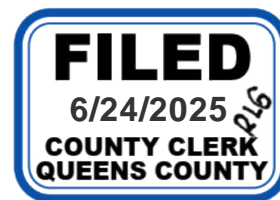


<b>Kim v White</b>
2025 NY Slip Op 35335(U)
June 17, 2025
Supreme Court, Queens County
Docket Number: Index No. 72490512020
Judge: Ulysses B. Leverett
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF QUEENS



-----X  
JANE KIM,

Plaintiff,

**DECISION and ORDER**

- against -

Index No.: 724905/2020  
Motion Sequence No. 3

LYDIA WHITE,

Defendant.

-----X  
LYDIA WHITE,

Third-Party Plaintiff,

- against -

YU KUN KIM,

Third-Party Defendant.

Papers Numbered

Defendant’s Notice of Motion – Statement of Material Facts –  
Affidavit/Affirmations – Exhibits – Memorandum  
Plaintiff’s Opposition to Defendant’s Motion – Exhibits  
Defendant’s Reply Affidavit/Affirmation

EF 79-87, 89  
EF 120, 122-136  
EF 138

On August 21, 2020, Plaintiff Jane Kim was a passenger in Third-Party Defendant Yu Kun Kim’s car when it came into contact with a motor vehicle owned and operated by Defendant and Third-Party Plaintiff, Lydia White. Plaintiff alleges serious injury as a result of the collision.

On October 21, 2024, Defendant and Third-Party Plaintiff, Lydia White filed a Notice of Motion requesting summary judgment pursuant to CPLR § 3212, alleging that Plaintiff failed to meet the serious injury threshold as required by New York Insurance Law § 5102(d).

New York Insurance Law § 5102(d) states:

“Serious injury” means 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

[1]

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.

In the Verified Complaint (EF Doc. No. 1), Plaintiff asserts serious injury under NY Ins. Law § 5102(d). In the Verified Bill of Particulars (EF Doc. No. 63), Plaintiff claims to have suffered significant disfigurement; permanent consequential limitation and significant limitation of use of a body organ, member, function or system; and/or a serious injury under the 90/180 day category.

When a Plaintiff makes claims of serious injury due to permanent consequential or significant limitation of use of a body organ, member, function, or system, these claims must be established by objective medical evidence that contains quantitative evidence of Plaintiff's diminished range of motion, or a qualitative evaluation that compares Plaintiff's current limitation to the normal function of the injured body part or system. *Toure v. Avis Rent A Car Systems, Inc.*, 98 N.Y.2d 345 (2002).

When a Defendant seeks summary judgment on the basis that the Plaintiff's injuries were not serious within the meaning of New York Insurance Law § 5102(d), Defendant must establish a prima facie case through evidence in admissible form that the Plaintiff has not met the serious injury threshold. *Perez v Ali*, 23 AD3d 363 (2d Dept 2005). In cases that involve range of motion tests, Defendant's medical expert must show the performance of objective tests that led to the expert's determination that the Plaintiff did not incur a serious injury. *Kennedy v Brown*, 23 AD3d 625 (2d Dept 2005). Objective medical evidence must contain quantitative evidence of diminished range of motion, or a qualitative assessment that compares Plaintiff's present status of functionality to the normal function, use, and purpose of the affected body organ, member, function, or system. *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345 (2002).

In support of her motion for summary judgment pursuant to CPLR § 3212, Defendant Lydia White submitted independent medical examination (IME) reports. In the September 8, 2023 report, Dr. Pierce Ferriter, M.D. found the following test results (EF Doc. No. 83): Cervical spine: "Active range of motion reveals flexion to 50 degrees (50 degrees normal), extension to 60 degrees (60 degrees normal), right lateral flexion to 45 degrees (45 degrees normal) and left lateral flexion to 45 degrees (45 degrees normal), and right rotation to 80 degrees (80 degrees normal) and left rotation to 80 degrees (80 degrees normal)." Thoracic spine: "Active range of motion reveals flexion to 45 degrees (45 degrees normal), extension to 0 degrees (0 degrees normal), right lateral flexion to 45 degrees (45 degrees normal) and left lateral flexion to 45 degrees (45 degrees normal), and right rotation to 25 degrees (25 degrees normal) and left rotation to 25 degrees (25 degrees normal)." Dr. Ferriter's IME findings state that Plaintiff Jane Kim had normal ranges of motion in every category for her right shoulder, left shoulder, right hand, right hip, left hip, right knee, and left knee; for both her right wrist and left wrist, Plaintiff's palmer flexion range of motion was 33.3% above normal; all other ranges of motion in Plaintiff's right and left wrist were normal. Dr. Ferriter's range of motion findings for Plaintiff's lumbar spine was stated as follows: "flexion at 50 degrees (60 degrees normal), [16.66% below

[2]

normal]; extension at 15 degrees (25 degrees normal), [40% below normal]; right lateral flexion at 25 degrees (25 degrees normal); and left lateral flexion at 25 degrees (25 degrees normal).”

Defendant White also submitted objective medical evidence from Dr. Daniel J. Feuer, M.D. (EF Doc. No. 84). Dr. Feuer’s September 20, 2023 medical report stated the following results for conducted range of motion tests: Cervical spine: “Flexion approximately 50 degrees (50 degrees normal), extension approximately 60 degrees (60 degrees normal), right lateral flexion approximately 45 degrees (45 degrees normal), left lateral flexion approximately 45 degrees (45 degrees normal), right rotation approximately 80 degrees (80 degrees normal), left rotation approximately 80 degrees (80 degrees normal).” Lumbar spine: “Flexion was performed to approximately 59 degrees (60 degrees normal), extension approximately 25 degrees (25 degrees normal), right lateral flexion was performed to approximately 24 degrees (25 degrees normal), left lateral flexion was performed to approximately 25 degrees (25 degrees normal).”

Defendant White met her burden by providing sufficient evidence to support their motion against Plaintiff’s serious injury claim, the burden shifts to Plaintiff to provide evidence that overcomes Defendant’s motion. *Pommells v Perez*, 4 NY3d 566 (2005).

In this case, Plaintiff Jane Kim submitted objective medical evidence from an evaluation performed by Dr. Sangwoo Mah, D.C., DAAML, on August 21, 2020, the date of the subject accident (EF Doc. No. 128). Dr. Mah’s medical report stated the following results for the range of motion tests performed on August 21, 2020: Cervical spine: flexion 24 degrees (50 degrees normal), 52% below normal; extension 18 degrees (60 degrees normal), 70% below normal; lateral left 14 degrees (45 degrees normal), 69% below normal; lateral right 16 degrees (45 degrees normal), 64% below normal; rotation left 42 degrees (80 degrees normal), 47% below normal; and rotation right 40 degrees (80 degrees normal), 50% below normal. Lumbar spine: flexion 20 degrees (60 degrees normal), 67% below normal; extension 8 degrees (25 degrees normal), 68% below normal; lateral left 8 degrees (25 degrees normal), 68% below normal; lateral right 9 degrees (25 degrees normal), 64% below normal. Right shoulder: flexion 127 degrees (180 degrees normal), 29% below normal; extension 35 degrees (50 degrees normal), 30% below normal; abduction 124 degrees (180 degrees normal), 31% below normal; adduction 38 degrees (50 degrees normal), 24% below normal; internal rotation 42 degrees (90 degrees normal), 53% below normal; external rotation 66 degrees (90 degrees normal), 27% below normal. Right knee: flexion 104 degrees (150 degrees normal), 31% below normal. Right ankle: plantar flexion 27 degrees (40 degrees normal), 32% below normal; dorsiflexion 14 degrees (20 degrees normal), 30% below normal. Right foot: inversion 21 degrees (30 degrees normal), 30% below normal; eversion 15 degrees (20 degrees normal), 25% below normal.

On November 30, 2020, Plaintiff Kim once again had range of motion tests performed by Dr. Sangwoo Mah. In the medical report for Plaintiff Kim’s November 30, 2020 examination, Dr. Mah compared Plaintiff’s test results from November 30, 2020 with her range of motion determinations from August 21, 2020 (EF Doc. No. 135). According to the November 30, 2020 medical report, Plaintiff’s ranges of motion deteriorated, or in a few cases, improved slightly. Plaintiff’s progress as of November 30, 2020, was stated by Dr. Mah as follows: Cervical spine: flexion decreased by 29%, extension decreased by 17%, lateral left decreased by 7%, lateral right decreased by 25%, rotation left decreased by 36%, and rotation right decreased by 35%. Lumbar

spine: flexion increased by 10%, extension increased by 13%, lateral left stayed the same, lateral right increased by 11%. Right shoulder: flexion decreased by 56%, extension decreased by 51%, abduction decreased by 50%, adduction decreased by 63%, internal rotation decreased by 36%, external rotation decreased by 47%. Right knee: flexion decreased by 20%. Right ankle: plantar flexion decreased by 19%, dorsiflexion decreased by 29%. Right foot: inversion decreased by 24%, eversion decreased by 20%.

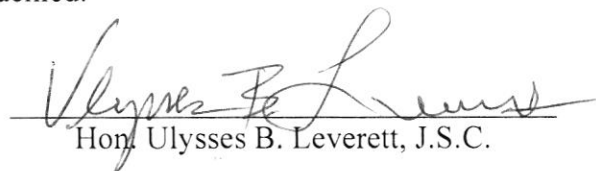
In a "final report" from Dr. John S. Cho, M.D., dated December 18, 2024, Plaintiff exhibited limited ranges of motion. The December 18, 2024 physical examination found the following: Cervical spine: flexion 30 degrees (45 degrees normal), 33% below normal; extension 22 degrees (45 degrees normal), 51% below normal; lateral left 27 degrees (45 degrees normal), 40% below normal; lateral right 22 degrees (45 degrees normal), 51% below normal; rotation left 45 degrees (80 degrees normal), 44% below normal; and rotation right 42 degrees (80 degrees normal), 47% below normal. Lumbar spine: flexion 35 degrees (50 degrees normal), 30% below normal; extension 10 degrees (30 degrees normal), 67% below normal; lateral left 10 degrees (35 degrees normal), 71% below normal; lateral right 15 degrees (35 degrees normal), 57% below normal; right rotation 30 degrees (30 degrees normal), 0% below normal; left rotation 25 degrees (30 degrees normal), 17% below normal.

Plaintiff Kim also submitted operative reports for right shoulder arthroscopy on November 6, 2020 (EF Doc. No. 136), cervical spine discectomy on November 24, 2020 (EF Doc. No. 123), and a right thumb A1 pulley excision and tenosynovectomy (EF Doc. No. 82). Plaintiff also provided medical records from Northern Interventional Medical, and other medical assessments.

In this case, the affirmed reports and medical records submitted by both parties' doctors directly contradict each other. Where the parties offer conflicting medical records on the existence of a serious injury, the existence of such injury is a triable issue of fact for a jury's determination. See *Cracchiolo v. Omerza*, 87 A.D.3d 674 (2011).

Accordingly, Defendant and Third-Party Plaintiff Lydia White's motion for summary judgment made on the grounds that Plaintiff Jane Kim has not sustained a serious injury as required by New York Insurance Law § 5102(d) is denied.

Dated: 6/17/2025

  
Hon. Ulysses B. Leverett, J.S.C.

**HON. ULYSSES B. LEVERETT**

