

Yutog Shi v Choi
2024 NY Slip Op 35337(U)
March 11, 2024
Supreme Court, Queens County
Docket Number: Index No. 721241/2021
Judge: Ulysses B. Leverett
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS-----X
YUTONG SHI and BOJING YU,

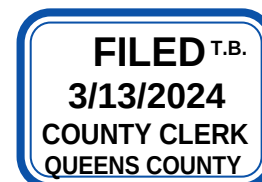
Plaintiff,

Index No.: 721241/2021
Motion Seq. No.:3

-against-

SAMUEL SEUNGHOON CHOI,

Defendant.

-----X
Present: **HONORABLE ULYSSES B. LEVERETT****DECISION and ORDER**

Notice of Motion-Statement of Material Facts-Affirmation-Exhibits
 Affirmation in Opposition-Exhibits-Statement of Facts
 Affirmation in Reply

Papers Numbered
 EF 41-55
 EF 58-59, 61
 EF 65

Upon the foregoing papers, it is ordered that defendant Samuel Seunghoon Choi's motion for an order pursuant to CPLR §3212 granting defendant summary judgment and dismissing plaintiffs' complaint pursuant to Insurance Law §5104(a) in that plaintiffs did not sustain a serious injury as defined under Insurance Law §5102(d) is granted.

This action was brought to recover damages for serious personal injuries allegedly sustained by plaintiffs as a result of a motor vehicle accident on March 17, 2021 on the Long Island Expressway in the County of Queens, City and State of New York.

Plaintiffs allege that a vehicle operated by Defendant came into contact with a vehicle in which plaintiff Shi was operating and plaintiff Yu was a passenger. Plaintiff Yu states that as a result of the accident, she sustained injuries to her lumbar and cervical spine, right and left shoulder and right knee. Plaintiff Shi alleges injuries to the cervical and lumbar spine, left knee and left and right shoulder.

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." Plaintiffs argue that the only category they are arguing on is significant limitation of use of a body function or system.

"[T]o prove the extent or degree of physical limitation, an expert's designation of a numeric percentage of a plaintiff's loss of range of motion can be used to substantiate a claim of serious

injury... An expert's qualitative assessment of a plaintiff's condition may also suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system" See *Toure v Avis Rent A Car Systems, Inc.*, 98 N.Y.2d 345, 350 (2002).

Bojing Yu

In support of the motion, defendant Samuel Seunghoon Choi asserts that plaintiff Yu did not sustain a serious injury as defined in Insurance Law §5102(d). Defendant submitted an orthopedic independent medical examination dated November 14, 2022 by Pierce Ferriter, M.D.

The report notes that plaintiff Yu was a passenger in the vehicle and was transported by ambulance to the hospital the same day for an evaluation and treatment. Plaintiff reported that one week after the accident, she started on a course of physical therapy, acupuncture, massage therapy and heat treatment. She also reported that she was no longer continuing the recommended treatment as of September 30, 2021 and had not received any surgeries or injections as a result of the accident.

The examination of the cervical spine revealed no swelling, discoloration or deformity; nor was there are muscle spasm or tenderness upon palpation. Active range of motion revealed flexion to 50 degrees (50 degrees normal), extension to 60 degrees (60 degrees normal), right lateral flexion to 45 degrees (45 degrees normal) and left lateral flexion to 45 degrees (45 degrees normal), and right rotation to 80 degrees (80 degrees normal) and left rotation to 80 degrees (80 degrees normal).

Inspection of the lumbar spine revealed no swelling, discoloration, or deformity. There was no muscle spasm upon palpation of the paralumbar muscles. There was no complaint of tenderness upon palpation. Active range of motion revealed flexion to 60 degrees (60 degrees normal), extension to 25 degrees (25 degrees normal), right lateral flexion to 25 degrees (25 degrees normal) and left lateral flexion to 25 degrees (25 degrees normal).

There was no heat, swelling, effusion, erythema, or crepitus appreciated for the right shoulder. The Hawkins/Kennedy impingement; Neer impingement maneuver; cross arm adduction; empty can (Jobe's) test; scapular winging; drop arm; O'Brien; painful arc and atrophy of deltoid were negative, rotator cuff strength was 5/5. There was no complaint of tenderness upon palpation in the acromioclavicular or supraspinatus. Active range of motion demonstrated forward flexion to 180 degrees (180 degrees normal), extension to 40 degrees (40 degrees normal), abduction to 180 degrees (180 degrees normal), adduction to 30 degrees (30 degrees normal), internal rotation to 80 degrees (80 degrees normal), and external rotation to 90 degrees (90 degrees normal).

There was no heat, swelling, effusion, erythema, or crepitus appreciated for the left shoulder. The Hawkins/Kennedy impingement; Neer impingement maneuver; cross arm adduction; empty can (Jobe's) test; scapular winging; drop arm; O'Brien; painful arc and atrophy of deltoid were negative, rotator cuff strength was 5/5. There was no complaint of tenderness upon palpation in the acromioclavicular or supraspinatus. Active range of motion demonstrates forward flexion to 180 degrees (180 degrees normal), extension to 40 degrees (40 degrees normal), abduction to 180 degrees (180 degrees normal), adduction to 30 degrees (30 degrees normal), internal rotation to 80 degrees (80 degrees normal), and external rotation to 90 degrees (90 degrees normal).

There was no heat, swelling, effusion, erythema, or crepitus appreciated to the right knee. There was no complaint of tenderness upon palpation. The Lachman's, patella tracking, anterior

drawer, posterior drawer, patella grind, McMurray's, bounce and pivot shift tests were all negative. Active range of motion revealed flexion to 150 degrees (150 degrees normal) and extension to 0 degrees (0 degrees normal). Quadriceps and hamstring strength testing revealed 5/5 strength. No atrophy noted in the quadriceps and hamstring muscles. No chondromalacia were present on palpation of the patella.

Dr. Ferriter diagnosed the plaintiff with a resolved cervical spine sprain/strain, lumbar spine sprain/strain, right shoulder sprain/strain, left shoulder sprain/strain and right knee sprain/strain; all of which he found to be resolved. It was his impression that within a reasonable degree of medical certainty the plaintiff had fully recovered at the time of the exam.

Yutong Shi

In support of the motion, defendant Samuel Seunghoon Choi asserts that plaintiff Shi did not sustain a serious injury as defined in Insurance Law §5102(d). Defendant submitted an orthopedic independent medical examination dated November 14, 2022 by Pierce Ferriter, M.D.

The report notes that plaintiff Shi was a restrained driver at the time of the accident when the vehicle was struck on the rear side. Plaintiff reported that he initially sustained injuries to his neck, low back and left knee. He also reported that he was transported by ambulance to the emergency room for evaluation and treatment and that no diagnostic tests were performed, and he was discharged without admission with prescriptions for pain relief medications. Plaintiff reported that one week after the accident, he started on a course of physical therapy, acupuncture, massage therapy and heat treatment four times a week. He also reported that she was no longer continuing the recommended treatment as of September 30, 2021 and did not want to continue conservative treatments.

The examination of the cervical spine revealed no swelling, discoloration or deformity; nor was there are muscle spasm or tenderness upon palpation. Active range of motion revealed flexion to 50 degrees (50 degrees normal), extension to 60 degrees (60 degrees normal), right lateral flexion to 45 degrees (45 degrees normal) and left lateral flexion to 45 degrees (45 degrees normal), and right rotation to 80 degrees (80 degrees normal) and left rotation to 80 degrees (80 degrees normal).

Inspection of the thoracic spine revealed no swelling, discoloration or deformity. There was no parathoracic spasm upon palpation and no complaint of tenderness upon palpation. Active range of motion revealed flexion to 45 degrees (45 degrees normal), extension to 0 degrees (0 degrees normal), right lateral bending to 45 degrees (45 degrees normal) and left lateral bending to 45 degrees (45 degrees normal), and right rotation to 30 degrees (30 degrees normal) and left rotation to 30 degrees (30 degrees normal).

Inspection of the lumbar spine revealed no swelling, discoloration, or deformity. There was no muscle spasm upon palpation of the paralumbar muscles. There was no complaint of tenderness upon palpation. Active range of motion revealed flexion to 60 degrees (60 degrees normal), extension to 25 degrees (25 degrees normal), right lateral flexion to 25 degrees (25 degrees normal) and left lateral flexion to 25 degrees (25 degrees normal).

There was no heat, swelling, effusion, erythema, or crepitus appreciated to the left knee. There was no complaint of tenderness upon palpation. The Lachman's, patella tracking, anterior drawer, posterior drawer, patella grind, McMurray's, bounce and pivot shift tests were all negative.

Active range of motion revealed flexion to 150 degrees (150 degrees normal) and extension to 0 degrees (0 degrees normal). Quadriceps and hamstring strength testing revealed 5/5 strength. No atrophy noted in the quadriceps and hamstring muscles. No chondromalacia were present on palpation of the patella.

There was no heat, swelling, effusion, erythema, or crepitus appreciated for the right shoulder. The Hawkins/Kennedy impingement; Neer impingement maneuver; cross arm adduction; empty can (Jobe's) test; scapular winging; drop arm; O'Brien; painful arc and atrophy of deltoid were negative, rotator cuff strength was 5/5. There was no complaint of tenderness upon palpation in the acromioclavicular or supraspinatus. Active range of motion demonstrated forward flexion to 180 degrees (180 degrees normal), extension to 40 degrees (40 degrees normal), abduction to 180 degrees (180 degrees normal), adduction to 30 degrees (30 degrees normal), internal rotation to 80 degrees (80 degrees normal), and external rotation to 90 degrees (90 degrees normal).

There was no heat, swelling, effusion, erythema, or crepitus appreciated for the left shoulder. The Hawkins/Kennedy impingement; Neer impingement maneuver; cross arm adduction; empty can (Jobe's) test; scapular winging; drop arm; O'Brien; painful arc and atrophy of deltoid were negative, rotator cuff strength was 5/5. There was no complaint of tenderness upon palpation in the acromioclavicular or supraspinatus. Active range of motion demonstrates forward flexion to 180 degrees (180 degrees normal), extension to 40 degrees (40 degrees normal), abduction to 180 degrees (180 degrees normal), adduction to 30 degrees (30 degrees normal), internal rotation to 80 degrees (80 degrees normal), and external rotation to 90 degrees (90 degrees normal).

Dr. Ferriter diagnosed the plaintiff with a resolved cervical spine sprain/strain, thoracic spine sprain/strain, lumbar spine sprain/strain, right shoulder sprain/strain, left shoulder sprain/strain and left knee sprain/strain; all of which he found to be resolved. It was his impression that within a reasonable degree of medical certainty the plaintiff had fully recovered at the time of the exam.

Plaintiffs in opposition to the motion state that defendants have not demonstrated that plaintiff did not sustain a serious injury as defined by Insurance Law §5102 (d). Plaintiffs state that there is no issue with a gap in treatment as they treated for five months and stopped as they felt treatment no longer improved their condition.

Here, the Court notes that plaintiffs treated for approximately five months after the subject motor vehicle accident and have not provided sufficient proof or reason as to why they have not been treated by a physician since September 2021. *See Bandoian v. Bernstein*, 254 A.D.2d 205 (1st Dep't 1998) and *Kim v. Budhu*, 709 N.Y.S.2d 440 (2d Dep't 2000). The Court also notes that the medical reports plaintiffs uses to bolster their argument in support of the opposition are uncertified, unsworn and unaffirmed. A party seeking or opposing summary judgement on the question of serious injury must submit medical proof in admissible form and, consequently, unsworn and unaffirmed physicians' reports are insufficient. *See Grasso v. Angerami*, 79 79 N.Y.2d 813 (1991) and *Lowe v. Bennet*, 122 A.D.2d 728 (1st Dep't 1986).

Defendant argues in their reply affirmation that plaintiffs failed to submit admissible medical evidence to support their claims as plaintiffs did not submit sworn or affirmed reports.

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).

Consequently, defendant Samuel Seunghoon Choi's motion for an order pursuant to CPLR § 3212 granting defendant summary judgment and dismissing the complaint of plaintiffs Yutong Shi and Bojing Yu 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 granted.

Dated: March 11, 2024


Hon. Ulysses B. Leverett, J.S.C.

HON. ULYSSES B. LEVERETT

