

Songho An v Gilligan-Evans
2018 NY Slip Op 30474(U)
March 20, 2018
Supreme Court, New York County
Docket Number: 159401/15
Judge: Adam Silvera
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**SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY
PRESENT: Hon. Adam Silvera** **Part 22**

SONGHO AN,

Plaintiff,

-against-

A GILLIGAN-EVANS,

Defendants.

DECISION/ORDER

**INDEX NO. 159401/15
MOTION SEQ. NO. 002**

ADAM SILVERA, J. :

This is a personal injury action where plaintiff sustained injuries after a rear end collision between the parties’ vehicles. The accident occurred on August 9, 2015 at 291 Central Avenue, Westchester County, New York. The complaint alleges that defendant-driver was negligent, careless and reckless in the operation and control of her vehicle. Plaintiff seeks damages for injuries caused by the accident, which he defines as “serious,” pursuant to §5102(d) of the Insurance Law.

Defendant moves for summary judgment dismissing the complaint on the ground that plaintiff’s alleged injuries did not reach the threshold of “serious injury,” as required by §5102(d), to allow him to maintain a lawsuit such as this one.

On January 14, 2016, plaintiff served a verified bill of particulars alleging injuries to his right shoulder. On February 3, 2016, plaintiff served a supplemental bill of particulars alleging that he underwent multiple trigger point and cortisone injections for his right shoulder injuries. On May 9, 2017, plaintiff served another supplemental bill of particulars alleging that he underwent an arthroscopic surgical procedure for his right shoulder.

Defendant contends that plaintiff failed to reach the threshold requirement of serious injury and submits an affirmation from Dr. Alan Zimmerman, a certified orthopedic surgeon, who examined plaintiff on January 25, 2017. Dr. Zimmerman performed the following shoulder tests: Impingement, Supraspinatous, Hawkins, Neer, Apprehension, Empty Can, Speed and Yergason. The report concludes that all of these tests were negative. A range of motion test was also conducted by Dr. Zimmerman, who affirmed that plaintiff had a resolved right shoulder sprain, but found no disability or permanent condition. Dr. Zimmerman commented on a "Hill Sachs" deformity mentioned in plaintiff's bill of particulars, stating that it was a "prior injury."

Defendant also submits an affirmation from Dr. Jonathan Lerner, a radiologist, who examined and reviewed plaintiff's right shoulder MRI taken on September 25, 2015. Dr. Lerner noted the presence of degenerative changes and the absence of fractures. He found no causation between the right shoulder condition and the accident.

Defendant argues that all of the competent medical evidence suggests that any injuries sustained by plaintiff were minor, preexisting, degenerative and/or resolved. Defendant contends that, accordingly, plaintiff failed to show any permanent loss of use, any significant limitation of use of a body function or system, or any permanent consequential limitation. Defendant also contends that plaintiff did not suffer from medically determined injuries or impairments of a non-permanent nature that substantially curtailed his usual and customary activities for 90 days during the first 180 days following the accident. Defendant submits deposition testimony from plaintiff that provides that plaintiff did not seek treatment at a hospital post-incident, and that he returned to work on the Monday following the Sunday accident. Defendant claims that she has submitted sufficient evidence for the granting of summary judgment.

In opposition, plaintiff argues that defendant has not made out a case for summary

judgment. He contends that defendant's physicians are deficient because they failed to consider the recent surgical procedure he underwent for his right shoulder. According to plaintiff, the two physicians disagree as to the existence of a Hill-Sachs deformity and/or tears or impingement in the right shoulder. Plaintiff also claims that the physicians cannot agree as to whether plaintiff sustained any trauma related injuries as a result of this accident. Moreover, plaintiff argues that the reports are arbitrary and cursory, and raise issues of fact, precluding summary judgment.

Plaintiff submits an affirmation from his orthopedic surgeon, Dr. Thomas Scilaris, which states that plaintiff has suffered injuries that prevented him from performing many of the acts that constitute his usual and customary activities since the accident. Plaintiff also submits his own affidavit explaining in detail the activities that he no longer performs as a result of the accident. In his affirmation, Dr. Scilaris states that he examined plaintiff's right shoulder on November 5, 2015 and on May 9, 2017, and concludes that plaintiff's condition has worsened with time. Dr. Scilaris provides a report involving his range of motion testing, as well as Neer, Hawkins and Speed tests. He claims that he found positive findings of tenderness to bicipital groove and AC joint, and restrictive range of motion regarding flexion, abduction, internal and external rotation. He refers to the injections plaintiff underwent, finding that the results did not avert his persistent pain. He claims to have performed the arthroscopic procedure on plaintiff and examined him afterwards. Based on his examinations, Dr. Scilaris affirms that plaintiff's injuries are permanent in nature, and that plaintiff has a partial permanent orthopedic disability. He finds that plaintiff will require additional treatment in the form of medication, therapy, injections and, possibly, an additional arthroscopic procedure if his symptoms persist or worsen.

Plaintiff submits a copy of a letter, dated September 27, 2015, from Dr. Thomas Kolb, a radiologist, who discussed plaintiff's MRI results, emphasizing evidence of trauma.

Plaintiff argues that the motion for summary judgment should be denied as insufficient, or that there are issues of fact precluding judgment.

Defendant submits a reply and a sur-reply. The sur-reply includes an affirmation from Dr. Zimmerman, who examined plaintiff on September 13, 2017, after plaintiff underwent the arthroscopic procedure, and provided his medical findings, which appear to be consistent with his earlier findings. Defendant contends that the medical evidence concludes that, objectively, plaintiff has suffered no serious injury as a result of the accident. Defendant argues that plaintiff failed to adequately address the issue of a prior injury in his papers. According to defendant, plaintiff failed to establish any viable “90/180” claim, and there are “gaps” in relation to his medical treatment since the time of the accident.

Defendant contends that the MRI letter/report from Dr. Kolb should be disregarded because it is not certified or affirmed. Defendant argues that plaintiff’s affidavit is self-serving and non-medical, whereas defendant claims to have submitted adequate objective medical evidence to affirm her motion.

“The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law”. *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dep’t 2007), citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Upon the proffer of evidence establishing a prima facie case by the movant, “the party opposing a motion for summary judgment bears the burden of ‘produc [ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact’”. *People v Grasso*, 50 AD3d 535, 545 (1st Dep’t 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable

issue of fact, summary judgment must be denied. *See Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 (1st Dep't 2002).

Courts have continually held that the question of whether a plaintiff has established a prima facie case for a "serious injury," as described in §5102(d) of the Insurance Law, remains an issue of law. *See Licari v Elliott*, 57 NY2d 230, 235 (1982). Claims of serious injury are to be supported by objective medical evidence demonstrating a significant physical limitation resulting from the accident. *See Pommells v Perez*, 4 NY3d 566, 574 (2005). Where a plaintiff's physician asserts a permanent injury and sets forth the findings upon which this opinion is based, such evidence is sufficient for denying summary judgment to a defendant. *See Lopez v Senatore*, 65 NY2d 1017, 1020 (1985).

Defendant has submitted medical evidence demonstrating a lack of a permanent condition that physically effects plaintiff which can be traced to the subject accident. The evidence indicates that plaintiff was never hospitalized after the accident and did not take any time off from his work as a result of the injuries. Plaintiff was not given medication for his injuries. However, plaintiff did undergo chiropractic and physical therapy and acupuncture, which has been discontinued, until recently, when plaintiff has resumed some form of physical therapy. Plaintiff was subjected to an MRI of his right shoulder and a number of injections, and later underwent an arthroscopic procedure performed by Dr. Scilaris.

Dr. Zimmerman concluded in his report that plaintiff's Hill-Sachs deformity was the result of a prior injury. Plaintiff admittedly had a prior accident in 2013, but injuries from that accident were confined to his lower back and right knee, not his right shoulder.

Dr. Lerner provided his assessment of plaintiff's MRI, finding no evidence of a serious consequential injury. The opposition papers included Dr. Kolb's assessment of the MRI, but as it

was not affirmed or certified, it is inadmissible. However, Dr. Scilaris' affirmation includes his assessment of the MRI, which provides a very different conclusion when compared to Dr. Lerner's findings.

Plaintiff claims in his affidavit that the accident has limited his abilities to carry out household activities such as cleaning and laundry work. Plaintiff claims that he cannot lift heavy objects and participate in taekwondo. Dr. Scilaris provides a more clinical and objective affirmation of plaintiff's current condition in contrast to the affirmations of Dr. Zimmerman. Unlike Dr. Zimmerman, Dr. Scilaris, upon examination, affirmed a positive finding of impingement and weakness on isolation with supraspinatus tendon for plaintiff's right shoulder, and a positive loss in range of motion for the right shoulder.

The issue of permanency regarding plaintiff's injuries cannot be resolved at this point, where there is an apparent dispute by expert physicians who have conducted quantified tests on plaintiff. Based on the conflicting evidence submitted by the parties, summary judgment must be denied.

Accordingly, it is

ORDERED that defendant A Gilligan-Evans' motion for summary judgment is denied; and it is further

ORDERED that, within thirty days of entry, plaintiff shall serve a copy of this order upon all parties, together with notice of entry.

Dated: March 20, 2018

ENTER:



Hon. Adam Silvera, J.S.C.