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| <b>Gang Chu v Caselficio</b>                                                                                                                                                                                                     |
| 2012 NY Slip Op 32521(U)                                                                                                                                                                                                         |
| September 25, 2012                                                                                                                                                                                                               |
| Supreme Court, Queens County                                                                                                                                                                                                     |
| Docket Number: 29448/2010                                                                                                                                                                                                        |
| 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

GANG CHU,

Index No.: 29448/2010

Plaintiff,

Motion Date: 08/30/12

- against -

Motion No.: 8

Motion Seq.: 1

DELLE CASEIFICIO and RAFFAELE  
 CENTOFANTI,

Defendants.

- - - - - x

The following papers numbered 1 to 14 were read on this motion by defendants, DELLE CASEIFICIO and RAFFAELE CENTOFANTI, for an order pursuant to CPLR 3212, granting defendants summary judgment and dismissing the plaintiff's complaint on the ground that the plaintiff did not sustain a serious injury within the meaning of Insurance Law §§ 5102 and 5104:

Papers  
Numbered

Notice of Motion-Affidavits-Exhibits- Memo.....1 - 6  
 Affirmation in Opposition-Affidavits-Exhibits.....7 - 11  
 Reply Affirmation.....12 - 14

This is a personal injury action in which the plaintiff, Gang Chu, seeks to recover damages for injuries he sustained as a result of a motor vehicle accident that occurred on November 4, 2010, at or near the intersection of Fifth Avenue and 57<sup>th</sup> Street, New York County, New York.

At the time of the accident, plaintiff's vehicle was stopped at a red traffic signal when it was allegedly hit in the rear by the van operated by defendant, Raffaele Centofanti, and owned by defendant, Delle Caseificio. Plaintiff allegedly sustained physical injuries as a result of the accident.

In his verified Bill of Particulars, the plaintiff states that as a result of the accident he sustained, inter alia, a focal tear involving the supraspinatus tendon of the right shoulder; a partial tear of the anterior cruciate ligament of the right knee; and a grade 1 meniscal capsular separation in the region of the medial meniscus of the right knee.

The plaintiff contends that he sustained a serious injury as defined in Insurance Law § 5102(d) in that he 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 the plaintiff from performing substantially all of the material acts which constitute his 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.

Defendant now moves for an order pursuant to CPLR 3212(b), granting summary judgment dismissing the plaintiff's complaint on the ground that plaintiff did not suffer a serious injury as defined by Insurance Law § 5102.

In support of the motion, defendants submit an affirmation from counsel, Peter T. Connor, Esq; a copy of the pleadings; plaintiff's verified bill of particulars; the affirmed medical report of Dr. Leon Sultan; and a copy of portions of the transcript of the plaintiff's examination before trial.

Dr. Leon Sultan, a board certified orthopedic surgeon, retained by the defendant, examined plaintiff on December 12, 2011. At the time of the examination he was 47 years old. Plaintiff told Dr. Sultan that as a result of this accident he sustained injuries to his right shoulder, right knee, as well as his neck and lower back. Dr Sultan reviewed the MRI reports of the plaintiff's right shoulder and right knee. He also reviewed the reports of the plaintiff's treating physicians.

On the day of the examination the plaintiff presented with pain that "comes and goes" in regards to his lower back, right shoulder and right knee. As part of his physical examination Dr. Sultan performed objective and comparative range of motion testing. He found no limitations of range of motion of the plaintiff's cervical spine, right shoulder, thoracolumbar spine, and right knee. He states that the plaintiff's examination indicated that he is orthopedically stable and neurologically intact. He states that, "today's examination does not confirm any

ongoing causally related orthopedic or neurological impairment in regard to the occurrence of November 4, 2010. From a clinical point of view there is no correlation between today's examination and the spinal MRI and electrodiagnostic readings."

In his examination before trial, taken on October 25, 2011, plaintiff, a taxi driver, testified that he left the scene of the accident on his own but went to the emergency room at a Queens Hospital later that day. He was examined at the emergency room and released the same day. The next day he went to a clinic at the Sanford Medical Center where he saw Dr. Chung. He began a course of physical rehabilitation for pain in his right shoulder, right knee, lower back and neck, he testified that he was told by Dr. Sun that he required surgery for his right knee. He testified that he returned to work one month after the accident.

Defendant's counsel contends that the medical report of Dr. Sultan as well as the transcript of the plaintiff's examination before trial in which he states that he returned to work one month post-accident are sufficient to establish, prima facie, that the 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 his 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's attorney, Jae W. Woo, Esq., submits his own affirmation, as well as the affirmation of Dr. Sea Hyun Chung, Dr. Ayoub Khodadadi and the affidavit of the plaintiff dated August 21, 2012.

Dr. Chung, an internist initially examined the plaintiff on November 5, 2010, one day subsequent to the date of the accident. The plaintiff remained under his care until July 13, 2011. He was treated during that time three times per week. He was unable to continue with treatments because his no-fault benefits were denied and he had no private health insurance. Dr. Chung states that upon the initial evaluation, as well as his most recent examination in June 16, 2012, his objective testing showed that the plaintiff suffered from significant limitations of the right shoulder and right knee. He states that the plaintiff never previously injured his right knee or right shoulder. He states that his findings are consistent with the finding of the MRIs which showed a

partial rotator cuff tear of the right shoulder and a tear of the ACL of the right knee. He states that the plaintiff's injuries to his right shoulder and right knee are causally related to the accident of November 4, 2010, are permanent in nature, and resulted in a permanent consequential and significant limitation of use of the plaintiff's right shoulder and right knee. He states that any further treatments would only be palliative in nature.

In his affidavit, Mr. Chu states that after the accident he treated consistently with Dr. Chung three times per week for eight months until his no-fault benefits were terminated. He states that he still suffers from daily pain in his right shoulder and right knee.

On a motion for summary judgment, where the issue is whether the plaintiff has sustained a serious injury under the no-fault law, it is defendant's initial obligation to demonstrate that the plaintiff has not sustained a "serious injury" by submitting affidavits or affirmations of its medical experts who have examined the litigant and have found no objective medical findings which support the plaintiff's claim (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]). 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]).

Here, the proof submitted by the defendants, including the affirmed medical report of Dr. Sultan and the plaintiff's examination before trial in which he stated that he returned to work one month after the accident, were sufficient to meet defendants' prima facie burden by demonstrating that the 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]).

However, this Court finds that the plaintiff raised triable issues of fact by submitting the affirmed medical report of Dr. Chung attesting to the fact that after a

qualitative examination the plaintiff had substantiated injuries contemporaneous to the accident and had significant limitations in range of motion at a recent examination, and concluding that the plaintiff's limitations were significant and permanent and resulted from trauma causally related to the accident. As such, the plaintiff raised a triable issue of fact as to whether he sustained a serious injury 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 ADd 606 [2d Dept. 2011]; Compass v GAE Transp., Inc., 79 AD3d 1091 [2d Dept. 2010]; Evans v Pitt, 77 AD3d 611 [2d Dept. 2010]; Tai Ho Kang v Young Sun Cho, 74 AD3d 1328 743 [2d Dept. 2010]).

In addition, Dr. Chung adequately explained the gap in the plaintiff's treatment by stating that his no fault benefits were terminated and in addition, the plaintiff reached the point of maximum medical improvement and any further treatments would be palliative (see Abdelaziz v Fazel, 78 AD3d 1086 [2d Dept. 2010]; Tai Ho Kang v Young Sun Cho, 74 AD3d 1328 [2d Dept. 2010]; Gaviria v Alvarado, 65 AD3d 567 [2d Dept. 2009]; Bonilla v Tortori, 62 AD3d 637 [2d Dept. 2009]).

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

ORDERED, that the defendants' motion for an order granting summary judgment dismissing the plaintiff's complaint is denied.

Dated: September 25, 2012  
Long Island City, N.Y.

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ROBERT J. MCDONALD, J.S.C.