Jing Chang Fang v Khurana
2021 NY Slip Op 33141(U)
November 16, 2021
Supreme Court, Queens County
Docket Number: Index No. 716406/19
Judge: Timothy J. Dufficy

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY **PART 35**
Justice

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JING CHANG FANG,

Plaintiff,

Index No.: 716406/19
Mot. Date: 11/9/21
Mot. Seq. 1

-against-

RAJENDER KHURANA and NIKKA WHOLESALE DISTRIBUTOR, INC.,

Defendants.

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The following papers were read on the motion by defendants for an order, pursuant to CPLR 3212, granting summary judgment in their favor dismissing the complaint of plaintiff on the basis that plaintiff did not sustain a "serious injury" under Insurance Law § 5102(d).

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	EF 15-29
Answering Affidavits-Exhibits.....	EF 33-41
Replying Affidavits-Affidavits.....	EF 42-45

Upon the foregoing papers, it is ordered that the motion by defendants is denied.

In this action seeking damages for personal injuries, allegedly sustained in a motor vehicle accident, that occurred on March 24, 2018, the defendants move for an order granting summary judgment dismissing plaintiff's complaint on the basis that the plaintiff Jing Chang Fang did not sustain a "serious injury" under Insurance Law § 5102(d).

As a general proposition, the proponent of a summary judgment motion of this type must make a *prima facie* showing of entitlement to summary judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. (*See Licari v Elliot*, 57 NY 2d 230 [1982]; *Alvarez v Prospect Hospital*, 68 NY2d

320 1986]; *Zuckerman v City of New York*, 49 NY 2d 557 [1980]). The defendant's motion papers must demonstrate, through admissible medical evidence, which may include medical reports and records and affidavits and/or affirmed reports of medical examinations, including range-of-motion testing, that address all of the plaintiff's claims, that the plaintiff did not sustain functional limitations which would constitute either a permanent consequential limitation of use of a body organ, member, a significant limitation of use of body function or system, or a medically determined injury or impairment of a non-permanent nature that prevented the plaintiff from performing substantially all of the material, acts which constituted his or her usual customary daily activities for not less than 90 days during the 180 days immediately following the subject accident. (*See Toure v Avis Rent A Car Sys*., 98 NY2d 345 [2002]; *Gaddy v Eyler*, 79 NY2d 955 [1992]; *Choi v Guerrero*, 82 AD3d 1080 [2d Dept. 2011]; *Jilani v Palmer*, 83 AD3d 786 [2d Dept 2011]). The failure to make a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see e.g. Reed v Righton Limo, Inc*., 82 AD3d 1070 [2d Dept 2011]; *Joris v UMF Car & Limo Service*, 82 AD3d 1050 [2d Dept 2011]; *Keenum v Atkins*, 82 AD3d 843 [2d Dept 2011]; *Pero v Transervice Logistics*, 83 AD3d 681 [2d Dept 2011]).

Here, the defendants' moving papers present proof in admissible form via, *inter alia*, the affirmed report of the defendants' independent examining orthopedic surgeon, Dr. Jerry A. Lubliner, M.D. Based upon the foregoing, the defendants provided proof demonstrating, *prima facie*, the absence of any condition that might have arguably met the serious injury threshold of Insurance Law § 5102(d). Thus, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact (*See Gaddy v Eyler, supra*).

A medical affirmation or affidavit which is based upon a physician's personal examinations and observation of plaintiff is an acceptable method to provide a doctor's opinion regrading the existence and extent of a plaintiff's serious injury (*O'Sullivan v Atrium Bus Co.*, 246 AD2d 418 [1st Dept 1980]). The causal connection must ordinarily be established by competent medical proof (*see Kociocek v Chen*, 283 AD2d 554 [2d Dept 2001]; *Pommels v Perez*, 4 NY3d 566 [2005]). Plaintiff submitted medical proof that was contemporaneous with the accident showing *inter alia,* range of motion limitations of the plaintiff's lumbar spine (*Pajda v Pedone*, 303 AD2d 729 [2d Dept

2003]). The sworn narrative report submitted by plaintiff's physician, Dr. Arden M. Kaisman, M.D. sets forth the tests and review of medical records which were performed contemporaneously with the accident to support his conclusion that the plaintiff suffered from significant injuries, to wit, *inter alia*, range of motion limitations of the lumber spine. Plaintiff has established a causal connection between the accident and the plaintiff's lumbar spine injuries. Additionally, the record reflects that the plaintiff underwent a lumbar discectomy at the L4-L5 and L5-S1 levels, on August 3, 2018. Furthermore, the plaintiff has provided a recent medical examination detailing the status of his injuries at the current point in time (*Kauderer v Penta*, 261 AD2d 365 (2d Dept 1999). The sworn narrative report of Dr. Kaisman, dated October 21, 2021, provides that a recent examination of the plaintiff was conducted, on October 21, 2021, by Dr. Kaisman and sets forth the objective examination, tests, and review of medical records which were performed to support his conclusion that the plaintiff suffers from significant injuries, to wit, *inter alia*, disc herniations at L4-L5 and L5-S1 with lumbar radiculopathy. Dr. Kaisman concludes that the injuries to plaintiff's lumbar spine are causally related to the motor vehicle accident of March 24, 2018, and that a permanent disability is present in the lumbar spine. Clearly, the plaintiff's experts' conclusions are not based *solely* on the plaintiff's subjective complaints of pain, and therefore are sufficient to defeat the motion (*DiLeo v Blumber, supra*, 250 AD2d 364, [1st Dept 1998].

Additionally, despite the defendants' contentions that there is an unexplained gap or cessation in treatment (the Court of Appeals held in *Pommells v Perez*, 4 NY3d 566 [2005], that a plaintiff who terminates therapeutic measures following the accident, while claiming "serious injury," must offer some reasonable explanation for having done so), the Court finds that the gap in treatment is adequately explained by plaintiff himself in his examination before trial transcript testimony wherein he explains that: he stopped chiropractic therapy at the direction of his doctors and that he stopped physical therapy because Dr. Tang told him there's not much more that can be done with the physical therapy, so he should do home exercises (which he did). Such is a sufficient explanation.

Since there are triable issues of fact regarding whether the plaintiff sustained a serious injury to his lumbar spine, the plaintiff is entitled to seek recovery for *all* injuries

allegedly incurred as a result of the accident (*Marte v New York City Transit Authority*, 59 AD3d 398 [2d Dept 2009]).

Therefore, plaintiff's submissions are sufficient to raise a triable issue of fact on "serious injury" grounds (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Accordingly, it is

ORDERED that the defendants' motion for summary judgment on "serious injury" grounds is denied.

The foregoing constitutes the decision and order of the Court.

Dated: November 16, 2021

FILED
11/16/2021
COUNTY CLERK
QUEENS COUNTY

TIMOTHY J. DUFFICY, J.S.C.