Choi v Effinger
2014 NY Slip Op 30835(U)
March 27, 2014
Supreme Court, Suffolk County
Docket Number: 11-29897
Judge: W. Gerard Asher

SHORT FORM ORDER

INDEX No. 11-29897
CAL. No. 13-00752MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 7-23-13 (#001)
MOTION DATE 8-22-13 (#002)
ADJ. DATE 11-19-13
Mot. Seq. # 001 - MD
002 - MD

---X

BOK N. CHOI, BYUNG C. CHOI and YOON HA CHOI,

Plaintiffs,

- against -

ROBERT D. EFFINGER,

Defendant.

---X

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Upon the following papers numbered 1 to 62 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; 13 - 32; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 33 - 41; 42 - 55; Replying Affidavits and supporting papers 56 - 62; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (# 002) by plaintiff on the counterclaim, Byung C. Choi, and the motion (# 003) by the defendant are consolidated for purposes of this determination; and it is further

ORDERED that the motion (#002) by plaintiff on the counterclaim, Byung C. Choi, for an order granting summary judgment dismissing the counterclaim against him on the ground that plaintiffs Bok N. Choi and Yoon Ha Choi did not sustain serious injuries as defined in Insurance Law § 5102 (d) is denied; and it is further

3-31-14

ORDERED that the motion (# 003) by the defendant for an order granting summary judgment dismissing the complaint on the ground that plaintiffs Byung C. Choi, Bok N. Choi and Yoon Ha Choi did not sustain serious injuries as defined in Insurance Law § 5102 (d) is denied.

This is an action to recover damages for personal injuries allegedly sustained by the plaintiffs when their vehicle collided with a vehicle owned and operated by the defendant. The accident occurred on Route 231 in the County of Suffolk, New York, on August 16, 2011. At the time of the accident, plaintiffs Bok N. Choi and Yoon Ha Choi were passengers in a vehicle owned and operated by plaintiff on the counterclaim, Byung C. Choi.

By their bill of particulars, the plaintiffs allege that, as a result of the subject accident, plaintiff Bok N. Choi sustained serious injuries including joint effusion, a horizontal tear, and Grade I meniscal capsular separation in her right knee; joint effusion and a focal intrasubstance tear of her left shoulder; numbness and tingling of the shoulder, "down the arms and into the wrists"; and loss of sensation. Plaintiff Byung C. Choi sustained serious injuries including joint effusion, an oblique tear of the posterior horn of the medial meniscus, and a partial thickness tear of the anterior cruciate ligament in his left knee, and joint effusion in his left hip. Plaintiff Yoon Ha Choi sustained serious injuries including joint effusion, Grade I meniscal capsular separation, and a focal tear in her right knee; joint effusion, a focal intrasubstance tear, and tendinitis of the biceps tendon in her right shoulder; numbness and tingling of the shoulder, "down the arms and into the wrists"; and loss of sensation.

Plaintiff on the counterclaim, Byung C. Choi, moves (# 002) for an order granting summary judgment dismissing the counterclaim against him on the ground that plaintiffs Bok N. Choi and Yoon Ha Choi did not sustain a "serious injury" as defined in Insurance Law § 5102 (d).

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 non-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 than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment."

In order to recover under the "permanent loss of use" category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance***, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system" categories, either a specific percentage of the loss of range of motion must be ascribed, or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (*see* ***Perl v Meher***, 2011 NY Slip Op 8452, 2011 NY Lexis 3320 [2011]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]).

On a motion for summary judgment, the defendant has the initial burden of making a prima facie showing, through the submission of evidence in admissible form, that the injured plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) (*see* ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Akhtar v Santos*** 57 AD3d 593, 869 NYS2d 220 [2d Dept 2008]). The defendant may satisfy this burden by submitting the plaintiff's own deposition testimony and the affirmed medical report of the defendant's own examining physician (*see* ***Moore v Edison***, 25 AD3d 672, 811 NYS2d 724 [2d Dept 2006]; ***Farozes v Kamran*** 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316 [1985]; ***Boone v New York City Tr. Auth.***, 263 AD2d 463, 692 NYS2d 731 [2d Dept 1999]).

Here, plaintiff on the counterclaim, Byung C. Choi, failed to make a prima facie showing that plaintiff Bok N. Choi did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) (*see* ***Reitz v Seagate Trucking, Inc.***, 71 AD3d 975, 898 NYS2d 173 [2d Dept 2010]). On October 27, 2011, approximately two months after the subject accident, plaintiff Bok N. Choi's treating orthopedist, Dr. Robert Orlandi, administered certain orthopedic tests, and all the test results were negative or normal. Dr. Orlandi administered range of motion testing on plaintiff Bok N. Choi's cervical and lumbar spine and right and left shoulder. With regard to the right and left shoulder, Dr. Orlandi reported that plaintiff Bok N. Choi was "capable" of a normal 180 degrees of forward flexion and abduction, external rotation was "possible" to a normal 70 degrees, and internal rotation was "possible" to a normal 100 degrees. Dr. Orlandi's report is insufficient to sustain the defendant's prima facie burden, since Dr. Orlandi used the ambiguous words "capable" and "possible," leaving it unclear as to what range the plaintiff actually demonstrated (*see* ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]).

On March 19, 2013, approximately one year and seven months after the subject accident, the defendant's examining orthopedist, Dr. Lee Kupersmith, examined plaintiff Bok N. Choi using certain orthopedic tests including Lachman's test and McMurray's test. All the test results were negative or normal. Dr. Kupersmith performed range of motion testing on plaintiff Bok N. Choi's right and left shoulder and the right knee, and found that plaintiff Bok N. Choi had normal range of motion. Whereas Dr. Kupersmith considered 80 degrees and 90 degrees to be the normal range of internal rotation and external rotation respectively, Dr. Orlandi considered 100 degrees and 70 degrees to be the normal range of internal rotation and external rotation respectively. Moreover, whereas Dr. Kupersmith considered 150 degrees to be the normal range of the right knee flexion, Dr. Orlandi considered 140 degrees to be the normal range of the right knee flexion. When the measurements that the defendant's examining orthopedist and the plaintiff's treating orthopedist considered normal for their range of motion testing differ, the Court is left to speculate as to which is the correct normal value (*see* ***Cracchiolo v Omerza***, 87 AD3d 674, 928 NYS2d 644 [2d Dept 2011]; ***Frey v Fedorciuc***, 36 AD3d 587, 828 NYS2d 454 [2d Dept 2007]). Furthermore, although plaintiff Bok N. Choi claimed in the bill of particulars that she sustained numbness, tingling and loss of sensation in her left shoulder as a result of this accident, Dr. Kupersmith did not address said injuries, and plaintiff on the counterclaim, Byung C. Choi, has not submitted a report from a neurologist who examined plaintiff Bok N. Choi to rule out the claimed injury (*see* ***McFadden v Barry***, 63 AD3d 1120, 883 NYS2d 83 [2d Dept 2009]; ***Browdame v Candura***, 25 AD3d

747, 807 NYS2d 658 [2d Dept 2006]; ***Lawyer v Albany OK Cab Co.***, 142 AD2d 871, 530 NYS2d 904 [3d Dept 1988]).

Here, plaintiff on the counterclaim, Byung C. Choi, failed to make a prima facie showing that plaintiff Yoon Ha Choi did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) (*see* ***Reitz v Seagate Trucking, Inc.***, *supra*). On October 27, 2011, plaintiff Yoon Ha Choi's treating orthopedist, Dr. Orlandi, administered certain orthopedic tests including Lachman's test, and all the test results were negative or normal. Dr. Orlandi administered range of motion testing on plaintiff Yoon Ha Choi's cervical and lumbar spine, right and left shoulder, and right and left knee. With regard to the right and left shoulder, Dr. Orlandi reported that plaintiff Yoon Ha Choi was "capable" of a normal 180 degrees of forward flexion and abduction, external rotation was "possible" to a normal 70 degrees, and internal rotation was "possible" to a normal 100 degrees. Dr. Orlandi's report is insufficient to sustain the defendant's prima facie burden, since Dr. Orlandi used the ambiguous words "capable" and "possible," leaving it unclear as to what range the plaintiff actually demonstrated (*see* ***Browdame v Candura***, *supra*).

On March 19, 2013, the defendant's examining orthopedist, Dr. Kupersmith, examined plaintiff Yoon Ha Choi using certain orthopedic tests including Hawkin's sign, Neer's sign, Lachman's test and McMurray's test. All the test results were negative or normal. Dr. Kupersmith performed range of motion testing on plaintiff Yoon Ha Choi's right shoulder and right knee, and found that plaintiff Yoon Ha Choi had normal range of motion. Whereas Dr. Kupersmith considered 80 degrees and 90 degrees to be the normal range of internal rotation and external rotation respectively, Dr. Orlandi considered 100 degrees and 70 degrees to be the normal range of internal rotation and external rotation respectively. Moreover, whereas Dr. Kupersmith considered 150 degrees to be the normal range of the right knee flexion, Dr. Orlandi considered 140 degrees to be the normal range of the right knee flexion. When the measurements that the defendant's examining orthopedist and the plaintiff's treating orthopedist considered normal for their range of motion testing differ, the Court is left to speculate as to which is the correct normal value (*see* ***Cracchiolo v Omerza***, *supra*; ***Frey v Fedorciuc***, *supra*). Moreover, although plaintiff Yoon Ha Choi claimed in the bill of particulars that she sustained numbness, tingling and loss of sensation in her right shoulder as a result of this accident, Dr. Kupersmith did not address said injuries, and plaintiff on the counterclaim, Byung C. Choi, has not submitted a report from a neurologist who examined plaintiff Yoon Ha Choi to rule out the claimed injury (*see* ***McFadden v Barry***, *supra*; ***Browdame v Candura***, *supra*; ***Lawyer v Albany OK Cab Co.***, *supra*).

Although it is unnecessary to consider whether the papers submitted by plaintiffs Bok N. Choi and Yoon Ha Choi in opposition to Byung C. Choi's motion for summary judgment were sufficient to raise a triable issue of fact (*see* ***McMillian v Naparano***, 61 AD3d 943, 879 NYS2d 152 [2d Dept 2009]; ***Yong Deok Lee v Singh***, 56 AD3d 662, 867 NYS2d 339 [2d Dept 2008]), the Court reviewed the opposition papers of plaintiffs Bok N. Choi and Yoon Ha Choi and found that the affirmation of the plaintiffs' treating physician, Dr. Yan Sun, has raised a triable issue of fact as to whether plaintiffs Bok N. Choi and Yoon Ha Choi have sustained serious injuries as defined in Insurance Law § 5102 (d). Accordingly, the motion is denied.

The defendant moves (# 003) for an order granting summary judgment dismissing the complaint on the ground that plaintiffs Byung C. Choi, Bok N. Choi and Yoon Ha Choi have not sustained serious injuries as defined in Insurance Law § 5102 (d).

Here, the defendant failed to make a prima facie showing that plaintiffs Bok N. Choi and Yoon Ha Choi did not sustain a serious injury within the meaning of Insurance Law § 5102 (d), as discussed above. However, the defendant made a prima facie showing that plaintiff Byung C. Choi did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) through the affirmed reports of the defendant's examining physician and the plaintiffs' bill of particulars (*see* ***Bailey v Islam***, 99 AD3d 633, 953 NYS2d 39 [1st Dept 2012]; ***Sierra v Gonzalez First Limo***, 71 AD3d 864, 895 NYS2d 863 [2d Dept 2010]).

On March 19, 2013, the defendant's examining orthopedist, Dr. Kupersmith, examined plaintiff Byung C. Choi using certain orthopedic tests including Lachman's test and McMurray's test. All the test results were negative or normal. Dr. Kupersmith performed range of motion testing on plaintiff Byung C. Choi's left knee and left hip using a goniometer, and found that he had normal range of motion. Dr. Kupersmith opined that plaintiff Byung C. Choi had no orthopedic disability at the time of the examination (*see* ***Willis v New York City Tr. Auth.***, 14 AD3d 696, 789 NYS2d 223 [2d Dept 2005]).

At his deposition, plaintiff Byung C. Choi testified that he worked for a credit card merchant service company as a branch officer at the time of the accident; that, after he missed approximately a week of work as a result of the accident, he returned to work on the same job; that during four months after the accident, he had a helper who provided the needed assistance while performing networking and wiring; and that he received acupuncture, massage and electric therapy treatment for approximately six months. Plaintiff Byung C. Choi also testified that there is no activity that he is unable to perform. His deposition testimony reveals that his injuries did not prevent him from performing "substantially all" of the material acts constituting his customary daily activities during at least 90 out of the first 180 days following the accident (*see* ***Burns v McCabe***, 17 AD3d 1111, 794 NYS2d 267 [4th Dept 2005]; ***Curry v Velez***, 243 AD2d 442, 663 NYS2d 63 [2d Dept 1997]).

Thus, the defendant has met his initial burden of establishing that plaintiff Byung C. Choi did not sustain a permanent consequential limitation of use of a body organ or member or significant limitation of use of a body function or system, and that he was not prevented from performing substantially all of his usual and customary daily activities for 90 of the first 180 days following the accident within the meaning of Insurance Law § 5102 (d) (*see* ***Gonzalez v Green***, 24 AD3d 939, 805 NYS2d 450 [3d Dept 2005]).

In opposition, plaintiff Byung C. Choi contends that he did sustain a serious injury within the meaning of Insurance Law § 5102 (d). In support, plaintiff Byung C. Choi submits, *inter alia*, the affirmation of his treating physician, Dr. Yan Sun.

On October 1, 2011, approximately 45 days after the subject accident, Dr. Sun administered certain orthopedic tests including McMurray's test, Lachman's test, and Anterior drawer test, and all the test results were positive. Dr. Sun administered range of motion testing on plaintiff Byung C. Choi's left

knee and left hip using a goniometer, and found that there were range of motion restrictions in the left knee and left hip. On August 3, 2013, approximately two years after the subject accident, Dr. Sun re-examined plaintiff Byung C. Choi and administered range of motion testing on his left knee and left hip using a goniometer. Based on the positive orthopedic tests and the comparison of plaintiff Byung C. Choi's limitations of motions with normal function, Dr. Sun concluded that plaintiff Byung C. Choi sustained a serious injury within the meaning of Insurance Law § 5102 (d). Furthermore, Dr. Sun satisfactorily explained in her affirmation the approximately 18-month gap between the end of the medical treatment to plaintiff Byung C. Choi and the re-examination on August 3, 2013 (*see* ***Williams v New York City Tr. Auth.***, 12 AD3d 365, 786 NYS2d 183 [2d Dept 2004]; ***Black v Robinson***, 305 AD2d 438, 759 NYS2d 741 [2d Dept 2003]). As an explanation for the cessation of treatment, Dr. Sun stated that plaintiff Byung C. Choi's "no fault coverage had been denied ... even though treatment was necessary to relieve pain." Plaintiff Byung C. Choi also explained the gap in his medical treatment by his testimony that his no-fault benefits were cut off and he could no longer afford to pay for treatment (*see* ***Abdelaziz v Fazel***, 78 AD3d 1086, 912 NYS2d 103 [2d Dept 2010]; ***Domanas v Delgado Travel Agency, Inc.***, 56 AD3d 717, 868 NYS2d 132 [2d Dept 2008]).

Thus, plaintiff Byung C. Choi has raised a triable issue of fact as to whether he sustained a significant limitation of use of a body function or system constituting a serious injury as defined by Insurance Law § 5102 (d) (*see* ***Kraemer v Henning***, 237 AD2d 492, 655 NYS2d 96 [1997]). Thus, the defendant's motion for summary judgment dismissing the complaint on the ground that plaintiff Byung C. Choi, Bok N. Choi and Yoon Ha Choi have not sustained serious injuries as defined in Insurance Law § 5102 (d) is denied.

Dated: March 27, 2014

W. Gerard Asher
J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**