

<b>Jae Hyun Kim v Miller</b>
2023 NY Slip Op 30209(U)
January 19, 2023
Supreme Court, New York County
Docket Number: Index No. 152828/2020
Judge: James G. Clynnes
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JAMES G. CLYNES PART 22M

Justice

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INDEX NO. 152828/2020

JAE HYUN KIM, DASOM KIM,

MOTION DATE 04/05/2022

Plaintiff,

MOTION SEQ. NO. 001

- v -

CHRISTOPH MILLER,

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents, and following oral argument Defendant's motion for summary judgment and dismissal of the complaint on the grounds that neither Plaintiff has sustained a "serious injury" within the meaning of Insurance Law 5102 (d) is decided as follows:

Plaintiffs seek recovery for injuries allegedly sustained as a result of a December 7, 2018 accident between a motor vehicle operated by Plaintiff Jae Hyun Kim within which Plaintiff Dasom Kim was a passenger, and a motor vehicle owned and operated by Defendant Christoph Miller (Defendant). The Bill of Particulars alleges the following injuries that fall within the categories of Insurance Law 5102 (d): As to Plaintiff Jae Hyun Kim: injuries to the cervical spine and right shoulder; and as to Plaintiff Dasom Kim : injuries to the thoracic spine, lumbar spine, neck, shoulder, and knee.

Plaintiff Jae Hyun Kim

In support of his motion as to Plaintiff Jae Hyun Kim, Defendant relies on the affirmed independent medical examination (IME) report of Dr. Howard A. Kiernan, orthopedic surgeon

who examined Plaintiff Jae Hyun Kim on January 5, 2022. Dr. Kiernan reviewed relevant medical records and concluded that as a result of the subject accident, Plaintiff Jae Hyun sustained cervical spine and right shoulder sprains that are now resolved<sup>1</sup>. Dr. Kiernan measured Plaintiff Jae Hyun's range of motion using a hand-held goniometer pursuant to AMA Guidelines and found normal range of motion as to both the cervical spine and the right shoulder. Dr. Kiernan performed orthopedic tests of the cervical spine and right shoulder, which were all negative. Dr. Kiernan determined that Plaintiff Jae Hyun Kim has no orthopedic disability, that he can perform his activities of daily living as he was doing prior to the accident, and that he is capable of working without restrictions.

Dr. Marc J. Katzman, radiologist, undertook an independent review of the MRIs of Plaintiff Jae Hyun Kim's cervical spine and right shoulder. As to the cervical spine, Dr. Katzman observed minimal posterior degenerative disc bulges at C3-4 and C4-5 but found that they were degenerative and nontraumatic. At C5-6 and C6-7, Dr. Katzman found mild posterior central disc herniations and mild-to-moderate facet arthropathy, but they appear chronic, degenerative, and pre-existing due to multiple factors including underlying degenerative disc dehydration, small anterior marginal bone spur formation, lack of associated annular tear, and due to secondary degenerative arthritic changes of the facet joints. Overall, Dr. Katzman recorded no recent-appearing traumatic disc herniation, extrusion, or annular tear and no evidence of post-traumatic injury to the cervical spine causally related to the subject accident.

As to the right shoulder, Dr. Katzman observed no evidence of fracture or dislocation, and no Hill-Sachs or Bankart lesion. Dr. Katzman found no posttraumatic labral tear or SLAP lesion and no posttraumatic joint effusion or hemarthrosis. Dr. Katzman did observe a laterally down-

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<sup>1</sup> Dr. Kiernan also examined Plaintiff Jae Hyun Kim's thoracic spine, lumbar spine, and left shoulder, but as these were not alleged as to Plaintiff Jae Hyun Kim in the Bill of Particulars, they will not be discussed.

sloping and developmentally low-lying acromion process which contributes to chronic internal impingement of the rotator cuff and upon further evaluation found minimal chronic degeneration in the setting of chronic internal impingement, without focal tear or rupture. Dr. Katzman also noted trace subdeltoid/subacromial bursitis, but found this, along with the other derangements, to be chronic, degenerative, and pre-existing particularly because he found no posttraumatic joint effusion, hemarthrosis, capsular edema, bone bruise, or muscle sprain. Dr. Katzman concluded that there is no evidence of recent post-traumatic injury to the right shoulder on the basis of this MRI exam. He disagreed with the initial interpretation report regarding its finding of labral tearing.

Here, Defendant has met his initial burden of establishing that Plaintiff Jae Hyun Kim did not sustain serious injuries as a result of the accident under Insurance Law 5102 (d) and the burden shifts to Plaintiff Jae Hyun Kim to produce evidentiary proof in admissible form sufficient to establish the existence of material facts that require a trial for resolution (*Perez v Rodriguez*, 25 AD3d 506 [1st Dept 2006]; *Licari v Elliott*, 57 NY2d 230 [1982]).

In opposition, Plaintiff Jae Hyun Kim relies on the affirmed report of Dr. Mark S. McMahon, an orthopedic expert who evaluated Plaintiff Jae Hyun Kim on July 13, 2022, the chiropractic evaluation by Dr. Thomas V. Nguyen, chiropractor, and the unsigned and unaffirmed report of Dr. David Hong, chiropractor.

Defendant opposes the admissibility of Plaintiff Jae Hyun Kim's chiropractic evaluations of Dr. Nguyen and Dr. Hong on the ground that Dr. Hong's report was unsigned and that chiropractors are not authorized to proceed by affirmation pursuant to CPLR 2106. Dr. Hong's report was unsigned and neither in the form of an affidavit nor with an attached affidavit. Dr. Nguyen's evaluation was signed, but not affirmed and notarized, nor with an affidavit. As these

chiropractic reports/evaluations are not in admissible form, the Court will not consider them in its determination.

Dr. McMahon's report is properly affirmed pursuant to CPLR 2106. Dr. McMahon performed a physical evaluation of Plaintiff Jae Hyun Kim and measured his range of motion using a goniometer. As to Plaintiff Jae Hyun Kim's cervical spine, Dr. McMahon reported normal range of motion as to flexion and extension, but decreased range of motion as to left and right bending. Dr. McMahon diagnosed broad-based central posterior disc herniations at C5-6 and C6-7 causing spinal canal stenosis, narrowing of the foramina at C6-7, disc bulges at C3-4 and C4-5 indenting the thecal sac, and straightening of the lordosis, which may be secondary to spasm. These diagnosis, Dr. McMahon reported, occurred as a result of the subject accident. Dr. McMahon concluded that Plaintiff Jae Hyun Kim's cervical spine prognosis is poor, and his condition is permanent. Dr. McMahon determined that Plaintiff Jae Hyun Kim's condition interferes with his quality of life, his activities of daily living, and his ability to be self-employed.

As to Plaintiff Jae Hyun Kim's right shoulder, Dr. McMahon reported normal range of motion, but positive Hawkins sign and Neer sign. However, under current condition, Dr. McMahon noted that Plaintiff Jae Hyun Kim's right shoulder "symptoms have resolved." Dr. McMahon diagnosed right shoulder anteroinferior and posterosuperior labral tears, rotator cuff tendinosis, subcoracoid bursitis and glenohumeral joint effusion that were causally related to the subject accident. Dr. McMahon concluded that if Plaintiff Jae Hyun Kim's symptoms recurred, he would benefit from surgery.

Plaintiff Jae Hyun Kim has failed to raise a triable issue of fact as to causation. The existence of a tear in a shoulder ligament, bulging, or herniated discs taken alone are not evidence of serious injury without object proof as to the extent of the alleged physical limitation. (*Williams*

*v Horman*, 95 AD3d 650, 651 [1st Dept 2012]; *DeJesus v Paulino*, 61 AD3d 605 [1st Dept 2009]). While Dr. McMahon diagnosed disc bulges and herniations in Plaintiff Jae Hyun Kim's cervical spine as well as a right shoulder tear, both his cervical spine and right shoulder measured full range of motion. Plaintiff Jae Hyun Kim fails to offer objective medical proof showing a significant impairment of a body function caused by this injury, or that the alleged tear, bulges, and herniations were objectively caused by the subject accident. Further, Plaintiff Jae Hyun Kim's orthopedic expert fails to adequately address the findings of Defendant's Dr. Katzman, who found degeneration in both Plaintiff Jae Hyun Kim's cervical spine and right shoulder, nor does Dr. McMahon explain why degeneration was not the cause of the claimed injuries (*Francis v Nelson*, 140 AD3d 467 [1st Dept 2016]; *Acosta v Traore*, 136 AD3d 533 [1st Dept 2016]). In instances where a defendant asserts that the evidence reveals a preexisting injury or a degenerative condition, the plaintiff must present evidence to the contrary (*Brewster v FTM Servo, Corp.*, 44 AD3d 351 [1st Dept 2007]).

Plaintiff Jae Hyun Kim also fails to allege in his Bill of Particulars that he was incapacitated for at least 90 of the first 180 days following the accident (*Frias v Son Tien Liu*, 107 AD3d 589 [1st Dept 2013]). Therefore, as to Plaintiff Jae Hyun Kim, Defendant's motion is granted.

#### *Plaintiff Dasom Kim*

In support of his motion as to Plaintiff Dasom Kim, Defendant relies on the affirmed IME report of Dr. Kiernan who examined Plaintiff Dasom Kim on January 5, 2022. Dr. Kiernan reviewed relevant medical records and concluded that as a result of the subject accident, Plaintiff Dasom Kim sustained thoracic and lumbar spine, right shoulder, and left knee sprains that

are now resolved<sup>2</sup>. Dr. Kiernan measured Plaintiff Dasom Kim's range of motion using a hand-held goniometer pursuant to AMA Guidelines and found normal range of motion and negative orthopedic tests as to her thoracic spine, lumbar spine, right and left shoulders, and right and left knees. Dr. Kiernan determined that Plaintiff Dasom Kim has no orthopedic disability, that she can perform activities of daily living as she was doing prior to the accident, and that she is capable of working without restrictions.

Having made the requisite showing that Plaintiff Dasom Kim has not suffered a serious injury, the burden shifts to the non-moving party to raise a triable issue of fact (*Perez v Rodriguez*, 25 AD3d 506 [1st Dept 2006]; *Licari v Elliott*, 57 NY2d 230 [1982]).

In opposition, Plaintiff Dasom Kim relies on the affirmed report of Dr. McMahon, who evaluated Plaintiff Dasom Kim on July 12, 2022, and the unaffirmed report of Dr. David Hong, chiropractor.

Defendant opposes the admissibility of Dr. Hong's report as to Plaintiff Dasom Kim for the same reasons he opposed the admissibility of Dr. Hong's report as to Plaintiff Jae Hyun Kim. Dr. Hong's report on Plaintiff Dasom Kim is also not in admissible form and therefore the Court will not consider it in its analysis.

Dr. McMahon's report is properly affirmed pursuant to CPLR 2106. Dr. McMahon performed a physical evaluation of Plaintiff Dasom Kim and measured her range of motion using a goniometer. As to Plaintiff Dasom Kim's lumbar spine, Dr. McMahon measured flexion to 85 degrees (90 normal), and normal range of motion as to extension and left and right bending. As to Plaintiff Dasom Kim's right shoulder, Dr. McMahon measured elevation to 160 degrees (180 normal), internal rotation to T12 (T10 normal), and normal external rotation. As to her left

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<sup>2</sup> Dr. Kiernan also examined Plaintiff Dasom Kim's cervical spine, but as a cervical spine injury was not alleged in the Bill of Particulars as to Plaintiff Dasom Kim, it will not be discussed.

shoulder, Dr. McMahon measured elevation to 175 degrees (180 normal), internal rotation to T12 (T10 normal), and normal external rotation. As to her knees, Dr. McMahon measured normal range of motion, noting that her right knee had medial joint line tenderness while her left knee did not. Dr. McMahon did not measure Plaintiff Dasom Kim's thoracic spine but diagnosed that injury as a sprain/strain. Strains and sprains are not considered serious injuries within the meaning of Insurance Law 5102 (d) (*Gaddy v Eycler*, 79 NY2d 955 [1992]; *Nagbe v Minigreen Hacking Group*, 22 AD3d 326 [1st Dept 2005]).

Dr. McMahon diagnosed a tear in Plaintiff Dasom Kim's right shoulder, a tear of the anterior horn of the medial meniscus in her right knee, and disc bulges in her lumbar spine. While the existence of a tear in a shoulder ligament, bulging or herniated discs are not evidence of serious injury without objective proof as to the extent of the alleged physical limitation, when considered with a limitation in range of motion, it may be sufficient to defeat the motion (*Williams*, 95 AD3d at 651). In this case, the diagnosis of Plaintiff Dasom Kim's right shoulder tear coupled with the measured elevation limitation of 20 degrees sufficiently raises an issue of fact as to whether she suffered as a permanent or significant serious injury as to her right shoulder.

If a claimant can satisfy at least one of the serious injury thresholds, then the claimant is permitted to recover for all damages proximately caused by the accident, even those that are not considered "serious." (*Jiang Chung v State of NY*, 70 Misc3d 775, 786 [Ct Cl 2020]). As such, the Court need not determine whether Plaintiff Dasom Kim's other injuries fall into one of the serious injury categories under Insurance Law 5102 (d). Defendant's motion is therefore denied as to Plaintiff Dasom Kim.

Accordingly, it is

**ORDERED** that Defendant's motion for summary judgment as to Plaintiff Jae Hyun Kim is GRANTED; and it is further

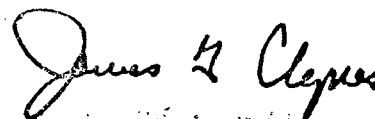
**ORDERED** that the Complaint of Plaintiff Jae Hyun Kim is dismissed; and it is further

**ORDERED** that Defendant's motion for summary judgment as to Plaintiff Dasom Kim is DENIED; and it is further

**ORDERED** that any requested relief not specifically addressed herein has nonetheless been considered; and it is further

**ORDERED** that within 30 days of entry, Defendant shall serve a copy of this Decision and Order upon Plaintiffs with Notice of Entry.

This constitutes the Decision and Order of the Court.



JAMES G. CLYNES, J.S.C.

1/19/2023

DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE