

**Jungmi Kwon v Darah**

2021 NY Slip Op 34178(U)

October 1, 2021

Supreme Court, Queens County

Docket Number: Index No. 709392/2018

Judge: Chereé A. Buggs

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Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS**  
**Justice**

-----X IAS PART 30  
JUNGMI KWON AND JE KOOK MUN, FATHER  
AND NATURAL GUARDIAN OF ERIC MUN,

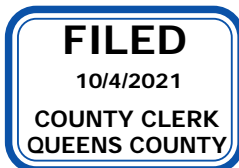
Plaintiffs,

Index No.:709392/2018

-against-

Motion  
Date: September 15, 2021

MAKENZIE S. DARAH AND  
TASHA L. ELKINGTON,



Motion Cal. No.: **11 & 12**  
Motion Sequence No.: **6 & 7**

Defendants.

-----X  
The following papers numbered 70-80, 92-100, 103-104 submitted and considered on this motion by Plaintiff on the Counterclaim, Jungmi Kwon (hereinafter “Kwon”) seeking summary judgment pursuant to CPLR 3212 on the basis that Plaintiff Eric Mun (hereinafter “Mun”) did not sustain a serious injury under Insurance Law §5102(d) (Sequence 6); and the following papers numbered 81-86, 101-102, 105 by Defendants Makenzie S. Darah and Tasha L. Elkington (hereinafter collectively “Darah”) seeking summary judgment pursuant to CPLR 3212 on the grounds that Mun did not sustain a serious injury under Insurance Law §5102(d) (Sequence 7).

**Motion Sequence #6**

	<u>Papers Numbered</u>
Notice of Motion-Affidavits-Exhibits.....	EF 70-80
Affirmation in Opposition-Exhibits.....	EF 92-100
Reply Affirmation-Affidavits-Exhibits.....	EF 103-104

**Motion Sequence #7**

**Papers  
Numbered**

Notice of Motion-Affidavits-Exhibits.....	EF 81-86
Affirmation in Opposition-Exhibits.....	EF 101-102
Reply Affirmation-Affidavits-Exhibits.....	EF 105

**Facts and Procedural History**

This is a personal injury action which arose from a two-vehicle collision which occurred on April 17, 2018 at or near the intersection of Northern Boulevard and 221<sup>st</sup> Street in the County of Queens, State of New York. Kwon was operating the vehicle in which her son Mun was a passenger. The matter was commenced on June 18, 2018 with the filing of a summons, verified complaint and statement of authorization for electronic filing. Kwon and Mun alleged Darah was negligent in the ownership, operation and maintenance of the alleged offending vehicle. Kwon and Mun sought damages for serious injuries sustained in the accident. Darah filed a verified answer with affirmative defenses on July 17, 2018, asserting a counterclaim against Kwon for contribution and indemnification. Kwon filed a verified answer to the counterclaim on December 31, 2018. Now, Kwon on the counterclaim and Darah move for summary judgment against Mun on the grounds that he did not sustain a serious injury as defined under the Insurance Law. In support of the motion, documentary evidence included the pleadings, an Attorney Affirmation, Memorandum of Law, verified bill of particulars dated January 4, 2019, and the independent medical examination reports of Dr. Jeffrey Guttman, an orthopedist, and Dr. Marc J. Katzman, a radiologist. Darah adopted and incorporated the facts, legal arguments, exhibits and procedural history as set forth by Kwon. A Note of Issue was filed on October 8, 2019.

Mun alleged in his verified bill of particulars that he was a passenger in a vehicle that was involved in an accident which occurred on April 17, 2018 at or near the intersection of Northern Boulevard and 221<sup>st</sup> Street, County of Queens, State of New York. Mun asserted that as a result of the accident, he sustained injuries to his neck and back. He claimed that he sustained a serious injury and was a covered person under Section 5104(a) because he sustained an injury resulting in a permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; and the 90/180 day category. He was not at that time making a claim for lost wages, and information related to the time he was confined to home and/or bed was to be provided.

### **Mun's deposition testimony**

Mun gave sworn testimony in this litigation on November 25, 2019. At the time of the accident he a passenger in his mother Kwon's vehicle. He was enrolled in high school, and as a result of the accident he stated that he did not miss any time from school, and was able to participate in physical education classes, although he was told he claimed by a doctor to refrain from any high intensity sports. The accident occurred on a Tuesday and he was able to return to school the following Wednesday.

He began treating for pain in his neck and back at the end of the week following the accident, and he recalled that a doctor sent him for MRI's. He related that his medical treatment included acupuncture and physical therapy three times a week. He testified that he stopped treating when his insurance coverage ceased. He could not recall if he was confined to his home or bed after the accident. He claimed that he was no longer able to play basketball due to discomfort to his back. He began working part-time in August 2018 for about two months.

### **Independent Medical Examination report of Dr. Jeffrey Guttman**

Dr. Jeffrey Guttman performed an orthopedic evaluation on March 13, 2020. He also rendered a report that day. Dr. Guttman stated that Mun was not employed at the time of the accident and that he was a full time student. The doctor reviewed the verified bill of particulars and performed an examination with the aid of a goniometer. Range of motion was based on the "American Medical Association (AMA) Impairment Guidelines, 5<sup>th</sup> Edition" and was as follows:

**Cervical Spine**- flexion at 50 degrees (50 degrees normal); extension at 60 degrees (60 degrees normal); right and left lateral flexion at 45 degrees (45 degrees normal); right and left rotation at 80 degrees (80 degrees normal);

**Lumbar Spine**-flexion 60 degrees (60 degrees normal); extension 25 degrees (25 degrees normal); right and left lateral bending 25 degrees (25 degrees normal).

In Dr. Guttman's opinion, Mun was status-post cervical and lumbar strains, without any evidence of disability. Dr. Guttman stated that Mun did not require any further orthopedic or physical therapy treatment.

### **Radiology Report of Marc J. Katzman, M.D.**

Dr. Marc J. Katzman, Diplomate of the American Board of Radiology and Board Certified in Neuroradiology, reviewed MRI films taken of Mun and conducted an independent radiological review on April 10, 2019. He reviewed the MRI of Mun's cervical spine taken in June 2018, and in his opinion, the film revealed minimal chronic multilevel degeneration, disc bulges, which he found to be pre-existing and unrelated to the accident. He also reviewed a MRI taken of the lumbar spine in May 2018 and in his opinion same revealed mild chronic multilevel disc degeneration

disease, disc bulges unrelated to the accident.

### **Discussion**

The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must produce competent evidence in admissible form to establish the existence of a triable issue of fact. (See *Zuckerman v City of New York*, 49 NY2d 557 [1980].)

Under New York's Insurance Law §5102(d) a "serious injury" is "a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system, or 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."

The Court finds that Kwon and Darah have established their entitlement to judgment as a matter of law (see *Gaddy v Eyster* 79 NY2d 955 [1992]; *Licari v Elliott*, 57 NY2d 230 [1982]). Their documentary evidence established that Mun did not sustain a serious injury as he alleged in his complaint and verified bill of particulars under Insurance Law §5102(d). Now, Mun must come forward with evidence to demonstrate a triable issue of fact.

In opposition, Mun argued that Kwon and Darah failed to establish prima facie cases since Dr. Guttman failed to conduct orthopedic tests such as the Spurling test or Compression test, which are usually used to evaluate persons with claimed injuries to the cervical spine. Also, Dr. Guttman conceded that Mun suffered strains to the cervical and lumbar spine. Mun submitted the affirmation in the form of an affidavit of Dr. Jinghui Xie. The doctor stated that he initially examined Mun on April 27, 2018 and on June 8, 2018 and performed a recent examination on Mun on November 30, 2020. The doctor stated the objective tests that he performed on April 27, 2018, and that in respect to Mun's lumbar spine, on range of motion, he found restrictions on extension of 5 degrees (30 degrees normal), left lateral rotation of 30 degrees (45 degrees normal); right lateral rotation of 30 degrees (normal 45 degrees); left flexion 15 degrees (30 degrees normal) and right flexion 15 degrees (normal 30 degrees). The doctor stated the further testing he performed on Mun's lumbar spine on follow up examination on June 8, 2018 and stated that Mun still exhibited range of motion restrictions in his lumbar spine. The doctor performed a recent examination on November 30, 2020 and stated that he found that Mun still exhibited range of motion restrictions in his lumbar spine, upon objective testing. The doctor also reviewed MRI film of the lumbar spine taken on May 12, 2018.


The doctor also stated that he found range of motion limitations in Mun’s cervical spine on April 27, 2018, set forth the testing performed on Mun that day and the range of motion restrictions, as well as his findings on recent examination of Mun’s cervical spine on November 30, 2020. He also reviewed an MRI of Mun’s cervical spine taken on June 16, 2018. Based upon his review and examination, Dr. Xie stated that Mun has orthopedic issues and that his prognosis was guarded, and that he may need further treatment. Dr. Xie stated that Mun sustained permanent injuries and significant limitation to his lumbar spine and cervical spine as a result of the accident of April 17, 2018, said injuries caused solely by the motor vehicle accident and not from degenerative diseases or pre-existing condition.

The Court has considered the opposition papers as well as the reply papers of Kwon and Darah and finds that Mun presented evidence of contemporaneous and recent range of motion limitations to his cervical spine and lumbar spine, raising triable issues of fact as to whether he suffered a serious injury under the permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member and/or significant limitation of use of a body function or system categories of the Insurance Law (*see Perl v Meher*, 18 NY3d 208 [2011]; *Manning v Bassi*, 195 AD3d 923 [2d Dept 2021]; *Nwanji v City of New York, et al.*, 190 AD3d 650 [1<sup>st</sup> Dept 2021]).

Therefore, the motion for summary judgment on the basis of serious injury brought by Plaintiff on the Counterclaim, Jungmi Kwon, Sequence 6, is denied. The motion for summary judgment of Defendants Makenzie S. Darah and Tasha L. Elkington, Sequence 7, seeking similar relief is also denied.

The foregoing constitutes the decision and Order of this Court.

Dated: October 1, 2021

  
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Hon. Chereé A. Buggs, JSC

