

Sang Soo Suh v Golden
2012 NY Slip Op 31929(U)
July 18, 2012
Supreme Court, Suffolk County
Docket Number: 10-31468
Judge: Denise F. Molia
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CAL. No. 11-02512MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Justice of the Supreme Court

MOTION DATE 3-12-12
ADJ. DATE 4-20-12
Mot. Seq. # 001 - MD

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SANG SOO SUH and KYUNG SOOK SUH,	:	SIM & PARK, LLP
	:	Attorney for Plaintiffs
Plaintiffs,	:	450 Seventh Avenue, Suite 1805
	:	New York, New York 10123
- against -	:	
	:	BAXTER SMITH & SHAPIRO, P.C.
TODD C. GOLDEN and TRAVIS S. GOLDEN,	:	Attorney for Defendants
	:	99 North Broadway
Defendants.	:	Hicksville, New York 11801
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Upon the following papers numbered 1 to 23 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 14; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 15 - 23; Replying Affidavits and supporting papers ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the defendants for summary judgment dismissing the complaint is denied.

In this action the plaintiffs seek to recover damages for personal injuries which they purportedly sustained in a two-car motor vehicle accident which occurred on August 11, 2010. The accident purportedly occurred when a vehicle owned by defendant Todd Golden and operated by defendant Travis Golden struck the rear of a vehicle being operated by plaintiff Sang Soo Suh in which plaintiff Kyung Sook Suh was a passenger. In their complaint, the plaintiffs allege that they each sustained serious and permanent injuries as a result of the defendants' negligence in causing the accident. Specifically, by way of the bill of particulars, plaintiff Sang Soo Suh alleges that he sustained serious and permanent injuries to his left knee including, *inter alia*, joint effusion, focal tear involving the anterior fibers of the medial collateral ligament, and grade one menisco-capsular separation in the region of the medial meniscus. He alleges that he sustained serious and permanent injuries to his lumbar spine including, *inter alia*, straightening with the reversal of the lordotic curvature, and subligamentous herniated discs at L3-4 and L4-5, causing pressure effect on the thecal sac. Plaintiff Kyung Sook Suh alleges that she sustained serious and permanent injuries to her left knee including, *inter alia*, joint effusion, focal tear involving the anterior fibers of the medial collateral ligament at the site of attachment

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to the medial femoral condole, and grade one menisco-sapsular separation in the region of the medial meniscus. Kyung Sook Suh further alleges that she sustained serious and permanent injuries to her cervical spine including, *inter alia*, straightening with the reversal of the lordotic curvature, central herniated discs at C5-6 and C6-7 causing partial obliteration of the anterior subarachnoid space, and ventral bulging anteriorly at C6-7. The plaintiffs allege that the injuries they sustained in the accident are serious within the meaning of the Insurance Law in that they sustained, *inter alia*, a fracture, a permanent loss of use of a body organ, member, function or system; a permanent consequential limitation of use of a body organ or member; a significant limitation of use of a body function or system; and a medically determined injury or impairment of a non-permanent nature which prevented them from performing substantially all of the material acts which constituted their usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence. Defendants asserted a counterclaim against the driver of plaintiffs' vehicle, which has been discontinued.

The defendants now move for summary judgment dismissing the complaint on the grounds that the plaintiffs did not sustain a serious injury as defined by Insurance Law § 5102 (d).

A "serious injury" is defined as 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 constitutes 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" (Insurance Law § 5102[d]). The Court of Appeals has held that the issue of whether a claimed injury falls within the statutory definition of a "serious injury" is a question of law for the courts in the first instance, which may properly be decided on a motion for summary judgment (*see Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]; *Charley v Goss*, 54 AD3d 569, 863 NYS2d 205 [1st Dept 2008] *aff'd* 12 NY3d 750, 876 NYS2d 700 [2009]).

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 925 [1980]). In a motor vehicle case, a defendant moving for summary judgment on the issue of whether the plaintiff sustained a serious injury has the initial burden of presenting competent evidence establishing that the injuries do not meet the threshold (*see Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). A defendant may satisfy this burden 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, 707 NYS2d 233 [2d Dept 2000]). Once this showing has been made the burden shifts to the plaintiff to produce evidentiary proof in admissible form sufficient to overcome the defendant's submissions by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law (*see Gaddy v Eyster*, 79 NY2d 955, 582 NYS2d 990 [1992]; *Grossman v Wright*, *supra*; *Pagano v Kingsbury*, *supra*; *see also Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*,

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supra).

In support of the motion for summary judgment, the defendants submit, *inter alia*, the affirmed examination reports of Robert Israel, M.D., and the deposition testimony of the plaintiffs. This evidence was sufficient to establish the defendants' *prima facie* entitlement to summary judgment dismissing the complaint by demonstrating that the plaintiffs 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, 746 NYS2d 865 [2002]; *Gaddy v Eycler*, *supra*; *Kreimerman v Stunis*, 74 AD3d 753, 902 NYS2d 180 [2d Dept 2010]; *Euvino v Rauchbauer*, 71 AD3d 820, 897 NYS2d 196 [2d Dept 2010]; *Casella v New York City Transit Auth.*, 14 AD3d 585, 787 NYS2d 883 [2d Dept 2005]; *Hodges v Jones*, 238 AD2d 962, 661 NYS2d 159 [2d Dept 1997]; *Pagano v Kingsbury*, *supra*).

The affirmed report of Dr. Israel and plaintiff Sang Soo Suh's deposition testimony established that plaintiff Sang Soo Suh did not sustain a serious injury as a result of the subject accident. In this regard, Dr. Israel avers that he performed an independent orthopedic examination on Sang Soo Suh on September 20, 2011. Examination of his cervical spine revealed a normal lordosis and no tenderness or spasm to palpation. He measured the range of motion, compared it to normal values, and found Sang Soo Suh's cervical spine range of motion to be normal in all respects. He performed cervical compression testing, Soto Hall test, Valsalva test, and Spurling test, and obtained negative results. Upon examination of his lumbar spine, he measured the range of motion, compared it to normal values, and found Sang Soo Suh's lumbar spine range of motion to be normal in all respects. He performed straight leg raising test, Bechterew test and Hoover test and obtained negative results. He found no clonus and that Babinski sign was negative. Examination of his shoulders revealed no atrophy or tenderness. He measured the range of motion, compared it to normal values, and found Sang Soo Suh's shoulder ranges of motion to be normal in all respects. He performed the drop arm, Yargason's apprehension, Speed, O'Brien, clunk, and Hawkin's tests and obtained negative results. He found no signs of impingement. Examination of his left knee found no tenderness or effusion. Sang Soo Suh's knee was found to be stable on valgus stress, varus stress and anterior stress at 30 degrees and 90 degrees. Dr. Israel measured the range of motion, compared it to normal values, and found Sang Soo Suh's left knee range of motion to be normal in all respects. He performed the McMurray test and the patella-femoral compression test and obtained negative results. He found that there was no patella-femoral crepitus. Based on his examination, Dr. Israel concluded that Sang Soo Suh had sustained sprains of the cervical spine, lumbar spine, shoulders, and left knee as a result of the accident and that all such injuries had resolved. He found that there was no disability and that Sang Soo Suh was capable of performing work activities and activities of daily living without restriction.

During his deposition, Sang Soo Suh testified, in pertinent part, that at the time of the collision his left knee hit the dashboard and there was a shock to his neck. Immediately following the accident, he had a bruise and tingling pain in his left knee, pain in his neck, and some pain in his lower back. The day following the accident he sought medical treatment from the Severance Pain Clinic, where he complained of pain in his neck, the area surrounding his neck, his lower back, and his left knee. He treated at the Severance Pain Clinic, receiving physical therapy, acupuncture and chiropractic care, for approximately seven months and twenty days, at which time no-fault stopped paying for his treatment. He also treated with an orthopedist and a neurosurgeon with respect to his injuries, and had MRIs

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performed of his left knee and neck. Sang Soo Suh testified that he last received medical treatment in March of 2011 and did not have any appointments scheduled for future treatment. According to Sang Soo Suh, he was not confined to his bed as a result of the injuries he sustained in the accident but did miss approximately one week from work. He currently has pain in his neck, left knee and lower back as a result of the accident. He takes pain medication at work. He admits that there are no activities that he is unable to perform as a result of the injuries he sustained in the subject accident.

The affirmed report of Dr. Israel and plaintiff Kyung Sook Suh's deposition testimony, likewise, establishes that plaintiff Kyung Sook Suh did not sustain a serious injury as a result of the subject accident. In this regard, Dr. Israel affirms that he performed an independent orthopedic examination of Kyung Sook Suh on September 20, 2011. Upon examination of her cervical spine, he found a normal lordosis and no tenderness or spasm to palpation. He measured the range of motion of her cervical spine, compared it to normal findings, and found it to be normal in all respects. He performed the cervical compression test, Soto Hall test, Valsalva test and Spurling test, and obtained negative results. Upon examination of Kyung Sook Suh's lumbar spine, Dr. Israel found a normal lordotic curve and no spasms or tenderness to palpation. He measured her lumbar range of motion, compared it to normal values, and found it to be normal in all respects. He performed straight leg raising test, Bechterew test and Hoover test and obtained negative results. He found no clonus and Babinski sign to be negative. Upon examination of Kyung Sook Suh's right shoulder, he found no instability and no sign of impingement. He performed range of motion testing, compared his findings to normal values, and found the plaintiff's range of motion to be normal. He performed the drop arm test, Yergason's test, apprehension test, Speed test, O'Brien test, clunk test, and Hawkin's test and obtained negative results. Upon examination of Kyung Sook Suh's left knee he found no tenderness or effusion. He found her knee to be stable on valgus, varus, and anterior stress tests at 30 degrees and 90 degrees. He performed range of motion testing on her left knee, compared his findings to normal values, and found her range of motion to be normal in all respects. He performed the posterior drawer test, McMurray test, and patella-femoral compression test and obtained negative results. He found no patella-femoral crepitus. Based on his examination, Dr. Israel concluded that Kyung Sook Suh had sustained sprains to her cervical spine, lumbar spine, right shoulder, and left knee and leg in the subject accident, and that all injuries were resolved. He concluded that she had no disability as a result of the subject accident and was capable of performing her work activities and activities of daily living without restriction.

During her deposition, Kyung Sook Suh testified that at the time of the accident her left knee came into contact with the dashboard and she came close to losing consciousness. She was taken to the hospital by ambulance where she complained of pain in her left knee and right shoulder. She was treated and discharged. She next sought medical treatment the following day from Severance Pain Clinic where she complained of pain to her left knee, neck and lower back. She received treatment from Severance Pain Clinic, including physical therapy, electric stimulation, and chiropractic treatment, for approximately seven months and twenty days. After having MRIs performed, she was told that she had a tear in her left knee and required surgery. She last received medical treatment for the injuries which she sustained in the accident in March of 2011 and has no future medical appointments scheduled. According to Kyung Sook Suh, she missed approximately one week from work as a result of the subject accident. Kyung Sook Suh testified she currently has pain in her left knee, neck and lower back as a result of the injuries she sustained in the accident. There are no activities that she is unable to perform,

but she is limited in her ability to walk long distances, remain standing for a long time, and bend down.

In opposition to the defendants' *prima facie* showing, it was incumbent upon the plaintiffs to demonstrate, by the submission of objective proof of the nature and degree of their injuries, that they did sustain a "serious" injury as a result of the instant accident, or that there are questions of fact as to whether they sustained such an injury (*see Toure v Avis Rent A Car Sys.*, *supra* at 350). The evidence submitted by the plaintiffs is sufficient to meet this burden. Specifically, the affirmed MRI reports of Ayoob Khodadadi, MD, and the affirmed report of Yan Q., Sun, M.D., raise a triable issue of fact, as to whether plaintiff Sang Soo Suh sustained a permanent consequential limitation of use and/or a significant limitation of use of his left knee and lumbar spine as a result of the subject accident (*see Johnson v Cristino*, 91 AD3d 604, 936 NYS2d 275 [2d Dept 2012]; *Young Chool Yoo v Rui Dong Wang*, 88 AD3d 991, 931 NYS2d 373 [2d Dept 2011]; *Khavosov v Castillo*, 81 AD3d 903, 917 NYS2d 312 [2d Dept 2011]; *Mahmood v Vicks*, 81 AD3d 606, 915 NYS2d 637 [2d Dept 2011]; *Sin v Singh*, 74 AD3d 1320, 904 NYS2d 744 [2d Dept 2010]; *see generally Perl v Meher*, 18 NY3d 208, 936 NYS2d 655 [2011]). Dr. Sun, the plaintiffs' treating physician, concludes based on his contemporaneous and most recent examinations of plaintiff Sang Soo Suh, that he has sustained injuries to his left knee and lumbar spine that are permanent and causally related to the subject accident. Dr. Sun bases this conclusion on objective testing performed on the plaintiff as well as significant range of motion limitations, which he found upon his examination of the plaintiff's lumbar spine and left knee. Moreover, Dr. Sun concludes that his positive objective findings are consistent with the results obtained on MRI studies of the plaintiff's lumbar spine performed on October 13, 2010 and left knee performed on September 13, 2010. Dr. Khodadadi affirms, based on his review of the MRI performed on Sang Soo Suh's lumbar spine on October 13, 2010, that such MRI depicts straightening of the lumbar spine associated with reversal of the lordotic curvature compatible with muscular spasm and herniated discs at L3-4 and L4-5 causing pressure effect on the thecal sac. He affirms, based on his review of an MRI performed on Sang Soo Suh's left knee on September 13, 2010, that such MRI depicts joint effusion, a focal tear involving the anterior fibers of the medial collateral ligament, and grade one menisco-capsular separation in the region of the medial meniscus. In addition, Dr. Suh's affirmation sufficiently explains any gap in the plaintiff Sang Soo Suh's medical treatment (*see Mazil v Quinones*, 84 AD3d 893, 922 NYS2d 560 [2d Dept 2011]; *Khavosov v Castillo*, 81 AD3d 903, 917 NYS2d 312 [2d Dept 2011]).

The evidence submitted is, likewise, sufficient to raise a triable issue of fact as to whether plaintiff Kyung Sook Suh sustained a serious injury to, *inter alia*, her left knee and cervical spine as a result of the subject accident. Specifically, the affirmed MRI reports of Ayoob Khodadadi, MD, and the affirmed report of Yan Q., Sun, M.D., raise a triable issue of fact, as to whether plaintiff Kyung Sook Suh sustained a permanent consequential limitation of use and/or a significant limitation of use of her left knee and cervical spine as a result of the subject accident (*see Johnson v Cristino*, *supra*; *Young Chool Yoo v Rui Dong Wang*, *supra*; *Khavosov v Castillo*, *supra*; *Mahmood v Vicks*, *supra*; *Sin v Singh*, *supra*; *see generally Perl v Meher*, *supra*). Dr. Sun, the plaintiffs' treating physician, concludes based on his contemporaneous and most recent examinations of plaintiff Kyung Sook Suh, that she has sustained injuries to her left knee and cervical spine that are permanent and causally related to the subject accident. Dr. Sun bases this conclusion on objective testing performed on the plaintiff as well as significant range of motion limitations, which he found upon his examination of her cervical spine and left knee. Moreover, Dr. Sun concludes that his positive objective findings are

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consistent with the results obtained on MRI studies of the plaintiff's cervical spine performed on October 13, 2010 and left knee performed on September 13, 2010. Dr. Khodadadi affirms, based on his review of the MRI performed on plaintiff Kyung Sook Suh's cervical spine on October 13, 2010 that such MRI depicts straightening of the cervical spine associated with the reversal of the lordotic curvature compatible with muscular spasm, central herniated discs at C5-C6 and C6-7, causing partial obliteration of the anterior subarachnoid space, and ventral bulging at C6-7 level. He affirms that, based on his review of the MRI performed on Kyung Sook Suh's left knee on September 13, 2010, that such MRI depicts joint effusion, a focal tear involving the anterior fibers of the medial collateral ligament at the site of attachment to the medial femoral condyle, and a grade one menisco-sapsular separation in the region of the medial meniscus. In addition, Dr. Suh's affirmation sufficiently explained any gap in the plaintiff Kyung Sook Suh's medical treatment (*see Mazil v Quinones*, 84 AD3d 893, 922 NYS2d 560 [2d Dept 2011]; *Khavosov v Castillo*, 81 AD3d 903, 917 NYS2d 312 [2d Dept 2011]).

Based on the foregoing, the motion by the defendant for summary judgment dismissing the complaint is denied.

Dated: July 18, 2012

Hon. Denise F. Moffa

J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION