

**Kim v Meditz**

2013 NY Slip Op 30431(U)

February 21, 2013

Sup Ct, Queens County

Docket Number: 6405/11

Judge: Howard G. Lane

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE  
Justice

IAS PART 6

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KYOUNG SOON KIM and JONG HWA WANG,

Plaintiffs,

-against-

CAROLYN M. MEDITZ,  
Defendant.  
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Index No. 6405/11  
Motion  
Date January 25, 2013

Motion  
Cal. No. 68

Motion  
Sequence No. 2

	<u>Papers Numbered</u>
Notice of Motion-Affidavits-Exhibits...	1-4
Opposition.....	5-7
Reply.....	8-9

Upon the foregoing papers it is ordered that this motion by defendant for summary judgment dismissing the complaint of plaintiffs, Kyoung Soon Kim and Jong Hwa Wang pursuant to CPLR 3212, on the ground that plaintiffs have not sustained a serious injury within the meaning of the Insurance Law § 5102(d) is decided as follows:

This action arises out of an automobile accident that occurred on March 17, 2008. Defendants have submitted proof in admissible form in support of the motion for summary judgment. Defendants submitted, inter alia, affirmed reports from an independent examining orthopedic surgeon, an independent examining neurologist, and an independent evaluating radiologist for both plaintiffs, and plaintiffs' own verified bills of particulars.

**APPLICABLE LAW**

Under the "no-fault" law, in order to maintain an action for personal injury, a plaintiff must establish that a "serious injury" has been sustained (Licari v. Elliot, 57 NY2d 230 [1982]). The proponent of a motion for summary judgment must

tender sufficient evidence to show the absence of any material issue of fact and the right to judgment as a matter of law (Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]; Winegrad v. New York Univ. Medical Center, 64 NY2d 851 [1985]). In the present action, the burden rests on defendants to establish, by the submission of evidentiary proof in admissible form, that plaintiff has not suffered a "serious injury" (Lowe v. Bennett, 122 AD2d 728 [1st Dept 1986], affd, 69 NY2d 701, 512 NYS2d 364 [1986]). When a defendant's motion is sufficient to raise the issue of whether a "serious injury" has been sustained, the burden shifts and it is then incumbent upon the plaintiff to produce prima facie evidence in admissible form to support the claim of serious injury (Licari v. Elliot, supra; Lopez v. Senatore, 65 NY2d 1017 [1985]).

In support of a claim that plaintiff has not sustained a serious injury, a defendant may rely either on the sworn statements of the defendant's examining physician or the unsworn reports of plaintiff's examining physician (Pagano v. Kingsbury, 182 AD2d 268 [2d Dept 1992]). Once the burden shifts, it is incumbent upon plaintiff, in opposition to defendant's motion, to submit proof of serious injury in "admissible form". Unsworn reports of plaintiff's examining doctor or chiropractor will not be sufficient to defeat a motion for summary judgment (Grasso v. Angerami, 79 NY2d 813 [1991]). Thus, a medical affirmation or affidavit which is based on a physician's personal examination and observations of plaintiff, is an acceptable method to provide a doctor's opinion regarding the existence and extent of a plaintiff's serious injury (O'Sullivan v. Atrium Bus Co., 246 AD2d 418 [1st Dept 1998]). Unsworn MRI reports are not competent evidence unless both sides rely on those reports (Gonzalez v. Vasquez, 301 AD2d 438 [1st Dept 2003]; Ayzen v. Melendez, 749 NYS2d 445 [2d Dept 2002]). However, in order to be sufficient to establish a prima facie case of serious physical injury the affirmation or affidavit must contain medical findings, which are based on the physician's own examination, tests and observations and review of the record rather than manifesting only the plaintiff's subjective complaints. It must be noted that a chiropractor is not one of the persons authorized by the CPLR to provide a statement by affirmation, and thus, for a chiropractor, only an affidavit containing the requisite findings will suffice (see, CPLR 2106; Pichardo v. Blum, 267 AD2d 441 [2d Dept 1999]; Feintuch v. Grella, 209 AD2d 377 [2d Dept 2003]).

In any event, the findings, which must be submitted in a competent statement under oath (or affirmation, when permitted) must demonstrate that plaintiff sustained at least one of the categories of "serious injury" as enumerated in Insurance Law §

5102(d) (Marquez v. New York City Transit Authority, 259 AD2d 261 [1st Dept 1999]; Tompkins v. Budnick, 236 AD2d 708 [3d Dept 1997]; Parker v. DeFontaine, 231 AD2d 412 [1st Dept 1996]; DiLeo v. Blumberg, 250 AD2d 364 [1st Dept 1998])). For example, in Parker, supra, it was held that a medical affidavit, which demonstrated that the plaintiff's threshold motion limitations were objectively measured and observed by the physician, was sufficient to establish that plaintiff has suffered a "serious injury" within the meaning of that term as set forth in Article 51 of the Insurance Law. In other words, "[a] physician's observation as to actual limitations qualifies as objective evidence since it is based on the physician's own examinations." Furthermore, in the absence of objective medical evidence in admissible form of serious injury, plaintiff's self-serving affidavit is insufficient to raise a triable issue of fact (Fisher v. Williams, 289 AD2d 288 [2d Dept 2001]).

## **DISCUSSION**

### **A. Defendants established a prima facie case that both plaintiffs did not suffer a "serious injury" as defined in Section 5102(d).**

The affirmed report of defendant's independent examining orthopedic surgeon, Howard Levin, M.D., indicates that an examination of plaintiff, Kyoung Soon Kim on April 13, 2012 revealed a diagnosis of: resolved cervical sprain and a normal orthopedic examination of the right and left shoulder, left knee, and lumbar spine. He opines that there is no need for treatment from an orthopedic standpoint. Dr. Levin concludes that there is no causally related orthopedic disability.

The affirmed report of defendant's independent examining orthopedic surgeon, Howard Levin, M.D., indicates that an examination of plaintiff, Jong Hwa Wang on April 13, 2012 revealed a diagnosis of: resolved cervical sprain, with some residual pain referred to the left shoulder; normal left shoulder examination; resolved lumbar sprain; and resolved left knee contusion. He opines that there is no need for causally related treatment from an orthopedic standpoint. Dr. Levin concludes that there is no causally related orthopedic disability.

The affirmed report of defendant's independent examining neurologist, Kuldip Sachdev, M.D., indicates that an examination of plaintiff, Kyoung Soon Kim on April 13, 2012 reveals an impression of: resolved sprains and strains and soft tissue

injuries of the cervical, thoracic, and lumbosacral spine. He opines that the neurological examination is within normal limits and there is no need for causally related treatment from a neurological treatment. Dr. Sachdev concludes that there is no causally related neurologic disability.

The affirmed report of defendant's independent examining neurologist, Kuldip Sachdev, M.D., indicates that an examination of plaintiff, Jong Hwa Wang on April 13, 2012 reveals an impression of: cervical and thoracic spine sprain and strain which are manifestations of soft tissue injuries. He opines that there is no causally related neurological disability and no need for causally related treatment from a neurological standpoint.

The affirmed report of defendant's independent evaluating radiologist, Audrey Eidenstadt, M.D., indicates that an MRI of the Cervical Spine of plaintiff, Kyoung Soon Kim taken on April 24, 2008 revealed an impression of: Cervical straightening. Osteophyte formation C4-5 and C5-6 levels. Desiccation of disc material throughout the cervical spine. Bulging C4-5 Intervertebral disc. Central and right paracentral C6-7 disc herniation. Dr. Eidenstadt concludes that there exists pre-existing degenerative disc disease.

The affirmed report of defendant's independent evaluating radiologist, Audrey Eidenstadt, M.D., indicates that an MRI of the Cervical Spine of plaintiff, Jong Hwa Wang taken on April 26, 2008 revealed an impression of: Disc generation, bulging, and superimposed central and left paracentral C5-6 disc herniation. Desiccation C2-3, C3-4, and C4-5, and C6-7 intervertebral discs with bulging seen at the C3-4 intervertebral disc level. The affirmed report of defendant's independent evaluating radiologist, Audrey Eidenstadt, M.D., indicates that an MRI of the Lumbar Spine taken on April 24, 2008 revealed an impression of: transitional vertebra felt to be the S1 vertebral level. Desiccation and bulging L4-5 intervertebral disc level. Degeneration, bulging, and superimposed disc herniation L5 transitional S1 level with caudal extension of disc material seen. She concluded that there is pre-existing degenerative disc disease..

Additionally, defendants established a prima facie case for the category of "90/180 days". The plaintiffs' verified bills of particulars indicates that plaintiffs were each only confined to bed for two-and-a-half months (2½) following the accident and plaintiffs were each only incapacitated from employment for two-and-a half months (2½) months following the accident. Such

evidence shows that the plaintiffs were not curtailed from nearly all activities for the bare minimum of 90/180, required by the statute.

The aforementioned evidence amply satisfied defendant's initial burden of demonstrating that plaintiffs did not sustain a "serious injury". Thus, the burden then shifted to plaintiffs to raise a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law (see, Gaddy v. Eyler, 79 NY2d 955 [1992]). Failure to raise a triable issue of fact requires the granting of summary judgment and dismissal of the complaint (see, Licari v. Elliott, supra).

***B. Plaintiffs fail to raise a triable issue of fact***

In opposition to the motion, plaintiff, Kyoung Soon Kim submitted: an attorney's affirmation; an affirmation of plaintiff's physician, Seung K. Kim, M.D.; and an affirmation and sworn Cervical Spine MRI Report of plaintiff's radiologist, Mary Hu, M.D.

In opposition to the motion, plaintiff, Jong Hwa Wang submitted: an attorney's affirmation; an affirmation of plaintiff's physician, Seung K. Kim, M.D.; and an unsworn Cervical Spine MRI Report and Lumbar Spine MRI Report of plaintiff's radiologist, Mary Hu, M.D.

Although defendant's independent evaluating radiologist opines in her affirmed report that her evaluation of plaintiffs revealed pre-existing degenerative disc disease, plaintiffs' experts failed to indicate their awareness that plaintiff was suffering from such condition and failed to address the effect of these findings on plaintiffs' claimed accident injuries (Larson v. Delgado, 71 AD3d 739 [2d Dept 2010]; Casimir v. Bailey, 70 AD3d 994 [2d Dept 2010]; Francis v. Christopher, 302 AD2d 425 [2d Dept 2003]; Monette v. Keller, 281 AD2d 523 [2d Dept 2001]; Ifrach v. Neiman, 306 AD2d 380 [2d Dept 2003]. Hence, plaintiffs failed to rebut defendant's claim sufficiently to raise a triable issue of fact (see, Pommels v. Perez, 4 NY3d 566 [NY 2005]).

Regarding both plaintiffs, defendant's argument that there is a gap in treatment is unavailing as plaintiffs' doctor, Seung K. Kim, M.D. indicates in her affirmations that she determined in July 2008 that any further therapy would only be palliative.

Also, the plaintiffs have failed to come forward with sufficient evidence to create an issue of fact as to whether the plaintiffs sustained a medically-determined injury which

prevented them from performing substantially all of the material acts which constituted their usual and customary daily activities for not less than 90 of the 180 days immediately following the underlying accident (Savatarre v. Barnathan, 280 AD2d 537 [2d Dept 2001]). The record must contain objective or credible evidence to support the plaintiff's claim that the injury prevented plaintiff from performing substantially all of their customary activities (Watt v. Eastern Investigative Bureau, Inc., 273 AD2d 226 [2d Dept 2000]). When construing the statutory definition of a 90/180-day claim, the words "substantially all" should be construed to mean that the person has been prevented from performing their usual activities to a great extent, rather than some slight curtailment (see, Gaddy v. Eyler, 79 NY2d 955, Licari v. Elliott, 57 NY2d 230 [1982]; Berk v. Lopez, 278 AD2d 156 [1<sup>st</sup> Dept 2000], lv denied 96 NY2d 708 [2001]). Plaintiffs' expert, Dr. Seung K. Kim merely states regarding plaintiff, Kyoung Soon Kim, that she was instructed to "avoid or diminish many of her activities, especially vigorous exercise and carrying, lifting, and overhead activities" and regarding plaintiff, Jong Hwa Wang, that she was instructed to "avoid or diminish many of her activities, including house cleaning, cooking and laundry, long driving, long periods of sitting, as well as lifting more than 20 pounds". As such, plaintiffs' submissions were insufficient to establish a triable issue of fact as to whether plaintiffs suffered from a medically determined injury that curtailed them from performing their usual activities for the statutory period (Licari v. Elliott, 57 NY2d 230, 236 [1982]). Accordingly, plaintiffs' claim that their injuries prevented them from performing substantially all of the material acts constituting their customary daily activities during at least 90 of the first 180 days following the accident is insufficient to raise a triable issue of fact (see, Graham v. Shuttle Bay, 281 AD2d 372 [1st Dept 2001]; Hernandez v. Cerda, 271 AD2d 569 [2d Dept 2000]; Ocasio v. Henry, 276 AD2d 611 [2d Dept 2000]).

Furthermore, plaintiffs' attorney's affirmation is not admissible probative evidence on medical issues, as plaintiff's attorney has failed to demonstrate personal knowledge of the plaintiff's injuries (Sloan v. Schoen, 251 AD2d 319 [2d Dept 1998]).

Therefore, plaintiffs' submissions are insufficient to raise a triable issue of fact (see, Zuckerman v. City of New York, 49 NY2d 557 [1980]).

Accordingly, the plaintiffs' Complaint is dismissed as to all categories based upon a failure to satisfy the no-fault

threshold.

The clerk is directed to enter judgment accordingly.

Movant shall serve a copy of this order with Notice of Entry upon the other parties of this action and on the clerk. If this order requires the clerk to perform a function, movant is directed to serve a copy upon the appropriate clerk.

The foregoing constitutes the decision and order of this Court.

Dated: February 21, 2013

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**Howard G. Lane, J.S.C.**