Jung Mi Chun v Hwa Chung
2017 NY Slip Op 30675(U)
April 5, 2017
Supreme Court, Queens County
Docket Number: 700207/2015
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

JUNG MI CHUN,

Plaintiff,

- against -

HWA CHUNG and HWAN HYUN LEE,

Defendants.

- x

Index No.: 700207/2015

Motion Date: 3/28/17

Motion No.: 25

Motion Seq.: 2

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 7 - 8
Affirmation in Opposition-Exhibits	EF 10

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 28, 2014 on the Cross Island Expressway, northbound, in Queens County, New York. In the verified bill of particulars, plaintiff alleges that she sustained serious injuries to his left knee and right shoulder.

Plaintiff commenced this action by filing a summons and complaint on January 9, 2015. Issue was joined by service of defendants' verified answer dated February 19, 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, Matthew E. French, Esq.; a copy of the pleadings; a

copy of the verified bill of particulars; a copy of the Preliminary Conference Order; a copy of the Compliance Conference Order; a copy of the Note of Issue; a radiological review of the right shoulder and left knee performed by Mark J. Decker, M.D.; and copies of affirmed medical reports from Frank D. Oliveto, M.D. and John Iozzio, D.C.

Dr. Oliveto examined plaintiff on March 12, 2015. Plaintiff presented with current complaints of pain in her neck, mid back, lower back, bilateral shoulders, and left knee. She reported that she was involved in a prior motor vehicle accident in 2011 in which she injured her left knee. She also told Dr. Oliveto that she missed ten days from work due to the injuries she sustained in the subject accident. At the time of the examination, she was currently working full time as a manager with light duties. Dr. Oliveto identifies that medical records he reviewed and performed range of motion testing with a goniometer. He reported all normal ranges of motion in plaintiff's cervical spine, thoracic spine, lumbar spine, bilateral shoulders, and bilateral knees. Dr. Oliveto concludes that plaintiff has no orthopedic disability, and she is capable of working and performing all of her normal activities of daily living without any limitations. He states that there is a causal relationship between the injuries sustained and the subject accident. Additionally, Dr. Oliveto opines that any future orthopedic intervention would be considered excessive, and plaintiff's subjective complaints are not supported by objective findings.

Dr. Iozzio performed an independent chiropractic and acupuncture examination on plaintiff on March 12, 2015. Dr. Iozzio identifies the medical records he reviewed and performed range of motion testing with a goniometer. He recorded all normal ranges of motion regarding plaintiff's cervical spine, lumbar spine, bilateral shoulders, bilateral elbows, bilateral wrists, bilateral hips, bilateral knees, and bilateral ankles and feet. All other objective tests were negative. Dr. Iozzio concludes that there is no objective evidence of a causally related disability, and plaintiff is capable of working and may continue with her normal activities of daily living without any restrictions or limitations. He opines that there is no further need for chiropractic or acupuncture treatment, and that there is a causal relationship between the subject accident and the reported injuries sustained.

Dr. Decker reviewed the MRI films of plaintiff's left knee and right shoulder. Regarding the left knee, Dr. Decker found that there was no evidence to suggest that a traumatic injury was sustained. There was no tear, fracture or meniscocapsular

separation, or a tear of medial collateral ligament. The patella alta with thickened medial plica and joint effusion. Dr. Decker opines that the findings are longstanding and not causally related to the subject accident. Regarding the right shoulder, he found biceps tenosynovitis of an indeterminate age. There was no tear or fracture.

Defendants' counsel contends that the medical reports 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; or a medically determined injury or impairment of a nonpermanent nature which prevented plaintiff from performing substantially all of the material acts which constitute her 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, Andrew Park, Esq.; an affirmation from Yan Q. Sun, M.D.; and her own affidavit dated March 13, 2017.

Plaintiff first presented to Dr. Sun on January 7, 2015. She reported that she had prior accidents where she injured her lumbar spine and in 2012 she injured her left knee and lumbar spine. Dr. Sun reviewed the medical records regarding plaintiff's prior accidents and the subject accident. He opines that plaintiff's left knee injury was aggravated and exacerbated by the subject accident. Additionally, she sustained a tear of the MCL which was a new injury from the subject accident. The injuries sustained to plaintiff's right shoulder are solely caused by the subject accident and not from any degenerative condition or prior accident. Dr. Sun performed range of motion testing with the use of a goniometer and found restricted ranges of motion in plaintiff's left knee and right shoulder. Most recently, Dr. Sun examined plaintiff on March 8, 2017. He found continued restricted ranges of motion in plaintiff's left knee and right shoulder. Dr. Sun also reviewed MRI films of plaintiff's left knee taken on November 25, 2014 and right shoulder taken on December 10, 2014. The MRI of the left knee revealed joint effusion due to trauma, grade I capsular separation in the medial meniscus, and a focal tear of the MCL. The MRI of the right shoulder revealed joint effusion due to trauma, biceps tendinitis, and an inflamed lymph node. Dr. Sun notes that although plaintiff's condition remained poor, after five months of treatment her no-fault benefit was denied. Therefore, she was unable to continue treatment even though

treatment was necessary to relieve pain. He concludes that her condition is permanent and any medical treatment she receives will be palliative in nature only.

Plaintiff submits her own affidavit affirming that she first sought treatment at New York Pain Clinic approximately one week after the subject accident. She treated there three times a week for a period of five months. She also treated with Dr. Sun during this time. She stopped treatment because her no-fault benefits were terminated, and she could not afford the payments. She continues to do stretching exercises at home. Although she had a prior accident in January of 2012 where she injured her left knee and back, the pain and injury to her left knee got worse after the subject accident. She had no prior injuries to her right shoulder. She had no subsequent injuries to her left knee or right shoulder. She continues to suffer from daily pain in her left knee and right shoulder. She is unable to walk her dog, do household chores, go to the gym, vacuum or wipe, and she is unable to get a sound sleep. She missed a total of six months from her part time employment at Spa Castle due to the injuries sustained in 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, this Court finds that defendants failed to meet the prima facie burden of 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]). Defendants' own experts use different normal values regarding range of motion testing. For example, Dr. Oliveto uses a normal value of 150 degrees for flexion of the knee, while Dr. Iozzio uses a normal of 135 degrees. Dr. Iozzio reported plaintiff's range of motion as 135 degrees, which would be a limited range of motion under Dr. Oliveto's normal value. Thus, the medical reports create issues of fact between themselves as to whether plaintiff's ranges of motion are within normal limits. Where defendants' experts offer different normal range of motion, defendants cannot demonstrate, prima facie, that plaintiff's injuries were not serious within the meaning of the Insurance Law (see Cracchiolo v Omerza, 87 AD3d 674 [2d Dept. 2011]; Martinez v Pioneer Transp. Corp., 48 AD3d 306 [1st Dept. 2008]).

Based on the foregoing, this Court finds that defendants failed to make a prima facie showing of entitlement to judgment as a matter of law that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d), tendering sufficient evidence to demonstrate the absence of any material issues of fact (see Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]; Reynolds v Wai Sang Leung, 78 AD3d 919 [2d Dept. 2010]).

Since defendant failed to establish a prima facie case, it is unnecessary to consider plaintiff's opposition (see Smith v Rodriguez, 69 AD3d 605 [2d Dept. 2010]; Washington v Asdotel Enters., Inc., 66 AD3d 880 [2d Dept. 2009]). In any event, in opposition plaintiff raised triable issues of fact as to whether she sustained a serious injury to her left knee and right 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 her left knee and right 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 and plaintiff 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 she sustained a serious injury to her left knee and right 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]).

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: April 5, 2017
Long Island City, N.Y.

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ROBERT J. MCDONALD
J.S.C