

Short Form Order

NEW YORK SUPREME COURT -QUEENS COUNTY

PRESENT: ORIN R. KITZES

PART 17

Justice

-----X
MEYLIN HENAO, MARIA HENAO,

Plaintiff,

Index No.: 9640/05

Motion Date: 10/24/07

-against-

Calendar Number: 39

KHADER H. ZIYAD, JOSE H. HURTADO,

Defendants.

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The following papers numbered 1 to 13 read on this motion by defendant Ziyad and cross-motion by defendant Hurtado for an order granting summary judgment in their favor and dismissing the complaint on the grounds that plaintiffs have not sustained a serious injury within the meaning of Insurance Law §§ 5102 and 5104.

	PAPERS NUMBERED
Notice of Motion-Affirmation-Exhibits.....	1-4
Notice of Cross-Motion-Affirmation-Exhibits.....	5-7
Affirmation in Opposition-Exhibits.....	8-10
Reply Affirmation.....	11-13

Upon the foregoing papers it is ordered that the motion by defendants for an order dismissing the complaint and directing that summary judgment be entered pursuant to CPLR 3212 in their favor and against plaintiffs on the ground that the injuries sustained by plaintiffs do not meet the requisite definition of "serious injury" as set forth in Article 51 of the Insurance Law, are granted for the following reasons:

The action arises out of an accident that occurred on September 16, 2004, at or near the intersection of Roosevelt Avenue and 97th Street, Queens County, New York. According to the complaint, plaintiffs were passengers in the car owned and being operated by defendant Ziyad when it came into contact with defendant Hurtado's vehicle. Thereafter, plaintiffs commenced the instant action to recover for personal injuries sustained.

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 (3rd 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 their motions, defendants have submitted, *inter alia*, plaintiffs' bill of particulars, an affirmed report Dr. Weiss, an orthopedist, who examined plaintiffs on February 8, 2007, at defendant's request; an affirmed report of Dr. Tikoo, a neurologist, who examined plaintiffs, at defendant's request, an affirmed report of Dr. April, a neurologist, who examined plaintiffs on November 1, 2004, an affirmed report of Dr. Dowd, who examined plaintiffs on January 12, 2005, and an affirmed report of Dr. Heiden, a radiologist, who reviewed Maria Henao's cervical spine MRI and found disc bulges that were due to dehydration from degenerative conditions.

The Court finds that defendants have submitted proof in admissible form which establishes that plaintiffs have not suffered serious injury within the meaning of Insurance Law § 5102. This also includes proof that they did not sustain a medically determined injury or impairment of a nonpermanent nature which prevented him from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident. Compare, Koulouris v IMS Car Service, Inc., 2007 NY Slip Op 6643 (2d Dept 2007.) Consequently, the burden shifts to the plaintiff to come forward with evidence to overcome the defendants' 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.) Consequently, the plaintiffs 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 her

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 plaintiffs' 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 plaintiffs.

In opposition, plaintiffs have submitted, inter alia, the following; an attorney's affirmation, their affidavits, and an affirmation of Dr. Kaisman, who examined plaintiff Maria Henao for the first time on December 4, 2004 and stopped treating her in July 2005, due to her denial of No Fault Insurance, an affirmation of Dr. Kaisman, who examined plaintiff Meylin Henao for the first time on November 29, 2004, and stopped treating her in April 2005, due to her pregnancy, and an affirmation of Dr. Rizzuti, a radiologist who supervised the taking of an MRI of the cervical spine of Maria Henao. Dr. Kaisman did various tests on plaintiffs and determined they had range of motion limitations. He also reviewed the MRI report for Maria Henao's cervical spine. In 2005 he diagnosed Maria Henao as having significant range of motion limitations caused by the subject accident; this diagnosis was repeated after the 2007 visit. Regarding Meylin Henao, he diagnosed her as having significant range of motion limitations caused by the subject accident; this diagnosis was repeated after the 2007 visit. Dr. Rizzuti states in his affirmation that plaintiff Maria Henao had disc herniations present at C4/5 and C5/6 in the 2004 cervical spine MRI film.

Plaintiffs' proof of an attorney's affirmation is not admissible probative evidence on medical issues. Armstrong v Wolfe, *supra* at 958. Similarly, their own affidavits are not admissible probative evidence on medical issues. *Id.* Moreover, their 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 affirmations of Dr. Kaisman fail 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. Kaisman refers to examination that were conducted in 2004 and 2005 without submitting any report generated at the time of these examinations-or any of his initial treatment sessions. Moreover, plaintiff Maria Henao has not submitted any expert evidence that explains the significance of the findings by defendant's radiologist regarding the degenerative nature of plaintiff's injuries. Francis v Christopher, 302 AD2d 425 (2d Dept 2003.)

Furthermore, plaintiff Maria Henao has not given any explanation for the significant gap of more than 2 years between her final 2005 visit with Dr. Kaisman and the 2007 visit. *See, Batista v Olivo*, 17 AD3d 494 92d Dept 2005.) Coupled with the lack of any indication that plaintiff Maria Henao visited a medical care provider during this time, it seems that plaintiff

ceased all treatment, and without an explanation casts grave doubt upon the initial diagnosis. Pommells v Perez, 4 NY3d 566 (2005.) Similarly, plaintiff Meylin Henao has not given any explanation for the cessation of medical treatment in 2005. Moreover, Dr. Kaisman's examinations of her are stale and inadequate since they are based upon exams conducted in 2004 and 2005 that failed to result in a finding of permanent injury and there is no indication of any post 2005 examination. *See*, Chinnici v Brown, 295 AD2d 465 (2d Dept 2002.) *See also*, Medina-Santiago v Nojovits, 5 AD3d 253 (1st Dept 2004.)

Finally, the plaintiffs have 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, plaintiffs have failed to raise an issue of fact that either one of them suffered a "serious injury" and defendants' motions for an order of summary judgment dismissing the complaint and all counterclaims are granted. CPLR 3212.

DATED : October 29, 2007

ORIN R. KITZES, J.S.C.

