

<b>Hoe Suk Nam v Schossig</b>
2015 NY Slip Op 31721(U)
September 8, 2015
Supreme Court, Queens County
Docket Number: 11142/2013
Judge: Robert J. McDonald
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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

HOE SUK NAM, Index No.: 11142/2013
Plaintiff, Motion Date: 08/03/15
- against - Motion No.: 76
SAMUEL CHRISTOPHER SCHOSSIG and C.A. Motion Seq.: 2
GRAMAROSSO,

Defendants.

- - - - - x

The following papers numbered 1 to 8 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):

Table with 2 columns: Document Name and Papers Numbered. Includes entries for Notice of Motion-Affirmation-Exhibits, Affirmation in Opposition-Exhibits, and Reply Affirmation-Exhibit.

In this negligence action, plaintiff seeks to recover
damages for personal injuries she allegedly sustained as a result
of a motor vehicle accident that occurred on May 4, 2013, at
approximately 7:00 a.m., at or near the intersection of 44th
Avenue and 58th Street in Woodside, New York. Plaintiff alleges
that she sustained serious injuries to her lumbar spine and left
knee as a result of the impact.

Plaintiff commenced this action by filing a summons and
verified complaint on June 10, 2013. Issue was joined by service
of defendants' verified answer dated September 5, 2013. A Note of
Issue was filed by plaintiff on November 7, 2014. Defendants now
move for an order pursuant to CPLR 3212(b), granting summary
judgment dismissing plaintiff's complaint on the ground that she
did not suffer a serious injury as defined by Insurance Law §
5102.

In support of the motion, defendants submit an affirmation from counsel; a copy of the pleadings; a copy of plaintiff's verified bill of particulars; a copy of the transcript of plaintiff's examination before trial taken on May 12, 2014; the affirmed medical report of orthopedic surgeon, Edward A. Toriello, M.D.; the affirmed medical report of radiologist Jonathan Lerner, M.D.; a copy of the Preliminary Conference Order; a copy of the Note of Issue; and a copy of an MRI report from Ayoob Khodadadi, M.D.

Plaintiff contends that as a result of the accident she sustained, inter alia, disc bulges at L2-3, L3-4, and L5-S1; broad based flat disc herniation at L4-L5 with bilateral foraminal narrowing; lumbar sprain; and left knee joint effusion. Plaintiff asserts that she sustained a serious injury as defined in Insurance Law § 5102(d) in that she sustained a permanent loss of use of a body organ, member function or system; a permanent consequential limitation or 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 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.

Dr. Toriello examined plaintiff on June 17, 2014. Plaintiff reported to Dr. Toriello that she was involved in a motor vehicle accident on May 4, 2013 at which time she sustained injuries to her lower back, left knee, and left shoulder. She presented with pain to her lower back, left shoulder, and left knee. Plaintiff stated that she missed one week from work due to her injuries. Dr. Toriello performed objective range of motion testing with a goniometer, which revealed no limitations of range of motion of the lumbosacral spine or left knee. His diagnosis was resolved left knee contusion and resolved low back strain, concluding that plaintiff has no medical necessity for physical therapy, orthopedic treatment, or future diagnostic testing. Dr. Toriello further concluded that plaintiff is able to work and perform normal activities of daily living without restriction.

Defendant also submits the affirmed report from Dr. Lerner who performed a radiological review of the MRI taken of plaintiff's lumbar spine on June 26, 2013. Dr. Lerner concludes that his evaluation of plaintiff's lumbar spine MRI examination reveals no causal relationship with the subject accident. Dr. Lerner also reviewed the MRI of plaintiff's left knee take on June 13, 2013, and concludes that there is no causal relationship with the subject accident.

In his examination before trial taken on May 12, 2014, plaintiff testified that she was the driver of a Toyota sedan at the time of the subject accident. At the time of the impact she got nervous and felt dizziness and her left knee struck the dashboard. Immediately after the accident, she felt left knee pain and lower back pain. She did not tell the responding police officer that she was hurt. She walked home and then walked back to the scene of the accident with her sister. She went to work on the day of the accident at approximately 2:00 p.m. She first sought medical attention two days after the accident with Dr. Jong Won Yom, a chiropractor. She previously injured her lower back, upper back, and right shoulder in a prior motor vehicle accident that occurred in 2010. She treated with Dr. Yom two to three times a week for three months after the subject accident. She has no future appointments with any doctor or health care provider regarding the injuries she sustained in the subject accident. She is currently employed as a nail technician. Prior to the accident and on the day of the accident, she was employed as a nail technician doing manicures, pedicures and waxing. After the accident, she only did manicures. She lies down in the bed in the waxing room two or three times per day at work to rest. Due to the knee pain, she cannot climb stairs while holding heavy things in her hands and she cannot sit for long periods of time.

Defendants' counsel contends that the medical reports of Drs. Toriello and Lerner, together with plaintiff's testimony at her examination before trial in which she testified that she only missed about one week from work as a result of the accident, is sufficient to demonstrate that plaintiff has not sustained a permanent consequential limitation or 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 the 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 her counsel; the affirmed medical report of orthopedic surgeon Dov J. Berkowitz, M.D.; the affirmed medical report of chiropractor Jong Won Yom, D.C.; and copies of Dr. Toriello's affirmed medical reports from 2006, 2007, and 2009.

Plaintiff was first examined on May 6, 2013, two days following the accident, by Dr. Yom. At the initial evaluation, plaintiff presented with complaints of pain in her neck, right shoulder, fingers of the right hand, right wrist, lower back, and left knee. The initial physical

examination revealed loss of range of motion of the cervical spine and lumbar spine. Dr. Yom re-evaluated plaintiff on June 27, 2015. He found loss of range of motion of the cervical spine and lumbar spine. He stated that plaintiff's injuries were causally related to the subject accident.

Dr. Berkowitz also examined plaintiff on July 19, 2013, two and a half months after the subject accident. Plaintiff complained of having left knee pain. Dr. Berkowitz states that plaintiff was able to fully extend and flex her left knee to 130 degrees, with the normal being 150 degrees. He also states that the MRI report of the left knee was positive for small joint effusion. Dr. Berkowitz examined plaintiff again on May 21, 2015. Plaintiff advised him that her knee pain has ultimately improved, but she still had some intermittent knee pain when doing stressful type of activities. Upon physical examination, plaintiff was still able to fully extend and flex to 130 degrees. Dr. Berkowitz concludes that plaintiff's injury to her left knee was 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 defendants' 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]).

Plaintiff alleges that defendants failed to meet their prima facie burden because Dr. Toriello departed from the

normal range of motion measurements used in his earlier affidavits. Plaintiff submits three affidavits from Dr. Toriello from 2006, 2007, and 2009, which use different normal values. In reply, Dr. Toriello affirms that normal values of range of motion used in his report regarding plaintiff were obtained from the American Medical Association Guidelines to the Evaluation of Permanent Impairment, 5<sup>th</sup> Edition, which has been the prevailing authority in orthopedic range of motion measurement since 2011, which is after the date of the old affirmed reports submitted by plaintiff.

Here, the proof submitted by defendants, including the affirmed medical reports of Drs. Toriello and Lerner, as well as plaintiff's deposition testimony stating she only missed one week of work as a result of the accident, is sufficient to meet defendants' 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]).

In opposition, plaintiff failed to raise a triable issue of fact (see Zuckerman v City of New York, 49 NY2d 557, [1980]; Cohen v A One Prods., Inc., 34 AD3d 517 [2d Dept. 2006]). To prove the extent or degree of an alleged physical limitation by a plaintiff, an expert must provide that the evaluation has an objective basis and the expert must compare the plaintiff's limitations to the normal function (see Toure v Avis Rent a Car Systems, Inc., 98 NY2d 345 [2002]). Dr. Berkowitz fails to indicate what authoritative guideline or objective measurement he utilized for obtaining the 130 degrees measurement. Moreover, Dr. Berkowitz does not state that such limitation is significant or that plaintiff's left knee injury is permanent. Dr. Yom fails to indicate the objective measurement used to obtain range of motion values upon his physical examination of plaintiff as well. Dr. Yom also refers to diagnostic testing, specifically an MRI of plaintiff's lumbar spine and left knee. However, he fails to annex such reports. As such, Dr. Yom is not permitted to rely upon the unattached medical records to raise a triable issue of fact (see Springer v Arthurs 22 AD3d 829 [2d Dept. 2005]; Mahoney v Zerillo, 6 AD3d 403 [2d Dept. 2004]; D'Amato v Mandello, 2 AD3d 482 [2d Dept. 2003]).

Lastly, plaintiff failed to submit competent medical evidence that the injuries allegedly sustained by her as a result of the subject accident rendered her unable to perform

substantially all of her daily activities for not less than 90 days of the first 180 days following the accident. Plaintiff herself testified that she only missed one week of work as a result of the accident (see Ayotte v Gervasio, 81 NY2d 1062 [1993]; Valera v Singh, 89 ADd 929 [2d Dept. 2011]; Lewars v Transit Facility Mgt. Corp., 84 AD3d 1176 [2d Dept. 2011]; Nieves v Michael, 73 AD3d 716 [2d Dept. 2010]; Joseph v A & H Livery, 58 AD3d 688 [2d Dept. 2009]).

Accordingly, because the evidence relied upon by plaintiff is insufficient to create a triable issue of fact with respect to any of the statutory categories of serious injury, and for the reasons set forth above, it is hereby,

ORDERED, that defendants' motion for summary judgment is granted and plaintiff's complaint is dismissed, and it is further

ORDERED, that the Clerk of Court is directed to enter judgment accordingly.

Dated: Long Island City, N.Y.  
September 8, 2015

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**ROBERT J. MCDONALD**  
**J.S.C.**