

**Eun Chul Ko v Liu**

2015 NY Slip Op 30252(U)

February 10, 2015

Supreme Court, Queens County

Docket Number: 701765/2012

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**

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EUN CHUL KO, Index No.: 701765/2012  
Plaintiff, Motion Date: 1/29/15  
- against - Motion No.: 108  
SU D. LIU, Motion Seq.: 1  
Defendant.

- - - - - x

The following papers numbered 1 to 14 were read on this motion by defendant, Su D. Liu, for an order pursuant to CPLR 3212, granting summary judgment in favor of the defendant and dismissing the plaintiff's complaint on the ground that the plaintiff, Eun Chul Ko, did not sustain a serious injury within the meaning of Insurance Law §§ 5102 and 5104:

	<u>Papers Numbered</u>
Notice of Motion-Affidavits-Exhibits.....	1 - 6
Affirmation in Opposition-Affidavits-Exhibits.....	7 - 11
Reply Affirmation.....	12 - 14

This is a personal injury action in which plaintiff, Eun Chul Ko, seeks to recover damages for injuries he sustained as a result of a motor vehicle accident that occurred on August 4, 2012, in a parking lot located at 150<sup>th</sup> Place and Northern Boulevard, Queens County, New York. Plaintiff claims that his vehicle was parked when it was struck by the vehicle owned and operated by defendant, Su D. Liu.

The plaintiff commenced this action by filing a summons and complaint on August 27, 2012. Issue was joined by service of the defendant's answer dated September 7, 2012. The plaintiff filed a Note of Issue on November 6, 2013. The matter is presently on the calendar in the Trial Scheduling Part for March 23, 2015.

Defendant now moves for an order pursuant to CPLR 3212(b), granting summary judgment dismissing the plaintiff's complaint on the ground that plaintiff did not suffer a serious injury as defined by Insurance Law § 5102. In support of the motion, defendant submits an affirmation from counsel, Donald M. Munson, Esq; a copy of the pleadings; a copy of plaintiff's verified bill of particulars; a copy of the transcript of the plaintiff's examination before trial; and affirmed report from defendant's retained board certified orthopedist, Dr. Edward A. Toriello.

The plaintiff alleges that as a result of the accident he sustained physical injuries including, a tear of the medial collateral ligament of the left knee, a Grade I meniscal capsular separation in the medial mensicus of the left knee, an intrasubstance tear of the subscapularis tendon of the left shoulder, disc bulges at C3-4, C4-5, L2-3 and L3-4; and intervertebral disc herniations at C5-6, C6-7, L3-4 and L5-S1

Plaintiff asserts that he sustained a serious injury as defined in Insurance Law § 5102(d) in that he sustained a permanent loss of use of a body organ, member function or system; a permanent consequential limitation or use of a body organ or member; a significant limitation of use of a body function or system; significant disfigurement; and a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff from performing substantially all of the material acts which constitute his 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.

In his examination before trial taken on January 10, 2014, the plaintiff, Mr. Ko, a truck driver, age 55, testified that he works independently picking up fruits and vegetables at Hunts Point Market and delivers them to two stores, one in Queens County and the other in New Jersey. He is paid by the store owners for the delivery. Since the accident he has been driving but has a helper to load the truck at Hunts Point Market. He lost one week from work immediately after the accident. He stated that his accident occurred on Saturday, August 4, 2012 at approximately 1-2 p.m. He was sitting in his parked vehicle, a Honda Accord, in the parking lot at Hanyang Market on Northern Boulevard. His car was parked in a designated parking space with the front facing a wall. After he finished shopping he was sitting in the vehicle with the engine off. He did not have his seat belt on. Less than five minutes afer he entered the vehicle, while he was talking to his mother on a cell phone, his vehicle was struck with a hard impact to the rear passenger's side by the front of the defendant's vehicle. He exited the vehicle and saw the defendant's vehicle driving away from the scene. Another

individual stopped the defendant's vehicle. He felt pain to his shoulder, neck, and back. The following day he began to feel pain in the left knee. About two or three days later he sought medical treatment at a pain clinic on Parsons Boulevard in Flushing. On his initial visit he made complaints of pain to his left shoulder, left knee, back, and neck. He began a course of physical therapy at a rate of three or four times per week and continued treatments for ten months. Then he treated once a week for another month after that and then stopped treatment all together when he was told his symptoms had reached maximum improvement.

Dr. Edward A. Torriello, an orthopedist retained by the defendant, examined the plaintiff on August 26, 2014. Plaintiff reported to him that his vehicle was struck in the rear while in a parked vehicle allegedly injuring his neck, lower back, left knee, and left shoulder. On the date of the examination he continued to complain of pain to his left knee and left shoulder.

Dr. Torriello tested the plaintiff's range of motion with a goniometer and found that plaintiff had no limitations of range of motion of the cervical spine, right shoulder, left shoulder, left shoulder, right elbow, left elbow, right wrist and hand, left wrist and hand, lumbosacral spine, right knee and left knee. He reviewed the plaintiff's medical and radiological records. His impression was that the plaintiff revealed evidence of a resolved cervical strain, resolved left knee contusion, resolved left shoulder strain, and resolved low back strain. He states that the plaintiff is able to return to work and normal activities of daily living.

Defendant's counsel contends that the medical report of Dr. Torriello together with the plaintiff's testimony at his examination before trial stating that he only missed one week from work following the accident, are sufficient to demonstrate that the plaintiff has not sustained a permanent consequential limitation or use of a body organ or member; a significant limitation of use of a body function or system; or a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff from performing substantially all of the material acts which constitute his 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.

In opposition, plaintiff's attorney, Steve Jungsuk Park, Esq., submits his own affirmation as well as the affirmed medical report of Dr Yan Q. Sun. The affidavit of the plaintiff, and the affidavit of radiologist, Dr. Ayooob Khodadadi.

In his affidavit, dated December 15, 2014, the plaintiff states that immediately following the accident he began to suffer from severe and persistent pain in his neck, lower back, left shoulder and left knee. He states that he treated regularly at Sanford Medical Center on Sanford Avenue in Flushing from August 2012 through May 2013. He states that he stopped treating because his no fault benefits were denied in May 2013 and he could no longer afford further treatments. He was last examined by Dr. Sun on December 13, 2014. Dr. Sun advised him that his injuries are permanent and any further treatment would be palliative in nature. He states that he still suffers from daily pain to his neck, lower back, left shoulder, and left knee.

In his affirmation, Dr. Sun states that he initially examined the plaintiff on October 13, 2012, two months following the accident. He also recently examined him on December 13, 2014. He states that based upon his examinations plaintiff's condition remains poor but no fault coverage was denied in May 2013. He states that upon initial examination and his recent examination he conducted objective range of motion testing which revealed significantly restricted range of motion of the left shoulder, left knee, cervical spine, and lumbar spine. He states that in his opinion the physical injuries sustained by the plaintiff are permanent in nature and he has a partial permanent orthopedic disability causally related to the accident of August 4, 2012. Based upon his review of the plaintiff's MRIs and his physical examinations he found that the plaintiff sustained a rotator cuff tear of the left shoulder, a meniscal tear of the left knee, herniated discs in the cervical spine and herniated discs in the lumbar spine.

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 defendant's 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 defendant, including the affirmed medical report of Dr. Toriello together with the plaintiff's testimony at his examination before trial that he only missed one week of work immediately following the accident, are sufficient to meet defendant's 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. Sun and Khodadadi and radiologist Dr. Hu attesting to the fact that the plaintiff sustained a rotator cuff tear in the left shoulder, a meniscal tear of the left knee, and herniated discs in the cervical and lumbar spines and finding that the plaintiff had significant limitations in range of motion of his cervical and lumbar spines and left knee and left shoulder 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 such, the plaintiff raised a triable issue of fact as to whether he sustained a serious injury under the permanent consequential and/or the significant limitation of use categories of Insurance Law § 5102(d) as a result of the subject accident (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]).

Further, the findings of Dr. Sun that the plaintiff's injuries were traumatic and were causally related to the subject collision expressly addressed and rebutted any finding of the defendant's radiologist, Dr. Hu that defendant suffered from a degenerative condition in the spine (see Fraser-Baptiste v New York City Tr. Auth., 81 AD3d 878 [2d Dept. 2011]; Harris v Boudart, 70 AD3d 643 [2d Dept. 2010]).

In addition, the plaintiff adequately explained the gap in treatment by submitting his own affidavit as well as the affirmation of Dr. Sun stating that no-fault had stopped his benefits and he could not afford to pay for treatments out-of-pocket and that any further treatments would only have been palliative in nature (see Abdelaziz v Fazel, 78 AD3d 1086 [2d Dept. 2010]; Tai Ho Kang v Young Sun Cho, 74 AD3d 1328 [2d Dept. 2010]; Domanas v Delgado Travel Agency, Inc., 56 AD3d 717 [2d Dept. 2008]; Black v Robinson, 305 AD2d 438 [2d Dept. 2003]).

The plaintiff's application for an order denying the motion as untimely is denied. Although the motion was made more than 120 days from the filing of the note of issue, the plaintiff failed to appear for a court ordered IME until August 26, 2014 and the plaintiff made the instant motion as soon as possible thereafter. This court finds that as the plaintiff failed to go for an IME until August 2014, the defendant has shown good cause for the failure to file the motion within the statutory time limitations. (see Grochowski v Ben Rubins, LLC, 81 AD3d 589 [2d Dept. 2011]; Kung v Zheng, 73 AD3d 862 [2d Dept. 2010]; Richardson v JAL Diversified Mgt., 73 AD3d 1012 [2d Dept. 2010]; Tower Ins. Co. of NY v Razy Assoc., 37 AD3d 702 [2d Dept. 2007]).

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

ORDERED, that the motion by defendant, Su D. Liu for an order granting summary judgment dismissing the complaint of plaintiff, Eun Chul Ko, is denied.

Dated: February 10, 2015  
Long Island City, N.Y.

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ROBERT J. MCDONALD  
J.S.C.