Jianping Gao v Kumar
2020 NY Slip Op 30709(U)
January 16, 2020
Supreme Court, Queens County
Docket Number: 700700/18
Judge: Robert I. Caloras

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. ROBERT I. CALORAS **PART 36**

Justice

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JIANPING GAO,

Plaintiff,

-against-

PARVEEN KUMAR AND JASPAL SINGH,

Defendants.

Index No. 700700/18
Motion Date: 11/14/19
Motion Cal. No. 15
Seq. No. 1

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The following papers numbered E13-E26, E39-E36 read on this motion by the defendants for an order pursuant to CPLR 3212 granting summary judgment and dismissing the Complaint on the grounds that there are no triable issues of fact, in that the plaintiff cannot meet the serious injury threshold requirement as mandated by Insurance Law Sections 5104(a) and 5102(d).

	PAPERS NUMBERED
Notice of Motion-Affirmation-Exhibits.....	E13-E25
Stipulation -Adjournment.....	E26
Affirmation in Opposition-Exhibits.....	E29-E35
Reply Affirmation.....	E36

Upon the foregoing papers, it is ordered that the defendants' motion is denied as follows:

This is an action to recover damages for personal injuries the plaintiff allegedly sustained, as a result of a motor vehicle accident, which occurred on December 25, 2016. In the Bill of Particulars, the plaintiff alleged that he sustained injuries including: right shoulder; left shoulder; cervical spine; lumbar spine and thoracic spine. In the Supplemental Bill of Particulars, the plaintiff claimed that he sustained the following injuries: right shoulder: rotator cuff tear requiring surgery, surgery on January 4, 2018 - arthroscopy, bursitis, impingement, and extraarticular interstitial tearing of the biceps; and bruised liver/abdomen. In the Second Supplemental Bill of Particulars, the plaintiff claimed that he sustained the following injuries: scarring of the left and right knee; skin pigment change of the left knee; skin pigment change of the anterior and medial aspects of the right knee; and scarring of the anterior and lateral aspect of the right shoulder.

Defendants now move for summary judgment dismissing the Complaint pursuant to Insurance Law 5104(a), alleging that plaintiff did not suffer a "serious injury" within the meaning of Insurance Law §5102 (d). Defendants have submitted the following: Summons

and Complaint; Bill of Particulars; Verified Answer with Demand for Bill of Particulars and discovery demands; Note of Issue; plaintiff's deposition transcript; affirmation from Howard V. Katz, M.D., FACS, FAAOS; affirmation from Daniel S. Arick, M.D., FACS; affirmation from Warren E. Cohen, M.D.; and affirmation from Michael Seton, D.O., D.A.B.R.

Dr. Katz, a Board Certified Orthopedist, examined the plaintiff on August 23, 2018. At this examination, Dr. Katz performed range of motion testing on the plaintiff using a goniometer. The plaintiff's cervical spine, thoracic spine, and lumbar spine revealed no spasm, no tenderness, and the range of motion results in terms of flexion, extension and rotation were normal. Dr. Katz's examination of the plaintiff's shoulders and hips, revealed no complaints of tenderness, and the range of motion exam revealed normal findings for flexion, rotation, extension and abduction. As to the plaintiff's knees, there was no complaint of tenderness and all objective testing revealed negative or normal results. Based upon his examination of the plaintiff, Dr. Katz opined that the plaintiff is capable of functional use of the examined body parts for normal activities of daily living, including regular work duties.

Dr. Arick, a Board Certified Otolaryngolist, examined the plaintiff on August 14, 2018, and found that the plaintiff's ear, nose, and throat were normal. Based upon this exam, Dr. Arick opined that the plaintiff has no disability from an ear, nose and throat point of view. Dr. Arick further opined that the plaintiff can perform activities of daily living.

Dr. Cohen, a Board Certified Neurologist, examined the plaintiff on August 13, 2018. At this examination, Dr. Cohen performed range of motion testing on the plaintiff using a goniometer. The plaintiff's cervical spine and thoracic spine exam revealed no tenderness, no spasm, and the range of motion results in terms of flexion, extension and rotation were normal. The plaintiffs lumbar spine exam revealed no spasm, a subjective report of mild tenderness, and the range of motion results in terms of flexion, extension and rotation were normal. Dr. Cohen noted that his exam of the plaintiff revealed no clinical objective evidence of a deficit of a Neuro function. Based on his exam, Dr. Cohen opined that there is no impairment of a Neuro function that would impair the ability of the plaintiff to participate in activities of daily living.

Dr. Setton, a Board Certified Radiologist, reviewed the plaintiff's MRI examination of his right shoulder. Dr. Setton found that the MRI showed, among other things, normal results, no evidence of osseous or soft tissue injury which may have resulted from the subject accident. Dr. Setton further found evidence of a chronic repetitive overuse type injury, with no causal relation to trauma. In addition, Dr. Setton found no evidence of a fracture, tear or effusion, but did find evidence of degenerative joint disease with chronic findings, which he determined predate and are unrelated to the subject accident.

Based on the medical evidence the defendants submitted, they argue that the plaintiff's alleged injuries were not caused in this accident, that no trauma was sustained, and/or the alleged injuries do not rise to the level of impairment sufficient to qualify under any category of the statute.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case (see Alvarez v Prospect Hosp., 68 NY2d 320 [1986]). Once this showing has been made, the burden shifts to the non-moving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution (see Alvarez v Prospect Hosp., supra; Zuckerman v City of New York, 49 NY2d 557 [1980]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]).

A defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred by the No-Fault Insurance Law bears the initial burden of establishing a *prima facie* case that the plaintiff did not sustain a "serious injury" (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]; Beltran v Powow Limo, Inc., 98 AD3d 1070 [2d Dept. 2012]). When such a defendant's motion relies upon the findings of the defendant's own witnesses, those findings must be in admissible form, such as affidavits and affirmations, and not unsworn reports, to demonstrate entitlement to judgment as a matter of law (see Brite v Miller, 82 AD3d 811 [2d Dept. 2011]; Damas v Valdes, 84 AD3d 87 [2d Dept. 2011], citing Pagano v Kingsbury, 182 AD2d 268 [2d Dept. 1992]). A defendant also may establish entitlement to summary judgment using the plaintiff's deposition testimony (see Beltran v Powow Limo, Inc., supra; Bamundo v Fiero, 88 AD3d 831 [2d Dept. 2011]; McIntosh v O'Brien, 69 AD3d 585 [2d Dept. 2010]). Once a defendant meets this burden, the plaintiff must present proof, in admissible form, which creates a material issue of fact (see Gaddy v Eyler, supra; Zuckerman v City of New York, supra; Beltran v Powow Limo, Inc., supra).

Here, the Court finds that the defendants have failed to meet their *prima facie* burden of 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., supra; 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]). The medical reports the defendants submitted in support of this motion are deficient (see Shumway v Bungeroth, 58 AD3d 431 [1st Dept. 2009] [defendant's expert only reviewed the police report and the Bill of Particulars]). Both Dr. Katz and Dr. Cohen only reviewed the

Verified Bill of Particulars, and the police accident report. Dr. Arick only reviewed the Bill of Particulars, and stated that "[t]here were no legally authenticated medical records available for review". Dr. Setton did not state what, if any, records he reviewed in preparing his affirmation. Under these circumstances the Court finds that the defendants failed to meet their *prima facie* burden of showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law 5102(d) (see Toure v Avis Rent A Car Sys., supra; Gaddy v Eyler, supra).

Since the defendants failed to establish a *prima facie* case, it is unnecessary to consider plaintiff's opposition (see Smith v Rodriguez, 69 AD3d 605 [2d Dept. 2010]; Washington v Asdotel Enters., Inc., 66 AD3d 880 [2d Dept. 2009]). Accordingly, the defendants' motion for summary judgment is denied.

Dated: January 16, 2020

ROBERT I. CALORAS, J.S.C.

FILED
JAN 24 2020
COUNTY CLERK
QUEENS COUNTY