

**Jian Sun v Fricano**

2019 NY Slip Op 35184(U)

October 24, 2019

Supreme Court, Queens County

Docket Number: Index No. 704626/2017

Judge: Robert J. McDonald

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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

FILED
OCT 30 2019
COUNTY CLERK
QUEENS COUNTY

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

JIAN SUN,

Index No.: 704626/2017

Plaintiff,

Motion Date: 10/24/19

- against -

Motion No.: 34

THOMAS FRICANO,

Motion Seq No.: 5

Defendant.

The following electronically filed documents read on this motion by defendant 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):

Notice of Motion-Affirmation-Exhibits.....EF 31
Affirmation in Opposition-Exhibits.....EF 34 - 40
Reply Affirmation.....EF 41

This is a personal injury action in which plaintiff seeks to recover damages for injuries allegedly sustained in a motor vehicle accident that occurred on July 26, 2016. As a result of the accident, plaintiff alleges that he sustained serious injuries to his spine and shoulders.

Plaintiff commenced this action by filing a summons and complaint on March 30, 2017. Defendant joined issue by service of a verified answer dated October 12, 2017. Defendant now moves 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 as they were not causally related to the subject accident.

Plaintiff appeared for an examination before trial on February 26, 2019 and testified that he was involved in the subject accident. He did not seek treatment in the emergency room. He did not sustain any broken bones or fractures. One week after the subject accident, he sought treatment with his primary care physician, Dr. Sung. He complained of pain in his shoulders, neck and lower back. Dr. Sung prescribed pain relief medication and advised plaintiff to have more rest. Plaintiff sought treatment at Apple Rehab, which included physical therapy, acupuncture, massage, chiropractic care, and electric stimulation. He treated for close to one year. He last treated at Apple Rehab in the summer of 2017. He went to Health Ease Ambulatory Surgical Center for injections. He saw Dr. Xie and complained of pain in his neck and shoulders. He received an injection for pain relief. He underwent shoulder arthroscopic surgery. He last received treatment from Dr. Sung for his lower back in February 2018. Dr. Sung prescribed pain relief medication. He missed two to three days of work following the accident. As a result of the accident, he can no longer play basketball or go to the gym. No doctor told him to refrain from those activities. Following the injections, he was confined to his home for two days due to pain. He was confined to his bed for one day after the surgery. Prior to the subject accident, he received physical therapy to his lower back. In 2011 or 2012, he was involved in a motor vehicle accident and received treatment for one year.

Edward A. Toriello, M.D. performed an independent orthopedic examination on plaintiff on May 14, 2019. Plaintiff presented with current complaints of neck, low back, and shoulder pain. Dr. Toriello identifies the records reviewed prior to rendering the report. Dr. Toriello performed range of motion testing with a goniometer and found normal ranges of motion in plaintiff's bilateral shoulders, bilateral elbows, bilateral wrists and hands, and lumbosacral spine. Dr. Toriello did note restricted ranges of motion in plaintiff's cervical spine regarding extension. Dr. Toriello notes that range of motion is a subjective finding under the voluntary control of the individual being tested. Variables such as body habitus, age, conditioning as well as plaintiff's effort may affect the observed results. All other objective tests were normal. Dr. Toriello opines that there is no objective evidence of continued disability. Plaintiff is able to return to work and normal daily living activities without restriction. The resolved injuries are causally related to the subject accident.

Sheldon P. Feit, M.D. performed an independent radiology review on plaintiff. Dr. Feit reviewed the MRI of plaintiff's left shoulder taken on September 12, 2016 and X-ray of plaintiff's chest taken on October 12, 2016. Dr. Feit opines that the left shoulder MRI and chest x-ray demonstrate no discernible abnormalities, and therefore, there are no abnormalities causally related to the subject accident.

Based on the submitted evidence, defendants contend that the evidence submitted is sufficient to establish, prima facie, that plaintiff has not sustained an injury which resulted in 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 that based on plaintiff's own testimony, he 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.

Here, the conclusion that plaintiff did not suffer a disability or impairment as a result of the subject accident was directly contradicted by Dr. Toriello who examined plaintiff nearly three years after the subject accident and recorded objectively-measured limitations in range of motion (see Ambroselli v Team Massapequa, Inc., 88 AD3d 927 [2d Dept. 2011]; Grant v Parsons Coach, Ltd., 12 AD3d 484 [2d Dept. 2004]; Lopez v Sentaroe, 65 NYS2d 1017 [1985] [finding that providing evidence of a ten degree limitation in range of motion is sufficient for the denial of summary judgment to defendants). Although Dr. Toriello states that range of motion testing is subjective, he never opines as to what extent the positive findings are self-imposed or affected by plaintiff's body habitus, age or other variables.

Based on such, this Court finds that defendants failed to make a prima facie showing of entitlement to judgment as a matter of law that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d), tendering sufficient evidence to demonstrate the absence of any material issues of fact (see Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]; Reynolds v Wai Sang Leung, 78 AD3d 919 [2d Dept. 2010]). Where a defendant fails to meet the defendant's prima facie burden, the court will deny the motion for summary judgment regardless of the sufficiency of the opposition papers (see Ayotte v Gervasio, 81 NY2d 1062 [1993]; Barrera v MTA Long Island Bus, 52 AD3d 446 [2d Dept. 2008]; David v Bryon, 56 AD3d 413 [2d Dept. 2008]).

In any event, even if this Court did find that defendant sustained his burden, in opposition plaintiff raised triable issues of fact by submitting, inter alia, the affirmation from Thomas A. Scilaris, M.D. and the MRI report of plaintiff's left shoulder taken on September 12, 2016, indicating interstitial tear in the supraspinatus tendon and superior labral tear with paralabral ganglion cyst. Dr. Scilaris affirms that he initially examined plaintiff on September 27, 2016 and most recently examined plaintiff on September 9, 2019. Dr. Scilaris performed range of motion testing and found restricted ranges of motion regarding plaintiff's left shoulder, both when plaintiff was initially evaluated and on his most recent examination. Dr. Scilaris indicates that the injuries to plaintiff's left shoulder are solely related to the subject accident. Additionally, plaintiff will have lifelong orthopedic problems including pain, difficulty with activities of daily living and activity and lifestyle modifications. Such problems may lead to repeat injections or physical therapy. Plaintiff's injuries are permanent and she has a permanent partial orthopedic disability. However, any medical treatment he receives will be palliative in nature. Plaintiff was advised to discontinue from engaging in any strenuous activities.

Accordingly, for the reasons set forth above and based on the conflicting expert medical opinions submitted by the parties, (see Wilcoxon v Palladino, 122 AD3d 727 [2d Dept. 2014]), it is hereby

ORDERED, that the summary judgment motion by defendant is denied.

Dated: October 24, 2019  
 Long Island City, N.Y.



ROBERT J. McDONALD  
 J.S.C.

FILED  
 OCT 30 2019  
 COUNTY CLERK  
 QUEENS COUNTY