

<b>Abreu v Braga Corp.</b>
2019 NY Slip Op 33104(U)
September 25, 2019
Supreme Court, Kings County
Docket Number: 505991/2016
Judge: Richard Velasquez
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At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 25<sup>th</sup> day of September, 2019.

P R E S E N T:  
HON. RICHARD VELASQUEZ  
Justice.

-----X  
LUIS ABREU,

Plaintiff,

Index No.: 505991/2016

-against-

Decision and Order

BRAGA CORP. and PAT ROCCHIO,

Defendants.

-----X

The following papers numbered 53 to 70 read on this motion:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion/Order to Show Cause Affidavits (Affirmations) Annexed _____	53-64
Opposing Affidavits (Affirmations) _____	65-69
Reply Affidavit _____	70

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After oral argument and a review of the submissions herein, the Court finds as follows:

Defendant moves this court pursuant to C.P.L.R. §3212, for an Order granting Defendant summary judgment and dismissing the Complaint of the Plaintiff, upon the ground that Plaintiff has failed to meet the "serious injury" threshold requirement mandated by Insurance Law §5102(d); and granting such other further relief as this Court

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deems just and proper. Plaintiff opposes the same contending there are material issues of fact.

### ARGUMENTS

Defendants argue Plaintiff's injuries do not meet the threshold requirements of a "serious injury" as defined by Insurance Law § 5102(d). Defendant's also argue that 2 months after the accident doctors found "normal" range of motion in the and left knee and right shoulder, shifting the burden to the Plaintiff. Defendant's argue that Plaintiff fails to raise a triable issue of fact for the jury.

Plaintiff argues Defendants' moving papers fail to establish no serious injury as a matter of law, because there are conflicting range of motion measurements.

### ANALYSIS

It is well established that a moving party for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issue of fact. *Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 853 (1985). Once there is a prima facie showing, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form to establish material issues of fact, which require a trail of the action. *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980); *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986). However, where the moving party fails to make a prima facie showing, the motion must be denied regardless of the sufficiency of the opposing party's papers.

A motion for summary judgment will be granted "if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing the judgment in favor of any party". C.P.L.R. §3212

(b). The “motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact.” *Id.*

In a soft tissue injury case, a plaintiff alleging a “serious injury”, must provide objective medical evidence of a “serious injury” within the meaning of the Insurance Law § 5102(d). “Both the defendant who seeks to make a prima facie showing, and the plaintiff who attempts to raise a triable issue of fact, must provide quantitative, numerical, range of motion findings and compare those findings to “normal.” *Knokhin v. Murray*, 27 Misc.3d 1211(A), 2010 WL 1542529 (N.Y.Sup.). A defendant seeking summary judgment on the grounds that plaintiff’s injury does not meet the threshold, the defendant must show that there is no question of fact that there is no loss of range of motion.

In the present motion defendants fail to show that there is no “serious injury” as a matter of law because the evaluating doctors find differing ranges of motion. Additionally, the reports annexed by the defendant do not state what means were used to take the alleged measurements where normal ranges of motion were found. Nonetheless, there are conflicting reports regarding ranges of motion.

This is similar to the situation in *Knokhin v. Murray*, 27 Misc.3d 1211(A), 2010 WL 1542529 (N.Y.Sup.), where the defendants evaluating doctors found differing normative values. In *Knokhin*, the court denied summary judgment because when the findings reported by one doctor are assessed by application of the standard of “normal” stated by the other doctors, the reports present “contradictory proof”. *Id.* See also *Dettori v. Molzon*, 306 A.D.2d 308, 309 [2d Dept 2003]. As Judge Battaglia noted in *Knokhin supra.*, in the Second Department, measuring a plaintiff’s range of motion and comparing

it to a normal range of motion has become the linchpin of determining if a soft tissue injury is a "serious injury."

Therefore, in a case such as this where the ranges of motion observed by one of the doctors is less than the norm sworn to by another of the doctors, the defendant has failed to sustain its burden for summary judgment on the threshold.

Accordingly, defendant's Motion for Summary Judgment is hereby denied as there are material issues of fact regarding the "serious injury" threshold.

This constitutes the Decision/Order of the Court.

Date: September 25, 2019

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RICHARD VELASQUEZ, J.S.C.

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So Ordered  
Hon. Richard Velasquez

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