

Shaikh v On Wah Chu
2023 NY Slip Op 30272(U)
January 13, 2023
Supreme Court, New York County
Docket Number: Index No. 160914/2020
Judge: James G. Clynnes
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JAMES G. CLYNES PART 22M

Justice

MUHAMMAD SAAD SHAIKH, SHEEZA SHAIKH, SHAGUFTA SHAIKH
Plaintiff,
INDEX NO. 160914/2020
MOTION DATE 03/02/2022
MOTION SEQ. NO. 001

- v -

ON WAH CHU, HENRY CHU,
Defendant.
DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 29, 30, 31, 32, 33, 34, 35, 36

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, the motion by Defendants to dismiss the complaint of Plaintiff Muhammad Saad Shaikh (Plaintiff Muhammad), as said Plaintiff did not sustain a "serious injury" under Insurance Law 5102(d) is denied.

Plaintiffs seek recovery for injuries allegedly sustained as a result of a December 27, 2019 accident between a motor vehicle owned and operated by Plaintiff Muhammad Saad Shaikh, within which Plaintiff Sheeza Shaikh and Plaintiff Shagufta Shaikh were passengers, and a motor vehicle owned by Defendant On Wah Chu and operated by Defendant Henry Chu. Plaintiff Muhammad's Bill of Particulars alleges injuries to his right shoulder, lumbar spine, and cervical spine that fall within the serious injury categories of Insurance Law 5102 (d).

Movant bears the initial burden to establish that the plaintiff has not sustained a serious injury (Lowe v Bennett, 122 AD2d 728 [1st Dept 1986]). When the movant has made such a showing, the burden shifts to the plaintiff to produce prima facie evidence to support the claim of serious injury (see Lopez v Senatore, 65 NY2d 1017 [1985]). In instances where a defendant asserts that the evidence reveals a preexisting injury or a degenerative condition, the plaintiff must present evidence to the contrary (Brewster v FTM Servo, Corp., 44 AD3d 351 [1st Dept 2007]).

Defendants have established a prima facie showing of entitlement to summary judgment. Defendants rely on the affirmed reports of Dr. Jeffrey Dermksian, orthopedic surgeon, and Dr. Michael D. Winn, radiologist.¹

Dr. Dermksian examined Plaintiff Muhammad on September 27, 2021 and reviewed relevant medical records and reports, including the MRI reports of Plaintiff Muhammad's cervical spine, lumbar spine, and right shoulder. Dr. Dermksian measured Plaintiff Muhammad's range of motion using a goniometer and found the following: as to his cervical spine forward flexion 45° (normal 45°), extension 60° (normal 60°), left lateral bending 45° (normal 45°), right lateral bending 45° (normal 45°), rotation to the left 60° (normal 60°), and rotation to the right 60° (normal 60°); as to his lumbar spine, flexion 60° (normal 60°), extension 25° (normal 25°), right lateral bending 25° (normal 25°), and left lateral bending 25° (normal 25°); and as to his right shoulder, forward elevation 170° (left 170°, normal 170°), abduction 110° (left 110°, normal 110°), external rotation 45° (left 45°, normal 45°), and internal rotation to L2 vertebra (left L2 vertebra, normal L2 vertebra). In addition to the normal ranges of motion, Dr. Dermksian found no objective evidence of radiculopathy and no objective abnormalities with regard to the cervical and lumbar spine.

Upon review of the MRI reports Dr. Dermksian noted pre-existing disc bulges in the cervical spine that are degenerative in nature, as well as pre-existing degenerative changes in the lumbar spine, neither causally related to the subject accident.

With regard to the right shoulder, in addition to the normal range of motion, Dr. Dermksian found no objective evidence of an internal derangement or impingement and the exam showed no objective abnormalities. Upon review of the MRI report of the right shoulder, Dr. Dermksian found pre-existing, degenerative changes that are not causally related to the subject accident. Dr. Dermksian did note that Plaintiff Muhammad stated that he was an athlete and had well-developed upper extremity musculature and concluded that the findings on the MRI are most likely consistent with Plaintiff Muhammad's upper body exercises that he has done in the past.

Dr. Dermksian concluded that Plaintiff Muhammad may continue to work, be a full-time student, and perform his usual and customary activities without limitations or restrictions.

¹ The submissions of both parties rely on and refer to the deposition testimony of Plaintiff Muhammad Saad Shaikh, indicating that it is attached as Exhibit D (NYSCEF DOC NO 19) to Defendants' motion papers. However, the document uploaded as Exhibit D (NYSCEF DOC NO 19) is the transcript of the deposition testimony of Plaintiff Sheeza Shaikh, not Plaintiff Muhammad Saad Shaikh.

Dr. Michael Winn undertook an independent review of the MRIs of Plaintiff Muhammad's cervical spine, lumbar spine, and right shoulder. With regard to his cervical spine, Dr. Winn found normal height and alignment in the cervical vertebrae and intervertebral discs, no evidence of disc bulge or herniation, and no evidence of spinal stenosis or neural foramen compromise. Dr. Winn reported that it is a normal MRI of the cervical spine and there is no causation. With regard to the lumbar spine, Dr. Winn found height diminishment at L3-L4 consistent with disc desiccation, a mild degree of endplate osteophyte formation consistent with degenerative spondylosis also at L3-L4, but found no evidence of disc bulge or herniation at other intervertebral discs. Dr. Winn concluded that the findings of disc space narrowing, disc desiccation, degenerative spondylosis, and diffuse and concentric bulging of the intervertebral discs are typical manifestations of chronic disc degeneration and would have to antedate the subject accident. Specifically, Dr. Winn reported that there cannot be a precise finding regarding the causation of the disc herniation at L3-L4, however the presence of pre-existing disc degeneration at this level suggests a strong likelihood that the disc protrusion is also degenerative and therefore, would predate the accident. With regard to the right shoulder, Dr. Winn found mild hypertrophic degenerative change at the right acromioclavicular which represent typical manifestations of impingement syndrome due to degenerative changes and would therefore predate the subject accident.

Defendants have met their initial burden of establishing that Plaintiff did not sustain serious injuries as a result of the accident under Insurance Law 5102 (d) (*Perez v Rodriguez*, 25 AD3d 506 [1st Dept 2006]).

In opposition, Plaintiff Muhammad has raised a triable issue of fact. Plaintiff Muhammad relies on Plaintiff's medical records with a notarized certification from the custodian of records from Quantum PT & Chiropractic Care where he was treated by Paul Manadan, M.D., Dr. Manandan's affirmation and affirmed examination report, and MRI reports with a notarized certification from the custodian of the records for Lenox Hill Radiology, which certifies the treatment records for Plaintiff and avers that they are a complete set of said records.

Defendants oppose the admissibility of Plaintiff Muhammad's medical records and MRI reports, contending that the records certifications do not authenticate the medical content therein, rendering them inadmissible. The certification of the records as business records pursuant to CPLR 4518 is only applicable for those records that are in fact day-to-day business records and not narrative reports prepared for litigation. Here, the subject MRI reports were not created in

preparation for litigation. The MRI exam was on February 5, 2020. This litigation commenced on December 15, 2020. The MRI exam was requested by a nurse practitioner (NP) who shares an address with Plaintiff's treating doctor, Dr. Manadan, not by Plaintiff's attorney. In his affirmation, Dr. Manadan affirms that included in Plaintiff Muhammad's treatment and testing were MRIs of the cervical spine, lumbar spine, and right shoulder. While typically unaffirmed medical records and MRI reports may be excludable at trial, they may be considered to deny a motion for summary judgment, if they are not the sole basis for the Court's determination (*Clemmer v Drah Cab Corp.*, 74 AD3d 660, 660 [1st Dept 2010]). In this specific case, the portions of Dr. Manadan's conclusions that are based on the unsworn MRI reports are also admissible, because Defendants' Dr. Dermksian expressly relied on those same reports in reaching his own conclusions (*id.*). While the MRI reports are unsworn, they were referred to by both Defendants' and Plaintiff Muhammad's experts in their affirmations and reports and hence, are properly before the Court (*Rivera v Super Star Leasing, Inc.*, 57 AD3d 288 [1st Dept 2008]; *Thompson v Abbasi*, 15 AD3d 95 [1st Dept 2005]). Moreover, the MRI of Plaintiff Muhammad's spine is sufficient to establish the existence of disc bulges and herniations, as both Defendants' and Plaintiff's physicians acknowledge those conditions, differing only as to the cause (*Toure v Avis Rent a Car Sys.*, 98 NY2d 345 [2002]). Accordingly, the Court rejects Defendants' challenges to Plaintiff Muhammad's proof.

In his affirmation, Dr. Manadan affirms that Plaintiff Muhammad began treating with him shortly after the subject accident. Dr. Manadan measured Plaintiff Muhammad's range of motion on January 15, 2020 with a goniometer pursuant to AMA Guidelines and found the following: as to his cervical spine, 30° (normal 50°), extension 45° (normal 60°), left lateral flexion 45° (normal 45°), right lateral flexion 35° (normal 45°), rotation to the left 80° (normal 80°), and rotation to the right 65° (normal 80°); as to his lumbar spine, flexion 45° (normal 60°), extension 15° (normal 25°), right lateral flexion 25° (normal 25°), and left lateral flexion 15° (normal 25°); and as to his right shoulder, flexion 120° (normal 180°), extension 50° (normal 60°), abduction 150° (normal 180°), and adduction 30° (normal 30°). Dr. Manadan measured Plaintiff Muhammad's range of motion again several times thereafter revealing only slight improvements but maintaining a limitation on range of motion. The MRI reports revealed a right shoulder SLAP tear, disc herniation at L3-L4 and disc bulge at L4-L5 in the lumbar spine, and disc protrusion at C4-C5 and C5-C6 in the cervical spine. Dr. Manadan conducted his own review of the MRIs and found no

evidence of degenerative stenosis, spondylosis or hypertrophy. Dr. Manadan concluded that Plaintiff Muhammad’s injuries are directly related to the subject accident, not the result of degeneration, and are permanent in nature.


Plaintiff Muhammad, therefore, has raised a sufficient issue of fact to warrant denial of summary judgment. Accordingly, it is

ORDERED that Defendants’ motion for summary judgment on the grounds that Plaintiff Muhammad Saad Shaikh did not sustain a serious injury as defined under Insurance Law 5102 (d) is denied; and it is further

ORDERED that any requested relief not specifically addressed herein has nonetheless been considered; and it is further

ORDERED that within 30 days of entry, Plaintiffs shall serve a copy of this Decision and Order upon Defendants with Notice of Entry.

This constitutes the Decision and Order of the Court.

1/13/2023					
DATE			JAMES G. CLYNES, J.S.C.		
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
				REFERENCE	