

**Colon v Meiyen Pan**

2019 NY Slip Op 35205(U)

October 24, 2019

Supreme Court, Queens County

Docket Number: Index No. 718017/2017

Judge: Chereé A. Buggs

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

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

IAS PART 30

-----X  
BRANDON C. COLON,

Index No.: 718017/2017

Plaintiff,

Motion

Date: October 16, 2019

-against-

Motion Cal. No.: 12

MEIYAN PAN,

Motion Sequence No.: 2

Defendant.  
-----X

The following efile papers numbered 19-28, 30-38 submitted and considered on this motion by defendant Meiyen Pan seeking an Order pursuant to Civil Practice Law and Rules (“CPLR”) 3212 granting summary judgment in her favor against plaintiff Brandon G. Colon on the ground that plaintiff did not sustain a serious injury under New York State Insurance Law §5102(d).

Papers  
Numbered

Notice of Motion-Affidavits-Exhibits.....	EF 19-28
Affirmation in Opposition-Affidavits-Exhibits....	EF 30-35
Reply Affirmation-Affidavits-Exhibits.....	EF 36-38

The instant litigation arises from a two-car motor vehicle accident which occurred on October 18, 2017 on 678I southbound Van Wyck Expressway at or near the intersection of Nassau Expressway, County of Queens, City and State of New York. Plaintiff Brandon G. Colon (hereinafter “Colon”) filed a summons and verified complaint on December 29, 2017 seeking to recover damages for serious injuries he alleged that he sustained in the accident. Defendant Meiyen Pan (hereinafter “Pan”) joined issue in this litigation with the filing of a verified answer on or about February 15, 2018, essentially denying the allegations contained in the complaint. Discovery is now complete with Colon’s filing of a Note of Issue on April 4, 2019. This motion has been made timely. In support of the motion, Pan’s submissions included the pleadings; Colon’s verified bill of particulars; Colon’s deposition transcript; and, Dr. Teresa Habacker’s Independent Medical Examination (“IME”) Report and Curriculum Vitae.

FILED  
OCT 31 2019  
COUNTY CLERK  
QUEENS COUNTY

**Plaintiff Brandon G. Colon's Verified Bill of Particulars**

In Colon's verified bill of particulars he alleged that as a consequence of the accident, he sustained serious injuries to his neck, back and left shoulder. He claimed that he was confined to bed for one day following the accident, and confined to home to date, except for medical treatment. He was not asserting a lost wages claim. He alleged that he sustained serious injuries under the significant disfigurement; fracture; permanent loss of use of a body organ, member function or system; permanent consequential limitation of use of a body organ, member, function or system significant limitation of use of a body function or system and the 90/180 day categories of the Insurance Law.

**Plaintiff Brandon G. Colon's Deposition Testimony**

Colon gave sworn testimony in this matter on January 22, 2019. He claimed, in sum and substance, that the accident occurred on October 18, 2017 at the aforementioned location. He was wearing his seatbelt at the time of the collision. About two days following the accident, he began treating with a chiropractor due to complaints of pain to his lower back and neck. The doctor recommended acupuncture treatment. He recalled that he was sent for Magnetic Resonance Imaging ("MRI") of his neck, back and left shoulder. He stated that he treated for three to four times a week for about five to six months. He advised that shots were recommended for his neck and back, and he recalled that he received at least two injections to both his neck and back. Shoulder surgery was recommended by one of his treating doctors, but he has not yet had the surgery. He stated that he stopped treatment because of new employment.

Prior to the accident, he had interviewed for employment as a de-icer for planes at John F. Kennedy Airport ("JFK") located in Queens. He was scheduled to start this position about a week prior to the accident, and the day of the accident would have been his first day at the de-icing position. However, due to the accident, he claimed that he could not start working at JFK. He advised the JFK employer that he was unable to make it to work on the day of the accident and also advised the JFK employer of his inability to work because of the accident about a week following the accident. He claimed that he remained home for about two to three months following the accident due to his injuries, but was not advised by a doctor not to leave his home. He did not injure his neck, back or left shoulder prior to the accident, and has not re-injured these areas either. He stated that there are no activities that he cannot participate in however he still has difficulty working out, making repairs to his car and playing basketball. He still complained of pain in his neck, back and left shoulder.

**Independent Medical Examination by Teresa Habacker, M.D.**

Dr. Teresa Habacker, Board Certified Orthopedic Surgeon, performed an independent examination of Colon on March 9, 2019. The doctor stated that Colon advised her that he did not sustain any fractures or lacerations or loss of consciousness in the accident, and reported injuries to his neck, back and left shoulder. The doctor reviewed the verified bill of particulars, legal

documents, various medical records, and performed an examination. The examination also had a neurological component. Range of motion testing was performed with a goniometer and was the following (the Court is only stating range of motion results for the areas of the body claimed in Colon's verified bill of particulars):

Cervical Spine-forward flexion 50 degrees (50 degrees normal); extension 60 degrees (60 degrees normal); right and left rotation 80 degrees (80 degrees normal); right and left lateral bend 45 degrees (45 degrees);

Thoracic Spine-forward flexion 90 degrees (45 degrees normal); extension 0 degrees (0 degrees normal); right and left rotation 30 degrees (30 degrees normal); right and left lateral bend 45 degrees (45 degrees normal); Straight leg raising in the seated position was negative bilaterally;

Lumbosacral Spine-forward flexion 90 degrees (60 degrees normal); extension 25 degrees (25 degrees normal); right and left lateral bend 45 degrees (45 degrees normal). Straight leg raising in the seated position was negative bilaterally.

Left Shoulder- forward flexion 170 degrees (180 degrees normal); extension 50 degrees (40 degrees normal); abduction 160 degrees (180 degrees normal); internal rotation 90 degrees (80 degrees normal); external rotation 90 degrees (90 degrees normal).

In Dr. Habacker's opinion, the alleged diagnosis was cervical sprain/strain; thoracic sprain/strain; lumbosacral sprain/strain and left shoulder sprain/strain, and Colon was without any objective disability.

### Discussion

Under New York's Insurance Law §5102(d) a "serious injury" is "a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system, or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment."

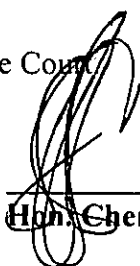
The proponent of a motion for summary judgment carries the burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met her or his burden, the opponent must produce competent evidence in admissible form to establish the existence of a triable issue of fact. (*See Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Andre v Pomeroy*, 32 NY2d 361 [1974].)

The Court finds that Pan failed to sustain her prima facie burden by demonstrating that Colon did not sustain a serious injury within the meaning of the Insurance Law (*see Gaddy v Eyler*, 79 NY2d 955 [1992]; *Licari v Elliott*, 57 NY2d 230, 235 [1982]; *Grossman v Wright*, 268 AD2d 79, 83-84 [2d Dept 2000]). Pan failed to demonstrate that Colon did not sustain a serious injury under the permanent consequential limitation of use of a body organ, member, function or system and/or the significant limitation of use of a body function or system categories of the Insurance Law (*Id.*) Pan's expert, Dr. Habacker found range of motion deficits in Colon's left shoulder on forward flexion and abduction (*Gaddy v Eyler*, 79 NY2d 955 [1992]; *Nash v MRC Recovery, Inc.*, 172 AD3d 1213 [2d Dept 2019]). Dr. Habacher also failed to state the range of motion on straight leg raising and make a comparison to normal values (*see Shirman v Lawal*, 69 AD3d 838 [2d Dept 2010]; *Walker v Public Admin. of Suffolk County*, 60 AD3d 757 [2d Dept 2009]). Pan also failed to adequately address Colon's claims of serious injury under the 90/180 day category. (*See Vega v Moradof*, 175 AD3d 532 [2d Dept 2019]; *Ji Hae Kim v Quintanilla*, 175 AD3d 476 [2d Dept 2019]; *Houng v Beers*, 151 AD3d 995 [2d Dept 2017]; *Che Hong Kim v Kossoff*, 90 AD3d 969 [2d Dept 2011].) Moreover, although the Court need not address at this point the merits of Colon's opposition papers, in opposition, Colon's submissions were sufficient to raise triable issues of fact (*see Perl v Meher*, 18 NY3d 208 [2011]; *Diaz-Montez v JEA Bus Co., Inc.*, 175 AD3d 1384 [2d Dept 2019]; *Herrin v Airborne Freight Corp.*, 301 AD2d 500 [2d Dept 2003]).

Therefore, the defendant's motion is denied.

This constitutes the decision and Order of the Court.

Dated: October 24, 2019

  
Hon. Chereé A. Buggs, JSC

