

<b>Joo Noh v Intorlocchio</b>
2015 NY Slip Op 30558(U)
April 6, 2015
Sup Ct, Queens County
Docket Number: 700250/2013
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

KEUM JOO NOH, MOTHER AND NATURAL  
GUARDIAN OF CASEY KIM, AND KEUM JOO  
NOH, INDIVIDUALLY,

Index No.: 700250/2013

Motion Date: 03/27/15

Plaintiffs,

Motion No.: 89

- against -

Motion Seq.: 3

C. R. INTORLOCCHIO,

Defendant.

- - - - - x

The following papers numbered 1 to 18 were read on this motion by defendant, C. R. Intorlocchio, for an order pursuant to CPLR 3212 granting summary judgment in favor of the defendant and dismissing the complaint of plaintiff, Casey Kim, on the ground that said plaintiff did not sustain a serious injury within the meaning of Insurance Law §§ 5102 and 5104:

Papers  
Numbered

Notice of Motion-Affidavits-Exhibits-Memorandum of Law...	1 - 5
Affirmation in Opposition-Affidavits-Exhibits.....	6 - 11
Supplemental Affirmation in Opposition.....	12 - 14
Reply Affirmation.....	15 - 18

This is a personal injury action in which plaintiffs, Casey Kim and Keum Joo Noh, seek to recover damages for injuries they each allegedly sustained as a result of a motor vehicle accident that occurred on December 16, 2012, on 94<sup>th</sup> Street at the intersection with 23<sup>rd</sup> Avenue, Queens County, New York. Plaintiff Casey Kim was a restrained passenger in a vehicle operated by his grandmother, Keum Jooh Noh, when their vehicle was struck by the vehicle owned and operated by defendant, C. R. Intorlocchio.

The plaintiff commenced this action by filing a summons and complaint on January 23, 2013. Issue was joined by service of the defendant's verified answer dated February 11, 2013. The plaintiff filed a Note of Issue on May 22, 2014. The matter is presently on the calendar in the Trial Scheduling Part for April 21, 2015.

Defendant now moves for an order pursuant to CPLR 3212(b), granting summary judgment dismissing the complaint of plaintiff Casey Kim on the ground that said plaintiff did not suffer a serious injury as defined by Insurance Law § 5102.

In support of the motion, defendant submits an affirmation from counsel, Katie A. Walsh, Esq; a copy of the pleadings; a copy of plaintiff's verified bill of particulars; a copy of the transcript of Casey Kim's examination before trial; an affirmed report from defendant's retained orthopedic surgeon, Dr. Joseph Y. Margulies; and the affirmed radiological report of Dr. Stephen W. Lastig.

Casey Kim contends that as a result of the accident he sustained, inter alia, a bulging disc at C6-C7. 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 February 26, 2014, plaintiff, Casey Kim, age 18, a student at John Bowne High School testified that he was involved in a motor vehicle accident on December 16, 2012. His grandmother was operating the vehicle and he was seated in the rear passenger seat behind the driver's seat. When the vehicle was in the intersection his vehicle was struck on the front driver's side. He saw the other vehicle coming from his left a split second before the impact. The following day he felt pain to his neck. After a week he sought medical treatment with Dr. Tak. Following that visit he began a course of physical therapy which began in December 2012 and ended in July 2013. During his treatment he was referred for an MRI of his cervical spine. He decided to stop treating because he felt better. Besides Dr. Tak and the other physical therapists he did not receive any other medical treatment as a result of the

injuries sustained in this accident. He did not miss any school as a result of the injuries sustained in the accident but he could not participate in physical education class.

Dr. Joseph Y. Margulies, an orthopedist retained by the defendant, examined the plaintiff on March 21, 2014. Casey told Dr. Margulies that he was seated in the rear of the vehicle when it was struck in the front. He sustained injuries to his neck and right knee. He told the doctor he missed one week from school after the accident. Dr. Margulies tested the plaintiff's range of motion with a goniometer and found that the plaintiff had no limitations of range of motion of the cervical spine and bilateral knees. His impression was that there were no residual objective orthopedic findings noted at the examination which were a result of the subject motor vehicle accident. He states that plaintiff sustained a cervical sprain which is resolved and states that there is no need from an orthopedic standpoint for further treatment including physical therapy. He states that the plaintiff revealed no functional disability at the present time.

Dr. Lastig, a board certified radiologist retained by the defendant reviewed the MRI of the plaintiff's cervical spine taken on February 23, 2013. His review revealed an unremarkable MRI of the cervical spine with no herniations or disc bulges identified. He states that in his opinion there are no findings on the study which are causally related to the subject accident.

Defendant's counsel contends that the medical reports of Drs. Lastig and Margulies together with the plaintiff's testimony at his examination before trial that he only missed a week from school 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 Jung Suk Park, Esq., submits his own affirmation as well as the affidavit of the plaintiff Casey Kim, the affirmed radiological report of Dr. Ayoob Khodadadi, and the affirmed medical report of Dr. Yong S. Tak

In his affidavit, dated March 7, 2015, Casey Kim states that immediately following the accident he began to suffer from severe and persistent pain in his neck. He began a course of physical therapy at Dr. Tak's Medical & Rehabilitation facility in Flushing, New York, from December 2012 through March 2013. He states that he stopped treating because his no fault benefits were denied in March of 2013 and he could no longer afford to pay for further treatments. He was re-evaluated by Dr. Tak on March 7, 2015. At that time he was advised that his injuries were permanent and could not be cured and any further treatments would be palliative in nature. He states that the injuries to the neck are solely caused by the accident of December 16, 2012. He states that he still suffers from daily pain in the neck.

Radiologist, Dr. Khodadadi, reviewed the MRI films of the plaintiff's cervical spine taken on February 23, 2013. Based upon he review he observed evidence of a mild degree of bulging at the C6-7 level .

Dr. Yong S. Tak, a physician board certified in physical medicine and rehabilitation states that he initially examined Casey Kim on December 19, 2012 with respect to the motor vehicle accident of December 16, 2012. He also re-examined the plaintiff on March 7, 2015. He states that upon initial examination as well as at the recent examination the plaintiff's chief complaints included pain to the neck and cervical spine. On December 19, 2012 and at the recent examination of March 2015, Dr. Tak conducted objective range of motion testing which revealed severely restricted range of motion of the plaintiff's cervical spine on both occasions. He states that the positive objective medical findings with respect to the cervical spine injury are consistent with the MRI findings of a bulging disc at the C6-7 level. He states that based upon both of his examinations he finds that the plaintiff's injuries are casually related to the motor vehicle accident of December 16, 2012. He states that any further medical treatment will be palliative in nature. He also states that the plaintiff sustained permanent injuries to his cervical spine as a result of the subject accident. He states that the plaintiff sustained a significant limitation of use of the body function or system and a significant limitation of the plaintiff's cervical spine. He states that the plaintiff treated consistently until March 2013 at which time his no fault coverage was terminated.

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 reports of Drs. Margulies and Lastig together with the plaintiff's testimony at his examination before trial that he only missed a week of school 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. Tak and Khodadadi attesting to the fact that the plaintiff sustained a bulging disc in the cervical spine as a result of the accident and finding that the plaintiff had significant limitations in range of motion of his cervical 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 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])).

In addition, the plaintiff adequately explained the gap in treatment by submitting his own affidavit and the affidavit of Dr. Tak stating that no-fault had terminated his coverage and in any event any further treatment would 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])).

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

ORDERED, that the motion by defendant, C. R. Intorlocchio, for an order granting summary judgment dismissing the complaint of plaintiff, Casey Kim, is denied.

This matter remains on the calendar in the Trial Scheduling Part for April 21, 2015.

Dated: April 6, 2015  
Long Island City, N.Y.

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