

**Yong Kun Lee v Linchi Zhang**

2019 NY Slip Op 34899(U)

November 25, 2019

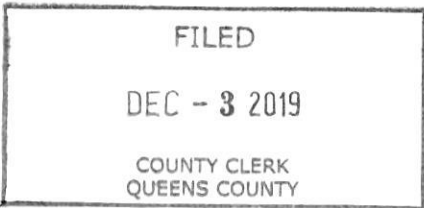
Supreme Court, Queens County

Docket Number: Index No. 711842/2017

Judge: Robert J. McDonald

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This opinion is uncorrected and not selected for official publication.



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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YONG KUN LEE, Index No.: 711842/2017
Plaintiff, Motion Date: 11/21/19
- against - Motion No.: 28
LINCHI ZHANG and RICHARD SCHOLL, Motion Seq.: 4
Defendants.

- - - - - x

The following electronically filed documents read on this motion by defendant RICHARD SCHOLL for an order pursuant to CPLR 3212, granting defendant summary judgment and dismissing the complaint of plaintiff on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law §§ 5104(a) and 5102(d); and on this cross-motion by defendant LINCHI ZHANG for same:

Papers Numbered
Notice of Motion-Affirmation-Memo. of Law-Exhibits...EF 45 - 59
Notice of Cross-Motion-Affirmation-Exhibits.....EF 60 - 65
Affirmation in Opposition-Memo. of Law-Exhibits.....EF 67 - 76

This is a personal injury action in which plaintiff seeks to recover damages for injuries he sustained as a result of an accident that occurred on March 2, 2017. As a result of the accident, plaintiff alleges that he sustained serious injuries to his left knee, cervical spine, lumbar spine, and right wrist.

Plaintiff commenced this action by filing a summons and complaint on August 25, 2017. Defendant Scholl joined issue by service of a verified answer with cross claim dated October 27, 2017. Defendant Zhang joined issue by service of a verified answer dated September 21, 2017. Defendants now move for an order pursuant to CPLR 3212, dismissing the complaint on the ground that the injuries claimed fail to satisfy the serious injury threshold requirement of Section 5102(d) of the Insurance Law.

After defendant Scholl made this motion for summary judgment, this action was discontinued as against him by Partial Stipulation of Discontinuance dated August 28, 2019. Based on such, the motion is now moot. However, in this Court's discretion, the cross-motion will be considered herein. Moreover, although plaintiff contends that the cross-motion is untimely, as the cross-motion is made on nearly identical grounds as the timely motion made by defendant Scholl, the cross-motion will be considered (see CPLR 3212; Brill v City of New York, 2 NY3d 648 [2004]; Ellman v Village of Rhinebeck, 41 AD3d 635 [2d Dept. 2007]; Grande v Peteroy, 39 AD3d 590 [2d Dept. 2007]).

Plaintiff appeared for an examination before trial on July 16, 2018 and testified that he was involved in the subject accident. He left the scene of the accident on his own accord and drove his vehicle directly home. He did not sustain any bleeding or bruises. He attended physical therapy at Northern Pain Clinic for approximately seven months following the subject accident. He did not undergo any injections. He underwent knee surgery in May of 2017. The treatment resulted in overall physical improvement. He occasionally has discomfort. He still has difficulty standing for long periods of time and picking up his child. At the date of the deposition, he was not actively treating and he did not have any intention of receiving any further treatment. He did not miss any time from work as a result of the accident.

R. Hillsman, M.D. performed an independent orthopedic examination on plaintiff on March 18, 2019. Plaintiff presented with current complaints of neck, left knee, mid back, and lower back pain. Dr. Hillsman identifies the records reviewed prior to rendering the report. Dr. Hillsman performed range of motion testing with a goniometer and found normal ranges of motion in plaintiff's cervical spine, thoracic spine, lumbar spine, right wrist, right hand, and left knee. All other objective testing performed was negative. Dr. Hillsman concludes that plaintiff does not demonstrate any disability. There is no permanency. Plaintiff may work without restrictions. Dr. Hillsman further opines that plaintiff's prognosis is good, and based on the information provided, there are no pre-existing conditions.

Howard Levin, M.D. reviewed plaintiff's intra-operative photos on May 31, 2017 of plaintiff's left knee and opined that there are no tears. There are no traumatic findings noted and no evidence of any type of acute trauma in the knee. Dr. Levin concludes that the left knee surgery performed on May 31, 2017 was not medically necessary or causally related to the subject accident.

Based on the submitted evidence, defendant contends that the evidence submitted is sufficient to establish, prima facie, that plaintiff has not sustained an injury which resulted in death; dismemberment; significant disfigurement; a fracture; loss of fetus; 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 organ, member, function or system. Defendants also contend plaintiff 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, plaintiff submits his own affidavit dated November 18, 2019, affirming, inter alia, that because of the injuries sustained he can no longer stand for long periods of time and lift his child the way he used to without being in severe pain.

Sangwoo Mah, D.C. submits an affidavit, affirming that plaintiff first presented to his office with pain in his neck and left knee on March 6, 2017. On March 29, 2017, Dr. Mah performed range of motion testing of the cervical spine, thoracic spine, and lumbar and found limited ranges of motion. On June 26, 2017, range of motion remained limited. Dr. Mah states that plaintiff received therapy in his office until December 11, 2017. Dr. Mah opines that the injuries and limitations that plaintiff suffers from are causally related to the subject accident and are serious and permanent in nature. Dr. Mah further opines that plaintiff has a permanent impairment of his spine as plaintiff has received extensive treatment and still has complaints of pain.

Daniel J. Yoo, M.D. also submits a narrative report affirming that he first examined plaintiff on May 4, 2017. Plaintiff had a chief complaint of left knee pain. On May 31, 2017, plaintiff underwent a left knee arthroscopy, partial medial meniscectomy, patellar chondroplasty and partial synovectomy. Dr. Yoo continued to examine plaintiff through October 2017. Most recently, Dr. Yoo examined plaintiff on November 7, 2019. Dr. Yoo notes that plaintiff has residual pain and stiffness in the left knee. Patellofemoral grind was positive. Based upon Dr. Yoo's review of the medical records and examinations of plaintiff, Dr. Yoo opines that the injuries are causally and consequentially related to the subject accident. Moreover, plaintiff has sustained a permanent injury that cannot be completely resolved by way of further medical treatment intervention.

David Payne, M.D. submits an affirmation indicating that, inter alia, the MRI of the left knee revealed a tear, the MRI of the cervical spine revealed bulging discs and a herniation, and the MRI of the lumbar spine revealed exaggerated lower lumbar lordosis.

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 (Wadford v Gruz, 35 AD3d 258 [1st Dept. 2006]). "[A] defendant can establish that a 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]).

Here, the competent proof submitted by defendant 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]).

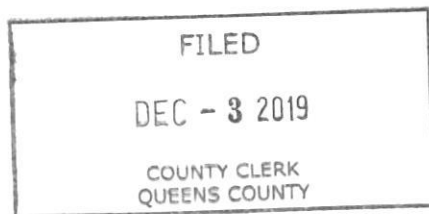
However, based on the conflicting expert medical opinions submitted by the parties, issues of fact preclude summary judgment (see Wilcoxon v Palladino, 122 AD3d 727 [2d Dept. 2014]).


Accordingly, and for the reasons stated above, it is hereby

ORDERED, that defendant RICHARD SCHOLL's motion is denied as moot; and it is further

ORDERED, that defendant LINCHI ZHANG's cross-motion is denied.

Dated: Long Island City, N.Y.  
November 25, 2019



  
ROBERT J. MCDONALD  
J.S.C.