Kyung Hee Kim v John Doe
2021 NY Slip Op 33080(U)
November 10, 2021
Supreme Court, Queens County
Docket Number: Index No. 701192/17
Judge: Timothy J. Dufficy
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY **PART 35**
Justice

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KYUNG HEE KIM and SOON DUK LIM,

Plaintiffs,

-against-

Index No.: 701192/17
Mot. Date: 10/26/21
Mot. Seq. 8

"JOHN DOE," THE ENTIRE NAME BEING FICTITIOUS, IT BEING INTENDED TO DESIGNATE THE OPERATOR OF THE VEHICLE MENTIONED HEREIN AFTER, and MARLENE S. SYERS,

FILED
11/15/2021
COUNTY CLERK
QUEENS COUNTY

Defendants.

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The following papers were read on the motion by plaintiff on the counterclaim Kyung Hee Kim for an order, pursuant to CPLR 3212, granting summary judgment in his favor dismissing the complaint of plaintiff Soon Duk Lim, on the basis that said plaintiff did not sustain a "serious injury" under Insurance Law § 5102(d).

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	EF 180-182
Answering Affidavits-Exhibits.....	EF 184-186
Replying Affidavits-Exhibits.....	EF 187-188

Upon the foregoing papers, it is ordered that the motion is denied.

In this action seeking damages for personal injuries, allegedly sustained in a motor vehicle accident, that occurred on November 27, 2016, plaintiff on the counterclaim, Kyung Hee Kim, moves for an order granting summary judgment dismissing plaintiff's Soon Duk Lim's complaint on the basis that the plaintiff Soon Duk Lim did not sustain a "serious injury" under Insurance Law §5102(d).

As a general proposition, the proponent of a summary judgment motion of this type must make a *prima facie* showing of entitlement to summary judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. (*See Licari v Elliot*, 57 NY 2d 230 [1982]; *Alvarez v Prospect Hospital*, 68 NY2d 320 1986]; *Zuckerman v City of New York*, 49 NY 2d 557 [1980]). The defendant's motion papers must demonstrate, through admissible medical evidence, which may include medical reports and records and affidavits and/or affirmed reports of medical examinations, including range-of-motion testing, that address all of the plaintiff's claims, that the plaintiff did not sustain functional limitations which would constitute either a permanent consequential limitation of use of a body organ, member, a significant limitation of use of body function or system, or a medically determined injury or impairment of a non-permanent nature that prevented the plaintiff from performing substantially all of the material, acts which constituted his or her usual customary daily activities for not less than 90 days during the 180 days immediately following the subject accident. (*See Toure v Avis Rent A Car Sys*., 98 NY2d 345 [2002]; *Gaddy v Eyler*, 79 NY2d 955 [1992]; *Choi v Guerrero*, 82 AD3d 1080 [2d Dept. 2011]; *Jilani v Palmer*, 83 AD3d 786 [2d Dept 2011]). The failure to make a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see e.g. Reed v Righton Limo, Inc*., 82 AD3d 1070 [2d Dept 2011]; *Joris v UMF Car & Limo Service*, 82 AD3d 1050 [2d Dept 2011]; *Keenum v Atkins*, 82 AD3d 843 [2d Dept 2011]; *Pero v Transervice Logistics*, 83 AD3d 681 [2d Dept 2011]).

Here, the moving papers present proof in admissible form via, *inter alia*, the sworn/affirmed reports of the movant's independent examining orthopedic surgeon, Dr. William J. Walsh, M.D., independent examining chiropractor and accupuncturist, Dr. Daniel Sposta, D.C., and independent examining anesthesiologist/pain management physician, Dr. Rajmani Krishnan, M.D. Based upon the foregoing, the movant provided proof demonstrating, *prima facie*, the absence of any condition that might have arguably met the serious injury threshold of Insurance Law §5102(d). Thus, the burden shifts to the plaintiff, Soon Duk Lim, to demonstrate the existence of a triable issue of fact (*See Gaddy v Eyler, supra*).

A medical affirmation or affidavit which is based upon a physician's personal examinations and observation of plaintiff is an acceptable method to provide a doctor's opinion regrading the existence and extent of a plaintiff's serious injury (*O'Sullivan v Atrium Bus Co.*, 246 AD2d 418 [1st Dept 1980]). The causal connection must ordinarily be established by competent medical proof (*see Kociocek v Chen*, 283 AD2d 554 [2d Dept 2001]; *Pommels v Perez*, 4 NY3d 566 [2005]).

Plaintiff Soon Duk Lim submitted medical proof that was contemporaneous with the accident showing *inter alia,* range of motion limitations of the plaintiff's cervical spine (*Pajda v Pedone*, 303 AD2d 729 [2d Dept 2003]). Plaintiff Soon Duk Lim has established a causal connection between the accident and the plaintiff's cervical spine injuries. Furthermore, the plaintiff has provided a recent medical examination detailing the status of her injuries at the current point in time (*Kauderer v Penta*, 261 AD2d 365 (2d Dept 1999). The affirmation of Dr. David Gamburg, M.D., dated May 7, 2021, provides that a recent examination of plaintiff Soon Duk Lim was conducted, on February 17, 2021, by Dr. Gamburg, and sets forth the objective examination, tests, and review of medical records which were performed to support his conclusion that plaintiff Soon Duk Lim suffers from significant injuries, to wit, *inter alia*, range of motion limitations of the cervical spine. Dr. Gamburg concludes that the injuries to plaintiff Soon Duk Lim's cervical spine are permanent in nature and causally related to the motor vehicle accident of November 27, 2016 . Clearly, the plaintiff's experts' conclusions are not based *solely* on the plaintiff's subjective complaints of pain, and therefore are sufficient to defeat the motion (*DiLeo v Blumber, supra*, 250 AD2d 364 [1st Dept 1998].

Additionally, despite movant's contentions that there is an unexplained gap or cessation in treatment (the Court of Appeals held in *Pommells v Perez*, 4 NY3d 566 [2005], that a plaintiff who terminates therapeutic measures following the accident, while claiming "serious injury," must offer some reasonable explanation for having done so), the Court finds that the gap in treatment is adequately explained by plaintiff herself in her affidavit wherein she explains that she "stopped treating in 2018 because [her] no-fault denied further medial treatment. If [she] had an opportunity to continue [her] physical therapy, chiropractic and acupuncture treatments and if those treatments had warranted complete recovery without incurring additional financial risks, [she] would have agreed to

proceed with those treatment [sic]).” Such is a sufficient explanation.

Since there are triable issues of fact regarding whether plaintiff Soon Duk Lim sustained a serious injury to her cervical spine plaintiff Soon Duk Lim is entitled to seek recovery for *all* injuries allegedly incurred as a result of the accident (*Marte v New York City Transit Authority*, 59 AD3d 398 [2d Dept 2009]).

Therefore, plaintiff’s submissions are sufficient to raise a triable issue of fact on “serious injury” grounds (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Accordingly, it is

ORDERED that the motion by plaintiff on the counterclaim Kyung Hee Kim for an order, pursuant to CPLR 3212, granting summary judgment in his favor dismissing the complaint of plaintiff Soon Duk Lim on the basis that said plaintiff did not sustain a “serious injury” under Insurance Law § 5102(d) is denied.

The foregoing constitutes the decision and order of the Court.

Dated: November 10, 2021

FILED
11/15/2021
COUNTY CLERK
QUEENS COUNTY

TIMOTHY J. DUFFICY, J.S.C.