

Park v Tong

2015 NY Slip Op 32340(U)

December 10, 2015

Supreme Court, Queens County

Docket Number: 701117/2013

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

SAM KYU PARK and SANG SU PARK, Index No.: 701117/2013

Plaintiffs, Motion Date: 12/4/15

- against - Motion No.: 124

CHRISTINE TONG, Motion Seq No.: 5

Defendant.

- - - - - x

The following papers numbered 1 to 8 read on this motion by defendant for an order pursuant to CPLR 3212 granting defendant summary judgment and dismissing the complaint of plaintiff SANG SU PARK (Mr. Park) on the ground that plaintiff fails to meet the serious injury threshold requirement of Insurance Law § 5102(d):

	<u>Papers</u> <u>Numbered</u>
Notice of Motion-Affirmation-Memo. of Law-Exhibits.....	1 - 5
Affirmation in Opposition-Exhibits.....	6 - 7
Reply Affirmation.....	8

This is a personal injury action in which plaintiffs seek to recover damages for injuries they allegedly sustained in a motor vehicle accident that occurred on February 21, 2013 on 150th Street near 14th Avenue, Queens County, New York. Mr. Park alleges that as a result of the accident he sustained serious injuries including right shoulder joint effusion, biceps tendonitis, and left knee joint effusion.

Plaintiffs commenced this action by filing a summons and complaint on March 20, 2013. Defendant joined issue by service of an answer dated April 29, 2013. Defendant now moves for an order pursuant to CPLR 3212, dismissing the complaint of Mr. Park on the ground that the injuries claimed by him fail to satisfy the serious injury threshold requirement of Section 5102(d) of the Insurance Law.

In support of the motion, defendant submits an affirmation from counsel, Katie A. Walsh, Esq.; a copy of the pleadings; a copy of the Note of Issue and So Ordered Stipulation; a copy of plaintiffs' verified bill of particulars; a copy of the transcript of Mr. Park's examination before trial; and a copy of the affirmed medical report of Joseph P. Stubel, M.D.

On June 25, 2015, Dr. Stubel performed an independent examination on Mr. Park. Mr. Park presented with current complaints of right shoulder and bilateral knee pain. Dr. Stubel identifies the medical records he reviewed and performed range of motion testing with the use of a goniometer. He found normal ranges of motion in Mr. Park's right shoulder, left shoulder, right knee, and left knee. Dr. Stubel's diagnosis is resolved sprains of bilateral shoulders and left knee. Dr. Stubel states that there is no objective signs of disability with reference to the subject accident and injuries. He concludes that Mr. Park can perform his usual activities of daily living and his usual work.

At his examination before trial, taken on February 20, 2015, Mr. Park testified that he was in a motor vehicle accident on February 21, 2013. He refused assistance of an ambulance at the scene of the accident. He sought medical treatment two weeks after the subject accident. The last time he treated as a result of the subject accident was during 2013. He did not undergo any surgical procedure or receive any injections. He was injured in a previous accident on November 1, 2007, but does not remember what part of his body was injured. Mr. Park also testified that he thinks he was injured in an accident on January 3, 2006. He is limited in playing golf, ascending and descending stairs, holding children and objects over twenty pounds, standing, moving boxes, driving long distances, walking, and playing sports.

Defendant's counsel contends that the evidence submitted is sufficient to establish, prima facie, that Mr. Park has not sustained a fracture; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; or significant limitation of use of a body function or system. Counsel also contends that Mr. Park, who alleges he missed only one week of work following the subject accident, did not sustain a medically determined injury or impairment of a nonpermanent nature which prevented him, for not less than 90 days during the immediate 180 days following the occurrence, from performing substantially all of his usual daily activities.

In opposition, Mr. Park submits an affirmation from counsel, Jason Ginsberg, Esq.; an affirmed medical report of Yan Q. Sun, M.D.; his own affidavit; and MRI affirmations from Ayooob Khodadadi, M.D. regarding his right shoulder and left knee.

Mr. Park first sought treatment with Dr. Sun on April 10, 2013. At the initial examination, Mr. Park presented with pain in his right shoulder and left knee. Dr. Sun performed range of motion testing with the use of a goniometer and found restricted ranges of motion in Mr. Park's right shoulder and left knee. Dr. Sun states that Mr. Park stopped treatment after five months even though his condition remained poor because his no fault coverage was denied. Dr. Sun re-examined Mr. Park on September 23, 2015 and found continued limitations in Mr. Park's range of motion in his right shoulder and left knee. Dr. Sun concludes that the injuries are permanent in nature and are causally related to the subject accident. Dr. Sun states that Mr. Park will continue to have difficulty in performing daily activities and will likely have lifelong orthopedic problems.

Dr. Khodadadi performed a film review of Mr. Park's right shoulder MRI taken on March 22, 2013. He states "that the findings reflected in the annexed report are not attributable to degenerative disease." Dr. Khodadadi also performed a film review of Mr. Park's left knee MRI taken on March 29, 2013 and draws the same conclusion. This Court notes that the MRI reports are not annexed to Dr. Khodadadi's MRI affirmation and the findings are not specified.

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 (see Wadford v. Gruz, 35 AD3d 258 [1st Dept. 2006]). "A defendant can establish that 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 defendant's 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 competent proof submitted by defendant, including Dr. Stubel's affirmed medical report and Mr. Park's deposition testimony, is sufficient to meet defendant's prima facie burden by demonstrating that 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]; Carballo v Pacheco, 85 AD3d 703 [2d Dept. 2011]; Ranford v Tim's Tree & Lawn Serv., Inc., 71 AD3d 973 [2d Dept. 2010]).

In opposition, Mr. Park failed to raise a triable issue of fact (see Zuckerman v City of New York, 49 NY2d 557, [1980]; Cohen v A One Prods., Inc., 34 AD3d 517 [2d Dept. 2006]). It is the plaintiff's burden to demonstrate that the plaintiff's injuries were proximately caused by the subject accident and not a prior or subsequent injury or condition (see Finkelshteyn v Harris, 280 AD2d 579 [2d Dept. 2001]; Alcalay v Town of Hempstead, 262 AD2d 258 [2d Dept. 1999]). Here, Mr. Park testified that he was involved in four motor vehicle accidents. However, it appears that Dr. Sun was unaware of these accidents as he fails to address such. Under these circumstances, it would be speculative to determine that the subject accident was the sole cause of Mr. Park's claimed injuries (see Mooney v Edwards, 12 AD3d 424 [2d Dept. 2004]; Dimenshteyn v Caruso, 262 AD2d 348 [2d Dept. 1999]). Additionally, Mr. Park's MRI reports are insufficient to demonstrate causality because Dr. Khodadadi failed to causally relate any findings, which are not stated, to the subject accident (see Munoz v Koyfman, 44 AD3d 914 [2d Dept. 2007]; Collins v Stone, 8 AD3d 321 [2d Dept. 2004]). Dr. Khodadadi merely states that the findings are not degenerative in nature but fails to state that the findings were caused by the subject accident or were even caused by some trauma.

Mr. Park also failed to submit competent medical evidence that the injuries allegedly sustained by him as a result of the subject accident rendered him unable to perform substantially all of his daily activities for not less than 90 days of the first 180 days following the accident (see Ayotte v Gervasio, 81 NY2d 1062 [1993]; Valera v Singh, 89 ADd 929 [2d Dept. 2011]; Lewars v Transit Facility Mgt. Corp., 84 AD3d 1176 [2d Dept. 2011]; Nieves v Michael, 73 AD3d 716 [2d Dept. 2010]; Joseph v A & H Livery, 58 AD3d 688 [2d Dept. 2009]).

Accordingly, because the evidence relied upon by plaintiff is insufficient to create a triable issue of fact with respect to any of the statutory categories of serious injury, and for the reasons set forth above, it is hereby,

ORDERED, that defendant's motion for summary judgment is granted and plaintiff SANG SU PARK's complaint is dismissed; and it is further

ORDERED, that the Clerk of Court is directed to enter judgment accordingly.

Dated: December 10, 2015
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.