

Hae Jung Yum v Wolters

2010 NY Slip Op 32957(U)

October 15, 2010

Supreme Court, Queens County

Docket Number: 30477/08

Judge: Robert J. McDonald

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SHORT FORM ORDER

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SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

- - - - - x

HAE JUNG YUM, HAE MIN YUM, KWANG HEE
CHOI, and MYUNG JA OH,

Index No.: 30477/08

Motion Date: 10/14/10

Plaintiffs,

Motion No.: 36

- against -

Motion Seq.: 3

VERONICA WOLTERS,

Defendants.

- - - - - x

The following papers numbered 1 to 7 were read on this motion by the Hae Jung Yum (hereafter "Yum") as plaintiff on a counter-claim seeking dismissal of the actions by Hae Jung Yum, Kwang Hee Choi and Myung Ja Oh have not sustained a "serious injury".

Papers
Numbered

Plaintiff's Notice of Motion-Affirmation-Affidavit(s)-Service-Exhibit(s)	1-3
Affirmation in Opposition	4-6
Reply	7

Upon the foregoing papers it is ordered that this motion is resolved as follows:

The underlying action involves an automobile accident which occurred December 1, 2008 in which the defendant and the plaintiff operator Hae Jung Yum had an accident at the intersection of Union Street and Northern Boulevard, Queens County, New York.

The moving party, Hae Jung Yum, plaintiff on the counter claim, assert that the plaintiffs Hae Min Yum, Kwang Hee Choi and Myung Ja Oh have not sustained a "serious injury" as a result of the accident.

In order to maintain an action for personal injury in an automobile case the three plaintiffs must each establish, after the moving party Hae Jung Yum has properly demonstrated that it is an issue, that they have sustained a "serious injury" which is defined as follows:

"Serious Injury" Insurance Law §5102(d)

In order to maintain an action for personal injury in an automobile case a plaintiff must establish that he has sustained a "serious injury" which is defined as follows:

Serious injury means a personal injury which result in ... 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 constitutes 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.

Whether a plaintiff has sustained a serious injury is initially a question of law for the Court (*Licari v Elliott*, 57 NY2d 230). Initially it is defendant's obligation to demonstrate that the plaintiff has not sustained a "serious injury" by submitting affidavits or affirmations of its medical experts who have examined the litigant and have found no objective medical findings which support the plaintiff's claim (*Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345; *Grossman v Wright*, 268 AD2d 79). If the defendant's motion raises the issue as to whether the plaintiff has sustained a "serious injury" the burden shifts to the plaintiff to prima facie demonstrate through the production of evidence sufficient to demonstrate the existence of a "serious injury" in admissible form, or at least that there are questions of fact as to whether plaintiff suffered such injury (*Gaddy v Eyler*, 79 NY2d 955; *Bryan v Brancato*, 213 AD2d 577).

Insurance Law 5102 is the legislative attempt to "weed out frivolous claims and limit recovery to serious injuries" (*Toure v Avis Rent-A-Car Systems, Inc.*, 98 NY2d 345, 350).

Under Insurance Law 5102(d) a permanent consequential limitation of use of a body organ or member qualifies as a "serious injury", however, the medical proof must establish that the plaintiff suffered a permanent limitation that is not minor slight, but rather, is consequential which is defined as an important or

significant limitation.

KWANG HEE CHOI:

Dr. Mark Pitman, M.D., a Board Certified Orthopedic Surgeon, submitted an affirmation dated December 9, 2009. Dr. Pitman conducted an orthopedic evaluation of Kwang Hee Choi conducted through Hae Min Yum as interpreter. The measurements were taken with a hand-held goniometer. With regard to the Cervical Spine Range of Motion the measurements were all normal. The Shoulders Range of Motion were all normal, as was this plaintiff's Lumbar Spine Range of Motion. Dr. Pitman noted that this plaintiff had "[p]robable cervical and lumbar sprains."

Dr. Stephen W. Lastig, M.D., a Board Certified Radiologist, submitted an affirmation dated April 6, 2010. Dr. Lastig reviewed the MRI study of this plaintiff's MRI of the cervical spine conducted at Kissena Medical Imaging Center. Dr. Lastig notes that there is no evidence of fracture. There is multilevel degenerative disc disease and a narrowing of the C5-C6 disc space due to uncinete osteophyte formation. It was Dr Lastig's opinion that there "are no findings on this study which are causally related to the reported accident".

Dr. Stephen W. Lastig, M.D., a Board Certified Radiologist, submitted an affirmation dated April 6, 2010. Dr. Lastig reviewed the MRI study of this plaintiff's MRI of the lumbar spine conducted at Kissena Medical Imaging Center. Dr. Lastig notes that the vertebral bodies are within normal limits. It was Dr. Lastig's impression that the MRI study of the lumbar spine was normal.

Dr. Lyudmila Trimba, M.D., submitted an affirmation in which she states that Kwang Hee Choi has been under her care from December 8, 2008 through May 16, 2009 and she saw Dr. Trimba three or four times a week. No fault coverage was denied Ms. Hee Choi despite the fact that Ms. Choi's "condition was and remained poor". Ms. Choi could not afford continued treatment. Dr. Trimba last saw Ms. Choi on May 2, 2010. In her initial examination of Ms. Choi's cervical spine she found that her range of motion was "severely restricted" between fifteen and twenty degrees. Dr. Trimba's examination on May 2, 2010 revealed a loss of range of motion of ten degrees. With regard to Ms. Choi's lumbar spine her examination conducted December 8, 2008 showed restricted movement ten to thirty degrees. On May 2, 2010 Ms. Choi had a restricted range of movement of between five and twenty degrees. Ms. Choi was referred by Kissena Medical Imaging for MRI studies performed on January 12, 2009 of her cervical spine and January 19, 2009 of her lumbar spine. The MRI of Ms. Choi's cervical spine revealed "bulge C2-3, C3-4, C5-6; frand [sic] spinal stenosis

C5-6; central herniations c6-7; left-sided herniation C4-5." The MRI report of Ms. Choi's lumbar spine revealed "bulges L1-2, L3-4 and L5S1; central herniations L4-5 with frank spinal stenosis L4-5." It is Dr. Trimba's opinion that Choi's "symptomatic and functional improvement is guarded" and her injuries are "permanent in nature; and that Ms. Choi suffers from permanent partial disability with permanent limitations" and "there will always be some aspect of the residual permanent impairment experienced for the balance of Ms. Choi's lifetime" that she will be "prevented from performing many of the material acts which constitute her usual and customary daily activities" and she has "therefore been advised to discontinue from engaging in any strenuous or work-related activities" and the accident has resulted in "a permanent consequential limitation of use of the patients's neck and back. There is a significant limitation of use of the body function or system."

MYUNG JA OH:

Dr. Mark Pitman, M.D., a Board Certified Orthopedic Surgeon, submitted an affirmation dated December 9, 2009. Dr. Pitman conducted an orthopedic evaluation of Myung Ja Oh conducted through her daughter as interpreter. The measurements were taken with a hand-held goniometer. With regard to the Cervical Spine Range of Motion the measurements were all normal. The Shoulders Range of Motion were all normal, as was this plaintiff's Lumbar Spine Range of Motion and the knees of this plaintiff. Dr. Pitman noted that this plaintiff had "[p]robable contusion of the left knee." Dr. Pitman notes that "[r]eview of the 1/7/09 MRI of the left knee by a consultant radiologist is recommended."

Dr. Lyudmila Trimba, M.D., submitted an affirmation in which she states that Myung Ja Oh has been under her care from December 8, 2008 through August 27, 2009 and she saw Dr. Tribma three or four times a week. No fault coverage was denied Ms. Hee Choi despite the fact that Ms. Choi's "condition was and remained poor". Ms. Oh could not afford continued treatment. Dr. Trimba last saw Ms. Oh on May 2, 2010. In her initial examination of Ms. Oh's left knee, she found that Ms. Oh had a reduced range of motion as of May 8, 2008 of 25 degrees. Ms. Oh's examination on May 2, 2010 revealed a decreased range of motion of 20 degrees. Ms. Oh was referred by Kissena Medical Imaging for an MRI study performed on January 7, 2009 of her left knee. The MRI "revealed joint effusion' sprain medial collateral ligament; high-grade intrasubstance tear anterior cruciate ligament; tear posterior horn medial meniscus; tear posterior horn lateral meniscus." It is Dr. Trimba's opinion that Ms. Oh will be unable to perform repetitive movements with her knee. And the "current pattern of symptoms will most probably persist for indefinite time with periodic remissions and exacerbations caused

by various aggravations; and interfere with Ms. Oh's job duties and her activities of daily living." Dr. Trimba found that it is "medically reasonable to predict that this injury is permanent in nature; and that Ms. Oh suffers from permanent partial disability with permanent limitations" and "there will always be some aspect of the residual permanent impairment experienced for the balance of Ms. Oh's lifetime" "causing her to alter her everyday life styles in order to cope with there injuries" and Ms. Oh's injury is "permanent in nature to a reasonable degree of medical certainty and have resulted in the permanent consequential limitation of use of a body organ or member. These injuries have resulted in a permanent consequential limitation of use of the patient's left knee. There is a significant limitation of use of the body function or system; more specifically, there is a significant limitation of use of the patient's left knee."

HAE MIN YUM:

Dr. Mark Pitman, M.D., a Board Certified Orthopedic Surgeon, submitted an affirmation dated December 9, 2009. Dr. Pitman conducted an orthopedic evaluation of Hae Min Yum, a 19 year old college student. The measurements were taken with a hand-held goniometer. With regard to the Cervical Spine Range of Motion the measurements were all normal. With regard to her Lumbar Spine Range of Motion, Dr. Pitman found no disability or permanency.

Dr. Stephen W. Lastig, M.D., a Board Certified Radiologist, submitted an affirmation dated March 26, 2010. Dr. Lasting reviewed the MRI study of this plaintiff's MRI of the cervical spine conducted at Kissena Medical Imaging Center. Dr. Lastig notes that there is no evidence of disc herniation or annular bulges, the cervical cord is normal and unremarkable. It was Dr. Lastig's impression that there was "[s]traightening" and "[m]ultilevel mild disc desiccation" He found no disc herniations or cord compression. It was Dr Lastig's opinion that there "are no findings on this study which are causally related to the reported accident". "The straightening of the cervical spine in a nonspecific finding. This may be related to muscle spasm. However, this finding can be technical in origin, related to how the patient is positioned in the MRI unit by the technologist during the examination."

Dr. Michael Trimba, M.D. submitted an affirmation in which he states that Hae Min Yum was under his care from December 3, 2008 through June 24, 2009 and she saw Dr. Tribma three or four times a week. No fault coverage was denied Ms. Yum despite the fact that Ms. Yum's "condition was and remained poor". Ms. Yum could not afford continued treatment. Dr. Trimba last saw Ms. Yum on April 26, 2010. In his initial examination of Ms. Min Yum's cervical spine he found

that her range of motion was "severely restricted" between ten and twenty degrees. Dr. Trimba's examination on April 26, 2010 revealed a loss of range of motion between ten and twenty-five degrees. With regard to Ms. Yum's lumbar spine his examination conducted December 8, 2008 showed restricted movement five to forty degrees. On April 26, 2010 Ms. Yum had severely restricted movement of between five and twenty degrees. On December 3, 2008 he conducted a range of motion test with regard to Ms. Yum's right shoulder and found restriction between fifteen and thirty degrees. On April 26, 2010 her movement was limited between ten and thirty degrees. On December 3, 2008 he conducted a range of motion test with regard to Ms. Yum's left shoulder and found restriction between fifteen and thirty degrees. On April 26, 2010 her movement was limited between ten and thirty degrees. Ms. Min Yum was referred by Kissena Medical Imaging for MRI studies performed on January 7, 2009 of her cervical spine, January 14, 2009 of her lumbar spine, and January 31, 2009 of her right shoulder. She had sustained "bulge C2-3; central herniations C3-4 and C6-7; left sided herniation C4-5; right-sided herniation C5-6". The MRI of Ms. Yum's lumbar spine was performed on January 14, 2009 which revealed "central herniations L1-2, L2-3, L3-4, L4-5 and L5-S1; frank spinal stenosis L4-5' bulge L3-4" Dr. Trimba found similar results in his examination conducted April 26, 2010. It is Dr. Trimba's opinion that the "[u]pon recent examination on April 26, 2010, final diagnosis is as follows: Status post cervical, thoracic, lumbar strain, sprain; C3-4, C4-5, C5-6, C6-7 disc herniations; C2-3 disc bulge, L1-2, L2-3, L4-5, L5-S1 disc herniations, L4-L5 spinal stenosis; right L5 lumbar radiculopathy; bilateral shoulder sprain, partial tear of the right supraspinatus tendon, posttraumatic chronic neck and low back pain." Ms. Min Yum suffers from "permanent partial disability with permanent limitations" "accelerated arthritic changes" "permanent injuries to the neck, back and bilateral shoulder" and she is "prevented from performing many of the material acts which constitute her usual and customary daily activities" and she has been "advise to discontinue from engaging in any strenuous or work related activities" and her injuries "have resulted in the permanent consequential limitation of use of a body organ or member. These injuries have resulted in permanent consequential limitation of use of the patient's neck, back and bilateral shoulder."

Ms. Yum submits the affirmation of Dr. Ayoub Chodadadi, M.D., the radiologist who conducted the various MRIs of Ms. Yum.

Dr. Michael Trimba, M.D. submitted an affirmation in which he states that Hae Jung Yum was under his care from December 3, 2008 through June 15, 2009 and she saw Dr. Tribma three or four times a week. No fault coverage was denied Ms. Jung Yum despite the fact that Ms. Yum's "condition was and remained poor". Ms. Yum could not

afford continued treatment. Dr. Trimba last saw Ms. Yum on June 2, 2010. In his initial examination of Ms. Yum's cervical spine he found that her range of motion was "severely restricted" between five and fifteen degrees. Dr. Trimba's examination on June 2, 2010 revealed a loss of range of motion between five and ten degrees. With regard to Ms. Yum's lumbar spine his examination conducted December 8, 2008 showed restricted movement five to fifteen degrees. On June 2, 2010 Ms. Yum had severely restricted movement of between twenty and ten degrees. On December 3, 2008 he conducted a range of motion test with regard to Ms. Yum's right knee and found restriction of 25 degrees. On June 2, 2010 her movement had improved but still was limited by 15 degrees. Ms. Yum was referred by Kissena Medical Imaging for MRI studies performed on January 7, 2009 of her cervical spine. She had sustained "disc herniation C6-C7; disc bulge C2-C3 through C5-C6; straightening lordosis." The MRI of Ms. Yum's lumbar spine was performed on January 14, 2009 which revealed "bulge L1-L2, L2-L3, L3-L4, L4-L5 and L5-S1; disc herniation L5-S1." Dr. Trimba found similar results in his examination conducted June 2, 2010. It is Dr. Trimba's opinion that the "symptoms will most probably persist for indefinite time with periodic remissions" and that her injury is "permanent in nature; and that Ms. Yum suffers from permanent partial disability with permanent limitations" that the "residuals of the injury cannot be completely resolved by way of further medical intervention" "she can expect chronic pain" which will prevent her from "performing many of the material acts which constitute her usual and customary daily activities" and the injuries "are permanent in nature to a reasonable degree of medical certainty and have resulted in the permanent consequential limitation of use of a body organ or member."

Ms. Yum submits the affirmation of Dr. Ayoub Chodadadi, M.D., the radiologist who conducted the various MRIs of Ms. Yum.

Here Hae Jung Yum has come forward with sufficient evidence to support the claim that the remaining plaintiffs have not sustained a "serious injury" (*Gaddy v Eyler*, 79 NY2d 955).

To establish that the plaintiffs have suffered a permanent or consequential limitation of use of a body organ or member and/or a significant limitation of use of a body function or system, each plaintiff must demonstrate more than "a mild, minor or slight limitation of use" and is required to provide objective medical evidence of the extent or degree of limitation and its duration (*Booker v Miller*, 258 AD2d 783; *Burnett v Miller*, 255 AD2d 541). Resolution of the issue of whether "serious injury" has been sustained involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part (*Dufel v Green*, 84 NY2d 795). Upon

examination of the papers and exhibits submitted this Court finds that the plaintiff Hae Jung Yum has raised triable factual issue as to whether the remaining plaintiffs have sustained injuries which constitute a "permanent consequential" and "significant limitation" as defined in the Insurance Law.

The question presented as to the difference between the conflicting measurements of each plaintiffs' ability to move creates an issue of fact for the jury (*Martinez v Pioneer Transportation Corp.*, 48 AD3d 306).

Generally, an unexplained cessation of medical treatment may be fatal to the plaintiffs claim of a significant or permanent consequential limitation (*Baez v Rahamatali*, 24 AD3d 256 *aff'd* 6 NY2d 868) A diagnosis of permanency having been sustained by each plaintiff obviates the need for further treatment and, therefore, there is no "gap" in treatment (*Pommells v Perez*, 4 NY3d 566). Also, a finding by the treating physician that continued treatment would be merely palliative can be considered a sufficient explanation for cessation of treatment (*Toure v Avis Rent A Car Systems*, 98 NY2d 345; *Turner-Brewster v Arce*, 17 AD3d 189).

The plaintiffs have failed to demonstrate that each has a "medically determined" injury or impairment which has prevented him or her from performing all of his usual and customary daily activities for at least 90 of the first 180 days following the accident. (*Ayotte v Gervasio*, 81 NY2d 1062; *Johnson v Berger*, 56 AD3d 725; *Roman v Fast Lane Car Service, Inc.*, 46 AD3d 535).

Regarding the "permanent loss of use" of a body organ, member or system the plaintiff must demonstrate a total and complete disability which will continue without recovery, or with intermittent disability for the duration of each plaintiff's life (*Oberly v Bangs Ambulance, Inc.*, 96 NY2d 295). The finding of "Permanency" is established by submission of a recent examination (*Melino v Lauster*, 195 AD2d 653 *aff'd* 82 NY2d 828). The mere existence of a herniated disc even a tear in a tendon is not evidence of serious physical injury without other objective evidence (*Sapienza v Ruggiero*, 57 AD3d 643; *Piperis v Wan*, 49 AD3d 840). Merely referring to the plaintiff's "subjective quality of the plaintiff's pain does not fall within the objective definition of serious physical injury" (*Saladino v Meury*, 193 AD2d 727, *see, Craft v Brantuk*, 195 AD2d 438). Here, the examination of Kwang Hee Coi, by Lyudmila Trimba, M.D. on May 2, 2010, the examination of Myung Ja Oh by Dr. Lyudmia Trimba, M.D. on May 2, 2010, and Hae Min Yum by Dr. Michael Trimba, M.D. on April 26, 2010 satisfy their requirement of proof.

Regarding "permanent limitation" of a body organ, member or system the plaintiff must demonstrate that he has sustained such permanent limitation (*Mickelson v Padang*, 237 AD2d 495). The word "permanent" is by itself insufficient, and it can be sustained only with proof that the limitation is not "minor mild, or slight" but rather "consequential" (*Gaddy v Eyer*, 79 NY2d 955). Once the question has been raised, in order for the plaintiff to sustain proof of permanency, he must demonstrate the existence of such injury through objective medical tests which demonstrate the duration and extent of the injuries alleged (*Gobas v Dowigiallo*, 287 AD2d 690). The plaintiffs have met their burden with regard to demonstrating that there is a question of fact with regard to demonstrating that each has sustained a permanent limitation.

The "significant limitation of use of a body function or system" requires proof of the significance of the limitation, as well as its duration (*Dufel v Green*, 84 NY2d 795; *Fung v Uddin*, 60 AD3d 992; *Hoxha v McEachern*, 42 AD3d 433; *Barrett v Howland*, 202 AD2d 383). Each plaintiff has sustained their burden with regard to demonstrating that there exists a question of fact with regard to the question of significant limitation.

Accordingly, Hae Jung Yum's motion for summary judgment based on the allegation that the other plaintiffs have failed to demonstrate that each one has sustained a "serious injury" is denied. However, that portion of the defendant's motion relating to each plaintiffs injury resulting in loss of customary activity for not less than ninety days of the first one hundred eighty days is granted.

So Ordered.

Dated: Long Island City, N.Y.
October 15, 2010

ROBERT J. MCDONALD
J.S.C.