Fu Yan Wang v Uruchima
2013 NY Slip Op 33873(U)
October 17, 2013
Supreme Court, Queens County
Docket Number: 5914/12
Judge: Denis J. Butler

ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable DENIS J. BUTLER IAS PART 12
Justice

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FU YAN WANG AND YU XU,

Plaintiff,

-against-

MANUEL R. URUCHIMA,

Defendant.

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Index No.: 5914/12

Motion Date: August 26, 2013

Cal. No.: 1118
Seq. No.: 2

The following papers numbered 1 to 22 read on this motion by defendant for summary judgment and dismissal of plaintiffs' Complaint, pursuant to Insurance Law §5102(d).

	Papers Numbered
Notice of Motion, Affirmation, Exhibits.....	1-12
Affirmation in Opposition, Exhibits.....	13-21
Reply Affirmation.....	22

Upon the foregoing papers, it is ordered that this motion is determined as follows:

This is a negligence action to recover monetary damages for personal injuries allegedly suffered as a result of a motor vehicle accident on February 16, 2012. The caption of this matter is as stated above and not as incorrectly appearing on defendant's motion papers.

Defendant moves for summary judgment dismissing plaintiffs' complaint on the ground that plaintiffs did not sustain a serious injury, as defined by the No-Fault Law (Insurance Law §5102[d]).

Pursuant to the No-Fault Law, in order to maintain an action for personal injury, a plaintiff must establish that a "serious injury" has been sustained (see, Insurance Law §5104; Licari v. Elliot, 57 N.Y.2d 230 [1982]). In moving for summary judgment, the proponent must tender sufficient evidence to show the absence of any material issue of fact and the right to judgment as a matter of law (see, Alvarez v. Prospect Hospital, 68 N.Y.2d 320 [1986]; Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851

[1985]). In the present matter, defendant has the burden of proving, by submitting competent evidence in admissible form, that plaintiffs have not suffered a "serious injury" (see, Lowe v. Bennett, 122 A.D.2d 728 [1 Dept. 1986], affirmed, 69 N.Y.2d 701 [1986]; Carriollo v. DiPaolo, 56 A.D.3d 712 [2 Dept. 2008]). Upon movant's meeting such burden, the burden shifts to plaintiffs, and it is then incumbent upon plaintiffs to produce prima facie evidence, in admissible form, to support the claim of "serious injury" (see, Licari, supra; Lopez v. Senatore, 65 N.Y.2d 1017 [1985]; Felix v. Silred, 54 A.D.3d 891 [2 Dept. 2008]).

In support of the motion, defendant submitted plaintiffs' bill of particulars (Ex. D), plaintiffs' depositions (Ex. E & F) and the medical affirmations of Dr. Robert Israel, dated January 22, 2013 (Ex. G & I) and Dr. Stephen Lastig, dated September 4, 2012 (Ex. H & J). Plaintiffs' bill of particulars (Ex. D) states, inter alia, that plaintiff Fu Yan Wang ("Wang") sustained "focal intrasubstance tear involving the subscapularis tendon" in her right shoulder, "partial thickness tear of the anterior cruciate ligament. Grade 1 meniscal capsular separation in the region of the anterior medial meniscus" in her left knee" and "subligamentous herniated disc at the L5-S1 level" (¶10) and that plaintiff Yi Xu ("Xu") sustained "focal intrasubstance tear involving the supraspinatus tendon" in his left shoulder", "partial thickness tear of the anterior cruciate ligament. Grade 1 meniscal capsular separation in the region of the medial meniscus" of his left knee and "central herniated disc at the L4-L5 level" (¶10). At her deposition (Ex. E), plaintiff Wang testified she missed "two months" from work at the family restaurant as a result of the subject accident (p. 31) and at his deposition (Ex. F), plaintiff Xu claimed he missed "two or three days" from work at the family restaurant as a result of the subject accident (p. 32).

Dr. Robert Israel, an orthopedist, examined plaintiffs on January 22, 2013 on behalf of defendant and found normal ranges of motion in plaintiff Wang's cervical spine, right shoulder, right wrist and right knees (Ex. G). Dr. Israel determined plaintiff Wang's examination revealed "resolved sprain" of the cervical spine and right shoulder, knee and wrist with "no disability" as a result of the subject accident.

With respect to plaintiff Xu, Dr. Israel found normal ranges of motion in said plaintiff's cervical spine and left knee (Ex. I). Dr. Israel determined plaintiff Xu's examination revealed "resolved sprain" of plaintiff's cervical spine and left knee with "no disability" as a result of the subject accident.

Defendants also submitted affirmations of Dr. Stephen Lastig, a radiologist, who examined the MRI study of plaintiff Wang's right knee, taken on February 29, 2012 (Ex. H), on behalf of defendant and found "normal MRI of the right knee". Dr. Lastig's review of plaintiff Xu's MRI study of the left knee, taken on February 29, 2012 (Ex. J) revealed "small joint effusion. No evidence of internal derangement or osseous injury" and opined that there were no findings "causally related" to the subject accident.

Defendant's medical evidence that plaintiffs sustained no permanency, considered along with the fact that plaintiffs have failed to allege a cause of action for lost earnings (Ex. D, ¶20) and plaintiffs' admissions that they did not lose more than "two months" from work (Ex. E, p. 31; Ex. F, p. 32), was sufficient to make a prima facie showing that plaintiffs did not sustain "serious injury" (see, Pommels v. Perez, 4 N.Y.3d 566 [2005]; Hasner v. Budnik, 35 A.D.3d 366 [2 Dept. 2006]).

The burden thus shifted to plaintiffs to demonstrate the existence of a triable issue of fact as to whether they sustained a "serious injury" (see, Gaddy v. Eyler, 79 N.Y.2d 955 [1992]). In opposition, plaintiffs submitted their own affidavits sworn to on August 2, 2013 (Opposition, Ex. C & G), undated affirmations of Dr. Yan Q. Sun, (Opp., Ex. B & F) and undated affirmations of Dr. Ayoob Khodadadi (Opp., Ex. D & H). However, these submissions are deficient and fail to rebut defendant's prima facie entitlement to summary judgment herein.

Counsel's affirmation in opposition dated August 6, 2013, submitted without personal knowledge of plaintiffs' injuries, is inadmissible on medical issues (see, Huerta v. Longo, 63 A.D.3d 684 [2 Dept. 2009]; Jefferson v. Village of Ossining, 18 A.D.3d 502 [2 Dept. 2005].

Dr. Sun's examinations of plaintiffs on April 11, 2012 and on May 11, 2013 (Opp., Ex. B & F) allegedly revealed decreased ranges of motion in, inter alia, plaintiffs' lumbar spines, right or left shoulders and left or right knees, although such findings are not determinative herein. To defeat summary judgment, plaintiffs are required to demonstrate restricted ranges of motion based upon findings both recent and contemporaneous with the accident (see, Perl v. Meher, 74 A.D.3d 930 [2 Dept. 2010]; Linton v. Nawaz, 62 A.D.3d 434 [1 Dept. 2009]; Lee v. McQueens, 60 A.D.3d 914 [2 Dept. 2009]). Dr. Sun first examined plaintiffs on April 11, 2012, over seven weeks after the accident. As such, plaintiffs' opposition is devoid of medical evidence, either qualitative or quantitative, showing an injury contemporaneous

with the date of accident, and, as such, the conclusions of Dr. Sun regarding causation and permanence are merely speculative (see, Perl v. Meher, 18 N.Y.3d 208 [2011]; Ferebee v. Sheika, 58 A.D.3d 675 [2 Dept. 2009]). Further, to the extent that Dr. Sun's findings are predicated upon unsworn reports of others, Dr. Sun's report is based on hearsay and is not competent evidence to defeat summary judgment (see, Elshaaraway v. U-Haul Co. of Mississippi, 72 A.D.3d 878 [2 Dept. 2010]; Jemmott v. Lazofsky, 5 A.D.3d 558 [2 Dept. 2004]). Dr. Khodadadi's MRI findings (Opp., Ex. D & H) do not address a causal connection to the subject accident.

Plaintiffs thus failed to submit any admissible medical evidence showing the extent or degree of any limitation based upon either a qualitative or a quantitative examination of plaintiffs which was contemporaneous with the accident (see, Ranzie v. Abdul-Massih, 28 A.D.3d 447 [2 Dept. 2006]; Yeung v. Rojas, 18 A.D.3d 863 [2 Dept. 2005]). As such, plaintiffs have failed to establish that they sustained either a fracture, a significant disfigurement, a permanent loss of use, a permanent consequential limitation, or a significant limitation, as required by Insurance Law §5102(d).

As such, plaintiffs have failed to submit admissible medical evidence that the injuries found by Drs. Sun and Khodadadi are causally related to the subject accident (see, Pommells v. Perez, 4 N.Y.3d 566 [2005]). Further, plaintiffs have failed to submit admissible medical evidence that they was unable to perform substantially all of their daily activities for not less than ninety of the first one hundred eighty days after the accident as a result of the injuries sustained in the subject accident (see, Saetia v. VIP Renovations, Inc., 68 A.D.3d 1092 [2 Dept. 2009]; Geliga v. Karibian, Inc., 56 A.D.3d 518 [2 Dept. 2008]). As a result, plaintiffs have failed to establish that they sustained a "serious injury", as required by Insurance Law §5102(d), and have failed to raise a triable issue of fact sufficient to defeat defendants' prima facie entitlement to summary judgment herein.

Accordingly, defendant's summary judgment motion is hereby granted and plaintiffs' complaint is hereby dismissed.

This Constitutes the Decision and Order of the Court.

Dated: October 17, 2013

Denis J. Butler, J.S.C.