

Yon Soo Chong v Chowdhury

2020 NY Slip Op 35477(U)

October 20, 2020

Supreme Court, Queens County

Docket Number: Index No. 704032/2019

Judge: Ulysses B. Leverett

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FILED
10/20/2020
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COUNTY CLERK
QUEENS COUNTY

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

-----X
YON SOO CHONG,

Plaintiff,

-against-

NURUISLAM CHOWDHURY and MOHAMMAD A.
RAHMAN,

Defendants
-----X

Index No.: 704032/2019

Motion Seq. No.001

Decision and Order

Present: **HONORABLE ULYSSES B. LEVERET:**

Notice of Motion-Affirmation-Exhibits.....
Affirmation In Opposition-Exhibits-----
Reply Affirmation.....

Papers Numbered
EF-9-16
EF-18-24
EF-26

Upon the foregoing papers, it is ordered that defendants' motion for an order pursuant to CPLR 3212 granting summary judgment in favor of defendants and dismissing plaintiff's complaint on the ground that plaintiff Yon Soo Chong did not sustain a serious injury as defined by Insurance Law 5102 (d) is denied.

This action was brought to recover damages for serious personal injuries allegedly sustained by plaintiff arising out of a motor vehicle accident that occurred on or about August 19, 2018 on 59th Place near Queens Boulevard, County of Queens, State of New York. Plaintiff alleges that he sustained serious injuries to his right shoulder, left elbow, right knee, lumbar spine, cervical radiculopathy and sprain/strain to the bilateral wrists.

In support of their motion, defendants assert that plaintiff did not sustain a serious injury as defined in Insurance Law 5102 (d). Defendants submitted a sworn report dated October 23, 2019, by Willie E. Thompson, MD, a board certified orthopedic surgeon that stated plaintiff was seen on October 23, 2019 for an orthopedic evaluation of injuries sustained in the subject accident. Dr. Thompson's report stated that ranges of motion were measured with the use of a goniometer. Plaintiff's cervical spine range of motion testing revealed flexion to 50 degrees (50 degrees normal), extension to 60 degrees (60 degrees normal), right/left lateral flexion 45 degrees (45 degrees normal), right/left rotation to 80 degrees (80 degrees normal). No atrophy of bilateral upper extremities. Muscle strength is 5/5.

Plaintiff's lumbosacral spine range of motion testing revealed flexion to 60 degrees (60 degrees normal) and extension to 25 degrees (25 degrees normal). Plaintiff was able to bend laterally both left and right to 25 degrees (25 degrees normal). Right shoulder range of motion revealed full pain free range of motion, abduction of 180 degrees (normal 180 degrees), forward flexion of 180 degrees (180 degrees normal), adduction of 30 degrees (normal 30 degrees), extension of 40 degrees (40 degrees normal), external rotation to 90 degrees (90 degrees normal),

internal rotation to 80 degrees (normal 80 degrees). Dr. Thompson's examination of plaintiff's left elbow revealed pain free extension of 0 degrees (normal 0 degrees), flexion of 150 degrees (normal 150 degrees), pronation 80 degrees (normal 80 degrees), supination 80 degrees (normal 80 degrees), no heat, swelling, effusion, or crepitus.

Dr. Thompson's examination of plaintiff's right/left wrists and hands revealed no heat, swelling, effusion, or crepitus. Range of motion reveals flexion is 60 degrees (normal 60 degrees), ulnar deviation 30 degrees (normal 30 degrees), radial deviation 20 degree (normal 20 degrees), extension at 60 degrees (60 degrees normal). grip strength is within normal limits (5/5). Pinch strength is normal and no thenar and hypothenar eminence atrophy.

Dr. Thompson's examination of plaintiff's right knee revealed no heat, swelling, effusion, erythema, or crepitus. Range of motion revealed flexion at 150 degrees (normal 150 degrees) and extension at 0 degrees (normal 0 degrees). Dr. Thompson stated that he found no evidence of an orthopedic disability, permanency or residuals and that plaintiff is capable of working without restrictions and plaintiff can perform his activities of daily living as he was prior to the accident.

Defendant also submitted a sworn report dated June 21, 2019 from Dr. Scott A. Springer, radiologist who reviewed plaintiff's 10/28/2018 lumbar spine examination which revealed disc herniations related to degenerative disc disease. Disc desiccation, L2-L3 through L5-L1-2, loss of disc space height, T12-L1 and L1-L2, small anterior osteophytes L3 and L4, disc bulges, L1-L2, L2-L3, L3-L4 and L5-L5, annular tear, stenosis, facet hypertrophy, L4-L5 and L5-S1, paraspinal musculature atrophy, no fracture or subluxation and no post traumatic changes causally related to the subject accident. Right shoulder 8/19/2018 MRI examination review revealed mild narrowing, acromioclavicular joint, mild tendinosis, supraspinatus and infraspinatus tendons, no fracture, dislocation or acromioclavicular joint separation and no post traumatic changes causally related to the subject accident.

Dr. Stringer's review of plaintiff's 10/7/2018 right knee MRI revealed horizontal tear extending from the periphery of the posterior horn of the medial meniscus through the body of the meniscus, small joint effusion, mild soft tissue swelling, prepatellar extending inferiorly to the level of the proximal tibia, no fracture, dislocation or internal derangement of the knee, no definite posttraumatic changes causally related to the subject accident.

Dr. Stringer's review of plaintiff's 10/7/2018 MRI examination revealed tendinosis/tendinitis, common extensor tendon, small joint effusion, soft tissue swelling, posterior medial portion of the elbow, no fracture or dislocation, no definite posttraumatic changes causally related to the subject accident.

Where a defendant has made a showing sufficient for entitlement to summary judgment, the burden shifts to the plaintiff to raise an issue of material fact as to whether plaintiff has sustained a serious injury. See *Alvarez v Prospect Hospital*, 68 NY 2d 320 (1986).

Plaintiff in opposition states that defendants have not demonstrated that plaintiff did not sustain a serious injury as defined by Insurance Law 5102 (d) and that plaintiff has raised triable

issues of fact that she did indeed sustain a serious injury. Plaintiff submitted a physician affirmation dated 3/11/2020 by Andrew McDonnell, M.D. radiologist, who states that plaintiff presented herself on October 28, 2018 for an MRI of the right knee, left elbow, lumbar spine and right shoulder. The MRI of the right knee revealed a horizontal tear at the posterior body of the meniscus, the ACL and the PCL appear intact, no fracture and there is a small joint effusion without evidence of a loose body. The MRI of the left elbow revealed teninopathy changes at the common extensor tendon group, a partial thickness tear at the origin, a focal soft tissue contusion medially and posterior medially on coronal image #14 of series #16, no seroma or hematoma, the radial and ulnar collateral ligaments are unremarkable. The MRI of the lumbar spine revealed a mid line and paramedian herniation is seen at the L4-L5 level, loss mass effect without evidence of stenosis, proximal foraminal narrowing bilaterally at the L4-L5 level, disc bulges prominent at the L4-L5 levels and there is a straightening of the lumbar lordosis consistent with severe spasm. The MRI of the right shoulder revealed a bursal surface tear anteriorly at the supraspinatus tendon, mild tendinitis changes are seen at the supraspinatus and infraspinatus tendons, no subluxation and no labral injury.

Plaintiff submitted a medical report dated March 24, 2020 from Sanford R. Wert, M.D. a board certified orthopedic surgeon who last examined plaintiff on March 9/2020. The Goniometer measured range of motion of the right shoulder revealed flexion to 104 degrees (normal 180 degrees), extension to 21 degrees (normal 60 degrees), abduction 15 degrees (normal 180 degrees), adduction to 20 degrees (normal 30 degrees), internal rotation to 15 degrees (normal 70 degrees) and external rotation 40 degrees (normal 90 degrees). Left shoulder revealed flexion 137 degrees (normal 180 degrees), extension to 58 degrees (normal 60 degrees), abduction 89 degrees (normal 180 degrees), adduction to 30 degrees (normal 30 degrees), internal rotation to 60 degrees (normal 70 degrees) and external rotation 85 degrees (normal 90 degrees). The left and right knee revealed no evidence of tenderness, redness, swelling or effusion. Goniometer measured range of motion was from 0-140 degrees (normal 0 to 140 degrees).

Dr. Wert states that on 3/9/2020, plaintiff's right knee MRI revealed a torn meniscus. Dr. Wert asserts that he can state with a reasonable degree of medical certainty that the injuries to plaintiff's right shoulder and right knee are permanent in nature and are causally related to the subject accident.

Plaintiff also submitted a June 5, 2020 sworn affirmation from Jean Rhee, M.D. that stated that plaintiff was last seen by Dr. Rhee on March 4th 2019 wherein plaintiff presented with neck pain, shooting pain/stiffness, radiating to both shoulders and arms, bilateral shoulder pain with radiating pain/tingling/numbness, radiating to both legs, left elbow pain, soaring/stabbing pain, exacerbated by walking. Plaintiff states that within a reasonable degree of medical certainty, plaintiff's injuries are causally related to the subject motor vehicle accident and that plaintiff continues to experience pain, decreased range of motion and limitations that are permanent in nature.

Plaintiff further submitted a sworn report dated June 11, 2020 from Dr. Sung H. Chung, a licensed doctor of physical therapy who states that on August 23, 2018 and January 10, 2019, he examined plaintiff's cervical spine, both shoulders, left elbow, and both wrists. Dr Chung states

that he did not notice significant improvement in plaintiff's condition as compared to plaintiff's first visit on August 23, 2018. Dr. Chung states that based on his professional opinion, the pain in plaintiff's neck, back, bilateral shoulder pain, left elbow pain, bilateral knee pain confirmed by the findings of the restricted ranges of motion are both permanent in nature and causally related to the subject accident.

It is well established that the proponent of summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact. See *Zuckerman v City of New York*, 49 NY 2d 557 (1980). Here, the affirmed medical reports of the parties' doctors directly contradict each other. Where parties offer conflicting medical evidence on the existence of a serious injury, the existence of such injury is a matter for a jury's determination. See *Cracchiolo v Omerza*, 87 AD 3d 674 (2011).

The Court finds triable issues of fact as to the existence of serious injury. Accordingly, defendant's motion for summary judgment and dismissing the complaint is denied.

This is the decision and order of this Court.

Dated: October 20, 2020


Ulysses B. Leverett, JSC

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