

**Il Chung Lim v Chrabaszcz**

2011 NY Slip Op 30745(U)

March 29, 2011

Supreme Court, Queens County

Docket Number: 11948/09

Judge: Bernice Daun Siegal

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Short Form Order

**NEW YORK STATE SUPREME COURT - QUEENS COUNTY**  
Present: HONORABLE BERNICE D. SIEGAL IAS TERM, PART 19  
Justice

-----X  
IL CHUNG LIM,

Plaintiff,

Index No.: 11948/09  
Motion Date: 2/23/11  
Motion Cal. No: 16  
Motion Seq. No: 2

-against-

MICHAL K. CHRABASZCZ,

Defendant.

-----X

The following papers numbered 1 to 12 read on this motion by defendant for an order pursuant to CPLR 3212 and Article 51 of the Insurance Law of the State of New York granting summary judgment to defendant, Michal Chrabaszcz, and dismissing the complaint of plaintiff, Il Chung Lim, for personal injuries allegedly sustained in a motor vehicle accident on May 1, 2009 on the ground that the injuries claimed do not satisfy the “serious injury” threshold requirement of New York Insurance Law 5102(d); and thus, his claim for non-economic loss is dismissible as a matter of law.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	1-4
Affirmation in Opposition .....	5-9
Reply Affirmation .....	10-12

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

Defendant moves for an order granting summary judgment pursuant to CPLR §3212, dismissing the complaint and any and all cross-claims against him on the grounds that plaintiff did not sustain a “serious injury” under Insurance Law §5102(d). This is an action for personal injury in which plaintiff Il Chung Lim (“plaintiff”) alleges that he sustained serious personal injury within

the meaning of the Insurance Law on May 1, 2009, as a result of a motor vehicle accident. Plaintiff claims, as set forth in the bill of particulars, that as a result of the accident he sustained serious injury to his left knee. Defendant moves for summary judgment in its favor on the ground that plaintiff did not sustain a “serious injury” within the meaning of the Insurance Law. Section 5102(d) provides, in pertinent part, that a “serious injury” is defined as:

a personal injury which results in ...significant disfigurement;  
...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 party from performing substantially  
all of the material acts which constitute such person’s customary daily  
activities for not less than ninety days during the one hundred eighty  
days immediately following the occurrence of the injury or  
impairment.

The issue of whether plaintiff sustained a serious injury is a matter of law to be determined in the first instance by the court. (*See Licari v. Elliott*, 57 N.Y.2d 230 [1982].) The burden is on the defendant to make a prima facie showing that plaintiff’s injuries are not serious. (*Toure v. Avis Rent A Car Sys.*, 98 N.Y.2d 345 [2002].) A defendant can meet his or her prima facie burden by submitting the affidavits or affirmations of medical experts, who, through objective medical testing, conclude that plaintiff’s injuries are not serious within the meaning of Insurance Law § 5102(d).

(See *Margarin v. Krop*, 24 A.D.3d 733 [2<sup>nd</sup> Dept. 2005]; *Karabchievsky v. Crowder*, 24 AD3d 614 [2<sup>nd</sup> Dept. 2005].) The threshold question in determining a summary judgment motion on the issue of serious injury is the sufficiency of the moving papers, with consideration only given to opposing papers once the defendant, as the movant, makes a prima facie showing that the plaintiff did not sustain a serious injury. (See, *Toure v Avis Rent A Car Sys.*, 98 N.Y.2d 345 [2002].)

Defendants met their initial burden of establishing that plaintiff did not sustain a serious injury through the submission of the affirmation of Dr. Leon Sultan wherein he compared the results elicited from the goniometer testing to the normal range of motion testing and found that plaintiff's range of motion tests for his left knee were within normal limits and that plaintiff was not disabled. (*Staff v. Yshua*, 59 A.D.3d 614 [2<sup>nd</sup> Dept 2009].) Defendant also submitted the affirmed report of Dr. Alan Greenfield, a radiologist, who found degeneration in the knee with no evidence of trauma related injury.

Through the submission of the affirmed medical reports of defendant's experts, defendant established that plaintiff did not sustain a serious injury to his left knee within the meaning of Insurance Law § 5102(d). ( See, *Pommells v. Perez*, 4 N.Y.3d 566 [2005].) Defendant's evidence being sufficient to make a prima facie showing that plaintiff did not sustain a serious injury to his left knee [*Pommells v. Perez*, supra.], the burden shifts to plaintiff to demonstrate the existence of a triable issue of fact as to whether he sustained a serious injury to his left knee. (See, *Browne v M&P Distrib. Corp.*, 52 A.D.3d 638 [2<sup>nd</sup> Dept 2008].) Plaintiff has not met his burden.

In opposition, plaintiff submitted his attorney's affirmation, the affidavit of the plaintiff, the affidavit of Benjamin Chang, MD, plaintiff's treating physician and the affirmation of Ayoob Khodadadi, MD, a radiologist. With respect to plaintiff's attorney's affirmation, it is well recognized

that an attorney's affirmation that is not based upon personal knowledge is of no probative or evidentiary significance (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 563 (1980); *Warrington v. Ryder Truck Rental, Inc.*, 35 A.D.3d 455 [2<sup>nd</sup> Dept. 2006]), and would be insufficient to show that plaintiff sustained a serious injury, particularly where, as here, there is no objective medical evidence to demonstrate that she sustained a serious injury. (*See, Codrington v. Ahmad*, 40 A.D.3d 799 [2<sup>nd</sup> Dept. 2007].)

Plaintiff attached the affirmation of Dr. Benjamin Chang diagnosing plaintiff with injuries to his cervical spine, lumbar spine and left shoulder. However, plaintiff's bill of particulars only refers to a left knee injury and does not mention a claim for injuries sustained to the plaintiff's back, neck or shoulder. Plaintiff's failure to allege in his bill of particulars that he sustained an injury to his back, neck or shoulder precludes this court from considering evidence on those grounds. (*Ifrach v. Neiman*, 306 A.D.2d 380, [2<sup>nd</sup> Dept 2003].)

With respect to the alleged injury to plaintiff's left knee, both the affidavit of Dr. Chang and affirmation of Dr. Khodadadi failed to address the findings of the defendant's radiologist, who concluded that plaintiff's left knee symptoms were degenerative in nature and unrelated to the subject accident. Accordingly, the conclusions of Dr. Chang that the injuries and limitations noted during his examination were the result of the subject accident were speculative. (*Mensah v Badu*, 68 AD3d 945 [2<sup>nd</sup> Dept 2009]; *Saint-Hilaire v. PV Holding Corp.*, 56 A.D.3d 541 [2<sup>nd</sup> Dept 2008].)

Furthermore, Dr. Chang, in his affidavit relies upon the findings of Dr. Khodadadi to establish that the subject accident caused the plaintiff's alleged injuries to his left knee. However, Dr. Khodadadi's affirmation failed to render an opinion on causation and therefore did not raise a triable issue of fact as to these injuries. (*Sorto v. Morales*, 55 A3d 718 [2<sup>nd</sup> Dept 2008].) Moreover,

as Dr. Chang does not state in his affirmation that he reviewed plaintiff's MRI films, only the report, he cannot offer an opinion on causation. (See *Ortega v Maldonado*, 38 AD3d 388 [1st Dept 2007].)

With respect to plaintiff's claim under the "90/180" provision, the plaintiff's admissible medical submissions were insufficient to establish that plaintiff sustained a medically-determined injury, as a result of the accident, of a nonpermanent nature which prevented him from performing his usual and customary activities for 90 of the 180 days following the subject accident. (*Sierra v. Gonzalez First Limo*, 71 A.D.3d 864 [2<sup>nd</sup> Dept 2010]; *Ponce v. Magliulo*, 10 A.D.3d 644 [2<sup>nd</sup> Dept 2004].) As noted above, the affirmation of Dr Chang was deemed insufficient to establish causation and could therefore not establish a medically determined injury "as a result of the accident." Furthermore, plaintiff's assertion that he is limited in his ability to play sports and has difficulty driving, "while suggestive of discomfort, do not suggest the inability to perform substantially all of his usual and customary daily activities." (*Cantave v. Gelle*, 60 A.D.3d 988 [2<sup>nd</sup> Dept 2009].) In fact, plaintiff returned to work only two days following the accident.

Based upon the foregoing, defendants' motion for summary judgment on the ground that plaintiff failed to sustain a "serious injury" is granted and the complaint hereby is dismissed.

Dated: March 29, 2011

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Bernice D. Siegal, J.S.C.