

<b>Chryssty v Koskovolis</b>
2011 NY Slip Op 31883(U)
June 21, 2011
Supreme Court, Nassau County
Docket Number: 2055/09
Judge: Jeffrey S. Brown
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**SHORT FORM ORDER**

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

**P R E S E N T : HON. JEFFREY S. BROWN  
JUSTICE**

-----X **TRIAL/IAS PART 21**  
**NATALIA CHRYSSTY,**

**Plaintiff,**

**Index No. 2055/09**

**- against -**

**Mot. Seq. # 1,2  
Mot. Date 2.9.11  
Submit Date 4.28.11  
XXX**

**LOUIS KOSKOVOLIS, CHRISTINE KOSKOVOLIS  
and BRUCE YAFA,**

**Defendants.**

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The following papers were read on this motion:	Papers Numbered
Notice of Motion, Cross Motion, Affidavits (Affirmations), Exhibits Annexed.....	1, 2
Answering Affidavit .....	3,4
Reply Affidavit.....	5,6

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Defendants, Louis Koskovolis and Christine Koskovolis<sup>1</sup>, move pursuant to CPLR §3212, for an order granting summary judgment dismissing the plaintiff's complaint on the following bases: that defendant, Christine Koskovolis, was neither the owner nor the operator of

<sup>1</sup> Having reviewed the record, including the Police Accident Report, the Vehicle Title Record and the Registration Plate Record, the latter two of which were issued by the Department of Motor Vehicles, it is clear that defendant, Christine Koskovolis, was neither the owner nor the operator of the vehicle alleged to have rear-ended the plaintiff's vehicle (see La Penna Affirmation in Support at Exhs. F, G). Accordingly, summary judgment dismissing that plaintiff's complaint as against said defendant is hereby **GRANTED**.

the offending vehicle relevant herein; and that the plaintiff has not sustained a serious injury (Sequence #001).

Defendant, Bruce Yafa, cross-moves pursuant to CPLR §3212, for an order granting summary judgment dismissing the plaintiff's complaint, together with any and all cross-claims asserted against him, on the basis that he bears no liability for the happening of the subject accident or *in the alternative* on the basis that the plaintiff did not sustain a serious injury (Sequence #002).

The underlying action was commenced by the plaintiff, Natalia Chryssty, to recover for injuries she sustained as a result of an accident which occurred on August 8, 2008, in the intersection of Middle Neck Road and Northern Boulevard in Nassau County, New York (*see* La Penna Affidavit in Support at p. 5; *see also* Exhs. A, D, F, N). At the time of the accident, the 2007 Lexus automobile in which the plaintiff was a passenger and which was being operated by defendant, Bruce Yafa, was struck in the rear by the vehicle owned and operated by defendant, Louis Koskovolis (*id.* at Exhs. A; D at pp. 38,39,40; F). The plaintiff herein is the owner of the 2007 Lexus, which was being operated by Mr. Yafa with her consent (*id.* at Exh. A at ¶14). The plaintiff claims that a consequence of the subject accident, she has sustained serious injuries as defined in Article 51 of the New York State Insurance Law (*id.* at Exhs. A, D, N).

As extrapolated from the Verified Bill of Particulars, the plaintiff, alleges that the following injuries were proximately caused by the subject accident: right knee arthroscopy on 1/15/09; right knee partial medial and lateral menisectomy; left knee arthroscopy on 5/18/09; oblique tear of the posterior horn medial meniscus involving interior articular surface; horizontal cleavage tear of posterior horn and body lateral meniscus associated with small parameniscal

cyst; oblique tear of the posterior horn of the medial meniscus with extension into the body segment; cervical sprain/strain; myospasm at Occ-C1 bilaterally and C5-C7; lumbar sprain/strain with lumbar radicular involvement; restriction of motion to the cervical and lumbar spines; restriction of motion of the knees bilaterally; scarring of knees bilaterally; headaches (*id.* at Exh. N).

The Court initially addresses the application interposed by defendant, Louis Koskovolis, which seeks dismissal of the within action on the basis that the plaintiff injuries do not fall within any of the categories defined in §5102(d) of the Insurance Law (*id.* at pp. 11-19)<sup>2</sup>. As evidentiary support for the within application, the defendants provide the affirmed medical reports of Dr. Sultan, M.D., an orthopedist, and Dr. Pfeffer, M. D., a radiologist (*see* La Penna Affirmation in Support at Exhs. K, L).

Dr. Sultan conducted an orthopaedic examination of the plaintiff on July 6, 2010, which included an evaluation of the plaintiff's cervical and thoracolumbar spines, as well as both knees (*id.* at Exh. K). With respect to the cervical spine, range of motion testing, which was determined by way of a goniometer, revealed normal findings and Dr. Sultan noted the absence of paracervical muscle spasm (*id.*). As to the thoracolumbar spine, goniometric measurement again revealed normal findings and Dr. Sultan stated that straight leg raising was negative bilaterally and that both the Patrick and Trendelenburg tests were negative bilaterally (*id.*). With respect to the plaintiff's knees, goniometric measurement revealed normal ranges of motion and Dr. Sultan

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<sup>2</sup> In support of that branch of the cross-motion for summary judgment dismissing the plaintiffs's complaint on the basis that she did not sustain a serious injury, counsel for defendant, Bruce Yafa, expressly adopts those arguments set forth by counsel for defendant, Louis Koskovolis, proffered in support of his application, which seeks summary judgment on said basis (*see* Meli Affirmation in Support at 7).

noted that “[b]ilaterally, the Spring test [was] negative and the McMurray test [was] negative”(id.). Dr. Sultan ultimately concluded that the “orthopedic and neurological examination in regard to [the plaintiff’s] cervical spine and thoracolumbar spine reveals her to be orthopedically stable and neurologically intact” and that due to “the occurrence of 8/8/08 she is no longer disabled” (id.).

Dr. Sondra Pfeffer, M.D., conducted an independent radiologic review of a series of x-rays of the plaintiff’s left and right knees, on 11/5/08, as well as MRI’s of the plaintiff’s right and left knee, respectively taken on 11/10/08 and 1/6/09 (id. at Exh. L). With respect to the x-rays of the right knee, Dr. Pfeffer notes that said x-rays “fail to demonstrate any osseous, articular, or soft tissue abnormalities”(id.). As to the MRI of the right knee, Dr. Pfeffer notes the presence of “medial meniscal posterior horn intrasubstance degeneration/tearing extending to the inferior meniscal articular surface” (id.). Dr. Pfeffer ultimately opines that “there are no right knee x-ray or MRI findings attributable to the subject accident” (id.). As to the studies conducted in relation to the plaintiff’s left knee, Dr. Pfeffer states that the x-ray fails “to demonstrate any osseous, articular, or soft tissue abnormalities” and the results of the MRI indicate “medial and lateral meniscal intrasubstance degeneration with medial meniscal posterior horn tearing extending to the inferior meniscal articular surface” (id. at Exh. L).

It is well settled that a motion for summary judgment is a drastic remedy that should not be granted where there is any doubt as the existence of a triable issue of fact (*Sillman v Twentieth Century Fox*, 3 NY2d 395 [1957]; *Bhatti v Roche*, 140 AD2d 660 [2d Dept 1998]). To obtain summary judgment, the moving party must establish his or her claim or defense by tendering sufficient proof, in admissible form, sufficient to warrant the Court to direct judgment in the

movant's favor (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065 [1979]). Such evidence may include deposition transcripts as well as other proof annexed to an attorney's affirmation (CPLR §3212 [b]; *Olan v Farrell Lines*, 64 NY2d 1092 [1985]).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). It is incumbent upon the non-moving party to lay bare all of the facts which bear on the issues raised in the motion (*Mgrditchian v Donato*, 141 AD2d 513 [2d Dept 1998]). When considering a motion for summary judgment, the function of the court is not to resolve factual issues but rather to determine if any such material issues of fact exist (*Barr v County of Albany*, 50 NY2d 247 [1980]).

Within the particular context of a threshold motion which seeks dismissal of a personal injury complaint, the movant bears the specific burden of establishing that the plaintiff did not sustain a "serious injury" as enumerated in Article 51 of the Insurance Law §5102[d] (*Gaddy v Eyley*, 79 NY2d 955 [1992]). Upon such a showing, it becomes incumbent upon the nonmoving party to come forth with sufficient evidence in admissible form to raise an issue of fact as to the existence of a "serious injury" (*Licari v Elliott*, 57 NY2d 230 [1982]).

Within the scope of the defendant's burden, a defendant's medical expert must specify the objective tests upon which the stated medical opinions are based, and when rendering an opinion with respect to the plaintiff's range of motion, must compare any findings to those ranges of motion considered normal for the particular body part under evaluation (*Black v*

*Robinson*, 305 AD2d 438 [2d Dept 2003]; *Minlionica v Shahabi*, 296 AD2d 569 [2d Dept 2002]; *Junco v Ranzi*, 288 AD2d 440 [2d Dept 2001]; *Qu v Doshna*, 12 AD3d 578 [2d Dept 2004]; *Mondi v Keahan*, 32 AD3d 506 [2d Dept 2006]; *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345 [2002]; *Dufel v Green*, 84 NY2d 795 [1995]).

Insurance Law §5102[d] contains nine categories of injury which are deemed “serious” within the statutory scheme. Said categories include: “death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; a permanent consequential limitation of use of a body organ or member; a significant limitation of use of a body function or system; and a medically determined injury or impairment which prevents the injured person from performing substantially all of the material acts which constitute such person’s usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment [hereinafter the “90/180 category”].

In the instant matter, the plaintiff’s Verified Bill of Particulars does not identify into which of the nine enumerated categories her claimed injuries fall. However, the Court has reviewed the medicals records provided herein and notes that the plaintiff is not claiming the subject accident resulted in death, dismemberment, significant disfigurement, a fracture or the loss of a fetus (*id.*). Additionally, to establish a permanent loss of use of a body organ, member, function or system, the Court of Appeals has held that the plaintiff must demonstrate a “total loss of use” of the particular body part (*Oberly v Bangs Ambulance, Inc.*, 96 NY2d 295 [1996] at 297). Here, the medical evidence produced by the plaintiff does not establish that she suffered a total loss of use of any body parts (*id.*). Thus, the categories of injures which may be applicable

herein are a permanent consequential limitation of use of a body organ or member, a significant limitation of use of a body function or system and the 90/180 category.

Having carefully reviewed the record, the Court finds that the moving defendants have established their *prima facie* case entitling them to judgment as a matter of law (*Gaddy v Eyler*, 79 NY2d 955 [1992], *supra*). A review of Dr. Sultan's affirmed medical report indicates that he recited the specific tests upon which his medical opinions were predicated and compared the plaintiff's range of motion measurements to those which are deemed normal (*Black v Robinson*, 305 AD2d 438 [2d Dept 2003], *supra*; *Qu v Doshna*, 12 AD3d 578 [2d Dept 2004], *supra*; *Mondi v Keahan*, 32 AD3d 506 [2d Dept 2006], *supra*; *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345 [2002], *supra*; *Dufel v Green*, 84 NY2d 795 [1995], *supra*).

Additionally, with particular respect to the 90/180 category, the Court notes that Ms. Chryssty testified she lost a maximum of 25 days from work as a result of the subject accident and continued to maintain a home based business which she had established and attended monthly seminars in connection thereto (*Sanchez v Williamsburg Volunteer of Hatzolah, Inc.*, 48 AD3d 664 [2d Dept 2008]; *Geliga v Karibian*, 56 AD3d 518 [2d Dept 2008]).<sup>3</sup> Thus, the burden now shifts to the plaintiff to demonstrate a triable issue of fact with respect to the existence of a "serious injury" (*Licari v Elliott*, 57 NY2d 230 [1982], *supra*).

In opposition to the defendants' instant applications, counsel for the plaintiff submits the following: an affidavit and accompanying medical records and progress notes from Dr. Muchnick, D.C.; an affirmation from Dr. Natalie Arnoff, D.O.; two affirmed medical reports

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<sup>3</sup> *see* La Penna Affirmation in Support at Exh. D at pp. 21,22.

from Dr. Leon Bernstein, M.D.; two unsworn operative reports from Dr. Gazzaniga, M.D., and; two unsworn MRI reports relative to the plaintiff's right and left knees (*see* Pager Affirmation in Opposition at Exhs. A, B, C,E).

Dr. Muchnick, initially examined the plaintiff on 8/8/08, at which time the plaintiff specifically complained of pain in her "skull, \* \* \* lower cervicals, both shoulders, lower lumber spine and right medial knee" (*id.* at Exh. A). Dr. Muchnick conducted range of motion testing as to the plaintiff's cervical and lumbar spines and noted decreased ranges of motion in both areas (*id.*). He initially diagnosed the plaintiff as having sustained "cervical and lumbar sprain/strain with lumbar radicular involvement" (*id.*). As extrapolated from the progress notes, the plaintiff presented to Dr. Muchnick on a continuing basis until 1/12/09, after which she again appeared several months later on 5/11/09 (*id.*) On the latter of these visits, Dr. Muchnick commented that the plaintiff had undergone right knee surgery and exhibited "noted improvement" relative thereto (*id.*). Finally, on 3/23/11, the plaintiff again presented to Dr. Muchnick at which time he conducted an examination and noted tenderness as to the "right medial knee" and "mild medial tenderness" with respect to the left knee (*id.*).

Dr. Arnoff, D.O. examined the plaintiff on March 22, 2011, at which time range of motion testing was conducted indicating restrictions in the plaintiff's cervical and lumbar spines, as well as both knees (*id.* at Exh. B). Dr. Arnoff further noted that straight leg raising was positive "50 degrees on the right and 45 degrees on the left" (*id.*). Dr. Arnoff diagnosed the plaintiff as having sustained the following causally related injuries: "Bilateral knee arthralgia, post-operative, \* \* \* cervical and lumbar radiculopathy, right wrist and right hand arthralgia with

neuropathy, probably, due to cervical radiculopathy, thoracic and lumbosacral arthralgias, bilateral thighs neuropathy” (*id.*).

Dr. Bernstein, M.D., an orthopedist, examined the plaintiff on 12/17/10 and again on 3/9/11 (*id.* at Exh. C). On the first of these visits, Dr. Bernstein conducted a physical examination of the plaintiff and noted that “[r]ange of motion of both hips, knees and ankles are within normal” (*id.*). Dr. Bernstein further noted that there was “no instability in the knees” and that the plaintiff “was able to squat” (*id.*). On the examination conducted on 3/9/11, Dr. Bernstein conducted range of motion testing as to the cervical spine and noted restrictions with respect thereto (*id.*). Dr. Bernstein further noted that “straight leg raising is 60 degrees bilaterally with no referred pain” but does not specify the significance of such a finding or what a normal measurement would be.

In addition to the forgoing, the plaintiff submits two operative reports authored by Dr. Gazzaniga, who performed arthroscopic surgery on the plaintiff’s right and left knees on 1/15/09 and 5/18/09, respectively. As extrapolated from the operative report relevant to the right knee arthroscopy, Dr. Gazzaniga stated that “there was a degenerative medial and lateral meniscal tear to the posterior horn of the meniscus” (*id.* at Exh. E). With particular respect to the left knee arthroscopy, Dr. Gazzaniga opined that the plaintiff had “a longitudinal tear of the medial meniscus” (*id.*).<sup>4</sup>

When alleging a serious injury which falls within the ambit of Insurance Law §5102(d), a plaintiff is required to provide, *inter alia*, objective medical evidence contemporaneous with the

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<sup>4</sup> The Court notes that while neither of Dr. Gazzaniga’s reports are in admissible form, inasmuch as the defendant’s expert, Dr. Pfeffer made particular reference thereto, the plaintiff is entitled to rely thereon in opposing the within summary judgment motion (*Ayzen v Melendez*, 299 AD2d 381 [2d Dept 2002]; *Kearse v New York City Tr. Auth.*, 16 AD3d 45 [2d Dept 2005]).

subject accident, which demonstrates the extent and degree of the alleged physical limitation resulting from the injury (*see Ifrach v Neiman*, 306 AD2d 380 [2d Dept 2003]; *Jason v Danar*, 1 AD3d 398 [2d Dept 2003]; *Felix v New York City Tr. Auth.*, 32 AD3d 527 [2d Dept 2006]; *Garcia v Sobles*, 41 AD3d 426 [2d Dept 2007]; *Bestman v Seymour*, 41 AD3d 629 [2d Dept 2007]).

Further, in addition to providing medical proof contemporaneous with the subject accident, the plaintiff must also provide competent medical evidence containing verified objective findings based upon a recent examination, wherein the expert must provide an opinion as to the significance of the injury (*Kauderer v Penta*, 261 AD2d 365[2d Dept 1999]; *Constantinou v Surinder*, 8 AD3d 323 [2d Dept 2004]; *Brown v Tairi Hacking Corp.*, 23 AD3d 325 [2d Dept 2005]).

The Court has carefully reviewed the medical submissions provided the plaintiff herein, and applying the foregoing principles thereto, the Court finds that the plaintiff has failed to raise a triable issue of fact (*Licari v Elliott*, 57 NY2d 230 [1982], *supra*). In the matter *sub judice*, the only medical evidence offered by the plaintiff contemporaneous to the subject accident is that of Dr. Muchnick. However, while Dr. Muchnick examined the plaintiff on the very day of the subject accident and thus his examination is indeed contemporaneous therewith, his progress notes offered herein remain insufficient to defeat the defendants' respective motions for summary judgment (*id.*). As noted above, Dr. Muchnick opined that the plaintiff exhibited restricted range of motion in her cervical and lumbar spines and assigned a numerical value thereto. However, in rendering such an assessment, he does not, in any respect, compare his findings to those which are deemed normal for those body parts (*Morris v Edmund*, 48 AD3d 432 [2d Dept 2008];

*Johnson v Tranquille*, 70 AD3d 645 [2d Dept 2010]; *Berson v Rosada Cab Corp.*, 62 AD3d 636 [2d Dept 2009]; *Peri v Meher*, 74 AD3d 930 [2d Dept 2010]). The Court further notes that while the plaintiff is claiming injury to her left knee and asserts in her supporting affidavit that she complained of “bilateral knee pain”, nowhere in Dr. Muchnick progress notes spanning 8/8/08 through 5/11/09, does he ever mention the plaintiff’s left knee having been injured and thus the record is devoid of any medical evidence contemporaneous with the subject accident in relation thereto (*Vilomar v Castillo*, 73 AD3d 758 [2d Dept 2010]; *Jack v Acapulco Car Serv. Inc.*, 72 AD3d 646 [2d Dept 2010]; *Li v Woo Sung Yun*, 27 AD3d 624 [2d Dept 2006]).

Additionally, the plaintiff was last seen by Dr. Muchnick on 5/11/09. Thereafter Ms. Chryssty was not seen by a medical professional until she was examined by Dr. Bernstein on 12/17/10 and 3/9/11, as well as by Dr. Arnoff on 3/22/11. Thus, based upon the plaintiff’s own medical evidence, there exists a gap in treatment which exceeds a year and a half. As stated by the Court of Appeals, “while a cessation of treatment is not dispositive - the law surely does not require a record of needless treatment in order to survive summary judgment - a plaintiff who terminates therapeutic measures following the accident, while claiming ‘serious injury,’ must proffer some reasonable explanation for having done so” (*Pommells v Perez*, 4 NY3d 566 [2005] at 574). To this point, in her opposing affidavit, the plaintiff avers that “[a]fter months of chiropractic treatment spinal adjustment, I reached what I felt to be a ‘plateau’ for my back and neck injuries, where continued therapy was not providing any significant additional benefit.”<sup>5</sup> Additionally, Dr. Arnoff states that “[a]fter months of chiropractic treatment [with Dr. Muchnick], slight improvements of Ms. Chryssty’s neck and back condition were noted,

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<sup>5</sup> see Pager Affirmation in Opposition at Exh. D at ¶10).

however, the various modalities of therapy the patient was receiving no longer benefited [sic] her condition.”<sup>6</sup> However, notwithstanding the foregoing assertions, a review of Dr. Muchnick’s reports indicates that nowhere therein does he state the plaintiff reached maximum medical improvement when she stopped treating with him in May of 2009 (*id.*).

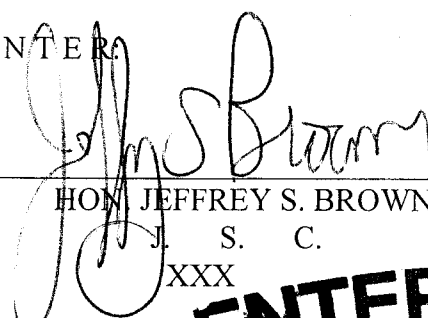
Finally, plaintiff failed to address the findings of defendant’s radiologist, Dr. Pfeffer, that the condition in plaintiff’s knees were caused by preexisting degeneration. This failure renders speculative plaintiff’s doctor’s conclusions that her knee injuries , and any alleged limitation thereof, were causally related to the subject accident (See, *Nieves v. Michael*, 73 AD3d 716).

Therefore, based upon the foregoing law and analysis, the application interposed by defendant, Louis Koskovolis, which seeks an order granting summary judgment dismissing the plaintiff’s complaint, as well as that branch of the application interposed by defendant, Bruce Yafa, which seeks an order dismissing the within complaint based upon the plaintiff’s failure to demonstrate the existence of a serious injury, are hereby **GRANTED** (Sequence # 001,002).

This constitutes the decision and order of this court. All applications not specifically addressed herein are denied.

Dated: June 21, 2011

ENTERED

  
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 HON. JEFFREY S. BROWN

J. S. C.

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**ENTERED**

JUN 23 2011

**NASSAU COUNTY  
 COUNTY CLERK'S OFFICE**

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<sup>6</sup> *id.* at Exh. B at ¶21).

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