Dr. Gregorace’s explanation is adequate. Dr. Gregorace recommended a continued home exercise program whereby plaintiff was performing range of motion exercises to the left shoulder and lumbar spine with advancement to progressive prone lumbar isotonic strengthening exercises. Additionally, Dr. Gregorace and plaintiff provide that plaintiff’s no-fault benefits ended. (*Jones v. Budhwa* 23 AD3d 154, citing *Pommels v. Perez*, 4 NY3d 566; *Green v. Nara Car & Limo*, 42 AD3d 430; and *Gutierrez v. Ambulette*, 14 Misc.3d 143).

### Conclusion

While the defendants have met their initial burden of establishing that the plaintiff has not sustained a serious injury as set forth in the insurance law, the plaintiff has submitted competent

objective evidence for the purposes of overcoming the defendants' submission that there are not triable issues of fact in this case. Accordingly, the defendants' motion for summary judgment is denied.

ENTER:



J.S.C.

Dated: November 26, 2007

cc: Mintz and Schaffer  
Ryan & Conlon, LLP.

**ENTERED**

NOV 29 2007

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**