

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

-----x  
EDWIN VALLES,

Plaintiff,

-against-

JOSHUA A. ROWE and DARYL S. ANDERSON,  
Defendants.

**MICHELE M. WOODARD,  
J.S.C.**

TRIAL/IAS Part 18

**Index No.: 13828/05**

**Motion Seq. Nos. : 01 & 02**

**DECISION & ORDER**

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**Papers Read on this Motion:**

Defendant Joshua Rowe's Notice of Motion	01
Defendant Daryl S. Anderson's Cross Motion	02
Plaintiff Edwin Valles' Affirmation in Opposition	xx
Defendant Joshua Rowe's Reply Affirmation	xx

The defendants move by Notice of Motion and Cross- Motion for an Order granting them Summary Judgment based on the Plaintiff failing to meet the "serious injury" threshold required by Insurance Law §5102(d).

The plaintiff opposes both motions.

This matter arose out of a motor vehicle accident that occurred on February 2, 2002 at approximately 4:33 P.M. on the Southern State Parkway near Nassau Road in Hempstead. Allegedly, Defendant DARYL ANDERSON's car hit defendant JOSHUA ROWES' car which then rear ended EDWIN VALLES' car, hereinafter referred to as "MR. VALLES".

MR. VALLES alleges to have sustained the following injuries as set forth in the plaintiff's Verified Bill of Particulars:

- Focal central disc herniation at C5-6,
- broad based disc bulge at L5-S1,
- right C5- C6 radiculopathy;

- myalgia and myositis;
- cervicalgia;
- brachial neuritis or radiculitis of upper limb;
- sprain and strain of neck;
- cervical segmental dysfunction;
- cervical subluxation;
- pain in the thoracic spine;
- thoracic segmental dysfunction,
- thoracic subluxation;
- low back pain syndrome;
- thoracic or lumbosacral neuritis and radiculitis;
- sprain and strain of lumbar spine;
- lumbar segmental dysfunction;
- lumbar subluxation;
- muscle spasms;
- contusion of the chest wall and shoulder girdle myofascial pain syndrome bilaterally.

Immediately following the accident, the Plaintiff was taken to the Emergency Room of Mercy Medical Center by ambulance. He sought follow-up treatment with Dr. Igor Chanmin, hereinafter referred to as “Dr. Chanmin”, for his injuries.

On November 28, 2005, the plaintiff, EDWIN VALLES, was examined by Dr. Leon Sultan, hereinafter referred to as “Dr. Sultan”, an orthopedic doctor, at the request of the defendants. Dr. Sultan concluded the following after a review of the plaintiff’s medical records and a thorough physical examination: “This gentleman claims multiple injuries as described above following the occurrence of 2/22/02. Today’s comprehensive orthopedic and orthopedic neurological evaluation in regard to the cervical spine and thoracolumbar spine reveals that he is orthopedically stable and neurologically intact. Clinically, I cannot confirm any ongoing disability or post-traumatic orthopedic impairment in regard to the occurrence of 2/22/02. From a clinical point of view, there is no correlation between today’s spinal examination and the above-described MRI or upper extremity EMG readings.”

On December 6, 2005, the plaintiff, EDWIN VALLES, was examined by Dr. Daniel J. Feuer, hereinafter referred to as "Dr. Feuer", a neurologist, at the request of the defendant. Dr. Feuer concluded the following after a thorough physical examination and review of the medical records: "Normal neurological examination." "The claimant's neurological examination is presently within normal limits. I am therefore unable to recommend any further treatment within my medical specialty." "Based on a reasonable degree of clinical certainty, I believe the claimant, Mr. Edwin Valles does not demonstrate any objective neurological disability or neurological permanency, which is causally related to the accident of February 22, 2002. He is neurologically stable to engage in full active employment, as well as the full activities of daily living without restrictions."

MR. VALLES himself acknowledged that approximately seven (7) months after the accident he stopped his medical treatment at Excellence Medical and never returned.

Pursuant to Sections §5102 and §5104 of the Insurance Law, an individual may not institute an action for personal injuries arising out of an automobile accident unless that individual has suffered a "serious injury. A "serious" injury is statutorily defined as: "death, dismemberment; significant disfigurement; 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, significant limitation of use of a body function or system; an injury or impairment of a non-permanent nature which prevents the injured person from substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety (90) days during the one hundred eighty (180) days immediately following the occurrence of the injury or impairment."

According to the MR. VALLES, he began experiencing pain in his head, back, neck and shoulders immediately following the accident. The pain was persistent and, several days after the accident, he sought medical treatment at Excellence Medical, P.C.

Dr. Chanmin reported that the EMG study revealed evidence consistent with left C5-6 radiculopathy. Dr. Chanmin recommended that MR. VALLES start physical therapy and rehabilitation program consisting of hot/cold packs, ultrasound, therapeutic massage and electrical stimulation. MR. VALLES underwent extensive medical treatment for approximately six (6) months. Plaintiff states that he stopped treatment only when he reached maximum medical improvement after physical therapy treatment and the treatment was not alleviating his symptoms.

Upon the recommendation of his doctor, Plaintiff underwent MRI of the cervical and lumbar spines, which revealed that Plaintiff sustained focal central disc herniation at C5-C6 level; broad based disc bulge at L5-S1.

Plaintiff also underwent range of motion tests performed by Dr. Chanmin. Examination of the cervical spine revealed loss of range of motion in the cervical region in flexion by 25%; in extension by 26%, in the lumbar region in flexion by 23%; in extension 26%.

Plaintiff continued treatment with Excellence Medical P.C. until October of 2002 when it ended because his no-fault benefits were cut off.

In his deposition testimony, MR. VALLES states that he still experiences pain in his neck, back, left shoulder and has regular headaches. Physical activity such as pushing or lifting causes pain.

On December 21, 2006, MR. VALLES was examined by Dr. Paul, an orthopedic surgeon

who using a goniometer, an objective medical instrument, measured MR. VALLES' range of motion of his cervical and lumbar spines. The results of the objective range of motion tests performed by Dr. Paul are as follows:

- Limited range of motion of the cervical spine with flexion to 20 degrees (normal is 60) and extension to 20 degrees (normal is 50).
- Tenderness on palpation over the C5 through C6 levels of the cervical spine. Neck compression test was positive. Vertex was positive.
- Limited range of motion of the lumbar spine with forward bending to 45 degrees (normal is 90) and lateral bending to 10 degrees, bilaterally (normal is 30).
- Straight left raising was positive at 45 degrees, bilaterally (normal is 90).
- Radicular sign positive at right lower leg.
- Physical examination of the shoulders demonstrated mild tenderness on palpation over the AC joint.
- Positive impingement sign.
- Crepitus on range of motion of the left shoulder is noted.
- Limited range of motion of the left and right shoulders with abduction to 120 degrees (normal is 180) and forward flexion to 120 degrees (normal is 180).

In his report Dr. Paul stated that he believes that the patient's condition is directly related to the accident of February 2, 2002. He also noted in his certified report that "as to the cervical and lumbar spine, patient will continue to suffer from limitation of range of motion."

Plaintiff asserts that it is enough to meet the "serious injury" threshold that he sustained a medically determined injury or impairment of a permanent nature which prevented him from performing substantially all of the material acts which constituted his usual and customary activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment.

It is well established that a party moving 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 issues of fact (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853; *Zuckerman v. City of New York*, 49 NY2d 557, 562). Once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (*Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324; *Zuckerman v. City of New York*, supra, at 562).

Plaintiff has successfully rebutted any *prima facie* showing of entitlement.

Based upon the reports and Affirmations of Dr. Chanmin and Dr. Paul, the Court finds that MR. VALLES has met the burden of producing evidence of “permanent consequential limitation of a body function or system” within the meaning of the statute, creating an issue of fact as to whether the Plaintiff suffered a “serious injury.”

Accordingly, the Defendant’s motion, pursuant to CPLR §3212 and New York Insurance Law §5102 is **DENIED**. It is hereby

**ORDERED**, that this matter is hereby **CERTIFIED** as Ready for Trial. It is further

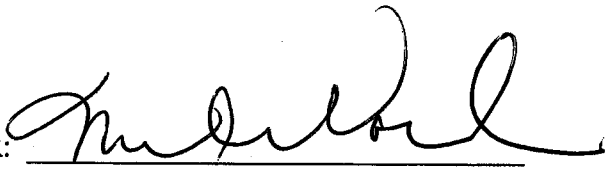
**ORDERED**, that this matter is **CONSOLIDATED** for Joint Trial with the matter of *Rowe v Valles*, Index #1866/2004.

Parties are directed to appear before DCM on June 28, 2007 for a Pre-Trial Conference.

This constitutes the Decision and Order of the Court.

**DATED:** Mineola, New York  
June 27, 2007

ENTER:



HON. MICHELE M. WOODARD

**ENTERED**

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NASSAU COUNTY  
COUNTY CLERK'S OFFICE