

Yong Jun Li v Adom

2016 NY Slip Op 30853(U)

May 2, 2016

Supreme Court, Queens County

Docket Number: 317/2013

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

YONG JUN LI,

Index No.: 317/2013

Plaintiff,

Motion Date: 4/13/16

- against -

Motion No.: 74

NANA K. ADOM,

Motion Seq No.: 1

Defendant.

- - - - - x

The following papers numbered 1 to 7 read on this motion by defendant for an order pursuant to CPLR 3212, granting defendant summary judgment and dismissing plaintiff's complaint on the ground that plaintiff fails to meet the serious injury threshold requirement of Insurance Law § 5102(d):

	<u>Papers</u> <u>Numbered</u>
Notice of Motion-Affirmation-Exhibits.....	1 - 4
Affirmation in Opposition-Exhibits.....	5 - 7

This is a personal injury action in which plaintiff seeks to recover damages for injuries he allegedly sustained in a motor vehicle accident that occurred on June 4, 2012 on 3rd Avenue and East 80th Street, New York County, New York. Plaintiff alleges that as a result of the accident he sustained serious injuries to his cervical spine, lumbar spine, and left shoulder.

Plaintiff commenced this action by filing a summons and complaint on January 7, 2013. Defendant joined issue by service of an answer dated January 30, 2013. Plaintiff filed a Note of Issue on November 19, 2015. Defendant now timely moves for an order pursuant to CPLR 3212, dismissing plaintiff's complaint on the ground that the injuries claimed by him fail to satisfy the serious injury threshold requirement of Section 5102(d) of the Insurance Law.

In support of the motion, defendant submits an affirmation from counsel, Alexander Perchekly, Esq.; 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 August 6, 2015; a copy of plaintiff's medical records from NY-Presbyterian Weill Cornell Hospital; a copy of the affirmed report of trauma expert, Dr. Stacey M. Donegan, M.D.; a copy of the affirmed orthopedic medical report of Dr. Thomas P. Nipper, M.D.; and a copy of the affirmed MRI review of Dr. David A. Fisher, M.D.

At his examination before trial, plaintiff testified that at the time of the accident he was the driver of an electrical scooter. His scooter was struck by defendant's vehicle. He was taken to NY-Presbyterian Weill Cornell Hospital by ambulance. He was confined to bed for approximately one month and his home for approximately two and a half months following the subject accident.

Dr. Donegan examined the hospital records from NY-Presbyterian Weill Cornell Hospital, and found that there is no indication of a significant injury to plaintiff as a result of the subject accident. Plaintiff complained of right thigh, right knee, left shoulder, and left sided abdominal pain. He had no complaints of pain to his neck or lower back. He had normal range of motion in his left shoulder. X-rays of his chest and bilateral shoulders were ordered. Plaintiff, however, did not remain in the hospital to complete his work up, including the ordered MRI of the left shoulder. The emergency room doctor documented that plaintiff walked out of the emergency room without notifying staff and left against medical advice. Dr. Donegan concludes that the alleged injuries are unsupported by plaintiff's own complaints to the ER staff and their examinations.

Dr. Nipper examined plaintiff on September 17, 2015. Dr. Nipper identified the medical documents reviewed and performed range of motion testing with the use of a goniometer. He found all normal ranges of motion regarding plaintiff's cervical spine, lumbar spine, and right shoulder. Dr. Nipper does note a fifty degree loss in range of motion in plaintiff's left shoulder regarding abduction and a thirty degree loss in range of motion in plaintiff's left shoulder regarding external rotation. His impression is cervical and lumbar sprain/strain, resolved, and internal derangement left shoulder, resolved. He finds that there is no disability resulting from the subject accident. Dr. Nipper states that plaintiff is able to perform his usual activities of daily living, and may work with restriction. Regarding a causal relationship, Dr. Nipper found a cause and effect relationship between plaintiff's original complaints and the subject accident.

Dr. Fisher conducted an independent radiology review. He found that the MRI of the left shoulder, performed on June 30, 2012, reveals no rotator cuff or labral tear, and there is no radiographic evidence of traumatic or causally related injury. Dr. Fisher reviewed the MRI of plaintiff's lumbar spine performed on July 14, 2012. He concludes that there are degenerative changes at the L2/3, L3/4, and L4/5 levels. There are no disc herniations. He found that the mild disc bulges noted are compatible with the amount of degenerative change present. He found there is no radiographic evidence of traumatic or causally related injury to the lumbar spine. Regarding the cervical spine MRI taken on July 14, 2012, defendant found mild degenerative changes, most pronounced at the C5/6 level. He states that there are no disc herniations and that the disc bulge is compatible with the amount of degenerative change present. He found there is no radiographic evidence of traumatic or causally related injury to the cervical spine.

Defendant's counsel contends that the evidence submitted is sufficient to establish, prima facie, that plaintiff has not sustained a fracture; permanent consequential limitation of use of a body organ or member; or significant limitation of use of a body function or system. Counsel also contends that plaintiff, who alleges that she was confined to bed and home for approximately three months as a result of the accident, did not sustain a medically determined injury or impairment of a nonpermanent nature which prevented her, for not less than 90 days during the immediate 180 days following the occurrence, from performing substantially all of her usual daily activities.

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 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 her or his

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]).

In opposition, plaintiff submits an affirmation from counsel, James Lo, Esq.; a copy of the ambulance call report and hospital records from NY Presbyterian-Weill Cornell Hospital; the affirmed medical report of Dr. Ki Y. Park, M.D.; the affirmed medical report of Dr. Mingxu Xu, M.D.; the MRI report of Dr. Jeffrey S. Chess, M.D.; and the affirmed medical report of Dr. Arden M. Kaisman, M.D.

Counsel first alleges that defendant failed to meet defendant's prima facie burden because, inter alia, Dr. Nipper, who examined plaintiff three years after the subject accident, found range of motion deficits regarding plaintiff's left shoulder. Additionally, Dr. Nipper's report causally relates plaintiff's alleged injuries to the subject accident, and thus, Dr. Nipper's opinion directly contradicts Dr. Fisher's opinion that plaintiff's cervical spine and lumbar spine injuries are degenerative in nature.

Accordingly, the conclusion that plaintiff had no disability or impairment was, therefore, directly contradicted by Dr. Nipper's recorded objectively-measured limitations in range of motion (see Grant v Parsons Coach, Ltd., 12 AD3d 484 [2d Dept. 2004]; Lopez v Sentaroe, 65 NYS2d 1017 [1985][finding that providing evidence of a ten degree limitation in range of motion is sufficient for the denial of summary judgment to defendants).

Based on the foregoing, this Court finds that defendant 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]). Where a defendant fails to meet the defendant's prima facie burden, the court will deny the motion for summary judgment regardless of the sufficiency of the opposition papers (see Ayotte v Gervasio, 81 NY2d 1062 [1993]; Barrera v MTA Long Island Bus, 52 AD3d 446 [2d Dept. 2008]; David v Bryon, 56 AD3d 413 [2d Dept. 2008]).

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

ORDERED, that the motion by defendant NANA K. ADOM for an order granting summary judgment dismissing plaintiff's complaint is denied; and it is further

ORDERED, that this matter remains on the calendar of the Trial Scheduling Part for May 23, 2016.

Dated: May 2, 2016
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.