

Jang Won Lee v Kolodka
2012 NY Slip Op 32759(U)
September 10, 2012
Supreme Court, Queens County
Docket Number: 5505/10
Judge: Timothy J. Dufficy
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SHORT FORM ORDER**NEW YORK SUPREME COURT-QUEENS COUNTY**

P R E S E N T : Hon. Timothy J. Dufficy
Justice

Part 35

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JANG WON LEE,

Plaintiff,

- against -

SAMOIL KOLODKA and
ALLAUDDIN KHAWJA,

Defendants.

Index No.: 5505/10
Motion Date: 6/21/12
Calendar No.:15
Motion Seq. : 2

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The following papers numbered 1 to 9 read on this motion by defendants **SAMOIL KOLODKA and ALLAUDDIN KHAWJA** for an order in pursuant to CPLR 3211 and 3212 granting summary judgment in their favor and against the plaintiff **JANG WON LEE** on the grounds that the plaintiff did not sustain a serious injury pursuant to New York State Insurance Law 5102(d).

	<u>Papers Numbered</u>
Notice of Motion-Affirmation-Exhibits.....	1-4
Affirmation in Opposition-Exhibits.....	5-7
Rely Affirmation.....	8-9

Upon the foregoing papers it is ordered that this motion by the defendants **SAMOIL KOLODKA and ALLAUDDIN KHAWJA** for an order in pursuant to CPLR 3211 and 3212 granting summary in their favor and against the plaintiff **JANG WON LEE** on the grounds that the plaintiff did not sustain a serious injury pursuant to New York State Insurance Law 5102(d) is denied. (see the accompanying memorandum)

Dated: September 10, 2012

TIMOTHY J. DUFFICY, J.S.C.

MEMORANDUM

**SUPREME COURT :QUEENS COUNTY
PART 35**

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JANG WON LEE,

Plaintiff,

Index No.: 5505/10

Motion Date: 6/21/12

- against -

Calendar No.:15

Motion Seq. : 2

**SAMOIL KOLODKA and
ALLAUDDIN KHAWJA**

Defendants.

-----X

This is an action for personal injuries allegedly sustained by the plaintiff Jang Won Lee as a result of a motor vehicle accident that occurred on September 22, 2009, on Pearl Street and Prospect Street, in the County of Kings, New York.

Defendant now moves for summary judgment on the grounds that plaintiff has not met the “serious injury” threshold requirement of Section 5102(d) of the New York State Insurance Law.

As the proponent of the summary judgment motion the defendants must make a *prima facie* showing of entitlement to judgment as a matter of law by offering sufficient evidence to demonstrate the absence of any material issues of fact. Alvarez v Prospect Hospital, 68 N.Y. 2d 320(1986); Zuckerman v City of New York, 49 N.Y. 2d 557 (1980). Therefore on this motion the defendants bear the initial burden establishing, *prima facie*, that plaintiff did not sustain a “serious injury” within the meaning of Insurance Law. Gaddy v Eyler, 79 N.Y. 2d 955 (1992); Licari v Elliot, 57 N.Y. 2d 230 (1982); Grossman v Wright, 268 A.D.2d 79(2d Dept. 2000).

In support of their motion, the defendants submit the pleadings in this case, the affirmed medical report of orthopedic surgeon Dr. Lisa Nason, the affirmed medical report from neurologist Dr. Jean-Robert Desrouleaux, and the deposition testimony of plaintiff Jang Won Lee taken on February 4, 2011.

Dr. Lisa Nason examined the plaintiff on May 5, 2011, regarding the plaintiff's complaints of pain in her left shoulder and lumbar spine. Dr Nason found the plaintiff's range of motion to be normal with respect to his left shoulder and spine. Dr. Nason concluded that the injury to the plaintiff's left shoulder and spine were resolved.

Dr. Jean-Robert Desrouleaux performed a neurological examination of the plaintiff on May 5, 2011, regarding plaintiff's complaint of pain in his left shoulder and lower back. Dr. Desrouleaux found that the plaintiff's range of motion in his spine to be in all respects normal with complaints of pain, and concluded that the alleged injury to his lumbar spine was resolved. The doctor concluded that the plaintiff was able to function in his pre-accident capacity and to carry out his work duties and his day-to-day activities without neurological restriction.

Here, the Court finds that the defendants have satisfied their burden through legally sufficient documentary evidence that the plaintiff's injuries did not meet the threshold requirement of Insurance Law §5102(d) and that plaintiff did not sustain a "serious injury" as a result of the September 22, 2009 accident. Oberly v Bangs, 96 N.Y. 2d 295 (2001).

The burden then shifts to the plaintiff to demonstrate that there are triable issues of fact which show that the plaintiff sustained a "serious injury" within the meaning of Insurance Law §5102(d) and that these injuries were sustained as a result of the subject accident. Gaddy v Eyler, *supra*; Hildenbrand v Chin, 52 AD3d 1164 (3d Dept. 2008).

In opposition to the defendant's motion, plaintiff Lee submits some of the pleadings in this case, her deposition testimony taken on February 4, 2011, the affirmed report of chiropractor Dr. Mark Snyder, the affirmation of radiologist John Himelfarb, and the affirmation of physician Dr. Mihir Bhatt.

On September 24, 2009, Dr. Snyder examined the plaintiff's complaints regarding his shoulder, back, neck, headaches, dizziness and pain in his left knee among other physical complaints. Thereafter, Dr. Snyder performed range of motion tests upon the plaintiff. The results of the cervical range of motion tests performed revealed the range of motion in his flexion was 15 degrees and the normal range is 45, the extension range of motion was 10 degrees and the normal is 45 degrees, left rotation had a 50 degree range

of motion while the normal is 90 degrees, right rotation was 45 degrees while the normal is 90 degrees, left lateral flexion is 10 degrees while the normal is 30 degrees, and plaintiff's right lateral flexion is 5 degrees while the normal range is 30 degrees.

The results of Dr. Snyder's lumbar range of motion tests revealed that the plaintiff's flexion range of motion was 55 degrees, the normal being 90 degrees, the extension was 5 degrees while the normal is 30 degrees, the left rotation was 5 degrees while the normal range is 30 degrees, plaintiff's right rotation was 10 degrees while the normal is 30 degrees, the left lateral flexion was 10 degrees while the normal range is 30 degrees, and the right lateral flexion is 5 degrees while the normal range is 30 degrees. The plaintiff was out on a chiropractic manipulation schedule, as well as referred to Dr. Bhatt for physical therapy.

Dr. Snyder opined that the plaintiff's injuries were permanent in nature and that those injuries interfered with his ability to function in his usual and customary daily activities. On January 5, 2010, Dr. Snyder performed cervical range of motion examinations on plaintiff Lee and found limitations in his range of motion in all areas. Dr. Snyder then performed a thoraco-lumbar spine range of motion study upon the plaintiff and these tests revealed limitations in all areas examined.

Dr. John Himelfarb performed an MRI upon the plaintiff Lee's left shoulder and found that he suffered from a slightly curved acromion process with mild hypertrophic changes of acromioclavicular joint causing a mild to moderate degree of subacromial impingement upon the musculotendinous junction of the supraspinatus, as well as partial intrasubstance tear and/or tendinitis without retraction.

Dr. Steven Brownstein performed an MRI of plaintiff Lee's lumbar spine and found straightening of the lumbar lordosis and broad based disc protrusion at the L5/S1 level. Dr. Brownstein found moderate left and mild right foraminal narrowing and a mass effect exerted in the ventral thecal sac. The doctor stated that the plaintiff's canal is borderline stenotic to which hypertrophic facet disease contributes. At the L4/L5 level, Dr. Brownstein stated that broad based disc bulge was seen in contrast with the ventral thecal sac, that foramina were mildly narrowed, and the canal was patent.

On September 20, 2009, Dr. Mihir Bhatt examined plaintiff Lee and found limited range of motion in all areas of his cervical spine, as well as limitations in his range of motion in all areas of the lumbosacral spine as well as disc herniations.

Therefore, the plaintiff has raised a triable issue of fact as to whether or not plaintiff has sustained a serious injury under New York State Insurance Law §5102(d) as a result of the accident that occurred on September 22, 2009. *see, Mahmmod v Vicks*, 81 AD3d 606 (2d Dept. 2011); *Evans v. Pitt*, 77 AD3d 611 (2d Dept. 2010). In support, plaintiff Lee has submitted the affirmed medical reports of his doctors showing that he had significant limitations in range of motion both contemporaneous to the accident, as well as in recent examinations. The plaintiff's doctors also concluded that the plaintiff's limitations were significant and permanent and in fact resulted from trauma which was caused by the accident (*see, Ortiz v Zorbas*, 62 AD3d 770 (2d Dept. 2009); *Azor v. Torado*, 59 AD3d 367 (2d Dept 2009)).

Accordingly, the defendants' motion for summary judgment is denied in all respects.

Dated: September 10, 2012

TIMOTHY J. DUFFICY, J.S.C.