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**

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SALVATORE SPUCCES and ROSANNA SPUCCES, Index No.: 703541/2014

Plaintiffs, Motion Date: 10/11/16

- against - Motion No.: 128

WEI LIM KOK and ZHI JUN TONG, Motion Seq No.: 7

Defendants.

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The following electronically filed documents read on this motion by plaintiffs for an Order pursuant to CPLR 2221, vacating the Order of this Court dated June 10, 2016 and granting leave to renew the prior motion of defendant Zhi Jun Tong, and upon renewal, denying defendant Zhi Jun Tong's motion for summary judgment:

| | Papers Numbered |
|---|---|
| Notice of Motion-Affirmation-Exhibits..... | EF 68 - 74 |
| Affirmation in Opposition..... | EF 78 |
| Reply Affirmation..... | EF 79 |

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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 April 16, 2013 on Flushing Avenue at or near its intersection with Cumberland Street, in Kings County, New York. In the verified bills of particulars, plaintiff Salvatore Spucces alleges serious injuries to his lumbar spine, cervical spine, and left shoulder. Plaintiff Rosanna Spucces alleges serious injuries to her lumbar spine.

Plaintiffs commenced this action by filing a summons and verified complaint on May 22, 2014. Defendants joined issue by service of a verified answer dated June 23, 2014. By Short Form Order dated June 10, 2016, this Court granted defendant Zhi Jun Tong's motion for summary judgment on the ground that plaintiffs did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident.

Plaintiffs now move to renew the prior summary judgment motion because the motion was marked fully submitted without opposition when in fact opposition was filed. Counsel for plaintiffs, Jed Kirsch, Esq., affirms that due to a court oversight the motion was submitted on May 24, 2016 instead of June 21, 2016. Counsel further contends that the summary judgment motion should have been denied outright, regardless of the sufficiency of plaintiffs' opposition papers.

In opposition, counsel for defendant Zhi Jun Tong, Sean M. Broderick, Esq., contends that plaintiffs failed to provide a justifiable reason for their failure to submit opposition to the prior motion.

A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and . . . shall contain reasonable justification for the failure to present such facts on the prior motion." (CPLR 2221[e][2], [3]; see Coll v Padilla, 5 AD3d 716 [2d Dept. 2004]; Rizzotto v Allstate Ins. Co., 300 AD2d 562 [2d Dept. 2002]). The question of what constitutes a reasonable justification and the answering of this question is within the Supreme Court's discretion (see Rowe v NYCPD, 85 AD3d 1001 [2d Dept. 2011]). Leave to renew should be denied unless the moving party offers a reasonable excuse as to why the additional facts were not submitted on the original application (see Fardin v 61st Woodside Assoc., 125 AD3d 59 [2d Dept. 2015]; Singh v. Avis Rent A Car Sys., Inc., 119 AD3d 76 [2d Dept. 2014]; Commisso v Orshan, 85 AD3d 845 [2d Dept. 2011]).

Upon a review of the motion papers, including affirmations from appearing attorneys, opposition, and reply thereto, and as public policy favors a disposition on the merits rather than on default, (see Billingly v Blagrove, 84 AD3d 848 [2d Dept. 2011]; Centennial Elevator Indus., Inc. v Ninety-Five Madison Corp., 90 AD3d 689 [2d Dept. 2011]; Dimitriadis v Visiting Nurse Service of New York, 84 AD3d 1150 [2d Dept. 2011]), this Court finds that plaintiffs submitted a reasonable justification. Thus, plaintiffs' branch of their motion to renew is granted and the prior summary judgment motion will be decided herein.

As previously summarized in the prior Order, on July 1, 2015, plaintiff Salvatore Spucces appeared for his examination before trial. He testified that he was involved in the subject accident. Immediately following the accident, he refused medical treatment, left the scene of the accident in his vehicle, and dropped his daughter off at work. He was confined to his bed for a couple of days after the accident.

Mr. Spucces first sought medical treatment from Steven M. Erlanger, M.D. on April 19, 2013. Dr. Erlanger's impression was acute cervical and lumbar sprains with underlying degenerative disc disease. He also notes lumbar radiculopathy and a contusion of the chest. An MRI of Mr. Spucces' lumbar spine, taken on April 25, 2013, revealed multilevel degenerative changes resulting in mild spinal stenosis at the L2-L3 and L3-L4 levels, small left-sided herniations at the L1-L2 and L3-L4 levels, and a small right foraminal disc herniation at the L2-L3 level. An MRI of Mr. Spucces' cervical spine was also taken on April 25, 2013, and revealed multilevel degenerative changes, and diffuse disc bulging associated with osteophytic ridging at the C5-C6 level.

On August 31, 2015, Dr. Emmanuel performed an independent orthopedic examination on Mr. Spucces. Mr. Spucces presented with current complaints of neck, left shoulder, and lower back pain. Dr. Emmanuel identifies the medical records she reviewed, and notes that Mr. Spucces sustained a work-related strain on March 28, 2011, a back injury on July 9, 1994, and a neck and left shoulder injury on April 2, 1999. Dr. Emmanuel performed range of motion testing with the use of a goniometer. She found normal ranges of motion in the cervical spine, left shoulder and lumbosacral spine. She did note decreased range of motion, twenty degrees or less, regarding Mr. Spucces' cervical spine on flexion and extension, left shoulder on flexion, abduction and external rotation, and lumbosacral spine on flexion and extension. Dr. Emmanuel attributes such to Mr. Spucces' pre-existing factors and advanced age. Dr. Emmanuel's diagnosis is status post cervical and lumbar sprain/strain, resolved; status post left shoulder sprain, resolved; pre-existing cervical injury, 1999; pre-existing left shoulder, 1999 and 2001; pre-existing left rotator cuff repair, 2011; pre-existing degenerative changes of the cervical spine, lumbar spine and left shoulder. She concludes that there is no objective evidence of a disability or permanency as a result of the subject accident.

Plaintiff Rosanna Spucces appeared for her examination before trial on July 1, 2015. She testified that immediately following the subject accident, she did not feel any pain. She did not advise the responding police officer that she was injured or in need of emergency medical attention. She missed one week from work immediately following the subject accident. She has no claim for lost wages.

Rosanna Spucces underwent an MRI of the thoracic spine on June 25, 2013, which revealed an old compression fracture of T9, and degenerative disc and endplate changes in the lower thoracic spine without disc herniation or stenosis. An MRI of her lumbar spine was taken on July 20, 2013 and revealed mild spondylosis.

Dr. Emmanuel performed an independent orthopedic examination on plaintiff Ms. Spucces on August 31, 2015. Ms. Spucces presented with current complaints of mid and lower back pain. Dr. Emmanuel identifies the medical records she reviewed, and notes that Ms. Spucces sustained a fracture of her T9 disc in 2012. Dr. Emmanuel performed range of motion testing with the use of a goniometer. She found normal range of motion regarding Ms. Spucces' thoracic spine, but found decreased range of motion, ten degrees or less, in Ms. Spucces' lumbosacral spine. Dr. Emmanuel attributes such to Ms. Spucces' pre-existing factors and weight. Dr. Emmanuel's diagnosis is status post thoracic and lumbar sprain/strain, resolved; pre-existing T9 fracture, 2012; pre-existing degenerative changes of the thoracic and lumbar spine; and pre-existing morbid obesity. She concludes that there is no objective evidence of a disability or permanency as a result of the subject accident.

Defendant Zhi Jun Tong's counsel contends that the evidence submitted is sufficient to establish, prima facie, that plaintiffs have not sustained a 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. Spucces, who alleges he was confined to bed a couple of days following the subject accident and Ms. Spucces who missed only a week of work, did not sustain a medically determined injury or impairment of a nonpermanent nature which prevented them, for not less than 90 days during the immediate 180 days following the occurrence, from performing substantially all of their usual daily activities.

In opposition, plaintiffs first contend that defendant Zhi Jun Tong failed to satisfy his prima facie burden as defendant's own expert, Dr. Emmanuel, found quantifiable loss of ranges of motion in each plaintiff. Specifically, regarding Mr. Spucces, Dr. Emmanuel found decreased range of motion in his cervical spine on flexion and extension. Regarding Ms. Spucces, Dr. Emmanuel found loss of range of motion in her lumbar spine regarding flexion, extension, right and left lateral bending, and rotation.

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 is sufficient to meet defendant's prima facie burden by demonstrating that plaintiffs 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. Spucces submits two medical affirmations from Dr. Demetrios Mikelis and Dr. Steven M. Erlanger. Although both doctors affirm that the alleged injuries, including restricted ranges of motion, were caused by the subject accident, neither doctor affirms that he reviewed any medical records from Mr. Spucces' prior accidents. Dr. Erlanger does affirm that his opinion is based on Mr. Spucces' history of being asymptomatic and pain free prior to the accident. However, as Dr. Erlanger solely relied on Mr. Spucces' representation, Dr. Erlanger's opinion is speculative at best (see Vaveris v Franco, 71 AD3d 1128 [2d Dept. 2010]).

Similarly, Ms. Spucces fails to submit competent proof that her alleged injuries are causally related to this accident. Although Dr. Jay Nathan affirms that Ms. Spucces reported to him that she recovered from her prior fall, Dr. Nathan fails to causally relate any injuries to the subject accident. Dr. Edward A. Toriello's affirmation, which was submitted by Ms. Spucces for the first time in reply to defendant's opposition, was not considered on this motion (see CPLR 2214; Voytek Technology, Inc. v Rapid Access Consulting, Inc., 279 AD2d 470 [2d Dept. 2001]; Dannasch v Bifulco, 184 AD2d 415 [2d Dept. 1992]).

It is the plaintiffs' burden to demonstrate that plaintiffs' 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]). As previously stated, defendant has presented evidence that the claimed injuries are all degenerative in nature and predate the accident. Under these circumstances, and as plaintiffs' failed to raise an issue of fact in opposition, it would be speculative to determine that the subject accident was the sole cause of plaintiffs' injuries (see Mooney v Edwards, 12 AD3d 424 [2d Dept. 2004]; Dimenshteyn v Caruso, 262 AD2d 348 [2d Dept. 1999]).

Accordingly, based on the reasons set forth above, it is hereby

ORDERED, that the branch of plaintiffs' motion to renew the prior summary judgment motion is granted, and upon renewal, it is hereby

ORDERED, that the original determination of this Court is adhered to, defendant ZHI JUN TONG's motion for summary judgment is granted, and plaintiffs' complaint is dismissed as against defendant ZHI JUN TONG; and it is further

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

Dated: October 27, 2016
Long Island City, N.Y.

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