

**Byun v Fakir**

2015 NY Slip Op 31538(U)

July 20, 2015

Supreme Court, Queens County

Docket Number: 703048/2013

Judge: Robert J. McDonald

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

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

JAE WOOK BYUN, Index No.: 703048/2013  
Plaintiff, Motion Date: 06/02/15  
- against - Motion No.: 12  
Motion Seq.: 2  
MOHAMMAD A. FAKIR,

Defendant.

- - - - - x

The following papers numbered 1 to 13 were read on this motion by defendant, JAE WOOK BYUN, for an order pursuant to CPLR 3212 granting defendant summary judgment and dismissing the plaintiff's complaint on the ground that the plaintiff, Jae Wook Byun, did not sustain a serious injury within the meaning of Insurance Law §§ 5102 and 5104:

Papers  
Numbered

Notice of Motion-Affidavits-Exhibits-Memorandum of Law...1 - 5  
Affirmation in Opposition-Affidavits-Exhibits.....6 - 10  
Reply to Opposition on the Motion.....11 - 13

This is a personal injury action in which plaintiff, Jae Wook Byun, seeks to recover damages for injuries he sustained when his motor vehicle was struck in the rear by the motor vehicle owned and operated by defendant Mohammad A. Fakir. The accident occurred on July 4, 2012 on the Long Island Expressway near its intersection with Utopia parkway in Queens County, New York. As a result of the accident the plaintiff alleges that he sustained serious physical injuries.

The plaintiff commenced this action by filing a summons and complaint on July 30, 2013. Issue was joined by service of defendant's verified answer dated September 3, 2013. A Note of Issue was filed by the plaintiff on February 12, 2015. The case

is presently on the calendar of the Trial Scheduling Part for August 11, 2015.

Defendant now moves for an order pursuant to CPLR 3212(b), granting summary judgment dismissing the plaintiff's complaint on the ground that the plaintiff did not suffer a serious injury as defined by Insurance Law § 5102. In support of the motion, defendant submits an affirmation from counsel, Brian Brown, Esq., a copy of the pleadings; a copy of plaintiff's verified bill of particulars; the affirmed medical reports of board certified orthopedic surgeon, Alexios Apazidis; and neurologist, Dr. Daniel J. Feuer; and a copy of the transcript of the examination before trial of plaintiff, Jae Wook Byun.

Plaintiff contends that as a result of the accident he sustained, *inter alia*, a disc bulge at the L3-L4 level and a herniated disc at L5-S1.

Plaintiff asserts 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.

Dr. Alexios Apazidis, an orthopedic surgeon retained by the defendant, examined Byun Jae Wook, age 47, on November 12, 2014. The plaintiff related to Dr. Apazidis, that he was involved in a motor vehicle accident on July 4, 2012. He stated that he was the driver of a vehicle that was struck from behind and pushed into the vehicle in front of his. He reported sustaining injuries to his neck, lower back, and left elbow. The plaintiff did not go to the hospital emergency room. One week post-accident he sought treatment at a clinic for physical therapy where he attended for five months. He stopped treating one year prior to the examination. Plaintiff presented with pain in neck and lower back with a pain level of 3 out of 10. He told Dr. Apazidis that he was employed full-time as messenger at the time of the accident and he missed two weeks of work following the accident. Dr. Apazidis, performed objective range of motion testing with the assistance of a goniometer which revealed no limitations of range of motion of plaintiff's cervical spine. However, Dr. Apazidis found a 17% loss of range of motion of the plaintiff's lumbar

spine. Based upon his examination he diagnosed the plaintiff with cervical spine sprain, resolved and lumbar spine, sprain, resolved. He states that he finds no orthopedic disability at this time based upon the physical examination and his review of the medical documentation which he reviewed.

The plaintiff was also examined by the defendant's retained neurologist Dr. Daniel Feuer on December 23, 2014. At that time he told Dr. Feuer he felt "much better." Although he continues to experience recurrent neck and low back pain. He stated that he is currently employed as a truck driver and removes debris from construction sites. Dr. Feuer, performed objective range of motion testing with the assistance of a goniometer which revealed very minor limitations of range of motion of plaintiff's cervical spine and lumbar spine. He states that the neurological examination was within normal limits and his diagnosis was status post cervical and lumbar sprain. Dr. Feuer states that based on a reasonable degree of clinical certainty the plaintiff does not demonstrate any objective neurological disability or neurological permanency. He states that the plaintiff is neurologically stable to engage in full active employment as a truck driver as well as the full activities of daily living without restriction.

In his examination before trial taken on September 26, 2014, Jae Wook Byun, testified that he is employed as a dump truck driver transporting construction waste. He states that on July 4, 2012 he was proceeding slowly in traffic on the Long Island Expressway when his vehicle was struck in the rear by the vehicle operated by the defendant. The impact to his vehicle caused it to be propelled into the vehicle in front of his. He was able to drive his vehicle away from the scene and returned to his home. He did not return to his truck driving job for a month following the accident.

The day following the accident he felt pain in his neck and lower back. About five or six days following the accident he sought treatment at the Bestain Pain Clinic for pain to his neck, lower back, right shoulder, and right arm. At the clinic he was examined by Dr. Tak and treated with a course of physical therapy, chiropractic treatments, and acupuncture. He continued physical therapy at the clinic for five months. He also was referred for two MRIs one for his neck and one for his lumbar spine. He states that he still suffers from pain in the neck, lower back, and right shoulder.

Defendant's counsel contends that the medical reports of Drs. Feuer and Apazidis, together with plaintiff's testimony at the examination before trial that he returned to work 30 days after the accident, is sufficient to demonstrate 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, Za'kiya Dorch, Esq., submits her own affirmation as well as the medical affirmation of Dr. Tak, radiologists, Dr. Khodadadi and Dr. Bonheim and the affidavit of the plaintiff.

In his affidavit, dated May 11, 2015, Mr. Byun states that on July 10, 2012, 6 days post-accident, he sought treatment with Dr Tak who recommended that he receive physical therapy, acupuncture and chiropractic treatments. On July 10, 2012 he began treating at YC Physical Therapy, Choi's Chiropractic and Shin Acupuncture. At that time he had pain in his neck and lower back from the subject accident. He received five months of therapy until his no-fault benefits were denied. He states that he could not afford to continue the treatments and pay out-of-pocket. He was also told at that time that his injuries were permanent and any further treatment would only be palliative in nature. He states that he had a follow-up examination on March 16, 2015 because he still was experiencing constant sharp pain in his neck with pain radiating to his right arm and constant aching pain in his lower back.

In his report, Dr. Khodadadi states that he reviewed the MRIs of plaintiff's cervical spine and found a bulging disc at the C4-5 level. Radiologist, Dr. Paul Bonheim. reviewed the MRI of the plaintiff's lumbar spine and found a disc bulge at L3-4 and a shallow central disc herniation at L5-S1.

In his affirmation, Dr. Yong S. Tak states that on his initial examination on July 10, 2012, the plaintiff complained of pain to the neck and lower back. Range of motion testing following the accident measured with a goniometer indicated significant loss of range of motion of the cervical and lumbar spines. He states that as of July 10 2012, the plaintiff began a course of physical therapy at Bestian facility relative to the neck and lower back complaints which lasted for five months at a frequency of 3 times per week until his no fault benefits were denied on December 11, 2012 due to maximal medical improvement. Dr. Tak states that at that time the plaintiff's range of motion was still restricted and he felt that he had reached a plateau with regard to the neck and lower back and any further treatments would be palliative in

nature. He referred the plaintiff for MRI studies which showed a disc bulge in the cervical spine and a disc herniation in the lumbar spine. He states that the MRI findings are consistent with his findings on physical examination,. He states that in his opinion the competent producing cause of the herniated disc and bulging disc and loss of range of motion was the motor vehicle accident of July 4, 2012 and not a degenerative condition. Dr. Tak re-examined the plaintiff on March 16, 2015 and conducted range of motion on the plaintiff's lower back and neck. Range of motion testing at that time showed significant loss of range of motion of the plaintiff's cervical and lumbar spines. He states that given that Mr. Byun is now nearly three years post-accident but remains symptomatic, it is his opinion that the injuries he sustained in the subject accident are permanent and that the range of motion deficits are permanent. He states that the injuries are not caused by a prior accident or a degenerative condition.

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]).

As stated above, the affirmed medical report of the defendant's examining orthopedist, Dr. Apazidis, relied on by the defendant, clearly set forth that upon his examination of the defendant he found significant limitation in the range of motion of the defendant's lumbar spine. Therefore, Dr. Apazidis's report is insufficient to eliminate all triable issues of fact (see Katanov v County of Nassau, 91 AD3d 723 [2d Dept. 2012]; Artis v Lucas, 84 AD3d 845 [2d Dept. 2011]; Borras v Lewis, 79 AD3d 1084

[2d Dept. 2010]; Smith v Hartman, 73 AD3d 736 [2d Dept. 2010]; Leopold v New York City Tr. Auth., 72 AD3d 906 [2d Dept. 2020]; Catalan v G & A Processing, Inc., 71 AD3d 1071[2d Dept. 2010]; Croyle v Monroe Woodbury Cent. School Dist., 71 AD3d 944 [2d Dept. 2010]; Kim v Orouke, 70 AD3d 995 [2d Dept. 2010]; Kjono v Fenning, 69 AD3d 581[2d Dept. 2010]; Loor v Lozado, 66 AD3d 847 [2d Dept. 2009]). Thus, the defendant failed to make a prima facie showing of entitlement to judgment as a matter of law that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d), tendering sufficient evidence to demonstrate the absence of any material issues of fact(see Winegrad v New York Univ. Med. Ctr., 64 NY2d 851[1985]; Reynolds v Wai Sang Leung, 78 AD3d 919 [2d Dept. 2010]).

In any event, this Court finds that the plaintiff raised triable issues of fact by submitting the affirmed medical reports of Drs. Tak, Bonheim and Khodadadi attesting to the fact that the plaintiff sustained a herniated and bulging disc as a result of the accident and finding that 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, 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 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. Tak and the plaintiffs adequately explained the gap in treatment stating that no-fault had stopped the plaintiff's benefits and that any further treatment would be palliative in nature (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 defendant for an order granting

summary judgment dismissing the complaint of plaintiff, JAE WOOK BYUN, is denied, and it is further,

ORDERED, that this matter remains on the calendar of the Trial Scheduling Part for August 11, 2015.

Dated: July 20, 2015  
Long Island City, N.Y.

---

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