

<b>Sang Kyu Khim v Lynch</b>
2014 NY Slip Op 30441(U)
February 24, 2014
Supreme Court, Queens County
Docket Number: 28492/2011
Judge: Robert J. McDonald
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SHORT FORM ORDER

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

SANG KYU KHIM,  
  
Plaintiff,  
  
- against -

**Index No. : 28492/2011**  
**Motion Dates: 12/09/13 and 01/09/14**  
**Mot.Cal. Nos: 52, 87 and 88**  
**Motion Seq.: 4, 5 and 7**

KRISTIE L. LYNCH, KAROLYN L. CURRIE,  
EUGENE F. CURRIE, and ASTRA A.  
GARJARIAN,  
  
Defendants.

- - - - - x

The following papers numbered 1 to 23 were read on three separate motions by defendants, KRISTIE L. LYNCH, KAROLYN L. CURRIE, EUGENE F. CURRIE, and ASTRA A. GARJARIAN for an order, pursuant to CPLR 3212, granting the defendants summary judgment and dismissing the complaint of plaintiff, SANG KYU KHIM, on the ground that said plaintiff has not sustained a serious injury within the meaning of Insurance Law §§ 5102 and 5104:

Papers Numbered

LYNCH Notice of Motion-Affidavits-Exhibits.....	1 - 6
CURRIE Notice of Motion-Affidavits-Exhibits.....	7 - 11
GARJARIAN Notice of Motion-Affidavits-Exhibits.....	12 - 16
Plaintiff's Affirmation in Opposition-Affidavits.....	17 - 20
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In this action for negligence, plaintiff, seeks to recover damages for personal injuries he allegedly sustained as a result of a four-vehicle chain reaction accident that occurred on September 7, 2010, on the westbound lanes of the Long Island Expressway near its intersection with 166<sup>th</sup> Street, Queens County, New York. Plaintiff alleges that he was stopped in traffic when his vehicle was struck in the rear by the vehicle owned and operated by defendant Kristie L. Lynch. Ms. Lynch contends that her vehicle had been struck in the rear by the Garjarian vehicle

and propelled into the plaintiff's vehicle. Garjarian alleges that her vehicle had been hit in the rear by the vehicle owned by Eugene F. Currie and operated by defendant Karolyn L. Currie. As a result of the accident, plaintiff, Sang Kyu Khim, alleges that he sustained physical injuries.

On December 21, 2011, the plaintiff commenced an action against the owners and drivers of the three vehicles behind his, Lynch in vehicle No. 2, Garjarian in Vehicle No. 3, and Currie in Vehicle No. 4. Plaintiff filed a Note of issue on April 19, 2013. This matter is presently on the calendar of the Trial Scheduling Part on May 20, 2014.

Defendants Currie, Lynch and Garjarian now move for an order pursuant to CPLR 3212 dismissing the plaintiff's complaint on the ground that the injuries claimed by the plaintiff fail to satisfy the serious injury threshold requirement of Section 5102(d) of the Insurance Law. In support of the motion, the defendants submit a copy of the pleadings; plaintiff's verified bill of particulars and supplemental verified bill of particulars; a copy of the transcript of the examination before trial of Sang Kyu Khim; the affirmed medical report of board certified neurologist Dr. Daniel J. Feuer; the affirmed radiological report of Dr. Sheldon Feit; the affirmed medical report of board certified orthopedic surgeon, Dr. Michael Baskies; and the affirmed medical report of board certified orthopedic surgeon Dr. Jacquelin Emmanuel.

In his verified bill of particulars, the plaintiff alleges that as a result of the collision he sustained herniated discs at L4-L5 and C4-C5, as well as a tear of the anterior cruciate ligament of the left knee and a tear of the medial meniscus of the left knee. The plaintiff states he was confined to bed for one week and confined to his home for three weeks following the accident. The plaintiff contends that he sustained a serious injury as defined in Insurance law §5102(d).

An MRI was conducted on the plaintiff's left knee on September 30, 2010, three weeks post-accident. Defendants' retained radiologist, Dr. Feit reviewed the MRI study and found that the MRI failed to demonstrate evidence of a meniscal tear, ligamentous injury or fracture. He stated that the anterior and posterior cruciate ligaments are intact. He states that there were no significant post-traumatic changes and no abnormalities causally related to the accident of September 7, 2010.

Plaintiff was examined on January 4, 2013 by Dr. Michael Baskies, an orthopedic surgeon retained by the defendants. Dr. Baskies states that the plaintiff presented with pain to his

neck, left shoulder, lower back and left knee. Objective range of motion testing using a goniometer showed that there was no loss of range of motion of the plaintiff's cervical spine, left shoulder, lumbar spine and left knee. The diagnosis was cervical spine sprain, resolved, left shoulder sprain, resolved, lumbar spine sprain, resolved and left knee sprain, resolved. Dr. Baskies concluded that the plaintiff displayed no objective evidence of an orthopedic disability.

Plaintiff was examined by Dr. Daniel Feuer, a neurologist on January 2, 2013. Plaintiff told Dr. Feuer that he experiences recurrent knee pain, shoulder pain and low back pain. Objective range of motion testing showed no limitations of the cervical spine and lumbar spine. The doctor states that the neurological examination was within normal limits. Plaintiff did not demonstrate any objective neurological disability or neurological permanency.

Dr. Jacquelin Emmanuel, an orthopedic surgeon retained by defendants, also examined the plaintiff on March 4, 2013. Upon objective range of motion testing she found no limitations of the plaintiff's left shoulder, thoracic spine, lumbosacral spine and left knee. She states that based upon her examination there is no objective evidence of disability.

In his examination before trial taken on November 19, 2012, plaintiff testified that after the accident he was transported to the emergency room at Flushing Hospital where he was treated for pain to his shoulders, neck and back and released the same day. One week after the accident he began treating with Dr. Tak at Murray Hill. He had physical therapy with Dr. Tak for six or seven months until his insurance was terminated. He also had acupuncture treatments. He states that he owns a grocery store and that after the accident he missed two or three weeks from work. He states that his back still hurts him when he exercises at the gym. He stated his shoulder and knee are currently better.

Defendants' counsel contends that the affirmed medical reports of Drs. Feit, Emmanuel, Baskies and Feuer are sufficient to establish, prima facie, that plaintiff has not sustained a permanent loss of a body organ, member, function or system; that he has not sustained a permanent consequential limitation of a body organ or member or a significant limitation of use of a body function or system. Counsel also contends that the plaintiff, who returned to work after two or three weeks, did not sustain a medically determined injury or impairment of a nonpermanent nature which prevented him from performing substantially all of his usual daily activities for not less than 90 days during the immediate one hundred days following the occurrence.

In opposition, plaintiff's attorney, Renata Kyu Khim, Esq., submits her own affirmation; the affirmation of Dr. Ayoob Khododadi, a board certified radiologist; the affirmed medical report of Dr. Tak, plaintiff's treating physician and an affidavit from the plaintiff.

Dr. Khododadi, reviewed the MRI studies of the plaintiff's left knee, cervical spine and lumbar spines. His review showed that in his opinion the plaintiff had sustained herniated discs at the L4-L5 and C4- C5 level. He also found that the plaintiff sustained a tear of the anterior cruciate ligament and the medial meniscus of the left knee.

Dr. Tak submits an affirmed report stating that he initially saw Mr Khim on September 10, 2010 at which time he presented with pain to his cervical spine, left shoulder, left knee and lumbosacral spine. The plaintiff completed a course of physical therapy with some improvement. Dr. Tak recently examined the plaintiff on September 13, 2013 at which time he had limitations of range of motion of the cervical spine, lumbar spine and left knee. He concludes that as a result of the motor vehicle accident of September 7, 2010, the plaintiff sustained a permanent reduction of range of motion of the subject areas, which is causally related to the accident of September 7, 2010. He stated that therapy was discontinued because plaintiff had achieved maximum medical benefits and that any further therapy would be palliative in nature.

On a motion for summary judgment, where the issue is whether the plaintiff has sustained a serious injury under the no-fault law, the defendant bears the initial burden of presenting competent evidence that there is no cause of action (Wadford v. Gruz, 35 AD3d 258 [1st Dept. 2006]). "A defendant can establish that a plaintiff's injuries are not serious within the meaning of Insurance Law § 5102 (d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (Grossman v Wright, 268 AD2d 79 [1st Dept. 2000]). Whether a plaintiff has sustained a serious injury is initially a question of law for the Court (Licari v Elliott, 57 NY2d 230 [1982]).

Where defendants' motion for summary judgment properly raises an issue as to whether a serious injury has been sustained, it is incumbent upon the plaintiff to produce evidentiary proof in admissible form in support of his or her allegations. The burden, in other words, shifts to the plaintiff to come forward with sufficient evidence to demonstrate the

existence of an issue of fact as to whether he or she suffered a serious injury (see Gaddy v Eyler, 79 NY2d 955 [1992]; Zuckerman v City of New York, 49 NY2d 557[1980]; Grossman v Wright, 268 AD2d 79 [2d Dept 2000]).

Here, the proof submitted by the defendants, including the affirmed medical reports of Drs. Feuer, Baskies, Emmanuel and Feit and the plaintiff's examination before trial in which he stated that he returned to work two or three weeks after the accident, were sufficient to meet defendants' prima facie burden by demonstrating that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]).

However, this Court finds that the plaintiff raised triable issues of fact by submitting the affirmed medical reports of Drs. Khododadi and Tak, attesting to the fact that the plaintiff sustained injuries to his cervical spine, left knee and lumbar spine as a result of the accident and finding that the plaintiff had significant limitations in range of motion of his left knee, cervical spine and lumbar spine, both contemporaneous to the accident and in a recent examination, and concluding that the plaintiff's limitations were significant and permanent and resulted from trauma causally related to the accident (see Perl v Meher, 18 NY3d 208 [2011]; David v Caceres, 96 AD3d 990 [2d Dept. 2012]; Martin v Portexit Corp., 98 AD3d 63[1<sup>st</sup> Dept. 2012]; Ortiz v Zorbas, 62 AD3d 770 [2d Dept. 2009]; Azor v Torado, 59 ADd 367 [2d Dept. 2009]). As a result this court finds that the plaintiff submitted competent medical evidence raising a triable issue of fact as to whether the alleged injuries to the cervical and lumbar regions of his spine and left knee constituted serious injuries under the permanent consequential limitation of use and significant limitation of use categories of Insurance Law § 5102 (d) (see Khavosov v Castillo, 81 AD3d 903[2d Dept. 2011]; Mahmood v Vicks, 81 AD3d 606 [2d Dept. 2011]; Compass v GAE Transp., Inc., 79 AD3d 1091[2d Dept. 2010]; Evans v Pitt, 77 AD3d 611 [2d Dept. 2010]; Tai Ho Kang v Young Sun Cho, 74 AD3d 1328 743 [2d Dept. 2010]).

In addition, Dr. Tak adequately explained the gap in the plaintiff's treatment by stating that his no fault benefits were terminated and in addition, the plaintiff reached the point of maximum medical improvement and any further treatments would be palliative (see Abdelaziz v Fazel, 78 AD3d 1086 [2d Dept. 2010]; Tai Ho Kang v Young Sun Cho, 74 AD3d 1328 [2d Dept. 2010]; Gaviria v Alvarado, 65 AD3d 567 [2d Dept. 2009]; Bonilla v Tortori, 62 AD3d 637 [2d Dept. 2009]).

Accordingly, for the reasons set forth above, it is hereby,

ORDERED, that the respective motions of defendants Currie, Lynch, and Garjarian for an order granting summary judgment dismissing the complaint of plaintiff Sang Kyu Khim on the ground that said plaintiff has not sustained a serious injury within the meaning of Insurance Law §§ 5102 and 5104 are denied.

Dated: February 24, 2014  
Long Island City, N.Y.

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**ROBERT J. MCDONALD**  
**J.S.C.**