

Kim v Rosenblatt

2018 NY Slip Op 34217(U)

December 3, 2018

Supreme Court, Nassau County

Docket Number: 608736/16

Judge: Denise L. Sher

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

<hr/> STEVE S. KIM and CHRISTINA KIM, <p style="text-align: center;">Plaintiffs,</p> <p style="text-align: center;">- against -</p> STEVEN ROSENBLATT, FREDY Y. MALDONADO and ARROW TRANSFER AND STORAGE, INC., <p style="text-align: center;">Defendants.</p> <hr/>	TRIAL/IAS PART 32 NASSAU COUNTY Index No.: 608736/16 Motion Seq. No.: 04 Motion Date: 07/24/18
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The following papers have been read on this motion:

	Papers Numbered
<u>Notice of Motion, Affirmation and Exhibits</u>	1
<u>Affirmation in Support</u>	2
<u>Affirmation in Opposition and Exhibits</u>	3
<u>Reply Affirmation</u>	4

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

Defendants Fredy Y. Maldonado (“Maldonado”) and Arrow Transfer and Storage, Inc. (“Arrow”) move, pursuant to CPLR § 3212 and Article 51 of the Insurance Law of the State of New York, for an order granting them summary judgment dismissing plaintiffs’ Verified Complaint on the grounds that plaintiffs did not suffer a “serious injury” in the subject accident as defined by New York State Insurance Law § 5102(d). Defendant Steven Rosenblatt (“Rosenblatt”) submitted an Affirmation in Support of the motion. Plaintiffs oppose the motion.

The instant action arises from personal injuries allegedly sustained by plaintiffs as a result of a motor vehicle accident that occurred on June 23, 2016, at approximately 2:53 p.m., on Hempstead Turnpike, at or near its intersection with Marvin Avenue, Uniondale, County of Nassau, State of New York. The subject accident involved three (3) vehicles - a 2016 Lexus, owned and operated by plaintiff Steve S. Kim, in which plaintiff Christina Kim was a passenger, a 2016 Ford, owned and operated by defendant Rosenblatt, and a 2007 Ford Van, owned by defendant Arrow and operated by defendant Maldonado. *See* Defendants Maldonado and Arrow's Affirmation in Support Exhibit C.

Plaintiffs commenced the action with the filing and service of a Summons and Verified Complaint on or about November 10, 2016. *See* Defendants Maldonado and Arrow's Affirmation in Support Exhibit A. Issue was joined by defendants Maldonado and Arrow on or about December 15, 2016. *See* Defendants Maldonado and Arrow's Affirmation in Support Exhibit B.

As a result of the accident, plaintiff Steve S. Kim claims that he sustained the following injuries and/or aggravation of pre-existing conditions:

...[S]evere right shoulder pain;

Longitudinal tear of anterior fibers of the supraspinatus;

Underlying tendinosis of the right shoulder;

Reactive subacromial-subdeltoid bursitis;

Anteroinferior labral tear of the right shoulder;

Superior glenoid labrum lesion of the right shoulder;

Capsular effusion of the right shoulder;

Decompression into the biceps long head tendon sheath;

Strain muscles and tendon of the rotator cuff;

Muscular spasms along the right shoulder;

Limited range of motion of the right shoulder;

Sprain and strain of the right shoulder;

...[M]ay require further right shoulder surgery;

... [S]uffers from severe lower back pain;

L1-L2 level bulging disc;

L2-L3 level bulging disc with bilateral foraminal stenosis;

L2-L3 level foraminal herniation impinging on the exiting L2 root;

L3-L4 level circumferential bulging disc;

L3-L4 central disc herniation indenting the thecal sac;

L3-L4 left foraminal herniation impinging upon the exiting L3 root with canal and bilateral foraminal stenosis;

L4-L5 level annular tear with thecal sac impingement and bilateral foraminal stenosis;

L5-S1 bulging disc with biforaminal impingement upon exiting L5 roots;

Right sided L5 radiculopathy;

Multilevel retrolistheses which clear on flexion and become accentuated on extension along with Grade 1 anterolisthesis at L5-S1 which reserves on extension;

Injury of nerve root of lumbar spine;

Lumbar disc displacement;

Lumbosacral disc displacement;

Traumatic rupture of lumbar disc;

Segmental and somatic dysfunction of lumbar region;

Muscular spasms along the lumbar spine;

Limited range of motion of the lumbar spine;

Sprain and strain of the lumbar spine;

... [M]ay require future lumbar spine surgery;

... [S]uffers from severe neck pain;

Cervical radiculopathy;

Injury of nerve root of cervical spine;

Segmental and somatic dysfunction of the cervical region;

Muscular spasms along the cervical spine;

Limited range of motion of the cervical spine;

Sprain and strain of the cervical spine;

...[S]evere middle back pain;

Segmental and somatic dysfunction of the thoracic region;

Muscular spasms along the thoracic spine;

Limited range of motion of the thoracic spine;

Sprain and strain of the thoracic spine;

... [S]evere pelvic pain;

Segmental and somatic dysfunction of the pelvic region;

Muscular spasms along the pelvic region;

Limited range of motion of the pelvic region;

Sprain and strain of the pelvic region;... *See Defendants Maldonado and Arrow's Affirmation in Support Exhibit C ¶ 9.*

As a result of the accident, plaintiff Christina Kim claims that she sustained the following injuries and/or aggravation of pre-existing conditions:

...[S]evere neck pain;

... [S]urgical procedures to her cervical spine involving the following surgical procedures:

Anterior cervical corpectomy C5;

Discectomies C5-6, with decompression of the spinal cord and bilateral nerve roots;

Anterior cervical fusion C5-6;

Application of the intervertebral biomechanical device using biomet Solitaire-C cage;

Application of allograft;

Use of fluroscopy;

Use of operative microscope;...

C3-C4 level disc herniation causing cord flattening and indenting thecal sac;

C4-C5 level central and left paracentral disc herniation causing left-sided cord flattening and left hemicord compression and with impingement upon originating left C6 root;

C5-C6 level broad-based disc herniation causing cord compression and bilateral neural foramina stenosis and impingement upon originating C7 roots;

C5-C6 level cervical lordotic spondylosis;

C5-C6 level Grade 1 retrolisthesis with decrease in flexion and increase in extension;

C6-C7 level broad-based disc herniation causing thecal sac compression and cord impingement;

C7-T1 level disc herniation causing thecal sac flattening;

Right sided C7 radiculopathy;

Cervical radiculopathy;

Ligamentous instability of the cervical spine;

Injury to nerve root of the cervical spine;

Segmental and somatic dysfunction of the cervical spine;

Muscular spasms along the cervical spine;

Limited range of motion of the cervical spine;

Sprain and strain of the cervical spine;

... [M]ay require additional cervical spine surgery;

... [S]evere right shoulder pain;

Insertional tendinosis of the supraspinatus of the right shoulder;

Anteroinferior labral tear;

Capsular effusion of the right shoulder;

Strain muscles and tendons of the rotator cuff;

Muscular spasms along the right shoulder;

Limited range of motion of the right shoulder;

Sprain and strain of the right shoulder;

... [M]ay require future right shoulder surgery;

... [S]evere lower back pain;

Injury of nerve root of lumbar spine;

Segmental and somatic dysfunction of the lumbar region;

Muscular spasms along the lumbar spine;

Limited range of motion of the lumbar spine;

Sprain and strain of the lumbar spine;

... [S]evere middle back pain;

Segmental and somatic dysfunction of the thoracic region;

Muscular spasms along the thoracic spine;

Limited range of motion of the thoracic spine;

Sprain and strain of the thoracic spine;

... [S]evere right arm pain;

Muscular spasms along the right arm;

Limited range of motion along the right arm;

Sprain and strain of the right arm;

.. [S]evere pelvic pain;

Segmental and somatic dysfunction of the pelvic region;

Muscular spasms along the pelvic region;

Limited range of motion of the pelvic region;

Sprain and strain of the pelvic region;.... *See id.*

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. *See CPLR* § 3212 (b);

Olan v. Farrell Lines Inc., 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York, supra*. When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. *See Sillman v. Twentieth Century-Fox Film, supra*. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. *See Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988). Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989).

Within the particular context of a threshold motion which seeks dismissal of a personal injury complaint, the movant bears a specific burden of establishing that the plaintiff did not sustain a “serious injury” as enumerated in Article 51 of the Insurance Law § 5102(d). *See Gaddy v. Eyler*, 79 N.Y.2d 955, 582 N.Y.S.2d 990 (1992). Upon such a showing, it becomes incumbent upon the non-moving party to come forth with sufficient evidence in admissible form to raise an issue of fact as to the existence of a “serious injury.” *See Licari v. Elliott*, 57 N.Y.2d 230, 455 N.Y.S.2d 570 (1982).

In support of a claim that the plaintiff has not sustained a serious injury, the defendant may rely either on the sworn statements of the defendant’s examining physicians or the unsworn

reports of the plaintiff's examining physicians. *See Pagano v. Kingsbury*, 182 A.D.2d 268, 587 N.Y.S.2d 692 (2d Dept. 1992). However, unlike the movant's proof, unsworn reports of the plaintiff's examining doctors or chiropractors are not sufficient to defeat a motion for summary judgment. *See Grasso v. Angerami*, 79 N.Y.2d 813, 580 N.Y.S.2d 178 (1991).

Essentially, in order to satisfy the statutory serious injury threshold, the legislature requires objective proof of a plaintiff's injury. The Court of Appeals in *Toure v. Avis Rent-a-Car Systems*, 98 N.Y.2d 345, 746 N.Y.S.2d 865 (2002) stated that a plaintiff's proof of injury must be supported by objective medical evidence, such as sworn MRI and CT scan tests. However, these sworn tests must be paired with the doctor's observations during the physical examination of the plaintiff. Unsworn MRI reports can also constitute competent evidence if both sides rely on those reports. *See Gonzalez v. Vasquez*, 301 A.D.2d 438, 754 N.Y.S.2d 7 (1st Dept. 2003).

Conversely, even where there is ample proof of a plaintiff's injury, certain factors may nonetheless override a plaintiff's objective medical proof of limitations and permit dismissal of a plaintiff's complaint. Specifically, additional contributing factors such as a gap in treatment, an intervening medical problem or a pre-existing condition would interrupt the chain of causation between the accident and the claimed injury. *See Pommells v. Perez*, 4 N.Y.3d 566, 797 N.Y.S.2d 380 (2005).

Plaintiffs claims that, as a consequence of the above described automobile accident with defendants, they have sustained serious injuries as defined in New York State Insurance Law § 5102(d) and which fall within the following statutory categories of injuries:

- 1) significant disfigurement; (Category 3)
- 2) a permanent consequential limitation of use of a body organ or member; (Category 7)
- 3) a significant limitation of use of a body function or system; (Category 8)

4) a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's 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.(Category 9). *See* Defendants Maldonado and Arrow's Affirmation in Support Exhibit C ¶ 17.

To meet the threshold regarding significant disfigurement, the law is well settled that the test for determining when an injury is a significant disfigurement is whether a reasonable person viewing the plaintiff's body in its altered state would regard the condition as unattractive, objectionable or as the object of pity or scorn. *See Spevak v. Spevak*, 213 A.D.2d 622, 624 N.Y.S.2d 232 (2d Dept. 1995); *Maldonado v. Piccirilli*, 70 A.D.3d 785, 894 N.Y.S.2d 119 (2d Dept. 2010); *Lynch v. Iqbal*, 56 A.D.3d 621, 868 N.Y.S.2d 676 (2d Dept. 2008); *Sirmans v. Mannah*, 300 A.D.2d 465, 752 N.Y.S.2d 359 (2d Dept. 2002). Small, well-healed scars do not constitute significant disfigurement within the meaning of the no-fault statute. *See Santos v. Taveras*, 55 A.D.3d 405, 866 N.Y.S.2d 43 (1st Dept. 2008).

To meet the threshold regarding significant limitation of use of a body function or system or permanent consequential limitation of a body function or system, the law requires that the limitation be more than minor, mild or slight and that the claim be supported by medical proof based upon credible medical evidence of an objectively measured and quantified medical injury or condition. *See Gaddy v. Eyler, supra; Licari v. Elliot, supra*. A minor, mild or slight limitation will be deemed insignificant within the meaning of the statute. *See Licari v. Elliot, supra*. A claim raised under the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories can be made by an expert's designation of a numeric percentage of a plaintiff's loss of motion in order to prove the extent or degree of the physical limitation. *See Toure v. Avis Rent-a-Car Systems, supra*. In addition, an expert's qualitative assessment of a plaintiff's condition is also probative, provided:

(1) the evaluation has an objective basis and (2) the evaluation compares the plaintiff's limitation to the normal function, purpose and use of the affected body organ, member, function or system.

See id.

Finally, to prevail under the "medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's 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" category, a plaintiff must demonstrate through competent, objective proof, a "medically determined injury or impairment of a non-permanent nature" (Insurance Law § 5102(d)) "which would have caused the alleged limitations on the plaintiff's daily activities." *See Monk v. Dupuis*, 287 A.D.2d 187, 734 N.Y.S.2d 684 (3d Dept. 2001). A curtailment of the plaintiff's usual activities must be "to a great extent rather than some slight curtailment." *See Licari v. Elliott, supra* at 236. Under this category specifically, a gap or cessation in treatment is irrelevant in determining whether the plaintiff qualifies. *See Gomez v. Ford Motor Credit Co.*, 10 Misc.3d 900, 810 N.Y.S.2d 838 (Sup. Ct., Bronx County, 2005).

With these guidelines in mind, the Court will now turn to the merits of defendants Maldonado and Arrow's motion. In support of their motion, defendants Maldonado and Arrow submit the pleadings, plaintiffs' Verified Bill of Particulars, the reports of plaintiff Christina Kim's MRIs and radiological testing done by All County, LLC Diagnostic Radiology, plaintiff Christina Kim's reports from Yong H. Kim, M.D., plaintiff Christina Kim's reports from Bethel Interventional Pain Management, LLC, the certified report of Scott S. Coyne, M.D. who performed an independent radiological review of plaintiff Christina Kim's radiological exams, the certified report of Marc Chernoff, M.D., who performed an independent orthopedic

examination of plaintiff Christina Kim on February 1, 2018, the certified report of Matthew M. Chacko, M.D., D.P.N., FAADEP, who performed an independent neurological examination of plaintiff Christina Kim on February 13, 2018, the reports of plaintiff Steve S. Kim's MRIs and radiological testing done by All County, LLC Diagnostic Radiology, the certified report of Scott S. Coyne, M.D. who performed an independent radiological review of plaintiff Steve S. Kim's radiological exams, the certified report of Marc Chernoff, M.D., who performed an independent orthopedic examination of plaintiff Steve S. Kim on February 1, 2018, the certified report of Matthew M. Chacko, M.D., D.P.N., FAADEP, who performed an independent neurological examination of plaintiff Steve S. Kim on February 13, 2018, and the transcripts of plaintiffs' Examinations Before Trial ("EBT") testimony.

When moving for dismissal of a personal injury complaint, the movant bears a specific burden of establishing that the plaintiff did not sustain a serious injury. *See Gaddy v. Eyler, supra*. Within the scope of the movant's burden, defendant's medical expert must specify the objective tests upon which the stated medical opinions are based, and when rendering an opinion with respect to the plaintiff's range of motion, must compare any findings to those ranges of motion considered normal for the particular body part. *See Gastaldi v. Chen*, 56 A.D.3d 420, 866 N.Y.S.2d 750 (2d Dept. 2008); *Malave v. Basikov*, 45 A.D.3d 539, 845 N.Y.S.2d 415 (2d Dept. 2007); *Nociforo v. Penna*, 42 A.D.3d 514, 840 N.Y.S.2d 396 (2d Dept. 2007); *Meiheng Qu v. Doshna*, 12 A.D.3d 578, 785 N.Y.S.2d 112 (2d Dept. 2004); *Browdame v. Candura*, 25 A.D.3d 747, 807 N.Y.S.2d 658 (2d Dept. 2006); *Mondi v. Keahan*, 32 A.D.3d 506, 820 N.Y.S.2d 625 (2d Dept. 2006).

Counsel for defendants Maldonado and Arrow submits, in pertinent part, that, "[i]t is claimed that the plaintiffs, STEVE S. KIM and CHRISTINA KIM, sustained injuries as a result

of a motor vehicle accident which occurred on June 23, 2016. However, STEVE S. KIM and CHRISTINA KIM were involved in a prior motor vehicle accident, nearly five months earlier, in the State of California on January 16, 2016. Furthermore, plaintiffs both treated at the same medical facilities; and underwent diagnostic tests at the same medical facilities, and were treated by most the same physicians who continued to treat them prior to and subsequent to the date of the accident involving my clients.”

Counsel for defendants Maldonado and Arrow asserts that, “[p]rior to the accident date of June 23, 2016, plaintiff Christina Kim underwent MRIs of her right shoulder and left knee on March 30, 2016 at All County, LLC Diagnostic Radiology. The MRI of the right shoulder found in (*sic*) insertional tendinosis of the supraspinatus. Reactive subacromial-subdeltoid bursitis, and the partial tear of the anterior labor and at the equator. The MRI of the left knee found a (*sic*) medial and lateral meniscus tears as described, with parameniscal cyst posterior to posterior horn of medial meniscus. Regarding plaintiff’s [Christina Kim’s] cervical spine the records indicate plaintiff underwent a cervical MRI on February 17, 2016 finding cervical herniations and was administered electrodiagnostic testing by Dr. Sangwoo Mah, D.C. on April 13, 2016 consisting of an EMG needle evaluation which found ‘nerve conduction findings are suggestive of a mild peripheral entrapment of the right median nerve at or about the rest. The above electrodiagnostic study reveals evidence of right sided C7 radiculopathy.’ Also, plaintiff [Christina Kim] underwent a lumbar MRI on February 17, 2016, as well as plain film x-rays and thereafter on April 26, 2016 she underwent an operation indicated as an L4/5 epidural steroid injection under fluroscopy and epidurogram, by John Cho, M.D. Regarding the lumbar spine, she also underwent a needle EMG on April 13, 2016 by Sangwoo Mah, D.C. with an impression indicating, ‘the above electrodiagnostic study reveals evidence of motor peripheral neuropathy, predominantly

affecting the left lower extremity. The above electrodiagnostic study reveals evidence of right sided L4 radiculopathy'.... Plaintiff [Christina Kim] was treated by an orthopedic spine surgeon Yong H. Kim, M.D. who examined her on March 24, 2016 with a chief complaint of 'neck pain and right arm pain'. The report clearly indicates in detail the happening of plaintiff's prior accident of January 16, 2016 in Palm Springs California; her complaints of neck pain radiating to the right on an (*sic*) shoulder as well as into the forearm with numbness and tingling along the thumb and index finger. These comments by Dr. Kim are clear evidence of the pre-existing cervical injury of Christina Kim's condition. In Dr. Kim's notes from plaintiff's visit subsequent to both accidents on August 11, 2016 he notes that the July 8, 2016 MRI of the cervical spine is a poor quality MRI scan and mentions a questionable left-sided C4-5 disc protrusion on the left.... [B]oth MRI reports are very similar and show no 'new' or 'further' injury, but rather show sequelae from the earlier accident." See Defendants Maldonado and Arrow's Affirmation in Support Exhibits D and E.

Counsel for defendants Maldonado and Arrow submits that, "[f]urthermore, Christina Kim was treated by Bethel Interventional Pain Management, LLC on May 16, 2016 and June 13, 2016, both visits prior to the accident in question indicating plaintiff underwent a series of epidural steroid injections to her cervical spine as a result of her January 16, 2016 accident." See Defendants Maldonado and Arrow's Affirmation in Support Exhibit F.

Counsel for defendants Maldonado and Arrow argues that, "[t]he records of plaintiff's [Christina Kim's] physicians who treated plaintiff after the earlier accident and who continued to treat plaintiff in between and subsequent to the second accident, make no showing in their records and reports of any evidentiary proof of the causal existence of an injury rising to the level required under the law, to rebut defendants (*sic*) prima facie prof of the lack of an actionable

injury solely from the second subject accident.”

Scott S. Coyne, M.D. (“Dr. Coyne”), a board certified radiologist, conducted independent film reviews of plaintiff Christina Kim’s cervical spine x-ray which was obtained on February 17, 2016 at All County Radiology, plaintiff Christina Kim’s cervical spine MRI which was obtained on February 17, 2016 at All County Radiology, plaintiff Christina Kim’s lumbosacral spine x-ray which was obtained on February 17, 2016 at All County Radiology, plaintiff Christina Kim’s lumbosacral spine MRI which was obtained on February 17, 2016 at All County Radiology, plaintiff Christina Kim’s right shoulder MRI which was obtained on March 30, 2016 at All County Radiology, plaintiff Christina Kim’s cervical spine x-ray which was obtained on July 8, 2016 at All County Radiology, plaintiff Christina Kim’s cervical spine MRI which was obtained on July 8, 2016 at All County Radiology, plaintiff Christina Kim’s right shoulder MRI which was obtained on July 8, 2016 at All County Radiology, and plaintiff Christina Kim’s right elbow MRI which was obtained on August 10, 2016 at All County Radiology. *See* Defendants Maldonado and Arrow’s Affirmation in Support Exhibit G. Dr. Coyne’s impression was, “[t]he cervical spine and lumbosacral spine x-ray and MRI examinations respectively demonstrate degenerative disc and facet joint changes, focally advanced at specific levels, as described. Chronic compensatory scoliosis contributed to these degenerative changes. The right elbow and right shoulder demonstrate mild degenerative osteoarthritic changes. All of these degenerative changes of the cervical spine, lumbosacral spine, right shoulder and right elbow are certainly chronic, long-standing, preexistent and are not casually related to the June 23, 2016 incident. The degenerative changes of the cervical spine, lumbosacral spine and right shoulder were clearly depicted on respective x-ray and MRI examinations prior to the June 23, 2016 incident. The cervical spine and right shoulder examinations demonstrated no interval changes on the MRI

studies performed after June 23, 2016. These radiology examinations of the cervical spine, right elbow and right shoulder demonstrate no osseous or soft tissue abnormality or any other trauma causally related to the June 23, 2016 incident.” *Id.*

Marc Chernoff, M.D., (“Dr. Chernoff”), an orthopedic surgeon, reviewed plaintiff Christina Kim’s medical records and conducted an examination of her on February 1, 2018. *See* Defendants Maldonado and Arrow’s Affirmation in Support Exhibit H. Dr. Chernoff performed quantified and comparative range of motion tests on plaintiff Christina Kim’s lumbar spine, cervical spine, right shoulder and right elbow. The range of motion testing was conducted by way of a goniometer and revealed deviations from normal with respect to her cervical spine. *Id.* Dr. Chernoff’s diagnostic impression was, “1) Right elbow medial collateral ligament sprain/common extensor tendinosis, resolved. 2) Right shoulder sprain. 3) Cervical sprain. 4) Disc desiccation with disc space narrowing, subchondral sclerosis C5-6 with small to moderate sized broad based disk (*sic*) herniation and circumferential osteophyte formation C5-6 as per MRI report status post anterior cervical discectomy and fusion C5-6.” *Id.* Dr. Chernoff notes that, “[t]his claimant had a significant prior motor vehicle accident in January 2016 with injuries to the neck, right shoulder and lower back. MRI reports are consistent with significant pre-existing condition consistent with cervical spondylosis with reports dated August 19, 2016 ... These findings would be chronic in nature and would certainly pre-exist the motor vehicle accident on June 23, 2016.... I find no evidence for orthopaedic disability or permanency related to the accident of record on June 23, 2016.” *Id.*

Matthew M. Chacko, M.D., D.P.N. FAADEP (“Dr. Chacko”), a board certified neurologist, reviewed plaintiff Christina Kim’s medical records and conducted an examination of her on February 13, 2018. *See* Defendants Maldonado and Arrow’s Affirmation in Support

Exhibit I. Dr. Chacko performed quantified and comparative range of motion tests on plaintiff Christina Kim's cervical spine and lumbar spine. The range of motion testing was conducted by way of a goniometer and revealed deviations from normal with respect to her cervical spine. *Id.* Dr. Chacko's impression was, in pertinent part, "[s]tatus post cervical discectomy and fusion with residual subjective complaints of pain. Thoracic and lumbar strains resolved from an objective neurological standpoint. Neurological examination does not reveal any focal neurological deficits.... Based on today's examination, it is my opinion that the claimant does not exhibit objective clinical evidence of any neurological sequelae or permanency." *Id.*

With respect to plaintiff Steve S. Kim, counsel for defendants Maldonado and Arrow asserts that, "[p]rior to this accident on March 30, 2016, he [plaintiff Steve S. Kim] underwent an MRI of his right shoulder administered at ALL COUNTY, LLC with the impression being 'insertional tendon noeses of the supra spinatus. Antero-inferior labral tear.' A prior MRI of the lumbosacral spine taken on February 16, 2016 also at ALL COUNTY, LLC found the following impression 'Central herniation at L2-L3 with thecal sac indentation. Mild canal and bilateral foraminal stenosis. Central herniation at L3-L4 with thecal sac indentation. Left foraminal herniation component impinging upon the exiting L3 root. Mild canal and bilateral foraminal stenosis. Midline annular tear at L4-5 with thecal sac impingement. Mild bilateral foraminal stenosis. Bulging disc at L5-S1 with bi-foraminal impingement exiting L5 roots. Right paramedian annular tear component impinging upon the thecal sac'. Also, a prior MRI administered on February 17, 2016 also at ALL COUNTY, LLC indicated an impression of 'right foraminal herniation at C3-4 with impingement upon the exiting C4 rot. Central herniation at C4-5 with thecal sac indentation. Bulging disc at C5-6 without stenosis.' A reading of the Bill of Particulars in this matter dated January 3, 2017, ..., as relates to Mr. Steve S. Kim alleges the

same injuries despite the fact of the preexistence as proven by plaintiff's own physicians (*sic*) MRIs taken prior to the accident out of which this lawsuit arises." *See* Defendants Maldonado and Arrow's Affirmation in Support Exhibits C and J.

Dr. Coyne, the board certified radiologist, conducted independent film reviews of plaintiff Steve S. Kim's cervical spine x-ray which was obtained on February 17, 2016 at All County Radiology, plaintiff Steve S. Kim's cervical spine MRI which was obtained on February 17, 2016 at All County Radiology, plaintiff Steve S. Kim's lumbosacral spine x-ray which was obtained on February 17, 2016 at All County Radiology, plaintiff Steve S. Kim's lumbosacral spine MRI which was obtained on February 17, 2016 at All County Radiology, plaintiff Steve S. Kim's right shoulder MRI which was obtained on March 30, 2016 at All County Radiology, plaintiff Steve S. Kim's lumbosacral spine x-ray which was obtained on July 8, 2016 at All County Radiology, plaintiff Steve S. Kim's lumbosacral spine MRI which was obtained on July 8, 2016 at All County Radiology, and plaintiff Steve S. Kim's right shoulder MRI which was obtained on July 8, 2016 at All County Radiology. *See* Defendants Maldonado and Arrow's Affirmation in Support Exhibit K. Dr. Coyne's impression was, "[t]he cervical spine and lumbosacral spine x-ray and MRI examinations demonstrate degenerative disc and facet joint changes, which are more advanced at specific levels than others, and degenerative changes of the sacroiliac joints, as described above. The right shoulder demonstrates moderate degenerative changes of the acromioclavicular joint with marginal subacromial impingement. There is also a small intrasubstance supraspinatus tendon partial-thickness tear, noted on the March 30, 2016 and July 8, 2016 MRI examinations. All of these degenerative changes of the cervical spine, lumbosacral spine, right shoulder and other findings are certainly chronic, long-standing, preexistent and are not casually related to the June 23, 2016 incident. The degenerative changes

of the cervical spine, lumbosacral spine and right shoulder and slight partial-thickness supraspinatus tendon tear were clearly depicted on the initial x-ray and MRI examinations prior to the June 23, 2016 incident. The lumbosacral spine and right shoulder examinations demonstrated no interval changes on the MRI studies which were performed after the June 23, 2016 accident. These radiology examinations of the lumbosacral spine and right shoulder demonstrate no evidence of any osseous or soft tissue abnormality or any other trauma causally related to the June 23, 2016 accident. The patient had pre-existing degenerative disc and facet joint changes of the cervical spine.” *Id.*

Dr. Chernoff, the orthopedic surgeon, reviewed plaintiff Steve S. Kim’s medical records and conducted an examination of him on February 1, 2018. *See* Defendants Maldonado and Arrow’s Affirmation in Support Exhibit L. Dr. Chernoff performed quantified and comparative range of motion tests on plaintiff Steve S. Kim’s lumbar spine, cervical spine and right shoulder. The range of motion testing was conducted by way of a goniometer and revealed deviations from normal with respect to his cervical spine. *Id.* Dr. Chernoff’s diagnostic impression diagnosis was, “1) Cervical sprain. 2) Lumbar sprain. 3) Right shoulder sprain.” *Id.* Dr. Chernoff notes that, “[t]his claimant had a significant prior motor vehicle accident in January 2016 with injuries to the neck, lower back and right shoulder.... Based on my review of the radiology reports of the cervical spine, lumbar spine and right shoulder as well as the above medical records, I find no evidence for any future orthopaedic surgical requirement related to the June 23, 2016 accident of record.” *Id.*

Dr. Chacko, the board certified neurologist, reviewed plaintiff Steve S. Kim’s medical records and conducted an examination of him on February 13, 2018. *See* Defendants Maldonado and Arrow’s Affirmation in Support Exhibit M. Dr. Chacko performed quantified and

comparative range of motion tests on plaintiff Steve S. Kim's cervical spine and lumbar spine.

The range of motion testing was conducted by way of a goniometer and revealed deviations from normal. *Id.* Dr. Chacko's impression was, in pertinent part, "[c]ervical, thoracic and lumbar strains resolved from an objective neurological standpoint. No focal neurological deficits are noted.... Based on today's examination, it is my opinion that there is no objective clinical evidence of any neurological permanency or sequelae." *Id.*

The Court notes that defendant Rosenblatt joins in defendants Maldonado and Arrow's motion.

Based upon the evidence presented in the papers before it, the Court finds that defendants Maldonado and Arrow have established a *prima facie* case that plaintiffs did not sustain serious injuries within the meaning of New York State Insurance Law § 5102(d).

The burden then shifts to plaintiffs to come forward with evidence to overcome defendants Maldonado and Arrow's submissions by demonstrating the existence of a triable issue of fact that serious injuries were sustained. *See Pommells v. Perez, supra; Grossman v. Wright*, 268 A.D.2d 79, 707 N.Y.S.2d 233 (2d Dept. 2000).

At the outset, the Court notes that counsel for plaintiffs asserts that, "[o]n or about September 12, 2018, the plaintiff, STEVE S. KIM, accepted a settlement offer and discontinued his action against defendants." *See* Plaintiffs' Affirmation in Opposition Exhibit F.

To support their burden with respect to plaintiff Christina Kim, plaintiffs submit the Affirmation of John Cho, M.D., the reports of plaintiff Christina Kim's MRIs and radiological testing done by All County, LLC Diagnostic Radiology, the affirmation of Yong H. Kim, M.D., the affirmed report of Philip J. Cilio, D.C., M.S., L.Ac. and the affidavit of plaintiff Christina Kim.

John Cho, M.D. (“Dr. Cho”) submits, in pertinent part, that, “[o]n June 23, 2016, the patient, CHRISTINA KIM, was involved in a motor vehicle accident as a restrained passenger of a vehicle sustaining injuries to her neck, low back, and right shoulder. The patient was involved in a prior motor vehicle accident on January 16, 2016 in which she sustained injuries to her cervical spine, lumbar spine, right shoulder, and left knee. She received treatment for those prior injuries at my facility. Prior to the subject accident on June 23, 2016, On (*sic*) June 13, 2016, I conducted an examination on the patient regarding her prior injuries. Although patient still had some pain in her neck, lower back, and right shoulder, upon receiving treatments, her overall condition was improving. On June 27, 2016, the patient visited my office for evaluation and reported that she was involved in a motor vehicle accident on June 23, 2016. The patient’s overall condition significantly worsened since the June 13, 2016 examination.... I conducted objective orthopedic tests and range of motion tests on the patient’s neck, lower back, and right shoulder on the day of the initial examination. The examination of the cervical spine revealed severe cervical spasm and severe bilateral trapezius spasm, limited range of motion in flexion, extension, bilateral flexion, and bilateral rotation. Spurling’s test was positive bilaterally. The examination of the lumbar spine revealed severe lumbar spasm and severe bilateral gluteal spasm, limited range of motion in flexion, extension and bilateral lateral flexion. Kemp’s test was positive on bilaterally. The examination of the right shoulders revealed limited ranges of motion in flexion, abduction, external rotation and internal rotation. Hawkin’s test was positive. Supraspinatus press test was positive. There was severe Rhomboid, Supraspinatus and Infraspinatus spasm present.... Based on the main complaint and the initial examination findings, I recommended the patient start physical therapy to diminish pain and improve range of motion and function. Since the patient had prior injuries, I also referred the patient for MRI studies to

reveal possible changed caused by the subject incident.... [T]o a reasonable degree of medical probability, the more recent trauma and injuries to the patient's cervical spine exist and caused new injuries and/or exacerbated pain and morbidity of the patient's cervical spine, which arises from the subject motor vehicle accident of June 23, 2016.... [T]o a reasonable degree of medical probability, the more recent trauma and injuries to the patient's right shoulder exist and caused new injuries and/or exacerbated pain and morbidity of the patient's right shoulder, which arises from the subject motor vehicle accident of June 23, 2016." See Plaintiffs' Affirmation in Opposition Exhibit A.

On July 25, 2018, Dr. Cho conducted another examination of plaintiff Christina Kim. Dr. Cho performed quantified and comparative range of motion tests on plaintiff Christina Kim's cervical spine, lumbar spine and right shoulder. The range of motion testing was conducted by way of a goniometer and revealed deviations from normal. *Id.*

Dr. Cho asserts that, "[t]he patient has been suffering from significant limitation in the use of her neck, lower back, and right shoulder, leaving her with difficulty of performing, to an extent, her usual and customary daily activities without experiencing pain. Ms. Kim may continue to have pain, stiffness and can be expected to have future difficulties with the body regions involved. In Ms. Kim's type of injuries there have been newly discovered the (*sic*) disc changes and tearing of the soft tissue components, contributing to limitation of motion and chronic recurrent pain. It is my professional opinion that the injuries have resulted in a reduction in the normal range of motion of the aforementioned areas of the musculoskeletal system of this patient. Her current condition from the injuries she sustained as a result fo the June 23, 2016 accident is permanent. Based upon the patient's medical history, comparison of medical records, examination findings, and the treatments of the patient, I conclude that the above-described

injuries, exacerbated conditions and the range of motion deficits to the patient's neck, lower back, and right shoulder were causally related to the automobile accident of June 23, 2016." *Id.*

Counsel for plaintiffs also submits the reports of plaintiff Christina Kim's July 8, 2016 MRIs of her cervical spine and right shoulder, performed by David R. Payne, M.D. of All County, LLC Diagnostic Radiology. *See* Plaintiffs' Affirmation in Opposition Exhibit B.

Yong H. Kim, M.D., ("Dr. Kim") submits, in pertinent part, that plaintiff Christina Kim was "referred to me for surgery consultation regarding her cervical spine condition. The patient was referred to have an MRI study on her cervical spine.... Based on the comparison of the MRIs taken on February 17, 2016 for the patient's prior injuries and the MRI taken more recently on July 8, 2016, there is a size-increased central disc herniation at C3-C4 level and broad central herniation at C5-C6 with a new central posterior extrusional component, which was not identified in the prior MRIs. These findings are also consistent with the patient's physical examinations. Thus, to a reasonable degree of medical probability, the more recent trauma and injuries to the patient's cervical spine exist and caused new injuries and/or exacerbated pain and morbidity of the patient's cervical spine, which arises from the subject motor vehicle accident of June 23, 2016. On September 20, 2016, I performed a surgical procedure, discectomy fusion, on the patient's cervical spine C5-C6 level at the New York University Hospital. Based on (*sic*) history of accident, chief complaints, history of complaints, MRI comparison reviews, and examination findings of the patient, I conclude, to a reasonable degree of medical certainty, that the injuries to the patient's cervical spine and the surgical procedure that (*sic*) performed on September 20, 2016 were causally related to the subject motor vehicle accident on June 23, 2016." *Id.*

Philip J. Cilio, D.C., M.S., L.Ac (“Dr. Cilio”) performed a chiropractic and acupuncture examination on plaintiff Christina Kim on April 7, 2016, prior to the subject accident. *See* Plaintiffs’ Affirmation in Opposition Exhibit D. Dr. Cilio performed quantified and comparative range of motion tests on plaintiff Christina Kim’s cervical spine, thoracic spine and lumbosacral spine. The range of motion testing was conducted by way of an inclinometer and revealed no deviations from normal. *Id.*

As indicated, plaintiff Christina Kim submitted her own Affidavit in opposition to the motion. *See* Plaintiffs’ Affirmation in Opposition Exhibit E.

Initially, it is noted that, inasmuch as plaintiffs Kim has failed to allege and claim that a reasonable person viewing their body in its alleged altered state would regard a condition as unattractive, objectionable or as the object of pity or scorn, it is plain that their injuries do not satisfy the “significant disfigurement” category of Insurance Law. *See* New York State Insurance Law § 5102(d); *Spevak v. Spevak, supra*; *Maldonado v. Piccirilli, supra*; *Lynch v. Iqbal, supra*; *Sirmans v. Mannah, supra*.

Accordingly, the branch of defendants Maldonado and Arrow’s motion (Seq. No. 01), pursuant to CPLR § 3212 and Article 51 of the Insurance Law of the State of New York, for orders granting them summary judgment on the issue of serious injury with respect to Category 3 (significant disfigurement), are hereby **GRANTED**.

Since plaintiffs submitted no opposition with respect to the defendants Maldonado and Arrow’s motion as to plaintiff Steve S. Kim, but instead asserted that “the plaintiff, STEVE S. KIM, accepted a settlement offer and discontinued his action against defendants,” and because the Court received no further information from counsel for defendants with respect to withdrawing this portion of the motion, defendants Maldonado and Arrow’s motion, pursuant to

CPLR § 3212 and Article 51 of the Insurance Law of the State of New York, for an order granting them summary judgment as to plaintiff Steve S. Kim dismissing plaintiffs' Verified Complaint on the grounds that plaintiff Steve S. Kim did not suffer a "serious injury" in the subject accident as defined by New York State Insurance Law § 5102(d), is hereby **GRANTED**.

As to plaintiff Christina Kim, with respect to the reports of Dr. Payne of All County, LLC Diagnostic Radiology, as to the MRIs taken of plaintiff Christina Kim's cervical spine and right shoulder, in order to constitute competent medical evidence, a radiologist is required to have the MRI taken under his or her supervision and he or she also has to be the physician to read the MRI. *See Sayas v. Merrick Transportation*, 23 A.D.3d 367, 804 N.Y.S.2d 769 (2d Dept. 2005); *Fiorillo v. Arriaza*, 24 Misc.3d 1215(A), 897 N.Y.S.2d 669 (Sup. Ct. Nassau County 2007). Under these circumstances, while the radiologist need not pair the findings of the MRI films with a physical examination, he or she, as the radiologist performing the MRI, must nevertheless also report an opinion as to the causality of the findings. *See Collins v. Stone*, 8 A.D.3d 321, 778 N.Y.S.2d 79 (2d Dept. 2004); *Betheil-Spitz v. Linares*, 276 A.D.2d 732, 715 N.Y.S.2d 435 (2d Dept. 2000).

Here, Dr. Payne is the performing radiologist and also the physician interpreting the examination findings. However, Dr. Payne's failure to report an opinion as to causation is insufficient to constitute competent medical evidence herein.

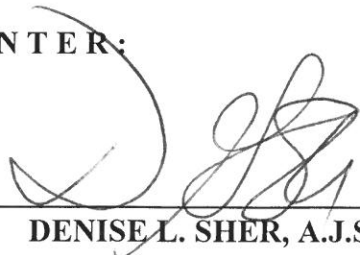
However, with respect to plaintiff's claims of "serious injury" under the categories of permanent consequential limitation of use of a body organ or member (Category 7), a significant limitation of use of a body function or system (Category 8) and a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's 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 (Category 9), the Court finds that the *admissible* evidence presented by plaintiff Christina Kim in her opposition papers is sufficient to raise triable issues of fact as to whether she sustained her alleged serious injuries as a result of the June 23, 2016 accident (emphasis added). *See Perl v. Meher*, 18 N.Y.3d 208, 936 N.Y.S.2d 655 (2011).

Accordingly, the branches of defendants Maldonado and Arrow's motion, pursuant to CPLR § 3212 and Article 51 of the Insurance Law of the State of New York, for an order granting them summary judgment on the issue of serious injury as to plaintiff Christina Kim with respect to Category 7 (permanent consequential limitation of use of a body organ or member), Category 8 (significant limitation of use of a body function or system) and Category 9 (medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's 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) are hereby **DENIED**.

All parties shall appear for Trial, in Nassau County Supreme Court, Central Jury Part, at 100 Supreme Court Drive, Mineola, New York, on January 8, 2019, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

ENTER:


DENISE L. SHER, A.J.S.C.

ENTERED

DEC 04 2018

NASSAU COUNTY
COUNTY CLERK'S OFFICE

Dated: Mineola, New York
December 3, 2018