

**Alvarez v Menmascheimer**

2010 NY Slip Op 30613(U)

March 19, 2010

Supreme Court, Richmond County

Docket Number: 104851/07

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND DCM PART 3**

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**Index. 104851/07  
Motion No.: 001**

**JACQUELYN ALVAREZ**

*Plaintiff*

**DECISION & ORDER**

*against*

**HON. JOSEPH J. MALTESE**

**PETER C. MENMASCHEIMER**

*Defendant*

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The following items were considered in the review of the following motion for summary judgment.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	2
Replying Affidavits	3
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

Defendant Peter C. Menmascheimer's motion for an Order granting him summary judgment dismissing Plaintiff Jacquelyn Alvarez's complaint pursuant to CPLR 3211 is denied.

**FACTS**

On January 4, 2005, a vehicle driven by Defendant impacted a vehicle driven by Plaintiff at the intersection of Liberty Ave. and Jefferson St. in Staten Island, New York. Plaintiff allegedly suffered serious injury as a result of the accident. These injuries include back pain and limitation of her range of motion that has allegedly rendered her unable to perform substantially all of her daily activities. Plaintiff sought an expert opinion from Dr. Steven W. Albert ("Dr. Albert"), a chiropractor, regarding loss of range of motion in her cervical spine. Dr. Albert determined that Plaintiff had lost between 30% and 56% of her range of motion, depending on the type of movement, as a result of her injuries. Defendant's medical examiner, Dr. Andrew Miller ("Dr. Miller"), also

examined Plaintiff to determine if she had lost any range of motion due to her injuries. Dr. Miller determined that Plaintiff had lost between 10% and 33% of her range of motion due to her injuries. As a result of the accident, Plaintiff missed one day of work and has alleged that she can no longer blow dry her hair, exercise in a gym, or mow her lawn.

### DISCUSSION

Defendant moves for summary judgment dismissing Plaintiff's complaint due to Plaintiff's failure to have alleged the existence of a "serious injury" as a result of the accident.

A motion for summary judgment must be denied if there are "facts sufficient to require a trial of any issue of fact" (CPLR §3212[b]). Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. "Moreover, the parties competing contentions must be viewed in a light most favorable to the party opposing the motion"<sup>1</sup> Summary judgment should not be granted where there is any doubt as to the existence of a triable issue or where the existence of an issue is arguable.<sup>2</sup> On a motion for summary judgment, the function of the court is issue finding, and not issue determination.<sup>3</sup> In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion.<sup>4</sup>

Insurance Law Section 5104(a) ("No-fault laws") restricts the ability of plaintiffs to recover non-economic losses resulting from injuries sustained in an automobile accident unless the plaintiff

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<sup>1</sup> *Marine Midland Bank, N.A., v. Dino, et al.*, 168 AD2d 610 (2d Dept 1990)

<sup>2</sup> *American Home Assurance Co., v. Amerford International Corp.*, 200 AD2d 472 (1<sup>st</sup> Dept 1994)

<sup>3</sup> *Weiner v. Ga-Ro Die Cutting*, 104 AD2d 331 [2d Dept 1984]. *Aff'd* 65 NY2d 732 [1985]

<sup>4</sup> *Glennon v. Mayo*, 148 AD2d 580 [2d Dept 1989]

suffered a “serious injury,”<sup>5</sup> which is defined under 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 function or system; 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 90 days during the 180 days immediately following the occurrence of the injury or impairment.”<sup>6</sup>

A court should decide the threshold question of whether the evidence warrants a jury finding that the injury falls within the class of injuries that, under No-Fault, should be excluded from judicial remedy. If it can be said, as a matter of law, that plaintiff suffered no “serious injury”, then plaintiff has no claim to assert and there is nothing for the jury to decide.<sup>7</sup>

Defendant has satisfied his initial burden of establishing that Plaintiff’s injuries do not qualify as a “serious injury” under Insurance Law §5102(d). Plaintiff did not allege to have suffered from death, dismemberment, significant disfigurement, a fracture or loss of a fetus. After examining Plaintiff, Dr. Miller, Defendant’s expert, determined that Plaintiff had not suffered a permanent loss of a body function or system since Plaintiff only had mild tenderness in certain locations on her back along with insignificant limitations in her range of motion. He also determined that Plaintiff’s range of motion was not significantly deficient, and thus inconsequential, when compared to a healthy person’s normal range of motion. Most of Plaintiff’s deficiencies in range of motion of the cervical spine were less than 25%. The largest deficiency in range of motion was 33%, which came in the extension test of the cervical spine.<sup>8</sup> A deficiency in range of motion up to 35% has been held to be

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<sup>5</sup>Insurance Law § 5104(a)

<sup>6</sup> Insurance Law §5102(d)

<sup>7</sup> *Licari v. Elliot*, 57 N.Y.2d 230 [1982]; *Toure v. Avis Rent-a-Car Systems*, 98 N.Y.2d 345 [2002]

<sup>8</sup> Exhibit D, Defendant’s Notice of Motion

an “insignificant” injury, even if permanent, and is an inconsequential limitation of the use of a body function.<sup>9</sup> As such, Plaintiff’s loss of range of motion in her cervical spine does not rise to the level of a “serious injury” under Section 5102(d) since it fails to qualify as a consequential limitation of use of a body function.

Defendant also establishes that Plaintiff did not suffer an injury that prevented her from performing substantially all of her daily activities for at least 90 out of the 180 days following the Accident. Defendant points to Plaintiff’s own deposition in which the only activities that are claimed to have been curtailed by the injury are working out, blow-drying her hair and mowing the lawn.<sup>10</sup> Indeed, Plaintiff only missed one day of work which was the day of the accident. Such a small impact on her employment, coupled with the lack of an impact on numerous activities, indicates that Plaintiff’s injury did not render her unable to participate in “substantially all” of her material daily activities.<sup>11</sup>

Once the moving party has made a showing of sufficient evidence, the burden shifts to the party opposing summary judgment to put forth evidence in admissible form to establish a triable issue of fact.<sup>12</sup> 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 can be used to substantiate a claim of serious injury. An expert's qualitative assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system.<sup>13</sup>

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<sup>9</sup> *Colon v. Kempner*, 20 A.D.3d 372 [1<sup>st</sup> Dept. 2005]

<sup>10</sup> Alvarez Transcript p. 54 - 58

<sup>11</sup> *Zuckerman v. Karagjozi*, 247 A.D.2d 536 [2d Dep't 1998]

<sup>12</sup> *Zuckerman v. City of New York*, 49 NY2d 557 [1980]

<sup>13</sup> *Toure*, supra

Plaintiff has presented sufficient evidence to meet her burden of establishing the existence of a triable issue of fact. Plaintiff's expert physician, Dr. Albert, examined the Plaintiff and determined that Plaintiff had a significant loss of range of motion in the cervical spine. These percentages of lost range of motion varied from 30% up to 56%. From the documents submitted this court cannot say that Plaintiff's alleged loss of over 50% of her range of motion in some movements is insignificant. Since there is a large discrepancy between the amount of range of motion the Plaintiff actually lost, as presented by Dr. Miller and Dr. Albert, Plaintiff has raised a triable issue of material fact with respect to whether Plaintiff suffered a permanent consequential limitation of use of a bodily function. Therefore, Defendant's motion for summary judgment must be denied.

### CONCLUSION

A court's role in evaluating summary judgment motions is one of issue finding, not issue resolution. In this case, Plaintiff submitted expert evidence that demonstrates that she suffered a significant physical limitation. The credibility of the competing expert opinions must be resolved at trial.

Accordingly, it is hereby:

ORDERED, that Defendant Peter C. Menmasheimer's motion for summary judgment dismissing Plaintiff's complaint is denied; and it is further

ORDERED, that the parties return to DCM Part 3 on Monday, April 19, 2010 at 9:30a.m. for a pre-trial conference.

ENTER,

DATED: March 19, 2010

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Joseph J. Maltese  
Justice of the Supreme Court

