

**Hwang v Rios**

2017 NY Slip Op 32198(U)

September 18, 2017

Supreme Court, Queens County

Docket Number: 704468/2015

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

SEA WOONG HWANG and HAE JUNG CHUNG,
Plaintiffs,
- against -
JAIRO RIOS,
Defendant.

Index No.: 704468/2015
Motion Date: 9/7/17
Motion No.: 65
Motion Seq.: 3

FILED
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COUNTY CLERK
QUEENS COUNTY

The following electronically filed documents read on this motion by plaintiffs for an Order pursuant to CPLR 5015(a)(1), vacating the Order of this Court dated May 9, 2017, granting on default summary judgment in favor of defendant on the ground that plaintiffs did not sustain serious injuries pursuant to Insurance Law Section 5102(d); restoring defendants' motion for summary judgment, and this case, to the Court's calendar; accepting plaintiffs' affirmation in opposition to defendant's motion; and denying defendant's motion for summary judgment:

Table with 2 columns: Document Name and Page Range. Includes entries for Notice of Motion-Affirmation-Exhibits (EF 57 - 63), Affirmation in Opposition-Exhibits (EF 64 - 72), and Affirmation in Reply-Exhibits (EF 73 - 74).

This is a negligence action to recover damages for personal injuries allegedly sustained by plaintiffs arising out of a motor vehicle accident that occurred on October 4, 2014 on Broadway at or near its intersection with 37th Avenue, in Queens County, New York. Plaintiff Sea Woong Hwang alleges that as a result of the subject accident, he sustained serious injuries to his cervical and lumbar spine. Plaintiff Hae Jung Chung alleges that as a result of the subject accident, she sustained serious injuries to her right shoulder, cervical spine, left shoulder, and lumbar spine.

Plaintiffs commenced this action by filing a summons and complaint on April 27, 2015. Defendant joined issue by service of an answer on June 25, 2015. Thereafter, defendant moved for summary judgment on the ground that the injuries claimed fail to satisfy the serious injury threshold requirement of Section 5102(d) of the Insurance Law. Plaintiff did not oppose the motion. By Short Form Order dated May 9, 2017 and entered on May 15, 2017, this Court granted defendant's summary judgment motion. Plaintiffs now move pursuant to CPLR 5015(a), seeking to vacate the prior Order, restore the prior motion for summary judgment, and upon restoration, denying defendant's motion.

A party seeking to vacate an order entered upon a default in opposing a motion must demonstrate both a reasonable excuse for the default and a potentially meritorious opposition to the motion (see Dokaj v Ruxton Tower Ltd. Partnership, 91 AD3d 812 [2d Dept. 2012]; Karamuco v Cohen, 90 AD3d 998 [2d Dept. 2011]; Donovan v Chiapetta, 72 AD3d 635 [2d Dept. 2010]). The determination of what constitutes a reasonable excuse lies within the trial court's sound discretion, and if no reasonable excuse is found, the court need not consider whether meritorious opposition was sufficiently shown (see Diaz v Ralph, 66 AD3d 819 [2009]; Tribeca Lending Corp. v Correa, 92 AD3d 770, 771 [2d Dept. 2012]; Maida v Lessing's Rest. Servs., Inc., 80 AD3d 732, 733 [2d Dept. 2011]). A claim of law office failure must be supported by a detailed and credible explanation of the default at issue (see Neilson v 6D Farm Corp., 123 AD3d 676 [2d Dept. 2014]; Eastern Savings Bank, FSB v Charles, 103 AD3d 683 [2d Dept. 2013]; Henry v Kuveke, 9 AD3d 476 [2d Dept. 2004]).

In support of the motion, plaintiffs submit an affidavit from Haewon Khym dated June 27, 2017. Ms. Khym affirms that one of her job responsibilities is entering adjourn dates into her firm's calendar system. On February 21, 2017, she received a letter from per diem attorney, Emmanuel Kossaris, Esq., who was hired by her firm to appear on the summary judgment motion in this matter. The letter stated that the adjourn date for the motion is April 24, 2017, opposition served by April 10, 2017. Ms. Khym further affirms that she only entered the adjourn date into the calendar system. She did not enter the date opposition was to be served. As a result, plaintiffs' opposition papers were rejected on the return date because they were untimely served.

In opposition, defendant's counsel contends that plaintiffs' counsel failed to set forth a reasonable excuse as counsel did not offer any explanation for the firm's failure to comply with CPLR 2214(b), requiring opposition papers to be served at least seven days before the return date. Counsel further contends that

plaintiffs previously filed a motion for the same relief requested herein, but failed to appear on the return date and submit working copies. As a result of such failure, the prior motion was "marked off".

Upon a review of the motion papers and opposition thereto, and as public policy favors a disposition on the merits rather than on default, (see Billingly v Blagrove, 84 AD3d 848 [2d Dept. 2011]; Centennial Elevator Indus., Inc. v Ninety-Five Madison Corp., 90 AD3d 689 [2d Dept. 2011]; Dimitriadis v Visiting Nurse Service of New York, 84 AD3d 1150 [2d Dept. 2011]), this Court finds that plaintiffs established a reasonable excuse.

Regarding a potentially meritorious defense, plaintiffs submit their testimony from their examinations before trial to establish that they did sustain a serious injury under the Insurance Law.

Based on the above, the prior Order of this Court dated May 9, 2017 and entered on May 15, 2017 is vacated pursuant to CPLR 5015(a). The motion seeking summary judgment on the ground that neither plaintiff sustained a serious injury pursuant to Insurance Law Section 5102(d) will be determined herein.

In support of the motion for summary judgment, defendant submits the transcript of the examination before trial of plaintiff Sea Woong Hwang taken on March 9, 2016. Plaintiff Hwang testified that he was involved in the subject accident. He was never treated in a hospital as a result of the subject accident. He was confined to bed and home for one week after the accident. He did not take any time off from work.

Edward M. Weiland, M.D. performed an independent medical examination on plaintiff Hwang on April 12, 2016. Plaintiff Hwang reported current complaints of intermittent neck pain without any radicular component and persistent lower back pain without any radicular component. Dr. Weiland identifies the records reviewed prior to rendering his report. He performed range of motion testing with a goniometer and found normal ranges of motion in plaintiff Hwang's cervical spine, lumbar spine, and thoracic spine. All other objective tests were normal. Dr. Weiland diagnosed plaintiff with resolved cervical and lumbosacral sprain/strain. He notes a normal neurological examination. Dr. Weiland opines that there is no primary neurologic disability as it relates to the injuries reportedly occurring on October 4, 2014. Dr. Weiland did not find any neurologic residual or permanency.

Mark J. Decker, M.D. performed an independent radiology evaluation of the MRI of plaintiff Hwang's cervical spine dated December 13, 2014 and the MRI of the lumbar spine dated December 6, 2014. Dr. Decker found no evidence to suggest that an acute traumatic injury was sustained. Regarding the cervical spine, no herniation or fracture was found. Regarding the lumbar spine, Dr. Decker found degenerative disc disease, not causally related to the subject accident.

Defendant also submits the transcript of the examination before trial of plaintiff Hae Jung Chung taken on March 9, 2016. Plaintiff Chung testified that she was involved in the subject accident. She was confined to bed for four days following the subject accident.

Dr. Weiland also performed an independent medical examination on plaintiff Chung on April 12, 2016. Plaintiff Chung reported current complaints of pain in her neck, lower back, and right shoulder. Dr. Weiland identifies the records reviewed prior to rendering his report. He performed range of motion testing with a goniometer and found normal ranges of motion in plaintiff Chung's cervical spine, lumbar spine, and thoracic spine. All other objective tests were normal. Dr. Weiland diagnosed plaintiff with resolved cervical and lumbosacral sprain/strain. He notes a nonfocal neurological examination. Regarding the right shoulder, he notes history of contusion to the right shoulder and status post right shoulder arthroscopic procedure. Dr. Weiland opines that there is no primary neurologic disability as it relates to the injuries reportedly occurring on October 4, 2014 and no finding of any neurologic residual or permanency.

Dr. Decker also performed an independent radiology evaluation of the MRIs of plaintiff Chung's cervical spine dated December 13, 2014, lumbar spine dated November 22, 2014, right shoulder dated December 13, 2014, and left shoulder dated December 6, 2014. Dr. Decker found no evidence to suggest that an acute traumatic injury was sustained. The MRI of the cervical spine revealed straightening of lordosis and degenerative disc disease, which were not causally related to the subject accident. The MRI of the lumbar spine revealed herniations, bulging, and mild central stenosis, which Dr. Decker opines are all degenerative, longstanding, and not causally related to the subject accident. The MRIs of the right and left shoulders revealed AC joint hypertrophy with rotator cuff tendinopathy, diffuse capsular thickening, which can be seen with adhesive capsulitis. Dr. Decker opines that such findings were degenerative, longstanding, and not causally related to the subject accident.

Defendant contends that the evidence submitted demonstrates that no trauma was sustained by either plaintiff and, thus, is sufficient to establish, prima facie, that neither plaintiff has sustained an injury which resulted in a permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; or significant limitation of use of a body function or system. Defendant also contends that as plaintiff Hwang testified that he was only confined to his bed and home for one week following the subject accident, and as plaintiff Chung testified that she was only confined to bed for four days following the subject accident, neither plaintiff sustained a medically determined injury or impairment of a nonpermanent nature which prevented them for not less than 90 days during the immediate 180 days following the occurrence, from performing substantially all of their usual daily activities.

In opposition, plaintiff Hwang submits an affirmation from Alan Ng, M.D. Plaintiff Hwang first presented to Dr. Ng on October 20, 2014 with complaints of neck pain radiating to the trapezius muscle bilaterally and right shoulder pain. Dr. Ng identifies that records he reviewed and found decreased ranges of motion regarding plaintiff Hwang's cervical spine and lumbar spine. Dr. Ng examined plaintiff Hwang on November 10, 2014, December 8, 2014, February 2, 2015, and April 11, 2015. Most recently, Dr. Ng examined plaintiff Hwang on January 21, 2017. Plaintiff Hwang presented with continued complaints of neck pain radiating to the trapezius muscle bilaterally and right shoulder and low back pain, worse on the right side. Dr. Ng performed range of motion testing and found limited range of motion regarding plaintiff Hwang's lumbar spine and cervical spine. Right upper extremity range of motion was also restricted. He reviewed the MRIs and diagnosed plaintiff Hwang with lumbar herniated disk and cervical herniated disk. He opines that the injuries are permanent and causally related to the subject accident. Plaintiff Hwang is permanently partially disabled and cannot do any work involving prolonged bending or lifting.

Plaintiff Hwang also submits an affirmation from Ji Han, M.D. Plaintiff Hwang first presented to Dr. Han on October 15, 2014. Dr. Han performed range of motion testing on plaintiff Hwang's cervical and lumbar spine, and found reduced ranges of motion. Plaintiff Hwang followed up with Dr. Hwang through August 10, 2015. Plaintiff Hwang received epidural steroid injections. Dr. Han opines that Plaintiff Hwang's injuries to his cervical and lumbar spines are causally related to the subject accident. Dr. Han affirms that plaintiff Hwang stopped treating at his facility because his no-fault insurance cut off and he could not afford to pay out of pocket.



Plaintiff Hwang submits an affirmation from Ayoob Khodadadi, M.D. who reviewed the MRI of his cervical spine dated December 13, 2014 and the MRI lumbar spine dated December 6, 2014. Dr. Khodadadi found reversal of the cervical lordosis possibly due to muscular spasm, subligamentous C5-6 disc herniation, and ventral bulging at C6-7. Regarding the lumbar spine, Dr. Khodadadi found reversal of the lumbar lordosis possibly due to muscular spasm, subligamentous herniated discs at the L4-5 and L5-S1 levels, and ventral bulging at L5-S1 anteriorly.

Plaintiff Chung also submits an affirmation from Dr. Ng stating that plaintiff Chung's injuries to her cervical spine, lumbar spine, and right shoulder are causally related to the subject accident and not due to degeneration or a pre-existing condition. Dr. Ng first examined plaintiff on October 20, 2014. He performed range of motion testing and found restricted ranges of motion regarding plaintiff Chung's lumbar spine, cervical spine, and right shoulder. Dr. Ng examined plaintiff Chung on Also examined plaintiff Chung on November 10, 2014, December 8, 2014, February 2, 2015, and April 11, 2015. Most recently, on January 21, 2017, Dr. Ng examined plaintiff. Plaintiff Chung continued to exhibit neck pain radiating to her bilateral shoulders and low back pain. He performed range of motion testing and found limited ranges of motion regarding plaintiff Chung's lumbar spine, cervical spine, and bilateral shoulders. Dr. Ng diagnosed plaintiff Chung with lumbar and cervical herniated disks, left shoulder labral tear, and right shoulder impingement. Dr. Ng concludes that plaintiff Chung's injuries are permanent and causally related to the subject accident. Plaintiff Chung is partially disabled and cannot do any work involving prolonged bending or lifting.

Dr. Han also submits an affirmation regarding plaintiff Chung. Dr. Han first examined plaintiff Chung on October 15, 2014. He performed range of motion testing and found reduced ranges of motion regarding plaintiff Chung's cervical and lumbar spines. Dr. Han also performed epidural steroid injections. Dr. Han affirms that plaintiff Chung's injuries to her cervical spine, lumbar spine, and bilateral shoulders are causally related to the subject accident. He notes that plaintiff Chung stopped treating at his facility because her no-fault benefits were cut off and she could not afford to pay out of pocket.

Dr. Khodadadi reviewed the MRIs of her right shoulder dated December 13, 2014, left shoulder dated December 6, 2014, and cervical spine dated January 17, 2015. Regarding the right shoulder, Dr. Khodadadi found joint effusion possibly due to trauma, intrasubstance tear of the inferior labrum, and focal

tear of the subscapularis tendon. Dr. Khodadadi found reversal of the cervical lordosis possibly due to muscular spasm, bulging of annulus fibrosis at the C5-6 and C6-7 levels, and ventral bulging at C6-7 anteriorly. Regarding the left shoulder, he found joint effusion possibly due to trauma, biceps tendinitis, and focal tear of the inferior labrum.

Jeffrey C. Lee, M.D. reviewed the MRI taken of plaintiff Chung's lumbar spine dated November 22, 2014. Dr. Lee found, inter alia, disc herniations at the L3-4 and L4-5 levels.

Dov J. Berkowitz, M.D. submits an affirmation stating that plaintiff Chung underwent arthroscopic surgery to her right shoulder on January 23, 2015. Dr. Berkowitz opines that plaintiff Chung sustained a tearing of the labrum and tearing of the rotator cuff of the right shoulder that is causally related to the subject accident and not due to a pre-existing condition or degeneration.

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 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 defendant, including the affirmed medical reports of Drs. Weiland and Decker and plaintiffs' testimony, is sufficient to meet defendant's prima facie burden by demonstrating that neither plaintiff sustained 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 Hwang raised triable issues of fact as to whether he sustained a serious injury to his cervical and lumbar spines by submitting affirmations from Drs. Khodadadi, Ng, and Han attesting to the fact that plaintiff Hwang 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, 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]). Similarly, plaintiff Chung raised triable issues of fact as to whether she sustained a serious injury to her cervical spine, lumbar spine, and bilateral shoulders by submitting affirmations from Drs. Khodadadi, Lee, Berkowitz, Ng, and Han attesting to the fact that plaintiff Chung sustained injuries as a result of the subject accident, finding that plaintiff Chung had significant limitations in ranges of motion both contemporaneous to the accident and in a recent examination, and concluding that the limitations are permanent and causally related to the accident.

Additionally, Dr. Han adequately explained the gap in treatment by affirming that plaintiffs' no fault coverage had stopped and plaintiffs could not afford treatment out of pocket (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]). Plaintiffs submitted affidavits attesting to same.

As such, plaintiffs demonstrated issues of fact as to whether they sustained serious injuries 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 plaintiffs SEA WOONG HWANG & HAE JUNG CHUNG for an order vacating this Court's prior Order dated May 9, 2017 is granted, and upon restoring the prior motion for summary judgment on the ground that plaintiffs did not sustain serious injuries pursuant to Insurance Law Section 5102(d), defendants motion for an order granting summary judgment dismissing plaintiff's complaint is denied.

Dated: September 18, 2017  
Long Island City, NY



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ROBERT J. McDONALD  
J.S.C.

**FILED**  
SEP 22 2017  
COUNTY CLERK  
QUEENS COUNTY