

Sakhizada v Yan Hua Dang

2022 NY Slip Op 34631(U)

September 30, 2022

Supreme Court, Queens County

Docket Number: Index No. 713518/2019

Judge: Ulysses B. Leverett

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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WEISS SAKHIZADA

Plaintiff,

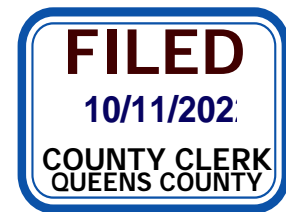
Index No.: 713518/2019

-against-

Motion Seq. No. 3

YAN HUA DANG and DENISE M. HOWLEY,

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

Papers Numbered

Notice of Motion-Affirmation-Exhibits.....	EF-70-79
Notice of Cross Motion-Exhibits-.....	EF-81-88
Affirmation In Opposition-Exhibits.....	EF-90-99
Affirmation in Opposition to Cross Motion-Exhibits.....	EF-101-111
Reply Affirmation.....	EF-112

Upon the foregoing papers, it is ordered that defendant Denise M. Howley’s motion and defendant Yan Hua Dang’s cross motion for an order pursuant to CPLR § 3212 granting defendants summary judgment and dismissing the complaint of plaintiff Weiss Sakhizada on the grounds that there are no triable issues of fact, in that plaintiff cannot meet the serious threshold requirement mandated by Insurance Law § 5102 (d) is denied.

This action was brought to recover damages for serious personal injuries allegedly sustained by plaintiff Weiss Sakhizada as a result of an automobile accident that occurred on May 23, 2019 on Northern State Parkway at or near the Wantagh State Parkway, Town of Hempstead, County of Nassau, State of New York.

Plaintiff Weiss Sakhizada states that at the time of the three vehicle rear end chain collision, he was a front seated passenger in a vehicle that had been operated by non party Tyron Garcia that was struck in the rear by a vehicle being operated by defendant Denise M. Howley. Plaintiff states that as a result of the impact, he sustained serious injuries to his right elbow, neck, and mid and low back.

Insurance Law § 5102(d) defines a “serious injury” as “ 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 90 days during the 180 days immediately following the occurrence of the injury or impairment.”

Defendants assert that plaintiff did not sustain a serious injury as defined in Insurance Law § 5102 (d). In support of the motion, defendants submitted a sworn report dated October 26, 2020 from Dr. R. Hillsman, a board certified orthopedic surgeon who performed an independent orthopedic evaluation on plaintiff on 10/26/2020 and reviewed plaintiff's medical records. Dr. Hillsman states that plaintiff's cervical spine range of motion measurements taken with a goniometer revealed forward flexion to 50 degrees (50 degrees normal), extension to 60 degrees (60 degrees normal), right/left rotation 80 degrees (normal 80 degrees), right/left lateral bending 45 degrees (45 degrees normal). No neurotrophic changes noted. Muscle strength is good with no noted atrophy.

The lumbar spine examination revealed a normal lordosis. Palpation revealed no tenderness and no evidence of muscle spasm. Range of motion revealed forward flexion to 60 degrees (60 degrees normal), extension 25 degrees (25 degrees normal), right/left lateral bending 25 degrees (25 degrees normal). Straight leg raise testing was negative bilaterally.

The thoracic spine examination revealed no tenderness over the trapezius to the superior angle of the scapula, along the medial border down to the inferior angle over the spinous process from T1 through T12. Range of motion revealed flexion to 45 degrees (45 degrees normal), extension 0 degrees (0 degrees normal), right/left lateral bending 45 degrees (45 degrees normal), right/left rotation 30 degrees (normal 30 degrees).

Right elbow examination revealed no heat, swelling or effusion. No evidence of crepitus or erythema. Range of motion examination revealed extension 0 degrees (normal 0 degrees), flexion 150 degrees (normal 150 degrees).

Dr. Hillsman states that plaintiff's cervical and lumbar spine sprain/strain are resolved as well as plaintiff's right elbow status-post surgery. Dr. Hillsman states that based on his orthopedic clinical evaluation, and upon a reasonable degree of medical certainty, plaintiff does not have any functional impairment and that there is no permanency.

Defendants submitted a February 10, 2021 report from Dr. Marianna Golden, a board certified neurologist who performed a neurologic evaluation of plaintiff on 2/20/2021 and reviewed plaintiff's medical records. Dr. Golden states that plaintiff related that he was involved in a subsequent motor vehicle accident on 9/4/2020. Dr. Golden states that plaintiff's had a normal neurologic examination and that based on her examination there is no objective evidence of a neurologic disability or permanence. There is no clinical evidence of radiculopathy and plaintiff is neurologically intact with normal reflex, motor and sensory examinations.

The proponent of a summary judgment motion has the initial burden of establishing entitlement to judgment as a matter of law, submitting evidence in admissible form demonstrating the absence of any triable issues of fact (see *Giuffrida v Citibank Corp.*, 100 NY 2d 72 (2003), see also *Alvarez v Prospect Hospital*, 68 NY 2d 320 (1980). Only when the movant satisfies its prima facie burden will the burden shift to the opponent "to lay bare his or her proof and demonstrate the existence of triable issues of fact" (*Alvarez*, 68 NY 2d at 324; see also *Zuckerman v City of New York*, 49 NY 2d 557 (1980).

Defendant Yan Hua Dang cross moves for summary judgment on the grounds that plaintiff has not sustained a serious injury as required by 5102(d) of the Insurance Law and hereby adopts the affirmation in support and exhibits of the co-defendant's motion.

Plaintiff in opposition to the motion and cross motion 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 he did indeed sustain a serious injury. Plaintiff alleges that he has sustained serious injuries under the "permanent loss of use", "significant limitation of use" and/or a "permanent consequential limitation of use of a body function or system", and "a medically determined injury or impairment of a non-permanent nature which prevents the injured person from customary activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment." subcategories as a result of the subject accident.

Plaintiff submitted a April 25, 2022 affirmation from Dr. Charles Ruotolo, plaintiff's treating orthopedic surgeon who last examined plaintiff in February 2022 and reviewed plaintiff's MRI reports and medical records. Dr. Ruotolo states that plaintiff's February 2022 right elbow range of motion testing with a hand held goniometer revealed -2 degrees (normal -5 degrees), flexion 135 degrees (normal 150 degrees). Dr. Ruotolo states that he was able to conclude within a reasonable degree of medical certainty that the limitations of the right elbow are permanent, medically significant and substantial in their effect on the plaintiff. Dr. Ruotolo states that the limitations will limit any activities requiring the full flexion of plaintiff's right arm. Dr. Ruotolo states that while plaintiff was involved in a subsequent accident in 9/2020, plaintiff's principal injury was to his cervical and lumbar spine which did not have any medically determined adverse effect on the condition of plaintiff's right elbow.

Plaintiff submitted a May 17, 2022 affirmation from Dr. Luis Alejo , plaintiff's treating physical medicine and rehabilitation specialist who last examined plaintiff on April 7, 2022 and reviewed plaintiff's MRI reports and medical records. Dr. Alejo states that on 4/7/2022, he performed lumbar spine range of motion testing with a hand held goniometer which revealed range of motion limitations, guarded by muscle splinting and spasms outside of plaintiff's voluntary control and found flexion 40 degrees (normal 90 degrees), extension 15 degrees (normal 30 degrees). Cervical range of motion testing revealed flexion 25 degrees (normal 50 degrees), extension 30 degrees (normal 60 degrees)

Dr. Alejo states that he concludes with a reasonable degree of medical certainty that these limitations of cervical and lumbar motion are permanent, medically significant and substantial in their effect on plaintiff.

Plaintiff submitted 6/11/2019 right elbow MRI from Zwanger-Pesiri which found partial thickness tear of the common extensor tendon origin, partial tear of the origin of the radial collateral ligament and lateral ulnar collateral ligament, tendinopathy and low grade partial tearing the common flexor tendon origin and osteoarthritis in the elbow joint with prominent marginal osteophytes with associated joint effusion.

Plaintiff's 6/21/2019 lumbar spine MRI revealed L4-L5 left lateralizing disc herniation with annular tear impinging the traversing left L5 nerve root, right lateralizing disc herniation L5-S1

with annular tear abuts the traversing right S1 nerve root, and disc herniation T12-L1 without neural impingement. Plaintiff's 6/21/2019 thoracic spine MRI revealed T12-L1 disc herniation with annular tear without neural impingement,

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, defendants Denise M. Howley's motion and defendant Yan Hua Dang's cross motion for an order pursuant to CPLR § 3212 granting defendants summary judgment and dismissing the complaint of plaintiff Weiss Sakhizada on the grounds that there are no triable issues of fact, in that plaintiff cannot meet the serious threshold requirement mandated by Insurance Law §5102 (d) is denied.

This is the decision and order of this Court.

Dated: September 30, 2022


Ulysses B. Leverett, JSC



Hon. Ulysses B. Leverett