

**Mosheyeva v Takuatong Chatchai Na**

2007 NY Slip Op 31091(U)

April 23, 2007

Supreme Court, Queens County

Docket Number: 0028752/2004

Judge: Orin R. Kitzes

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**Short Form Order**

**NEW YORK SUPREME COURT -QUEENS COUNTY**

**PRESENT: ORIN R. KITZES**

**PART 17**

**Justice**

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**LYUDMILA MOSHEYEVA,**  
**Plaintiff,**

**Index No.: 28752/04**  
**Motion Date: 4/18/07**  
**Motion Cal. No.: 39**

**-against-**

**TAKUATONG CHATCHAI NA and**  
**TIPPAWUN KINGSAWAT,**  
**Defendants.**

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The following papers numbered 1 to 10 read on these motions 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 in Opposition-Exhibits.....	5-7
Reply Affirmation-Exhibits.....	8-10

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

This action arose out of a motor vehicle accident that occurred on February 28, 2002, on the Long Island Expressway at Exit 30 South, 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, defendants have submitted, *inter alia*, affirmed reports of Dr. Farkas, an Orthopedist, who examined plaintiff on April 4, 2006, and an affirmed report of Dr. Feuer, a Neurologist, who examined plaintiff on February 28, 2006. Dr. Farkas found normal range of motion in the cervical spine and left shoulder, no muscle spasm, and a resolved cervical spine. He concluded that plaintiff was orthopedically stable and without an ongoing disability. Dr. Feuer found plaintiff to have a normal neurological examination and to not have any disability. Defendants have also referred to plaintiff's MRI reports that were prepared during 2002.

The Court finds that defendants have 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 Eyler, 79 N.Y.2d 955 [1992] ; Greggs v Kurlan, 290 AD2d 533 (2d Dept 2002.) As such, 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 been met by plaintiff.

In opposition, plaintiff has submitted, *inter alia*, an attorney's affirmation, an affirmation of Dr. Rosarian, who examined plaintiff on June 21, 2006, an affirmation and report of Dr. Sandler, who examined plaintiff on March 5, 2002, an April 8, 2002, MRI report of plaintiff's lumbar spine, by Dr. DeMarco, a radiologist, and a March 6, 2002, MRI report of plaintiff's cervical spine, by Dr. DeMarco.

Dr. Rosarian reviewed plaintiff's medical history, reviewed her MRI reports and then examined her. He found limitations in motion and specified the decreased range of motion in plaintiff's cervical spine and compared these with normal ranges. He also found muscle spasm in the cervical spine and explained that her injuries were permanent and causally related to the subject accident. He noted that she ceased treatment since additional care would not relieve her pain. Dr. Sandler examined plaintiff and found restrictions of motion in plaintiff's spine and confirmed the presence of disc herniations that were present in the MRI reports. She found that the limitations were a consequence of the subject accident and would be long lasting. Dr. DeMarco reviewed the MR images, that were taken during 2002 and observed, *inter alia*, straightening of the cervical and lumbar lordosis consistent with muscle spasm and disc a herniation at C5-C6.

This evidence is sufficient to raise a triable issue of fact that plaintiff sustained serious injuries within the meaning of the Insurance Law. *See Fabiano v Kirkorian*, 306 AD2d 373 (2d Dept 2003.) (Plaintiff who had a herniated disc, submitted an affirmation of an orthopedist which specified the decreased range of motion and explained that his injuries are permanent and causally related to the motor vehicle accident was sufficient to raise a triable issue of fact.) *See also, Cenatus v Rosen*, 3 AD3rd 546 (2d Dept 2004.) (Plaintiff's opposition of an affirmation from a physician who performed a recent examination of the plaintiff and quantified the results with percentages of the loss of range of motion of the cervical and lumbosacral established an issue of fact.) Moreover, the plaintiff's doctor's claim that treatment ended because plaintiff had reached maximum improvement is accepted as a minimally adequate explanation for his gap in treatment. *Brown v Achy*, 9 AD3d 30 (1<sup>st</sup> Dept 2004.) *See also, Pommels v Perez*, 4 NY3d 566 (2005.) Finally, the court notes that it has not considered plaintiff's prior injury, since defendants filed this motion without obtaining records concerning the prior injury. In this vein, defendants did not avail themselves of

available methods to obtain these records and it would be inappropriate for this Court to speculate as to the relationship between the prior injury and the current injuries. Consequently, plaintiff has met her burden and raised a triable issue of fact as to whether she suffered a "serious injury" and defendants' motion for summary judgment is denied.

**Dated: April 23, 2007**

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