

**Rahman v Konecsni**

2007 NY Slip Op 30558(U)

March 9, 2007

Supreme Court, Queens County

Docket Number: 0000734/2005

Judge: Orin R. Kitzes

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

**Short Form Order**

**NEW YORK SUPREME COURT -QUEENS COUNTY**

**PRESENT: ORIN R. KITZES**

**PART 17**

**Justice**

-----X

**FARRAH RAHMAN,**

**Plaintiff,**

**Index No.: 734/05**

**Motion Date: 3/7/07**

**-against-**

**Motion Cal. No.: 49**

**JOHNEMERY KONECSNI,**

**Defendant.**

-----X

The following papers numbered 1 to 9 read on this motion by defendant for an order granting summary judgment in defendant's favor and dismissing the complaint on the ground 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 in Opposition-Exhibits.....	5-7
Reply Affirmation.....	8-10

Upon the foregoing papers it is ordered that the motion for an order granting summary judgment in defendant's favor and dismissing the complaint, on the ground that plaintiff has not sustained a serious injury within the meaning of Section 5102 of the Insurance Law is granted, for the following reasons:

This action stems from a motor vehicle accident that occurred on January 17, 2002, on Braddock Avenue at or near its intersection with 89<sup>th</sup> Avenue, Queens County, New York. Plaintiff commenced this action and alleged in her complaint that she suffered serious injuries from this accident.

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.) The analysis of the meaning of serious injury has a long history beginning with *Licari v Elliott*, *supra*, and applying what could be discerned from the legislative intent, the Court of Appeals, analyzing the word "significant", wrote that "the word 'significant' as used in the statute pertaining to 'limitation of use of a body function or system' should be construed to

mean something more than a minor limitation of use. We believe that a minor, mild or slight limitation of use should be classified as insignificant within the meaning of the statute" ( Licari v Elliott, supra, at 236.) The Court of Appeals reiterated this analysis in Dufel v Green, 84 N.Y.2d 795 (1995), in which it wrote that the legislative intent of the "no-fault" legislation was to weed out frivolous claims and limit recovery to major or significant injuries.

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.) Additionally, summary judgment should be granted in cases where the plaintiff's opposition is limited to "conclusory assertions tailored to meet statutory requirements" ( Lopez v Senatore, 65 N.Y.2d 1017.) 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.)

In support of this motion, defendant has submitted, *inter alia*, plaintiff's deposition testimony and Bill of Particulars, an affirmed report of Dr. Katz, an orthopedist, who examined plaintiff on October 16, 2006, and an affirmed report of Dr. Mendelsohn, a radiologist, who reviewed MRI images of plaintiff's cervical and thoracic spine that were taken during March 2002.

Plaintiff's Bill of Particulars indicates that she suffered disc bulges at C5-6, C6-7, T11-T12 impinging on the anterior aspect of the spinal canal, cervical and lumbar sprain, and decreased range of motion of the lumbar, cervical, and thoracic spine. Her deposition testimony indicates that after the accident she made no complaints of pain to the ambulance personnel and did not seek treatment for her alleged injuries until two days after the accident. She visited Dr. Snyder and was treated for about a year, but was not given any medication. Doctor Katz reviewed plaintiff's medical records and performed an examination of plaintiff, at defendant's request and concluded that plaintiff had recovered from a cervical and thoracolumbar strain. Doctor Mendelsohn reviewed plaintiff's radiologist's reports and the MR images of plaintiff's cervical and thoracolumbar spine. He found adequate height and signal intensity of the discs and no evidence of a bulge or herniation in either image.

The Court finds that defendant has submitted proof in admissible form which establishes that plaintiff has not suffered a serious injury within the meaning of Insurance Law § 5102. Consequently, the burden shifts to the plaintiff to come forward with evidence to overcome the defendant's submissions by demonstrating a triable issue of fact that a serious injury was

sustained within the meaning of the Insurance Law. *See, Gaddy v Eyster*, 79 N.Y.2d 955 [1992] ; *Greggs v Kurlan*, 290 AD2d 533 (2d Dept 2002.) Consequently, the plaintiff must present objective evidence of the injury. The mere parroting of language tailored to meet statutory requirements is insufficient (*see, Powell v Hurdle*, 214 A.D.2d 720 [2d Dept. 1995].) Further, courts have consistently held that a plaintiff's subjective claim of pain and limitation of motion must be sustained by verified objective medical findings (*see, Grossman v. Wright*, 268 A.D.2d 79 (2d Dept 2000.) Moreover, these verified objective medical findings must be based on a recent examination of the plaintiff. *Id.* In that vein, any significant lapse of time between the cessation of the plaintiff's medical treatments after the accident and the physical examination conducted by his own expert must be adequately explained. *Id.* Therefore, in order to successfully oppose a motion for summary judgment on the issue of whether an injury is serious within the meaning of Insurance Law § 5102(d), the plaintiff's expert must submit quantitative objective findings in addition to an opinion as to the significance of the injury. *Id.* This burden has not been met by plaintiff.

In opposition, plaintiff has submitted, inter alia, an attorney's affirmation, her affidavit, an affidavit of Dr. Snyder, a chiropractor, and reports of Dr. Rizzuti, a radiologist. Dr. Snyder's report indicates plaintiff first treated with him on January 18, 2002 with complaints of pain from the subject accident. He did various tests and determined she had range of motion limitations and diagnosed her as having, inter alia, disc disorder and lumbar instability. He found them to be causally related to the subject accident and significant. He placed her on a course of physical therapy and chiropractic care, that included massage and electro-stimulation, that lasted until July 2002. Dr. Snyder referred her for MRI examinations; these indicated the above-mentioned findings and the Doctor found these confirmed his diagnoses. Plaintiff did not return to Dr. Snyder until February 15, 2007. At that time he performed an examination and found range of motion limitations in her cervical and thoracic- lumbar spine due to the injuries shown in the MRI. He concluded these injuries were significant and would hinder her daily activities for the remainder of her life.

Dr. Rizzuti affirmed that during March 2002 he supervised the taking of plaintiff's MR Images and made the findings that are set forth above.

Plaintiff's proof of an attorney's affirmation is not admissible probative evidence on

medical issues. Armstrong v Wolfe, *supra* at 958. Similarly, her own deposition testimony is not admissible probative evidence on medical issues. *Id.* Moreover, her subjective complaints of pain, unsupported by credible medical evidence, are insufficient to show serious injury. Georgia v Ramautar, 180 AD2d 713 ( 2d Dept. 1992.) The affidavit of Dr. Snyder fails to specifically state what objective tests were done, the manner in which they were performed and what results were obtained. *See*, Wadi v. Tepedino, 242 AD2d 327 (2d Dept. 1997.) Additionally, to the extent tests were conducted, they were subjective in nature since they relied upon plaintiff's complaints of pain. *See*, Toure v Avis, 98 NY2d 345, 357 (2002.) Dr. Snyder also refers to one examination that was taken in 2002 without submitting any report generated at the time of that examination-or any of his 2002 treatment sessions. Moreover, plaintiff has submitted no expert evidence that explains the significance of the findings by defendant's radiologist regarding the non-existence of plaintiff's injuries. Francis v Christopher, 302 AD2d 425 (2d Dept 2003.) Furthermore, plaintiff has not given any explanation for the significant gap of more than 4 years between her 2002 visits with Dr. Snyder and the February 2007 visit-which was made after the submission of the instant motion. *Id.* This gap in treatment indicates that plaintiff ceased all treatment, and without an explanation casts grave doubt upon the initial diagnosis. It also suggests that the findings made at the February 2007 examination are not causally related to the subject accident. Pommells v Perez, 4 NY3d 566 (2005.)

Finally, the appellants failed to raise a triable issue of fact as to whether their injuries prevented them from performing substantially all of their customary and usual activities during at least 90 of the first 180 days following the accident. *Id.* For all of the reasons set forth above, plaintiff has failed to raise an issue of fact that she suffered a "serious injury" and defendant's motion for an order of summary judgment dismissing the complaint and all counterclaims is granted. CPLR 3212.

**Dated: March 9, 2007**

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