

**Minsoo Yoon v Leesha**

2009 NY Slip Op 31261(U)

June 1, 2009

Supreme Court, Nassau County

Docket Number: 19751/07

Judge: Daniel Palmieri

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**SHORT FORM ORDER**

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

**Present:**

**HON. DANIEL PALMIERI  
Acting Justice Supreme Court**

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**MINSOO YOON,**

**Plaintiff,**

**-against-**

**TRIAL TERM PART 47**

**INDEX NO.: 19751/07**

**MOTION DATE: 2-9-09**

**SUBMIT DATE: 5-26-09**

**SEQ. NUMBER - 003**

**PHILIP M. LEESHA and KATHLEEN T. LEESHA,**

**Defendants.**

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**The following papers have been read on this motion:**

- Notice of Motion, dated 1-6-09.....1**
- Affirmation in Opposition, dated 5-6-09.....2**
- Reply Affirmation, dated 5-22-09.....3**

This motion by the defendants pursuant to CPLR 3212 for summary judgment dismissing the complaint on the ground that the plaintiff has not suffered a "serious injury" as that term is defined by the Insurance Law is denied.

This suit stems from an accident on September 11, 2007 on the Northern State Parkway in Nassau County, New York, in which the plaintiff alleges that while driving his vehicle he was struck by an automobile being operated by defendant Philip M. Leesha and

owned by defendant Kathleen T. Leesha. The defendants now move for summary judgment on the ground that the plaintiff did not sustain a serious injury.

“Serious injury” is defined by § 5102(d) of the New York Insurance Law as follows:

“a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature 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 and eighty days immediately following the occurrence of the injury or impairment.” Insurance Law § 5102(d).

The plaintiff’s bill of particulars alleges that he sustained injuries under all categories except death, dismemberment and loss of fetus, but a review of this pleading indicates that his factual allegations, including disc herniations, pain, weakness, restriction of motion and limitations of use in his neck, back shoulders and knees implicate only the seventh, eighth and ninth categories under the statute, that is, “permanent consequential limitation of use of a body organ or member,” “significant limitation of use of a body function or system” and “a medically determined injury or impairment of a non-permanent nature 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 and eighty days” immediately following the accident. There is no factual allegation made with regard to disfigurement, or permanent loss of use of a body organ, member,

function or system.

At the outset, the Court notes that the defendants have failed to annex the transcript, or any portion thereof, of the plaintiff's examination before trial, notwithstanding counsel's reference thereto in his supporting affirmation.<sup>1</sup> Further, the defendants' medical proof is based upon an examination by John C. Killian, M.D., an orthopedist, which took place on May 29, 2008, over eight months after the accident. Dr. Killian does not refer to the period immediately following that accident except to note the plaintiff's statement to him that he has not returned to work at his job as a cashier since the accident. There is thus no *prima facie* evidence submitted that would serve to negative his allegations regarding the 90/180 category. *See, Ali v Rivera*, 52 AD3d 445 (2d Dept. 2008); *Breland v Karnak Corp.*, 50 AD3d 613 (2d Dept. 2008); *cf., Camacho v Dwelle*, 54 AD3d 706 (2d Dept. 2008). This requires the denial of the motion, without regard to the strength of the opposing papers. *See, Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985).

A review of those opposing papers indicates that the motion should be denied in any event. Initially, the Court finds that Dr. Killian's report constitutes *prima facie* proof that the plaintiff did not meet the requirements of the other two categories described above. MRIs indicating disc herniations were noted, but it is well-established that herniations do not

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<sup>1</sup> Counsel refers to the transcript as an exhibit, but it is not present among the moving papers filed with the Court. Obviously, counsel's recitation regarding the content of plaintiff's statements at his deposition amounts to inadmissible hearsay (*see, e.g., Warrington v Ryder Truck Rental, Inc.*, 35 AD3d 455 [2d Dept. 2006]), and only admissible proof may be considered on a motion for summary judgment. *Cf., Olan v Farrell Lines*, 64 NY2d 1092 (1985) [deposition transcript annexed to attorney's affirmation admissible].

rise to the level of a serious injury absent objective medical evidence of the extent of the alleged limitations resulting from the disc injury and its duration. *Albano v Onolfo*, 36 AD3d 728 (2<sup>nd</sup> Dept. 2007); *Yakubov v CG Trans Corp.*, 30 AD3d 509 (2<sup>nd</sup> Dept. 2006); *Kearse v New York City Tr. Auth.*, 16 AD3d 45 (2<sup>nd</sup> Dept. 2005). Dr. Killian's examination of the plaintiff and his objective findings, which indicate either no or minor restrictions on range of motion of the affected areas, are sufficient to demonstrate that there was no "permanent consequential limitation of use of a body organ or member," or "significant limitation of use of a body function or system" resulting from the disc or other alleged injury, notwithstanding any herniations. *See, Walker v Greatheart*, 50 AD3d 893 (2d Dept. 2008).

However, in response the plaintiff presents the affirmation of Sung J. Pahng, M.D. Dr. Pahng was the examining and treating physician immediately after the accident, having first seen the plaintiff on September 14, 2007, and having continued treatment until November 24, 2007, at which time he states that the plaintiff's no-fault coverage (benefits) were denied.<sup>2</sup> Dr. Pahng states that the plaintiff's complaints on the initial examination were, *inter alia*, constant neck pain with radiation to the right, paresthesia, weakness, stiffness and difficulty with looking up. The same types of symptoms were reported with regard to the upper and lower back, with radiation to the right. He also complained of bilateral shoulder pain, knee pain with bending difficulties and stair climbing. The plaintiff reported that he had none of these complaints prior to the accident.

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<sup>2</sup> This was confirmed in the plaintiff's own affidavit, also submitted in opposition to the motion.

At that time, Dr. Pahng conducted objective range of motion tests of the cervical spine, and found flexion at 5 degrees (normal 50), extension at 5 (normal 60), right and left lateral flexion at 5 (normal 45), and left and right rotation at 10 (normal 80), all with pain at the end point. These tests were done with the aid of a goniometer, and Dr. Pahng explained that subjective patient pain is not a determining factor when measuring specific planar motion. On March 9, 2009 these tests were repeated, and while there had been improvement significant restrictions were still present. Flexion was at 35, extension at 30, right and left lateral flexion 30, right rotation at 45 and left rotation at 30.

Lumbosacral and thoracic spine tests revealed similar results, both immediately after the accident and on March 9, 2009. Dr. Pahng also described MRI studies of these areas, stated that there were herniations at all levels, with impingement on the anterior aspect of the spinal canal. It should be noted that these and the other MRI findings to which he refers are not stated to be based on personal review of the films, but are supported by the affirmation of Richard J. Rizzuti, M.D., the radiologist who conducted them, and the MRI results are thus admissible. *See, Batts v Medical Express Ambulance Corp.*, 49 AD3d 294 (1<sup>st</sup> Dept. 2008); *Zarate v McDonald*, 31 AD3d 672 (2d Dept. 2006).

In addition, Dr. Pahng names tests performed on the left and right shoulders which had yielded positive results in both 2007 and 2009 (Hawkin's Impingement, Neer Impingement and Yergason's Test), and on the knee joints (Squat Test). MRIs were taken of both shoulders, showing acromion impingement on the supraspinatus muscle, and of the knees, showing sprains. He also states that in October and November of 2007 he treated the

plaintiff's symptoms with cervical and lumbar epidural steroid injections, which were called "successful."

In view of the foregoing examinations, one conducted close in time to the accident, the other recently (*cf.*, *Garcia v Lopez*, 59 AD3d 593 [2d Dept. 2009]), the Court finds that there is an objective basis for Dr. Pahng's diagnosis and prognosis. He diagnoses cervical herniated disc, lumbar herniated disc, thoracic herniated disc, cervical radiculopathy, lumbar radiculopathy, bilateral ligament sprain and bilateral impingement syndrome, and that the herniations were not the result of degenerative disease but rather were caused by the September 11, 2007 accident.

His prognosis is stated to be guarded, in that these injuries have caused a weakening to the supportive soft tissue in the affected areas noted above, that they are permanent in nature, and that the plaintiff is unlikely to fully recover from the limitations found. Dr. Pahng states that the plaintiff "can expect chronic pain with periodic serious exacerbation of pain and weakness in his neck, back, both shoulders and both knees causing him to alter his everyday life styles.. [he] will require lifetime conservative care, in addition, he can experience accelerated arthritic changes to this neck, back, both shoulders and both knees due to this trauma." Pahng Aff, ¶¶ 51,52. Dr. Pahng concludes that this has resulted in a permanent consequential limitation of use of a body organ or member, and a significant limitation of use of a body function or system.

The foregoing is sufficient to meet the defendants' proof, creating an issue of fact as to whether the plaintiff sustained a permanent injury that would satisfy the "permanent

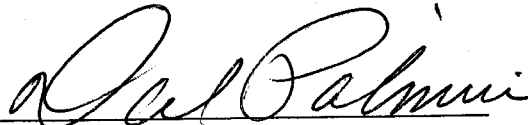
consequential limitation” and “significant limitation of use” categories of serious injury under Insurance Law § 5102(d).

Accordingly, the motion should be denied.

This shall constitute the Decision and Order of this Court.

DATED: June 1, 2009

ENTER

  
HON. DANIEL PALMIERI  
Acting Supreme Court Justice

**ENTERED**

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JUN 04 2009  
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