

Jong Cheol Yang v Grayline NY Tours
2018 NY Slip Op 33090(U)
October 1, 2018
Supreme Court, Queens County
Docket Number: 710028/2015
Judge: Cheree A. Buggs
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Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS**
Justice

IAS PART 30

JONG CHEOL YANG,

Index No.: 710028/2015

Plaintiff,

Motion Date: August 1, 2018

-against-

Motion Cal. No.: 59

GRAYLINE NY TOURS and GEORGE
WEINBARG,

Motion Sequence No.: 5

Defendants.

The following efile papers numbered 107-122, 139-145 submitted and considered on this motion by defendants Grayline NY Tours and George Wienbarg seeking an Order pursuant to CPLR 3211(a)(2), 3211(a)(7) and 3212 granting summary judgment against plaintiff Jong Cheol Yang on the grounds that he has not sustained a serious injury under Insurance Law section 5102 (d).

Papers
Numbered

Notice of Motion -Affidavits-Exhibits.....	EF 107-122
Affirmation in Opposition-Affidavits-Exhibits.....	EF 139-144
Reply Affirmation-Affidavits-Exhibits.....	EF 145

This litigation arises from a motor vehicle accident which occurred on October 9, 2013 at the intersection of East 57th Street near 5th and Madison Avenues, County and State of New York. Discovery is now complete and defendants, Grayline NY Tours and George Wienbarg (hereinafter collectively "Grayline") make this application seeking an Order pursuant to CPLR 3211(a)(2), 3211(a)(7) and 3212 granting summary judgment against plaintiff Jong Cheol Yang (hereinafter "Yang") on the grounds that he has not sustained a serious injury under Insurance Law sections 5102 (d). The matter is scheduled for trial in the Trial Scheduling Part on October 3, 2018.

Grayline contended that Yang is a professional plaintiff who has a long history of commencing lawsuits in connection with at least four (4) motor vehicle accidents. Beginning in 2009 he suffered a heart attack and was advised by his doctors that he could not work full time. Yang was involved in a prior accident in 2009 where he underwent a MRI of his right shoulder which revealed findings identical to those alleged herein; an April 22, 2013 accident wherein he sustained left shoulder injuries; this accident where he alleged right shoulder surgery and left knee surgery; a subsequent accident on February 11, 2014 for which he underwent right knee surgery. Defendants' contention herein is that based upon the documentary evidence they have submitted in support of the motion, the motion should be granted.

Plaintiff Jong Cheol Yang's Verified Bill of Particulars and Supplemental Bill of Particulars

Yang alleged in his verified bill of particulars dated February 22, 2016, that the accident took place on October 9, 2013 at the intersection of 57th Street and Madison Avenue. He alleged that as a result of the accident he sustained serious injury to his left knee and right shoulder, including surgical intervention. He contended that he sustained a serious injury under the permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; a significant limitation of use of a body or system; and the 90/180 day categories of the Insurance Law. He claimed that he was confined to his bed for four months following the accident, and to home for one month. In his supplemental bill of particulars he claimed that he had outstanding medical bills totaling \$32,260 for Western Janeda Ortho.

Deposition testimony of plaintiff Jong Cheol Yang

Plaintiff gave sworn testimony in this matter on August 17, 2017 and August 24, 2017. He testified that the accident occurred on October 9, 2013. He claimed that a bus hit his vehicle which caused him to injure his left knee and right shoulder. He testified that he was involved in prior accidents. He was shown various medical records related to the prior accidents and medical treatment. He testified that he did not recall having a right shoulder MRI in the year 2009 or a doctor telling him in 2009 that he had a partial tear of the supraspinatus tendon of his right shoulder. He suffered a heart attack in 2008 or 2009 and as a result he admitted that he could no longer work. However, he currently drives people he knows around in New Jersey, where he currently resides, and receives payment, although he is not operating a taxi service. He testified that he still has pain to his left knee and right shoulder and takes Advil for pain. He alleged that he could no longer jog three to four times a week and was unable to lift heavy items. He had prior accidents in 2007, one in April and one in June. He claimed injuries to his neck and back in those accidents, but he claimed he did not proceed with a lawsuit. He was involved in another accident on June 20, 2009, and claimed neck and back injuries and received treatment. In 2012 he was treating for back and right shoulder pain. In April 2013 he was involved in another accident and claimed injuries to his left shoulder, neck and back, and he has filed a lawsuit.

Plaintiff was also involved in a subsequent accident on February 11, 2014, where he claimed

that he sustained personal injuries to his right knee requiring surgery, and he settled that case. He was asked about an entry in medical records of February 3, 2014 of Flushing Hospital which stated that he had fallen on ice and hit his head and sustained a laceration to his face. He had not seen any doctor for any injuries alleged herein from 2015 to 2017. At the deposition, plaintiff was shown a video tape, purportedly depicting the plaintiff raising both his arms.

Record of Liberty Physical Medicine & Rehabilitation, P.C.

Medical records of Liberty Physical Medicine & Rehabilitation, P.C. reflect that the plaintiff had decreased range of motion in his neck, back and right extremity. An MRI of his right shoulder taken on August 20, 2009 revealed a partial tear of the supraspinatus tendon with encroachment syndrome and a complete tear of the subscapularis tendon.

Plaintiff's Verified bill of particulars-April 22, 2013 accident

A copy of plaintiff's verified bill of particulars related to plaintiff's April 22, 2013 accident was annexed to defendants' papers, which revealed that plaintiff alleged serious injuries to his left shoulder, and left knee, with surgery, neck, and back. Defendants also annexed a copy of plaintiff's verified complaint related to his February 11, 2014 accident.

Independent Medical Report of Dr. Ramesh Giduamal

Dr. Ramesh Giduamal performed an independent medical examination on the plaintiff on October 10, 2017. He reviewed various medical records, MRI reports, the plaintiff's verified bill of particulars and records relating to plaintiff's prior treatment. He also performed range of motion testing on the plaintiff's left and right shoulder, which he stated was normal (forward flexion 165 degrees/165 degrees normal; external rotation 90 degrees/90 degrees normal). Dr. Giduamal stated that according to the records, plaintiff was not advised to stay home for one month or in bed for four months. It was his opinion within a reasonable degree of medical certainty that plaintiff was not confined to his home for one month nor four months as a result of his shoulder injury. He reviewed the MRI of the right shoulder performed at Kissen Medical Imaging on August 20, 2009 and agreed with the radiologist that the study revealed a partial tear of the supraspinatus tendon with encroachment syndrome, subcoracoid bursal effusion and a complete tear of the subscapularis tendon. Dr. Giduamal discussed the plaintiff's four other accidents, and concluded that in his opinion, the MRI findings of November 27, 2013 revealed no evidence of an acute tear but the same abnormalities as the MRI findings of August 20, 2009, therefore, plaintiff did not sustain any injury to his right shoulder as a result of the accident. The intraoperative findings are consistent with the August 20, 2009 MRI findings. Therefore, plaintiff had pre-existing degenerative disease to his right rotator cuff, unrelated to the accident.

Independent Medical Examination of Dr. Ronald P. Grelsamer

Dr. Ronald P. Grelsamer performed an independent medical examination of the plaintiff's knees on October 12, 2017. He reviewed various records, including the verified bill of particulars, MRI reports and medical records for plaintiff's medical treatment related to this case and prior accidents. He performed range of motion testing of plaintiff's left knee with a protractor, and active range of motion in both knees was to 140 degrees (130 degrees or above normal). In his opinion, the plaintiff did not sustain a serious, permanent or surgical injury to the left knee as a result of the accident.

Analysis

It is well settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering admissible evidence to eliminate any material issues of fact from the case. (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). Summary judgment eliminates cases from the trial calendar which can be properly resolved by the Court as a matter of law (*Andre v Pomeroy*, 35 NY2d 361 [1974]). Summary judgment is a drastic remedy and should not be granted where there is doubt about the existence of any issues (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]). The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering admissible evidence to eliminate any material issues of fact from the case. (*Friends of Animals, Inc. v Assoc. Fur Mfrs.*, 46 NY2d 1065 [1979].)

The Court finds that defendants have established their entitlement to judgment as a matter of law. Defendants established that plaintiff's right shoulder injury was unrelated to this accident; that plaintiff had normal range of motion in his right shoulder and left knee; that any alleged injuries were not caused by the accident or were pre-existing; that plaintiff's testimony established that he failed to sustain an injury under the 90/180 day category; and that plaintiff had no explanation for his gap in treatment (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Patisso v Brady*, 152 AD3d 782 [2d Dept 2017]; *Moran v Kollar*, 96 AD3d 811 [2d Dept 2012]; *Frias v Son Tien Liu*, 107 AD3d 589 [1st Dept 2013]). Plaintiff must now come forward with evidence to raise a triable issue of fact.

In opposition, plaintiff contended that defendants' characterization of plaintiff as a "professional plaintiff" is unwarranted. He submitted the affirmation of Dr. Yan Q. Sun, and reports of Dr. Ayoob Khodadadi and Dr. Mary Hu. Dr. Sun's affirmation is not dated. He stated that initially examined plaintiff on November 9, 2013 and recently examined the plaintiff on April 23, 2018. He reviewed records relating to plaintiff's accident on June 20, 2009, April 22, 2013 and subsequent accident on February 11, 2014. As a result of this accident plaintiff had left knee surgery on February 7, 2014. On initial examination on November 9, 2013, he conducted objective range of motion testing on plaintiff's left knee. Range of motion was restricted on extension and flexion to 0-90 degrees (0-135 degrees normal). On December 18, 2013 range of motion testing on the left

knee was the same. On recent examination of the left knee on April 23, 2018, extension and flexion were 0-90 degrees (0 to 135 degrees normal). All range of motion testing were assessed with a goniometer. In regards to plaintiff's right shoulder, upon examination on April 23, 2018 the doctor found range of motion on forward elevation 140 degrees (180 degrees normal); internal rotation 60 degrees (90 degrees normal); external rotation 60 degrees (90 degrees normal). In his opinion, plaintiff sustained permanent orthopedic injuries to his left knee and aggravating permanent orthopedic injuries to his right shoulder, and that plaintiff's left knee injuries are not related to any pre-existing or degenerative conditions, and which prevented him from performing many of the material acts which constituted his usual and customary activities from the date of the motor vehicle accident. Dr. Sun alleged that these injuries were permanent in nature or permanent consequential or there is a significant limitation.

The Court finds that Dr. Sun failed to state what contemporaneous range of motion was for the plaintiff in relation to his right shoulder; failed to explain plaintiff's gap in treatment; failed to address defendants' allegations related to the MRI of plaintiff's his right shoulder taken on August 20, 2009 which revealed a partial tear of the supraspinatus tendon with encroachment syndrome and a complete tear of the subscapularis tendon; failed to address that the alleged injuries were either unrelated or pre-existing. Dr. Sun's affirmation failed to address or contest or rebut the findings of defendant's doctor's findings, failed to establish a reason for the gap in the plaintiff's treatment (*see Perl v Meher*, 18 NY3d 208 [2011]; *Pommells v Perez*, 4 NY3d 566 [2005]; *Cash v Abraham*, 105 AD3d 690 [2d Dept 2013]; *Perez v Schreier*, 102 AD3d 938 [2d Dept 2013]). Dr. Sun also relied upon two medical records that were prepared by another doctor (*Furrs v Griffith*, 43AD3d 389 [2d Dept 2007]; *Simms v APA Truck Leasing Corp.* 14 AD3d 322 [1st Dept 2005]). Plaintiff did not allege any exacerbation of any pre-existing injuries in his bills of particulars (*see Moran v Kollar*, 96 AD3d 811 [2d Dept 2012]). Conclusory recitation of the statutory language is not sufficient to raise a triable issue of fact (*Lopez v Senatore*, 65 NY2d 1017 [1985]).

Therefore, the defendants' motion is granted in its entirety.

This constitutes the decision and Order of the Court.

Dated: October 1, 2018



Hon. Chereé A. Buggs, JSC