Dongil Hong v Hoo Chen
2017 NY Slip Op 30561(U)
March 22, 2017
Supreme Court, Queens County
Docket Number: 700201/2015
Judge: Robert J. McDonald

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

- x

DOOGIL HONG,

Plaintiff,

- against -

HOO CHEN and BO CHEN,

Defendants.

- x

Index No.: 700201/2015

Motion Date: 3/10/17

Motion No.: 49

Motion Seq.: 3

The following electronically filed documents read on this motion by defendants for an order pursuant to CPLR 3212 granting defendants summary judgment and dismissing plaintiff's complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law §§ 5104(a) and 5102(d):

	Papers Numbered
Notice of Motion-Affirmation-Exhibits	EF 25 - 32
Affirmation in Opposition-Exhibits	EF 33 - 35
Reply Affirmation	EF 36 - 37

In this negligence action, plaintiff seeks to recover damages for personal injuries allegedly sustained as a result of a motor vehicle accident that occurred on October 22, 2014 on Northern Boulevard at its intersection with 147th Street, in Queens County, New York. At the time of the accident, plaintiff was a pedestrian. In the verified bill of particulars, plaintiff alleges that he sustained serious injuries to his cervical spine and lumbar spine, including disc bulges and herniations, and serious injuries to his left shoulder and right knee.

Plaintiff commenced this action by serving and filing a summons and complaint on January 9, 2015. Issue was joined by service of defendants' verified answer dated February, 2015. Defendants now move for an order pursuant to CPLR 3212(b), granting summary judgment and dismissing plaintiff's complaint on the ground that plaintiff did not suffer a serious injury as defined by Insurance Law § 5102.

In support of the motion, defendants submit an affirmation from counsel, Lauren E. Marron, Esq.; a copy of the pleadings; a copy of the Note of Issue; a copy of the verified bill of particulars; a copy of the transcript of the examination before trial of plaintiff taken on August 19, 2016; and copies of the affirmed medical reports of Drs. Andrew R. Miller, M.D. and Alan B. Greenfield, M.D.

At his deposition, plaintiff testified that he was involved in the subject accident. He did not lose consciousness as a result of the accident. Following the accident, he went to New York Hospital Queens. He then sought treatment at New York Pain Clinic. He received physical therapy and chiropractic treatment. He treated for approximately seven months. He has not seen a doctor in relation to the accident since May of 2015. He never had surgery in relation to the accident. He was never confined to his bed or home as a result of the accident. He is currently a manager for a dry cleaning business. He has been working for the same dry cleaning business since February of 2014. His schedule has never changed throughout the duration of his employment. He did not miss any days of work because of the accident. As a result of the accident, he can no longer run, kneel down, and sleep stretching straight. He is limited in lifting things using his left arm and shoulder, standing for a long time, and bending forward as a result of the accident.

Dr. Miller examined plaintiff on September 21, 2016. Plaintiff presented with current complaints of pain in his neck and lower back. Dr. Miller identifies the medical records he reviewed and performed objective range of motion testing using a goniometer. He found full range of motion in plaintiff's cervical spine, thoracic spine, lumbar spine, bilateral shoulders, left elbow, left wrist and hand, and right knee. All other objective tests were negative. Dr. Miller concludes that there is no objective evidence of orthopedic disability.

Dr. Greenfield reviewed the MRIs of plaintiff's right knee, left shoulder, cervical spine, and lumbar spine. Regarding the right knee MRIs, he found evidence of longstanding degeneration and no evidence of a tear. Dr. Greenfield concludes that there were no findings that could be attributed to the subject accident. Upon a review of the left shoulder MRI, Dr. Greenfield found evidence of chronic and longstanding degeneration and no evidence of a tear, and concluded that there were no findings that could be attributed to the subject accident. Upon a review of the cervical spine MRIs, Dr. Greenfield found evidence of degeneration and no evidence of any herniations. He concluded that there were no findings that can be attributed to the subject

accident. Upon a review of plaintiff's lumbar spine MRIs, Dr. Greenfield found evidence of chronic and longstanding degeneration, and concluded that there were no finding that can be attributed to the subject accident.

Defendants' counsel contends that the medical reports and plaintiff's testimony that he was not confined to his bed or home immediately following the accident are sufficient to demonstrate that plaintiff did not sustain 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 nonpermanent nature which prevented plaintiff from performing substantially all of the material acts which constitute his 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 opposition, plaintiff submits an affirmation from counsel, Jason Ginsberg, Esq.; an affirmation from Yan Q. Sun, M.D. and his own affidavit dated February 2, 2017.

Plaintiff first presented to Dr. Sun on December 3, 2014 with complaints of injuries to his right knee, left shoulder, lumbar spine, and cervical spine. Dr. Sun performed range of motion testing and found restricted ranges of motion in plaintiff's right knee and left shoulder. Dr. Sun further affirms that although plaintiff's condition remained poor, his no fault coverage had been denied. Therefore, he was unable to continue treatment after approximately seven months. Most recently, Dr. Sun examined plaintiff on January 25, 2017. He performed range of motion testing and found restricted ranges of motion in plaintiff's right knee, left shoulder, cervical spine, and lumbar spine. Dr. Sun also reviewed MRI films of plaintiff's right knee taken on November 4, 2014, left shoulder taken on November 11, 2014, cervical spine taken on November 25, 2014, and lumbar spine taken on December 2, 2014. Based upon the MRIs and his examinations, he diagnosed plaintiff with a right knee sprain injury, meniscal tear, and partial tear of the ACL; left shoulder sprain injury and a labrum tear; cervical spine sprain injury and herniated disc; and lumbar spine sprain injury and herniated disc. Dr. Sun opines that the injuries are permanent in nature and are causally related to the subject accident.

On a motion for summary judgment, where the issue is whether the plaintiff has sustained a serious injury under the no-fault law, the defendant bears the initial burden of presenting

competent evidence that there is no cause of action (Wadford v Gruz, 35 AD3d 258 [1st Dept. 2006]). "[A] defendant can establish that a plaintiff's injuries are not serious within the meaning of Insurance Law § 5102 (d) 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 [1st Dept. 2000]). Whether a plaintiff has sustained a serious injury is initially a question of law for the Court (Licari v Elliott, 57 NY2d 230 [1982]).

Where the defendant's motion for summary judgment properly raises an issue as to whether a serious injury has been sustained, it is incumbent upon the plaintiff to produce evidentiary proof in admissible form in support of his or her allegations. The burden, in other words, shifts to the plaintiff to come forward with sufficient evidence to demonstrate the existence of an issue of fact as to whether he or she suffered a serious injury (see Gaddy v Eyler, 79 NY2d 955 [1992]; Zuckerman v City of New York, 49 NY2d 557[1980]; Grossman v Wright, 268 AD2d 79 [2d Dept 2000]).

Here, the competent proof submitted by defendants, including the affirmed medical reports of Drs. Miller and Greenfield and plaintiff's own testimony, is sufficient to meet defendant's prima facie burden by demonstrating that plaintiff 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 [2002]; Gaddy v Eyler,79 NY2d 955 [1992]; Carballo v Pacheco, 85 AD3d 703 [2d Dept. 2011]; Ranford v Tim's Tree & Lawn Serv., Inc., 71 AD3d 973 [2d Dept. 2010]).

In opposition, this Court finds that plaintiff raised triable issues of fact as to whether he sustained a serious injury to his right knee and left shoulder by submitting Dr. Sun's affirmation attesting to the fact that plaintiff sustained injuries as a result of the subject accident, finding that plaintiff had significant limitations in ranges of motion both contemporaneous to the accident and in a recent examination regarding his right knee and left shoulder, and concluding that the limitations are permanent and causally related to the accident (see Perl v Meher, 18 NY3d 208 [2011]; David v Caceres, 96 AD3d 990 [2d Dept. 2012]; Martin v Portexit Corp., 98 AD3d 63 [1st Dept. 2012]; Ortiz v Zorbas, 62 AD3d 770 [2d Dept. 2009]; Azor v Torado,59 AD2d 367 [2d Dept. 2009]).

Additionally, Dr. Sun adequately explained the gap in treatment by affirming that plaintiff's no fault coverage had

been denied (see Abdelaziz v Fazel, 78 AD3d 1086 [2d Dept. 2010]; Tai Ho Kang v Young Sun Cho, 74 AD3d 1328 [2d Dept. 2010]; Domanas v Delgado Travel Agency, Inc., 56 AD3d 717 [2d Dept. 2008]; Black v Robinson, 305 AD2d 438 [2d Dept. 2003]).

As such, plaintiff demonstrated issues of fact as to whether he sustained a serious injury to his right knee and left shoulder under the permanent consequential and/or the significant limitation of use categories of Insurance Law § 5102(d) as a result of the subject accident (see Khavosov v Castillo, 81 AD3d 903[2d Dept. 2011]; Mahmood v Vicks, 81 AD3d 606 [2d Dept. 2011]; Compass v GAE Transp., Inc., 79 AD3d 1091 [2d Dept. 2010]; Evans v Pitt, 77 AD3d 611 [2d Dept. 2010]).

However, although Dr. Sun concludes that the injuries to plaintiff's cervical spine and lumbar spine were sustained in the subject accident, plaintiff did not submit competent objective medical evidence that revealed any treatment or the existence of an injury to plaintiff's cervical spine and lumbar spine that was contemporaneous with the subject accident. Here, Dr. Sun's examination of plaintiff's cervical spine and lumbar spine occurred over two years after the subject accident. As such, Dr. Sun's opinion that plaintiff's injuries to his cervical spine and lumbar spine were sustained in the subject accident is speculative (see Perl v Meher, 18 NY3d 308 [2011]; Griffiths v Munoz, 98 AD3d 997 [2d Dept. 2012]; Singh v City of New York, 71 AD3d 1121 [2d Dept. 2010]). Furthermore, Dr. Sun failed to indicate in his report his awareness that plaintiff was suffering from degenerative changes in his spine, and therefore, his finding that plaintiff's current restriction of motion was causally related to the subject accident was mere speculation (see Pajda v Pedone, 303 AD2d 729 [2d Dept. 2003]; Ginty v MacNamara, 300 AD2d 624 [2d Dept. 2002]; Narducci v McRae, 298 AD2d [2d Dept. 2002]).

As such, plaintiff failed to raise a triable issue of fact as to a serious injury of his cervical spine and lumbar spine.

Accordingly, for the reasons set forth above, it is hereby,

ORDERED, that the motion by defendants for an order granting summary judgment dismissing plaintiff's complaint is denied.

Dated: March 22, 2017
Long Island City, N.Y.

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ROBERT J. MCDONALD
J.S.C