

Jing Hui Huang v Filya Taxi Inc.
2018 NY Slip Op 33120(U)
December 7, 2018
Supreme Court, Kings County
Docket Number: 517431/16
Judge: Debra Silber
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

x

JING HUI HUANG and CHUN YING LI,

Plaintiffs,

-against-

FILYA TAXI INC. and BHAKTAJIT GARBUJA PUN,

Defendants.

DECISION / ORDER

Index No. 517431/16

Motion Seq. No. 1, 2

Date Sub.: 10/25/18

x

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendants' motion and plaintiff (on the counterclaim) Huang's motion for summary judgment.

Papers	NYSCEF No.
Notice of Motion, Affirmation and Exhibits Annexed.....	<u>16-32, 33-39</u>
Affirmation in Opposition, and Exhibits Annexed.....	<u>43-60</u>
Reply.....	<u>62</u>

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

This is a personal injury action arising out of a motor vehicle accident. Defendants move for summary judgment dismissing the plaintiffs' complaint, pursuant to CPLR Rule 3212, on the ground that neither plaintiff sustained "serious injuries" under Insurance Law § 5102(d). Plaintiff on the counterclaim cross-moves for summary judgment as to co-plaintiff Chun Ying Li's claims with a "me too" motion which relies on the same papers.

On July 4, 2016, Plaintiff Huang was the driver and plaintiff Li was a passenger in a vehicle that was traveling on the JFK Expressway in Queens, NY when plaintiff's vehicle was rear-ended by defendants' vehicle.

Defendants provide an attorney's affirmation, the pleadings, plaintiffs' bill of particulars, plaintiffs' EBT transcripts, some of plaintiffs' medical records, and affirmations for each plaintiff from Dr. Edward Toriello, an orthopedist, Dr. Michael Carciente, a neurologist and Dr. Ronald Paynter, a trauma medicine doctor.

Plaintiff Huang

Plaintiff claims he injured his right shoulder, neck and lower back and that, as a result of the accident, he had arthroscopic surgery to his right shoulder to repair the torn labrum and torn rotator cuff which he sustained as a result of the accident. He reported that he went to physical therapy for a year. At the time of the accident, he was approximately 42 years old.

Ronald A. Paynter, M.D., who is board certified in Emergency Medicine, did not examine the plaintiff but reviewed his emergency room records. He concludes in his affirmation that the emergency room records are inconsistent with the injuries alleged in the plaintiff's bill of particulars and show that the claimed injuries do not have an acute (traumatic) origin and are not causally related to the accident on July 4, 2016. He states that there are no findings which causally relate the accident to the claimed injuries "other than "mild neck and back strains," which are not serious injuries. Dr. Paynter states that "had a serious injury occurred the patient would have . . . gone in an ambulance to the ER, failure to do so or refusal of care is a sign of no significant injury." However, the accident was at around 11:00 p.m. and the plaintiffs were at Lutheran Medical Center, the emergency room closest to their home, less than four hours later.

Edward A. Toriello, M.D. conducted an orthopedic exam of plaintiffs (Exhibits J and M) on April 11, 2018. His range of motion testing of plaintiff Huang did not produce

normal results. Flexion of his cervical spine was 10 degrees, when Dr. Toriello states that normal is 45-50 degrees, and extension was 32 degrees, when normal is 55-60 degrees, according to his affirmation. The range of motion in plaintiff's lumbar spine was normal. Abduction of Huang's right shoulder was 90 degrees, when normal is 150-180 degrees. His left shoulder was normal. Dr. Toriello opines that range of motion is "a subjective finding under the voluntary control of the individual." He concludes that plaintiff did not suffer a right shoulder injury from this accident, and plaintiff's arthroscopic surgery was not made necessary by the subject accident because plaintiff did not have "complaints referable to his right shoulder when seen in the ER." Rather, he found that as a result of the subject accident, plaintiff suffered only a resolved cervical strain, a resolved low back strain, and a resolved right shoulder contusion.

Dr. Carciente examined plaintiff Huang on April 17, 2018 (Exhibit L). He states that plaintiff "has a normal neurological examination . . . There was no correlation between the findings allegedly found in the spine MRI and today's exam. As it is well known, bulges and herniations may also be seen in completely asymptomatic and atraumatic individuals. I find no evidence of an ongoing neurological injury, disability or permanency." Dr. Carciente did not test plaintiff's range of motion during his exam.

Defendants provide copies of the MRI reports from plaintiff's cervical and lumbar spine MRIs. The report from the cervical spine MRI, taken about six weeks after the accident, states that plaintiff Huang had four herniations, at C3-4, C4-5, C5-6 and C6-7, with nerve root impingement, thecal sac indentation, mild cord compression and impingement and thecal sac indentation, respectively. There was also a bulging disc at C7-T1. There is no explanation for these findings. The report does not say any of

these findings are either traumatic or degenerative. The MRI report for the lumbar spine MRI taken on the same date as the cervical MRI states that plaintiff has three disc bulges and one herniation at L4-5, with "mild thecal sac compression. Impingement upon the originating S1 roots." The report does not say any of these findings are either traumatic or degenerative. However, it does say that Dr. David R. Payne, the radiologist who read the films, compared the lumbar study to a study done on July 15, 2016, and states that "the herniation has not changed in size. On the prior study there is mild bilateral foraminal stenosis." Whether plaintiff had a prior accident is not referenced in the MRI report, nor would the court expect it to be.

In his EBT testimony, taken January 11, 2018, plaintiff Huang testified that he had stopped working before the date of the accident, perhaps in 2015, to take care of the parties' children. He had been a chef in a restaurant. Plaintiff Li, his wife, is a home health aide. He has not worked since. When asked if he had been in a prior accident, he testified that he had, but he couldn't remember when it was or if he was injured [Page 44]. He then said it was about four years prior to the EBT, or around 2014, and he filed a lawsuit, which was settled, represented by the same law firm as in this action [Page 45]. He testified that he shops, cooks, cleans and does laundry for his family, which consists of him, his wife and two children as well as his mother, but he cannot carry heavy things since this accident [Page 53].

Defendants have failed to make a prima facie case that plaintiff Huang did not sustain a serious injury in the subject accident. Even if defendants had made a prima facie case, plaintiff overcomes it with the multiple affirmations of his treating doctor Mingxu Xu, M.D. In his most recent affirmation, dated May 9, 2018, he found significant

restrictions in the range of motion in plaintiff's neck, back and right shoulder. He concludes that the injuries are permanent and are causally related to the accident. Dr. Xu states "[plaintiff] has significant permanent partial disability and loss of functions of his cervical and lumbosacral spines and right shoulder." Plaintiff Huang also provides an affirmation from the doctor who performed his shoulder surgery. Dr. Yan Q. Sun states "this patient has partial permanent orthopedic disability . . . lifelong problems including pain, difficulty with activities of daily living and activity and lifestyle modifications."

Plaintiff Li

Plaintiff claims she injured her left knee, neck and lower back as a result of the accident, and believes she will require surgery to repair the torn ACL and torn posterior horn of the medial meniscus in her left knee. At the time of the accident, she was approximately 41 years old.

Dr. Toriello examined plaintiff Li on April 11, 2018 as well. He tested the range of motion in her cervical spine, and reports normal results, albeit with "complaints of pain at the extremes of motion." The range of motion in her lumbar spine, both knees, both shoulders, both elbows, both wrists and both hands was normal as well. With regard to the left knee, plaintiff Li had "complaints of pain at the extremes of motion." Dr. Toriello opines that range of motion is "a subjective finding under the voluntary control of the individual." Dr. Toriello concludes that, as a result of the subject accident, plaintiff suffered only a resolved cervical strain, a resolved low back strain, and a resolved left knee contusion.

Dr. Carciente examined plaintiff Li on April 17, 2018 (Exhibit N). He states that

plaintiff "has a normal neurological examination . . . There were no objective findings consistent with either a central or peripheral nervous system condition. There was no evidence of a radiculopathy or a spinal cord injury. Today's neurological examination does not support the presence of an ongoing neurological injury, disability or permanency." Dr. Carciente did not test plaintiff's range of motion during his exam.

Ronald A. Paynter, M.D., who is board certified in Emergency Medicine, did not examine the plaintiff but reviewed his emergency room records. He concludes in his affirmation that the emergency room records are inconsistent with the injuries alleged in the plaintiff's bill of particulars and show that the claimed injuries do not have an acute (traumatic) origin and are not causally related to the accident on July 4, 2016. He states that there are no findings which causally relate the accident to the claimed injuries "other than "mild neck and back strains," which are not serious injuries. Dr. Paynter states that "had a serious injury occurred the patient would have . . . gone in an ambulance to the ER, failure to do so or refusal of care is a sign of no significant injury." However, the accident was at around 11:00 p.m. and the plaintiffs were at Lutheran Medical Center, the emergency room closest to their home, less than four hours later.

With respect to the 90/180 category, defendants make out a prima facie showing of entitlement to summary judgment as plaintiff testified at her EBT that she only missed a few days of work as a home health aide as a result of the accident.

Defendants have made a prima facie case for dismissal with regard to plaintiff Li.

In opposition to the motion, plaintiff provides several affirmations from her treating doctor, Mingxu Xu, M.D. In his most recent affirmation, dated May 9, 2018, he found significant restrictions in the range of motion in plaintiff's neck and back and a

minimal restriction in her left knee. He concludes that the injuries are permanent and are causally related to the accident. Dr. Xu states "almost two years have passed since the occurrence of the injury, and it can be stated with a reasonable degree of medical certainty that these conditions have become chronic and permanent in nature and are permanent consequential impairments of the patient's working and living functional ability . . . with a reasonable degree of medical certainty, the condition the patient has developed is solely related to and has a direct causal relationship to the accident on July 4, 2016 . . . [plaintiff] has significant permanent partial disability and loss of functions of her neck, lower back and left knee."

The court finds that plaintiff Li overcomes the motion and raises a triable issue of fact as to whether she sustained a serious injury as defined by Insurance Law §5102(d) as a result of the accident.

Accordingly, it is

ORDERED that the motion and cross motion for summary judgment are denied.

This constitutes the decision and order of the court.

Dated: December 7, 2018

ENTER:



Hon. Debra Silber, J.S.C.

Hon. Debra Silber
Justice Supreme Court