

Seong Cho v Jing Jia
2020 NY Slip Op 30895(U)
February 13, 2020
Supreme Court, Queens County
Docket Number: 717280/2017
Judge: Cheree A. Buggs
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Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: HONORABLE CHEREÉ A. BUGGS
Justice

IAS PART 30

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SEONG CHO,

Index No.: 717280/2017

Plaintiff,

Motion

Date: January 8, 2020

-against-

Motion Cal. No.: 14

JING JIA,

Motion Sequence No.:2

Defendant.

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The following e-file papers numbered 30-51 submitted and considered on this motion by defendant Jing Jia dismissing plaintiff Seong Cho's complaint pursuant to Civil Practice Law and Rules ("CPLR") 3212 on the grounds that defendant is not responsible for the accident, and on the grounds that plaintiff did not sustain a serious injury threshold requirement as mandated by Insurance Law sections 5104(a) and 5102(d).

FILED
FEB 18 2020
COUNTY CLERK
QUEENS COUNTY

	Papers <u>Numbered</u>
Notice of Motion-Affidavits-Exhibits.....	EF 30-42
Affirmation in Opposition-Affidavits-Exhibits....	EF 43-48
Reply Affirmation-Affidavits-Exhibits.....	EF 49-51

The instant litigation arises from a motor vehicle accident which occurred on September 1, 2017 at about 2:15 P.M. at or near the intersection of 37th Street and Park Avenue, County and State of New York. Plaintiff Seong Cho (hereinafter "Cho") commenced this action with the filing of a summons and verified complaint on December 13, 2017. Thereafter, on January 26, 2018, defendant Jing Jia (hereinafter "Jia") filed a verified answer to the complaint, denying the essential allegations therein and asserting affirmative defenses. On or about May 22, 2018 Cho served a verified bill of particulars, alleging that as a result of the collision, he sustained serious injuries to his neck, back, and both wrists. He claimed that as a result of the accident he sustained a serious injury under the Insurance Law under the permanent loss of use of a body organ, member, function or system; a

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permanent consequential limitation of use of a body organ, member, function or system; a significant limitation of use of a body function or system; and under the 90/180 day categories of the Insurance Law.

Cho filed a Note of Issue and Certificate of Readiness on May 29, 2019. Discovery was still outstanding, prompting Jia to make a motion to vacate the Note of Issue. On or about July 26, 2019, Jia's motion to vacate the Note of Issue was resolved by the So-Ordered Stipulation of Hon. Chereé A. Buggs dated July 10, 2019, wherein further discovery was directed and the deadline to file a motion for summary judgment was extended to October 30, 2019. This motion was made in compliance with the Court's July 10, 2019 Order.

In support of the motion, Jia's documentary evidence included Cho's deposition transcript, and the independent medical examination ("IME") reports of Board Certified Orthopedic Surgeon Regina Hillsman, M.D. dated June 24, 2019 and Jonathan Lerner, M.D., Board Certified Radiologist.

Plaintiff Seong Cho's deposition testimony

Cho gave sworn testimony in this matter on March 27, 2019. He claimed that as a result of the accident, he sustained injuries to his wrists, lower back and neck. He was not confined to his bed following the accident, and he was confined to his home for one day after the accident. At the time of the occurrence he was wearing a seatbelt. Although he was in pain, Cho testified that he sought treatment about six or seven days following the accident. He received treatment, primarily acupuncture to his wrists, chiropractic treatment and physical therapy to his neck and back. Cho also believed that he underwent Magnetic Resonance Imaging ("MRI") of his wrists, neck and back. He did not have any appointment scheduled for the injuries related to the subject accident. He was involved in a prior accident in April 2014, and two subsequent accidents, one in February or March, 2018 and the other on March 2, 2019. Cho also testified that he had injections to his back. He related that he sustained injuries to his wrists and ankles in the first accident, and in the second accident, he experienced pain in his neck and back. He related that since the accident he decreased his hours as a driver; however he was able to work since the accident, taking about a month off and then returning to work. He claimed that he could not longer lift anything heavy, play table tennis, and that he could not walk or run without difficulty.

IME report of Dr. Regina Hillsman

On June 24, 2019, Dr. Regina Hillsman, Board Certified in Orthopaedic Surgery, conducted an independent medical examination of Cho. Range of motion testing was performed with a goniometer, after the doctor had reviewed various medical records, and Cho's verified bill of particulars. Dr. Hillsman concluded that Cho exhibited normal range of motion in his wrists, neck and back. In Dr. Hillsman's opinion, Cho sustained wrists, cervical and lumbar spine strains/sprains which had resolved and from an orthopaedic standpoint, upon examination, Cho did not exhibit any disability or permanency and there was no need for further orthopedic treatment or physical therapy.

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IME report of Dr. Jonathan Lerner

On August 1, 2019 Dr. Jonathan Lerner performed a radiological review of the MRI taken of Cho's cervical spine on December 28, 2017. In his opinion the study demonstrated a right paracentral disc osteophyte complex with effacement of the ventral subarachnoid space and mild narrowing of the right lateral recess at C3-C4, C4-C5, and C6-C7. In his opinion, such findings are consistent with degenerative disc disease and suggestive of a chronic degenerative process and not an acute traumatic event, and no causal relationship to the accident. He also performed a radiological review of the MRI taken of Cho's lumbar spine taken on December 28, 2017. In his opinion the study revealed a mild diffuse disc bulge at L5-S1 with effacement of the thecal sac. He stated that these findings are seen in the setting of desiccation of the L5-Sq intervertebral disc space levels consistent with degenerative disease, suggesting a chronic degenerative process as opposed to an acute traumatic event, and not causally related to the accident. Dr. Lerner also reviewed MRI's of Cho's wrists, and in his opinion, same revealed no acute findings related to the accident.

Law and Application

Summary judgment is a drastic remedy, which will not be granted by the Court if there is any doubt as to the existence of a triable issue of fact (*Andre v Pomeroy*, 32 NY2d 361 [1974]; *Kwong on Bank, Ltd., v Montrose Knitwear Corp.*, 74 AD2d 768 [2d Dept 1980]). The proponent of a motion for summary judgment carries the initial 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 its 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].)

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."

Upon the Court's consideration of Jia's documentary evidence, the Court finds that Jia established her entitlement to judgment as a matter of law on the issue of serious injury, but not liability (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]).

In opposition, Cho argued that Jia failed to establish a prima facie case, that Jia's experts differed on whether Cho sustained a serious injury, that Jia's radiologist found traumatic injury, and the experts failed to address the 90/180 day category. Cho's documentary evidence included the


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affidavit of his treating doctor, Dr. David Gamburg. The affidavit is not sworn to before a notary public, however, as Dr. Gamburg is a physician and has sworn under the penalties of perjury, and has stated that he is a licensed physician in the State of New York, the Court will consider Dr. Gamburg's report. (See CPLR 2106[a]; see generally Executive Law §135; *Stradman v Cavaretta*, -AD3d-, 2020 NY Slip Op 00738 [4th Dept 2020]; *Cleasby v Acharya*, 150 AD3d 605 [1st Dept 2017].) Dr. Gamburg stated that he examined Cho on October 4, 2017, December 27, 2017 and recently on October 22, 2019. In Dr. Gamburg's opinion, Cho had contemporaneous and recent range of motion deficits in his wrists, neck and back. The doctor stated that he reviewed the MRI films. He also addressed Cho's prior accident, in Dr. Gamburg's opinion, Cho's injuries were permanent in nature; the injuries to his lumbar spine and both wrists were causally related to the accident, and the injuries to his cervical spine from a prior motor vehicle accident in August 2014 were aggravated by the subject accident which occurred on September 1, 2017. Further, the injuries were to the accident and not from degenerative disease. The doctor also stated that Cho stopped treating when his no-fault benefits ceased. The Court finds that Cho's opposition papers have raised triable issues of fact as to whether Cho sustained a serious injury to his wrists, cervical and lumber spine under the permanent consequential limitation of use and significant limitation of use categories of the Insurance Law. (See *Perl v Meher*, 18 NY3d 208 [2011]; *Singh v Singh*, -AD3d-, 2020 NY Slip Op 00887 [2d Dept 2020]; *Hopper v Burgos*, 174 AD3d 865 [2d Dept 2019]; *Jackson v City of Buffalo*, 155 AD3d 1522 [4th Dept 2017]).

Therefore, defendant Jing Jia's motion is denied is denied in its entirety.

This constitutes the decision and Order of the Court.

Dated: February 13, 2020



Hon. Chereé A. Buggs, JSC

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