

**Ja Young Suh v Yihwa Linda Yoon**

2015 NY Slip Op 30900(U)

May 26, 2015

Supreme Court, Queens County

Docket Number: 701535/2013

Judge: Robert J. McDonald

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The plaintiffs commenced this action by filing a summons and complaint on April 29, 2013. Issue was joined by service of defendants' verified answer dated May 23, 2013. A Note of Issue was filed by the plaintiff on August 22, 2014. The matter is presently on the calendar in the Trial Scheduling Part for June 8, 2015.

Defendants now move for an order pursuant to CPLR 3212(b), granting summary judgment dismissing the plaintiffs' complaint on the ground that each plaintiff did not suffer a serious injury as defined by Insurance Law § 5102. In support of the motion, defendant submits an affirmation from counsel, Katie A. Walsh, Esq., a copy of the pleadings; a copy of plaintiff's verified bill of particulars; the affirmed medical reports of board certified orthopedic surgeon, Dr. Marvin Winnell; the affirmed radiological reports of Dr. Stephen W. Lastig; and copies of the transcripts of the deposition testimony of each plaintiff, Ja Young Suh and Seung Keun Suh.

Plaintiff, Ja Young Suh, contends that as a result of the accident she sustained, inter alia, a tear of the medial meniscus of the right knee requiring arthroscopic surgery, tear of the left knee, a herniated disc at C5-C6 and a bulging disc at L4-L5. Her husband, plaintiff, Seung Keun Suh, contends that as a result of the accident he sustained a tear of the supraspinatus tendon of the right shoulder requiring arthroscopic surgery, a bulging disc at the L4-L5 level, and a right knee meniscocapsular separation.

Plaintiffs each assert that they sustained a serious injury as defined in Insurance Law § 5102(d) in that they each 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 their 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.

Dr. Marvin Winnell, an orthopedic surgeon retained by the defendants, examined Ja Young Suh, age 59, on May 29, 2014. The plaintiff related to Dr. Winnell that she was the driver of a vehicle involved in an accident on April 5, 2013. She stated that she sustained injuries to her neck, chest, lower back, left shoulder, left hip, left knee, right hip and right knee. Although she did not seek immediate medical attention at a hospital

following the accident, she immediately began a course of physical therapy and underwent arthroscopic surgery of the right knee on June 14, 2013. She then resumed physical therapy for six months following the surgery. She presented with continued pain to the back, knees, right ankle, and left foot. Dr. Winnell performed objective range of motion testing with the assistance of a goniometer which revealed no limitations of range of motion of Ja Young's cervical spine, lumbar spine, bilateral shoulders, hips, and bilateral knees. Based upon his examination and the records reviewed his impression was that the plaintiff sustained resolved sprain/ strain of the cervical spine, resolved sprain/strain of the lumbosacral spine; resolved contusion of the of the right and left hip; resolved contusion of the right and left knee; and status post-arthroscopy of the right knee resolved. He states that in his opinion there is no causality between the right knee surgery and the subject motor vehicle accident. He states that the mechanism of the accident as described by the plaintiff would not result in a lesion that would require surgical intervention. He states that based upon the accident as related by the plaintiff there is no causally related orthopedic disability resulting from the accident of record.

Dr. Lastig, the defendants' radiologist reviewed the MRI films of Ja Young's cervical spine and right knee. His review of the cervical spine MRI indicated no disc herniations or annular bulges. He stated that there were no findings on the cervical spine study which are causally related to the accident in question. With respect to the right knee he found that the anterior and posterior cruciate ligaments, collateral ligaments, quadriceps and patellar tendons were intact. There was no evidence of a meniscal tear and no findings on the right knee study which were causally related to the reported accident of April 5, 2013.

In her examination before trial taken on April 7, 2014, Ja Young, an insurance broker, stated that she was involved in a motor vehicle accident on April 5, 2013. On that date she was the operator of the vehicle and her husband plaintiff Seung Keun was a front seat passenger. She was driving northbound on 154<sup>th</sup> Street when the defendant's vehicle backed out of a driveway in a Chase Bank and struck her vehicle. The rear of his vehicle struck the driver's side door of her vehicle. As a result of the impact she hurt her right knee, neck, lower back, left shoulder, left knee and right knee. That afternoon she sought treatment with Dr. Kim at the New York Pain Rehabilitation Clinic. She underwent a course of physical rehabilitation which lasted until December 4, 2013. She testified that she stopped treatment when no fault

terminated her insurance payment. The MRIs revealed a tear in her right knee. After she fell on her steps at home in May 2013 she underwent arthroscopic surgery performed by Dr. Sun on June 14, 2013. She stated that she still has pain in her right knee and her lower back. She stated that she could not work from her home for two months following the accident.

Dr. Winnell examined plaintiff Seung Keun Suh on May 29, 2014. He told Dr. Winnell that he was a restrained front seat passenger involved in a motor vehicle accident on May 29, 2014. He reported sustaining injuries to his head, neck, mid-back, lower back, right shoulder and right knee. He commenced physical therapy the same day as the accident and then underwent arthroscopic surgery of the right shoulder on August 9, 2013. He resumed physical therapy until December 2013. He reported a prior accident in 2005 for which he required surgery to the right knee. He presented with pain to the head, neck, back and right shoulder. He is also an insurance broker and missed two months from work as a result of the accident. Dr. Winnell performed objective range of motion testing with the assistance of a goniometer which revealed no limitations of range of motion of Seung Keun's cervical spine, lumbar spine, bilateral shoulders, and bilateral knees.

Based upon his examination and the records reviewed his impression was that Seung Keun Suh sustained resolved sprain/strain of the cervical spine, resolved sprain/strain of the thoracic spine, resolved sprain/strain of the lumbosacral spine; resolved contusion of the of the right shoulder; resolved contusion of the right knee; and status post-arthroscopy of the right shoulder, resolved. He states that in his opinion there is no causally related orthopedic disability resulting from the subject accident.

Dr. Lastig, the defendants' radiologist reviewed the MRI films of Seung Heun's right shoulder and right knee. His review of the MRI films indicated a tear of the supraspinatus tendon of the right shoulder secondary to right shoulder chronic impingement syndrome, a degenerative condition. With respect to the right knee he found no tears of any of the tendons or meniscus and no evidence of internal derangement or osseous injury. He states that in his opinion there were no findings with respect to the right knee causally related to the subject accident and no evidence of a fracture, bone contusion, meniscal tear or ligamentous injury.

In his examination before trial taken on April 7, 2014, Seung Keun, age 60, stated that he was involved in a motor vehicle accident on April 5, 2013. He stated that he was involved

in prior motor vehicle accident 18 years ago and another accident four or five years ago in which he injured his left knee, left shoulder, neck, and lower back. He had left knee surgery as a result of that accident. He is also employed as an insurance broker and is paid on a commission basis. He stated that as a result of the impact he injured his right knee, right shoulder, neck, and lower back. On the date of the accident he sought treatment with Dr. Kim at the New York Pain Clinic. He went to the clinic three times per week until December 4, 2013. He also underwent arthroscopic surgery for his right shoulder on August 9, 2013 performed by Dr Sun. He stated he was confined home for two weeks after the accident and out of work for three weeks.

Defendants' counsel contends that the medical reports of Drs. Winnell and Lastig, together with the plaintiffs' testimony at the examination before trial, is sufficient to demonstrate that each 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 or her 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, Steve Jung Suk Park, Esq., submits his own affirmation as well as the medical affirmations of Dr. Yan Q. Sun, the affidavit of plaintiffs, Ja Young Suh and Seung Keun Suh and the affirmations of radiologist, Dr. Ayoob Khodadadi.

In her affidavit, March 23, 2015, plaintiff states that immediately following the accident she began to suffer from severe and persistent pain to her right knee, left knee, neck, and lower back. She treated consistently at New York Pain Clinic in Flushing from April 2013 until December 2013. She stopped treating because her no fault benefits were denied in December 2013 and she could not afford to pay for treatment out of pocket. She states that she presently still suffers from daily pain in her right knee, left knee, neck, and lower back due to the subject accident.

In his report, Dr. Khodadadi states that he reviewed the MRIs of plaintiff Ja Young and found a tear of the ACL of the right knee and a grade one menisco-capsular separation of the medial meniscus; with respect to the left knee he found a grade 2

tear of the medial meniscus; with respect to the cervical spine he observed a central hernated disc at C5-C6.

Dr. Sun states that he initially examined Ja Young Suh on May 29, 2013 and recently re-examined her on March 18, 2015. He states that upon his initial examination and upon the recent examination the plaintiff had complaints of pain to her left right knee, left knee, cervical spine and lower back. He states that the symptoms are causally related to the subject accident. On his initial examination he found significant limitations of range of motion of the plaintiff's right knee, left knee, cervical spine, and lumbar spine. In his recent examination the plaintiff continued to exhibit significant limitations of range of motion of her left knee, right knee, cervical and lumbar spines. He performed right knee arthroscopic surgery in June 2013. He concludes that the plaintiff has sustained, as a result of the subject accident, a permanent injury to her right knee, left knee, cervical spine, and lumbar spine and a significant limitation of use of the body function or system.

In his affidavit dated March 23, 2015, plaintiff Seung Keun Suh states that immediately following the accident he began to suffer from severe and persistent pain to his right shoulder, right knee, lower back, and head. He treated consistently at New York Pain Clinic in Flushing from April 2013 until December 2013. He stopped treating because his no fault benefits were denied in December 2013 and he could not afford to pay for treatment out of pocket. He states that he presently still suffers from daily pain in his right shoulder, right knee, lower back and head due to the subject accident.

In his report, Dr. Khodadadi states that he reviewed the MRIs of plaintiff Seung Keun and found a rotator cuff tear of the right shoulder, a meniso-capsular separation in the area of the medial meniscus of the right knee, and a bulging disc at the L4-L5 level.

Dr. Sun states that he initially examined Seung Keun Suh on May 29, 2013 and recently re-examined him on March 18, 2015. He states that upon his initial examination and upon the recent examination the plaintiff had complaints of pain to his right shoulder, right knee, and lumbar spine. He states that the symptoms are causally related to the subject accident. On his initial examination he found significant limitations of range of motion of the plaintiff's right shoulder right knee and lumbar spine. In his recent examination the plaintiff continued to exhibit significant limitations of range of motion. He performed right shoulder arthroscopic surgery in August 9, 2013. He concludes that the plaintiff has sustained, as a result of the

subject accident, a permanent injury to his right shoulder, right knee and lumbar spine and a significant limitation of use of the body function or system.

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 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 respective affirmed medical reports of Dr. Lastig and Winnell and the plaintiffs' testimony at their examinations before trial are sufficient to meet its prima facie burden by demonstrating that each plaintiff Ja Young Suh and Seung Keun Suh 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 plaintiffs raised triable issues of fact by submitting the affirmed medical reports of Drs. Sun and Khodadadi attesting to the fact that each plaintiff sustained tendon tears and herniated or bulging discs as a result of the accident and finding that each plaintiff had significant limitations in range of motion both contemporaneous to the accident and in a recent examination, and concluding that the plaintiff's limitations were significant and permanent and resulted from trauma 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 [1<sup>st</sup> Dept. 2012]; Ortiz v Zorbas, 62 AD3d 770 [2d Dept. 2009]; Azor v Torado, 59 ADd 367 [2d Dept. 2009]). As such, each plaintiff raised a triable issue of fact as to whether he or she 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 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]; Tai Ho Kang v Young Sun Cho, 74 AD3d 1328 743 [2d Dept. 2010]).

In addition, Dr. Sun and the plaintiffs adequately explained the gap in treatment stating that no-fault had stopped the plaintiff's benefits and the plaintiff had limited ability to pay for treatment (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]).

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

ORDERED, that the motion by defendants for an order granting summary judgment dismissing the complaint of plaintiffs, JA YOUNG SUH and SEUNG KEUN SUH, is denied, and it is further,

ORDERED, that this matter remains on the calendar for trial on June 8, 2015.

Dated: May 26, 2015  
Long Island City, N.Y.

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**ROBERT J. MCDONALD**  
**J.S.C.**