Chao v Hadi
2009 NY Slip Op 30663(U)
March 13, 2009
Supreme Court, New York County
Docket Number: 105076/07
Judge: Paul Wooten
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SCANNED ON 3/27/2009

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN
Justice

PART 22

INDEX NO. 105076/07

STEPHEN CHAO,
Plaintiff,

- v -

MOTION DATE

MOTION SEQ. NO. 001

SALMON HADI and SAYEED N. QUADER,
Defendants.

MOTION CAL. NO. 32

The following papers, numbered 1 to 2 , were read on this motion by defendant for summary judgment on the threshold "serious injury" issue.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits (Memo)	2
Replying Affidavits (Reply Memo)	

FILED
MAR 27 2009
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☐ Yes ■ No

On January 14, 2007, plaintiff, a pedestrian, was struck by a vehicle owned by defendant Sayeed Quader and operated by defendant Salmon Hadi. The accident occurred on 36th Street at or near its intersection with Fifth Avenue, New York, New York. Plaintiff commenced this action, to recover damages for alleged personal injuries suffered as a result of the subject motor vehicle accident. The parties completed discovery and a Note of Issue was filed. Defendants now move for an order pursuant to CPLR § 3212, granting summary judgment and dismissing the complaint on the basis that plaintiff cannot prove that he suffered a serious injury, pursuant to Insurance Law § 5102 (d).

SERIOUS INJURY THRESHOLD

Pursuant to the Comprehensive Motor Vehicle Insurance Reparation Act of 1974 (now Insurance Law § 5101, *et seq.* - the "No Fault" statute), a party seeking damages for pain and suffering arising out of a motor vehicle accident must establish that he or she has sustained at least one of the categories of "serious injury" as set forth in Insurance Law § 5102 (d) (*Marquez*

v New York City Tr. Auth., 686 NYS2d 18 [1 Dept 1999]; *DiLeo v Blumberg*, 672 NYS2d 319 [1 Dept 1998]).

Insurance Law § 5102 (d) defines "serious injury" as:

> a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a on-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less that ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

Serious injury is a threshold issue, and thus, a necessary element of plaintiff's prima facie case (*Licari v Elliott*, 57 NY2d 230 [1982]; *Toure v Harrison*, 775 NYS2d 282 [1 Dept 2004]; Insurance Law § 5104 [a]). This is in accord with the purpose of the "No-Fault" law, which was to "'weed out frivolous claims and limit recovery to significant injuries'" (*Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345 [2002], quoting *Dufel v Green*, 84 NY2d 795, 798 [1995]; *Licari v Elliott*, 57 NY2d 234 [1982]; *Rubensccastro v Alfaro*, 815 NYS2d 514 [1 Dept 2006]).

In order to satisfy the statutory threshold, the plaintiff must submit competent objective medical evidence of his or her injuries, based on the performance of objective tests (*Grossman v Wright*, 707 NYS2d 233 [2 Dept 2000]; *Lopez v Senatore*, 65 NY2d 1017, 1019 [1985]). Subjective complaints alone are insufficient to establish a prima facie case of a serious injury (*Gaddy v Eyler*, 79 NY2d 955, 957 [1992]; *Scheer v Koubek*, 70 NY2d 678, 679 [1987]).

It is well settled that positive MRI results may constitute a serious injury within the meaning of Insurance Law §5102(d) (*see Pommels v Perez*, 797 NYS2d 380 [2005]; *Nagbe v Mimigreen Hacking Group, Inc.*, 802 NYS2d 416 [1 Dept. 2005]). Furthermore, a CT scan or MRI may constitute objective evidence to support subjective complaints (*see Arjona v Calcano*,

776 NYS2d 49 [1 Dept 2004]; *Lesser v Smart Cab Corp.*, 724 NYS2d 49 [1 Dept 2001]). The plaintiff's medical submissions must show when the tests were performed, the objective nature of the tests, what the normal range of motion should be and whether the plaintiff' s limitations were significant (*see Milazzo v Gesner*, 822 NYS2d 49 [1 Dept 2006]; *Vasquez v Reluzco*, 814 NYS2d [1 Dept 2006]).

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The issue of whether a claimed injury falls within the statutory definition of "serious injury" is a question of law for the courts which may decide the issue on a motion for summary judgment (*Perez v Rodriguez,* 809 NYS2d 15 [1 Dept 2006]). On a motion for summary judgment based upon a failure to sustain a serious injury, the defendants bear the initial burden of establishing the absence of a serious injury by tendering evidentiary proof in admissible form eliminating any material issues of fact from the case (*Toure v Avis Rent A Car Sys.*, *supra*; *see also Gaddy v Eyler*, *supra*; *Pirrelli v Long Is. R.R.*, 641 NYS2d 240 [1 Dept 1996]).

A defendant may rely either on the sworn or affirmed statements of their examining physician, plaintiff's deposition testimony and plaintiff's unsworn physician's records (*Fragale v Geiger*, 733 NYS2d 901 [2 Dept 2001]; *Pagano v Kingsbury*, 587 NYS2d 692 [2 Dept 1992]). An affirmed physician's report demonstrating that plaintiff was not suffering from any disability or consequential injury resulting from the accident is sufficient to satisfy a defendant's burden of proof (*see Gaddy v Eyler*, *supra*). In addition, the Courts have unanimously held that a party may not use an unsworn medical report prepared by the parties' own physician on a motion for summary judgment (see *Grasso v Angerami*, 79 NY2d 813 [1991]; *Offman v Singh*, 813 NY2d 56 [1 Dept 2006]). Moreover, CPLR § 2106 requires a physician's statement be affirmed (or sworn) to be true under the penalties of perjury.

Once a defendant has made such a showing, the burden shifts to the plaintiff to come

forward with prima facie evidence, in admissible form, to rebut the presumption that there is no issue of fact as to the threshold question (*see Pommells v Perez, supra*; *Gaddy v Eyler, supra*; *Perez v Rodriguez, supra*). A medical affirmation or affidavit based on a physician's own examination, tests, and review of the record, can support the existence and extent of a plaintiff's serious injury (*O'Sullivan v Atrium Bus Co.*, 668 NYS2d 167 [1 Dept 1998]). However, "where a defendant fails to meet his initial burden of establishing a *prima facie* case that the plaintiff did not sustain a serious injury, it is not necessary to consider whether the plaintiff's papers in opposition were sufficient to raise a triable issue of fact" (*see Offman v Singh, supra*; *Winegrad v New York Univ. Med Ctr., supra*).

In deciding a summary judgment motion, the court must bear in mind that issue finding rather that issue determination is the key to summary judgment. See *Sillman v Twentieth Century Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 489 (1957). Furthermore, since summary judgment is a drastic remedy which deprives a litigant of her day in court, the evidence adduced on the motion must be liberally construed in the light most favorable to the opposing party. See *Kesselman v Lever House Restaurant*, 816 NYS2d 13, 29 AD3d 302,, [1 Dept 2006]; *Goldman v Metropolitan Life insurance Company*, 788 NYS2d 25, 13 AD3d 289, [1 Dept 2004].

DISCUSSION

In support of their motion, defendants submit, *inter alia*, plaintiff's deposition testimony and the affirmed medical reports of Dr. Charles Bagley, a neurologist, Dr. Michael Rafiy, an orthopedic surgeon. Dr. Bagley and Dr. Rafly's independent medical examination cover the plaintiff's spine. Defendants also submit, an unaffirmed x-ray report of plaintiff's radiologist, Dr. Eddy Tong of the plaintiff's shoulder, which indicates not bone injury. Dr. Bagley examined plaintiff on November 27, 2007, Dr. Bagley determined, without reviewing plaintiff's medical

records, that "from a neurological point of view the claimant is not disabled." Dr. Rafiy examined plaintiff on December 13, 2007. Dr. Rafiy concluded without reviewing plaintiff's medical records, that despite plaintiff's "subjective complaints there were no objective findings to support them."

The Court notes that in his medical report, defendants doctor, Dr. Bagley, acknowledged plaintiff's subjective complaints of pain to his right shoulder. However, Dr. Bagley failed to adequately address the complaint by an adequate examination of the right shoulder. Moreover, Dr. Bagley failed to conduct any objective test on plaintiff's right shoulder to support a no serious injury conclusion. However, Dr. Rafiy, defendants second doctor, fails to review plaintiff's medical records or MRI film, which were available. But he examined and performed a range of motion test on plaintiff's right shoulder, which indicated a full range of motion. Dr. Rafty's uses to test to support his conclusion that despite plaintiff's "subjective complaints there were no objective findings to support them".

Based on the foregoing, defendants have not submitted evidence in legally admissible form to meet their *prima facie* burden, entitling them to summary judgment and a finding that plaintiff has not sustained a "serious injury" within the meaning of Insurance Law § 5102 [d]. (*See*, *Gaddy v Eyler, supra; Lowe v Bennett*, 511 NYS2d 603 [1 Dept 1986], *Affd*, 69 NY2d 700 [1 Dept 1986]). Thus, the burden shifts to plaintiff to produce evidentiary proof in admissible form in order to establish the existence of a serious injury *(See Taynisha Baez v Imamally Rahamatali*, 817 NYS2d 204 [2006]; *Franchini v Palmieri*, 775 NYS2d 232 [2003]; *Gaddy v Eyler , supra; Shinn v Catanzaro*, 767 NYS2d 88 [1 Dept 2003]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Forrest v Jewish Guild for the Blind,* 765 NYS2d 326 [1 Dept 2003]).

In opposition, plaintiff submits, *inter alia*, plaintiff's affidavit and the affirmation and medical reports of Dr. Ayoob Khodadadi, a radiologist and the affirmation of Dr. Lijun Song, a

physician certified in physical medicine and rehabilitation. Dr. Song conducted her initial examination of plaintiff on January 17, 2007 (three days after the accident). Dr. Song conducted a Range of Motion Tests on the right shoulder and Lumbar spine, indicating abnormalities in both. (See Dr. Song's medical report, plaintiff's exhibit c, paragraphs 12-16.) Thereafter plaintiff continued treatment with Dr. Song on a regular basis. On October 20, 2007, plaintiff's No-Fault benefits were terminated, and thereafter, plaintiff continued to treat with Dr. Song, through his private insurance, with the most recent examination on April 10, 2008.

On January 25, 2007, Dr. Khodadadi, conducted an MRI of plaintiff's right shoulder. Dr. Khodadadi, found that plaintiff suffered from " a small amount of joint fusion, moderate swelling involving the acromioclavicular joint associated with inferior bulging of the joint capsule causing impingement of the suspraspinatus muscle tendon and biceps tendonitis".

In his April 10, 2008 Report, Dr. Song reviewed Dr. Khodadadi's MRI report and conducted a range of motion test on plaintiff's shoulder. The range of motion test indicated limited range of motion and abnormalities. Dr. Song concluded that "the impression contained in Dr. Khodadadi's report are causally related to the motor vehicle accident of January 14, 2007." Dr. Song also concluded that based upon plaintiff's physical examinations, the history given by Mr. Chao, the patient's consistent symptomology, the medical records and diagnostic reports which he has reviewed upon for my treatment and diagnosis, he concluded that "the right shoulder has developed into a medically chronic symptomatic condition which results in persistent right shoulder pain, diminished right shoulder strength and diminished right shoulder range of motion." In addition, plaintiff sustained a "partial permanent disability of the right shoulder as a direct result of the subject accident" (see Dr. Song's report paragraph 43-45). Moreover, the plaintiff will have a "permanent problems with his right shoulder which will continue to cause pain, limitation of motion and lack of flexibility" (*Id.* paragraph 46-47).

In conclusion, where "conflicting medical evidence is offered on the issue of whether a

plaintiff's injuries are permanent or significant, and varying inferences may be drawn, the question is one for the jury" (*Martinez v Pioneer Transp. Corp.*, 48 AD3d 306, 307 [1st Dept 2008]). Thus, defendants' motion,"must be denied since the court cannot pass on the credibility of witnesses on such a motion" (*Hourigan v McGarry*, *supra*, 106 AD2d at 845).

Accordingly, plaintiff has demonstrated by admissible or credible evidentiary proof, the existence of a triable issue of fact as to whether or not he sustained a "serious injury" as a result of the subject accident. *(See Zuckerman v City of New York, supra*, *Forrest v Jewish Guild for the Blind, supra*).

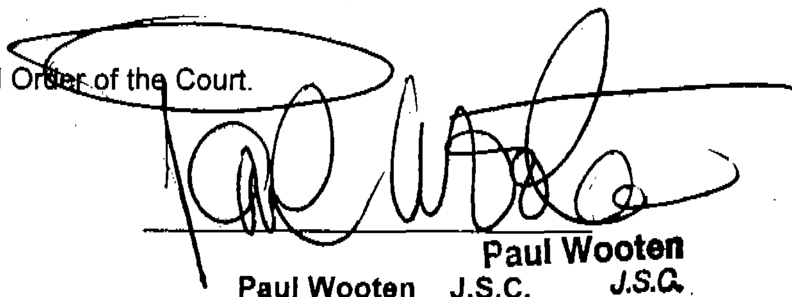
For these reasons and upon the foregoing papers, it is,

ORDERED that the defendant's motion for summary judgment to dismiss is denied; and it is further,

ORDERED that plaintiff shall serve a copy of this order, with notice of entry, upon defendants; and

IT IS FURTHER ORDERED that upon service of a copy of this order with notice of entry, the Clerk of the Trial Support Office (Room 158) shall restore this action to its former place on the trial calendar.

This constitutes the Decision and Order of the Court.



Dated: March 13, 2009

Paul Wooten J.S.C.

Paul Wooten *J.S.C.*

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