

Lun Nie v Lie Li

2019 NY Slip Op 35217(U)

November 18, 2019

Supreme Court, Queens County

Docket Number: Index No. 712015/2018

Judge: Chereé A. Buggs

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Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS**
Justice

IAS PART 30

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LUN NIE,

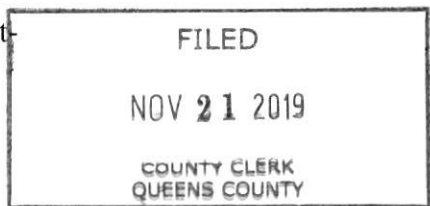
Index No.: 712015/2018

Plaintiff,

Motion

Date: November 6, 2019

-against-



Motion Cal. No.: 34

LIE LI,

Motion Sequence No.: 2

Defendant.

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The following efile papers numbered 19-28, 32-37, 41 submitted and considered on this motion by defendant Lie Li seeking an Order pursuant to Civil Practice Law and Rules (“CPLR”) 3212 granting summary judgment on the basis that plaintiff Lun Nie failed to sustain a serious injury as mandated by Insurance Law sections 5104(a) and 5102(d).

Papers
Numbered

| | |
|--|----------|
| Notice of Motion-Affidavits-Exhibits..... | EF 19-28 |
| Affirmation in Opposition-Affidavits-Exhibits..... | EF 32-37 |
| Reply Affirmation-Affidavits-Exhibits..... | EF 41 |

This action arises from a two vehicle car accident which occurred on January 25, 2018 at or near 11th Street and Jackson Avenue, on the Queens side entranceway to the Pulaski Bridge. Plaintiff Lun Nie (hereinafter “Nie”) commenced this action on August 3, 2018 with the filing of a summons and verified complaint asserting that defendant Lie Li (hereinafter “Li”) was negligent *inter alia*, in the ownership and operation of his vehicle. Li joined issue with the filing and service of a verified answer on September 5, 2018. Nie claimed that as a result of the accident he sustained serious injuries to his person. Discovery is now complete. Nie filed a Note of Issue and Certificate of Readiness on July 3, 2019, making this motion for summary judgment timely (*see* CPLR 3212[a]; *Brill v City of New York*, 2 NY3d 648 [2004]; *Bargil Assocs., LLC v Crites*, 173 AD3d 958 [2d Dept 2019]). In support of the motion, Li’s submissions included the pleadings, Nie’s verified bill of particulars, the report of orthopedic surgeon Dr. Thomas P. Nipper dated July 15, 2019, and reports of radiologist Scott A. Springer dated May 28, 2019.

Nie's Verified Bill of Particulars

According to Nie's verified bill of particulars dated October 25, 2018, Nie alleged that as a result of the accident, he sustained injuries to his right shoulder, requiring surgical intervention, neck, back, left knee, and aggravation and exacerbation of any pre-existing injuries. He alleged that he was confined to his home from the time of the accident until June 30, 2018. Nie claimed that he sustained serious injury under the significant disfigurement; a fracture; permanent loss of use of a body organ, member function or system; permanent consequential limitation of use of a body organ, member, function or system; significant limitation of use of a body organ, member, function or system and/or the 90/180 day categories of the Insurance Law.

Plaintiff's Deposition Testimony

Nie gave sworn testimony in this matter on March 5, 2019. He stated in relevant part that as a result of the accident, he sustained injuries to his right shoulder, neck, back, and left knee. He had been working in his current position as a deliveryman for a restaurant since September 2018, four days a week, part-time. When the accident occurred he was working in a flower shop part-time. He did not seek employment from January 2018 after the accident and September 2018. He stated that he hit his head on impact and lost consciousness for at least 8 to 10 seconds. He also hit his left knee on the steering wheel, hit his back, neck and right shoulder on the interior of the car. He was wearing a seatbelt. He underwent left knee surgery in 2013. Following the accident he treated for pain in his forehead, neck, back, left knee, right shoulder. He underwent acupuncture and physical therapy treatment for approximately one year. He recalled Magnetic Resonance Imaging ("MRI") films were taken of various parts of his body. He was told that he required surgery on his right shoulder, which was performed in May 2018, and after completing the surgery he returned to physical therapy for his right shoulder, which he completed in January 2019. He claimed that following the accident he was bedridden for twenty days, and he testified he was told to stay in bed by a physician. He related that he traveled to China in April 2018. He continued to have complaints of pain in his neck and right shoulder, and difficulty walking.

Independent Medical Report of Dr. Thomas P. Nipper

Dr. Thomas P. Nipper performed an independent orthopedic examination on Nie on May 28, 2019. He rendered his report on July 15, 2019. According to Dr. Nipper, Nie was experiencing right shoulder pain status post arthroscopy. He had a left knee arthroscopy in 2013. It was noted that Nie lost six to seven months from his job in delivery. The doctor reviewed various records including the verified bill of particulars, MRI reports and performed an examination. Range of motion testing was performed with a goniometer and was as follows:

Cervical Spine-flexion 50 degrees (50 degrees normal); extension 60 degrees (60 degrees normal); right and left rotation 80 degrees (80 degrees normal); right and left bending 45 degrees (45 degrees normal);

Lumbar Spine-flexion 50 degrees (50 degrees normal); extension 25 degrees (25 degrees normal); right and left bend 25 degrees (25 degrees normal); Straight leg raising was negative to 90 degrees bilaterally.

Right Shoulder- flexion and abduction to 180 degrees (180 degrees normal); adduction 30 degrees (30 degrees normal); external rotation 90 degrees (90 degrees normal); internal rotation was normal to the L1 level. Portal scarring was seen;

Left Knee- flexion to 130 degrees (130 degrees normal); extension to 0 degrees (0 degrees normal). Old scarring was seen.

In Dr. Nipper's opinion, Nie's injuries had fully resolved, and that he did not sustain any significant or permanent injury as a result of the motor vehicle accident.

Independent Radiology Reports of Dr. Scott A. Springer

Dr. Scott A. Springer reviewed a MRI of Nie's left knee which was performed at Fast Care Medical Diagnostics on March 19, 2018. In his opinion, the film revealed moderate spurs, superior and inferior poles of the patella; tendinosis in the distal quadriceps tendon and the patella tendon; mild narrowing, patellofemoral joint and no posttraumatic changes causally related to the accident. He also reviewed a MRI of the right shoulder taken at Fast Care Medical Diagnostics on March 22, 2018. His impression was hypertrophic changes and narrowing in the acromioclavicular joint; tendinosis in the supraspinatus tendon with associated chronic intrasubstance tears; tendinosis, long head of the bicep tendon; subchondral bone cysts, head of the humerus; mild narrowing, glenohumeral joint; small joint effusion; no fracture or posttraumatic changes causally related to the accident. Dr. Springer reviewed a MRI taken at Fast Care Medical Diagnostics on March 5, 2018. His impression was generalized disc desiccation; posterior disc osteophyte complexes, C4-C5 and C5-C6; disc bulges, C3-C4 and C6-C7; chronic disc herniations, C4-C5 and C5-C6; central canal narrowing C4-C5; canal stenosis C5-C6; no fracture of posttraumatic changes related to the accident. The doctor also reviewed a lumbar spine MRI taken on March 12, 2018 at Fast Care Medical Diagnostics. His impression was straightening of the normal lumbar lordosis; probable small hemangioma, right side of L3; disc dessication L4-L5, disc bulge, L4-L5, bright signal, posterior left side of the L4-L5 disc; chronic disc herniation L5-S1, paraspinal musculature atrophy, no fracture or posttraumatic changes causally related to the accident.

Law and Application

The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must produce competent evidence in admissible form to establish the existence of a triable issue of fact. (*See Zuckerman v City of New York*, 49 NY2d 557 [1980].) Summary judgment which is a drastic remedy, will not be granted by the Court if there is any doubt as to the existence of a triable

issue of fact (*Andre v Pomeroy*, 32 NY2d 361 [1974]).

Pursuant to New York Insurance Law §5102(d) a “serious injury” is “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 ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.”

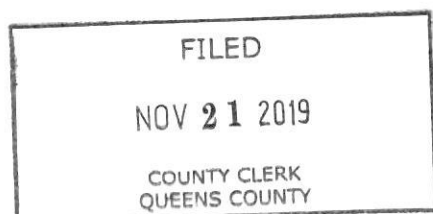
The Court finds that Li failed to establish his entitlement to judgment as a matter of law. He failed to demonstrate that Nie did not sustain a serious injury under the permanent consequential limitation of use of a body organ or member and/or significant limitation of use of a body function or system categories of the Insurance Law. Li’s expert, Dr. Nipper failed to state the range of motion for Nie’s right shoulder on internal rotation and make a comparison to normal values and he also failed to state the range of motion on straight leg raise in comparison to normal (*see Shirman v Lawal*, 69 AD3d 838 [2d Dept 2010]; *Walker v Public Admin. of Suffolk County*, 60 AD3d 757 [2d Dept 2009]; *see also Sixth Edition of the AMA Guides*). Therefore Li failed to demonstrate prima facie entitlement to judgment as a matter of law with evidence that Nie’s alleged injuries were not exacerbated by the accident (*see McKenzie v Redl*, 47 AD3d 775 [2d Dept 2008]). Li also failed to demonstrate that the scarring seen on Nie’s right shoulder, noted by Dr. Nipper did not constitute a significant disfigurement under the Insurance Law (*see Borquist v Hyde Park Cent. School District*, 107 AD3d 926 [2d Dept 2013]; *O’Brien v Bainbridge*, 89 AD3d 1511 [4th Dept 2011]; *Onder v Kaminski*, 3030 AD2d 665 [2d Dept 2003]; *Waldron v Wild*, 96 AD2d 190 [4th Dept 1983]). Li also failed to adequately address Nie’s claims of serious injury under the 90/180 day category. (*See Vega v Moradof*, 175 AD3d 532 [2d Dept 2019]; *Ji Hae Kim v Quintanilla*, 175 AD3d 476 [2d Dept 2019]; *Houng v Beers*, 151 AD3d 995 [2d Dept 2017]; *Che Hong Kim v Kossoff*, 90 AD3d 969 [2d Dept 2011].)

Moreover, assuming *arguendo* that Li had established his entitlement to judgment as a matter of law, in opposition, Nie submitted evidence, including the report of his doctor, Dr. Jayasekharan Komerath which raised triable issues of fact. (*See Perl v Meher*, 18 NY3d 208 [2011]; *Fernandez v Noshcese*, 172 AD3d 685 [2d Dept 2019]).

Therefore, defendant’s motion is denied.

This constitutes the decision and Order of the Court.

Dated: November 18, 2019





Hon. Chereé A. Buggs, JSC