

**Short Form Order**

**NEW YORK SUPREME COURT -QUEENS COUNTY**

**PRESENT: ORIN R. KITZES**  
**Justice**

**PART 17**

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**ANA GUEVARA,**

**Plaintiff,**

**-against-**

**Index No.: 18351/05**  
**Motion Date: 3/14/07**  
**Calendar Number: 25**

**YUAN MING SONG and YAO CHEN,**  
**Defendants.**

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The following papers numbered 1 to 8 read on this motion by defendants for an order granting summary judgment in their favor and dismissing the complaint on the grounds that plaintiff has not sustained a serious injury within the meaning of Insurance Law §§ 5102 and 5104.

	PAPERS NUMBERED
Notice of Motion-Affirmation-Exhibits.....	1-4
Affirmation & Opposition-Exhibits.....	5-6
Reply Affirmation.....	7-8

Upon the foregoing papers it is ordered that the motion by defendants for an order granting summary judgment in their favor and dismissing the complaint on the grounds that plaintiff has not sustained a serious injury within the meaning of Insurance Law §§ 5102 is denied, for the following reasons:

The action arises out of an accident that occurred on April 8, 2005, on at or near the intersection of Jerusalem Avenue and Rutland Road, Nassau County, New York. Thereafter, plaintiff commenced the instant action to recover for personal injuries sustained as a result of this accident.

Initially, it is for the court in the first instance to determine whether plaintiff has established a prima facie case of sustaining a serious injury within the meaning of Insurance Law 5102 (d). *See, Licari v Elliot*, 57 NY2d 230,237 (1982); *Armstrong v Wolfe*, 133 AD2d 957,958 (3<sup>rd</sup> Dept. 1987.) To grant summary judgment it must clearly appear that no triable issue of fact is presented. *Miceli v Purex Corp.*, 84 AD2d 562 (2d Dept. 1981.) The court need not resolve issues of fact or determine matters of credibility, but must determine whether such issues exist. *Bronson v March*, 127 AD2d 810 (2d Dept. 1987.)

Defendants have submitted, *inter alia*, the following in support of their motion: plaintiffs' bill of particulars and deposition testimony, an affirmed report of Dr. Jayaram, a

neurologist, who examined plaintiff, at defendants' request, on January 11, 2007, an affirmed report of Dr. Kerness, an orthopedist, who examined plaintiff, at defendants' request, on January 11, 2007, and Dr. Heiden, a radiologist, who reviewed plaintiff's MRIs of her left shoulder, cervical spine, and lumbar spine.

Plaintiff's Bill of Particulars states that plaintiff sustained various injuries as a result of the car accident, including, cervical radiculopathy, cervical disc bulges C2-C4, cervical disc herniation at C5-C6, lumbar disc herniations L4 -S1 and a tear of the supraspinatus muscle of the left shoulder. Doctor Jayaram found plaintiff to have large degrees of restrictions of motion in her cervical and lumbar spine. The Doctor found these restrictions to have been created by plaintiff's own actions and concluded she had no disability. Dr. Kerness found plaintiff to have large degrees of restrictions of motion in her cervical and lumbar spine and left shoulder. The Doctor found these restrictions to have been created by plaintiff's own actions and concluded she had no disability. Dr. Heiden's review of the MRIs revealed, inter alia, no evidence for any tear in the left shoulder, disc bulges at the C2-3, C3-4, and C4-5 levels indenting the thecal sac, and disc herniations at L4-5 and L5-S1.

The defendants failed to establish their prima facie entitlement to judgment as a matter of law by showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the subject motor vehicle accident. Toure v Avis Rent a Car Sys., 98 N.Y.2d 345(2002.) The affirmed medical reports of the defendants' examining doctors indicate the existence of limitations in the range of motion of the plaintiff's left shoulder, lumbar and cervical spine. Although these examining doctors found these restrictions to be self imposed, the degrees of restrictions found are so large that raise an issue of fact as to whether plaintiff suffered a "serious injury". *Compare*, Style v Joseph, 32 AD3d 212 (1<sup>st</sup> Dept 2006.) Furthermore, defendants' radiologist identified disc bulges and herniations in corresponding areas of the spine. Grady v Jacobs, 32 A.D.3d 994 (2d Dept 2006) Scotti v Boutoureira, 8 A.D.3d 652 (2d Dept 2004.) Significantly, defendants' doctors did not make findings that preclude the disc bulges and herniations to be causally related to the accident. Zavala v DeSantis, 1 Ad3d 354 (2d Dept 2003.) Since the defendants failed to meet their initial burden of establishing a prima facie case, it is unnecessary to consider whether the plaintiff's papers submitted in opposition to the defendant's motion were sufficient to raise a triable issue of fact . Grady v Jacobs, *supra*. Based upon the above, the defendants' motion is denied.

**DATED : March , 2007**

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**ORIN R. KITZES, J.S.C.**