

Short Form Order

SUPREME COURT - STATE OF NEW YORK  
 CIVIL TERM - PART TT-34 - QUEENS COUNTY  
 25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T :

HON. ROBERT J. McDONALD,  
 Justice

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DAVID NEWMAN,

Plaintiff(s),

- against -

PHYLLIS N. GLASS, SOL GLASS and  
 JIAN GANG SUN,

Defendant(s).

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 : Index. No.: 01325 / 2008  
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 : Motion: 10.29.08  
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 : Sequence: 1  
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The following papers numbered 1 to 10 read on this motion by defendant Jian Gang Sun for summary judgment pursuant to CPLR 3212 on the grounds that the plaintiff did not sustain “serious injury” as defined in Insurance Law 5102.

	Papers Numbered
Amended Notice of Motion, Affirmation, and Exhibits .....	1 - 4
Affirmation in Opposition and Exhibits .....	5 - 7
Reply Affirmation and Exhibits .....	8 - 9
Supplemental Affirmation in Opposition.....	10

Upon the foregoing papers it is ordered that this motion is determined as follows:

This is a motion by Jian Gang Sun to dismiss the instant complaint on the grounds that the plaintiff did not sustain a “serious injury” as defined in Insurance Law 5102. The underlying accident occurred at or near the east bound Junction Boulevard and Horace Harding Expressway in Queens County, New York on April 10, 2007 in a three vehicle collision.

The moving defendant asserts that the plaintiff has not sustained a “serious injury” as a result of the accident.

In order to maintain an action for personal injury in an automobile case a plaintiff must establish, after the defendant has properly demonstrated that it is an issue, that the plaintiff has sustained a “serious injury” which is defined as follows:

“Serious Injury” Insurance Law §5102(d) states in pertinent part:

In order to maintain an action for personal injury in an automobile case a plaintiff must establish that he has sustained a “serious injury” which is defined as follows:

Serious injury means a personal injury which result in ... 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 constitutes 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.

Whether a plaintiff has sustained a serious injury is initially a question of law for the Court (*Licari v Elliott*, 57 NY2d 230). Initially it is defendant’s obligation to demonstrate that the plaintiff has not sustained a “serious injury” by submitting affidavits or affirmations of its medical experts who have examined the litigant and have found no objective medical findings which support the plaintiff’s claim (*Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345; *Grossman v Wright*, 268 AD2d 79). If the defendant ‘s motion raises the issue as to whether the plaintiff has sustained a “serious injury” the burden shifts to the plaintiff to prima facie demonstrate through the production of evidence sufficient to demonstrate the existence of a “serious injury” in admissible form, or at least that there are questions of fact as to whether plaintiff suffered such injury (*Gaddy v Eyler*, 79 NY2d 955; *Bryan v Brancato*, 213 AD2d 577).

Insurance Law 5102 is the legislative attempt to “weed out frivolous claims and limit recovery to serious injuries” (*Toure v Avis Rent-A-Car Systems, Inc.*, 98 NY2d 345, 350).

Under Insurance Law 5102(d) a permanent consequential limitation of use of a body organ or member qualifies as a “serious injury,” however, the medical proof must establish that the plaintiff suffered a permanent limitation that is not minor slight, but rather, is consequential which is defined as an important or significant limitation.

The defendants rely on the affirmations of the examining doctors.

Dr. Ravi Tikoo, M.D., a board certified neurologist, examined plaintiff on October 15, 2008 and submitted his affirmed neurological report. Dr Tikoo in his conclusion found Mr. Newman “essentially normal” and despite “subjective complaints” he found “no objective findings to substantiate these complaints.” Dr. Tikoo stated that the plaintiff “does not have significant clinical evidence of neuropathy” and he is “not disabled” from a neurological basis.

Dr. Robert J. Orlandi, M.D., a Board Certified Orthopedic Surgeon, examined the plaintiff on October 14, 2008 and submitted his affirmed orthopedic report. Dr. Orlandi's examination of plaintiff's left shoulder revealed no deformity, no atrophy or dystrophy. The plaintiff was capable of normal forward flexion, and there was no evidence of shoulder laxity or labral tear. It was Dr. Orlandi's opinion that the plaintiff sustained a very minor impact. Dr. Orlandi wrote that there was no MRI of the plaintiff's shoulder because of "the metal in his aortic valve and, yet, Dr. Berkowitz had his Coumadin discontinued so that he could perform an arthroscopy for impingement only."

Dr. Audrey Eisenstadt, M.D., a radiologist, examined the plaintiff's CT scan taken at Central Radiology Services on May 10, 2007 and submitted her affirmed radiological report dated October 26, 2008. Dr. Eisenstadt found after examining the transaxial images of the plaintiff's "left shoulder performed one month following the accident reveals absolutely no bony abnormality attributable to the accident." "Not even a joint effusion to suggest any recent trauma is noted."

The defendant also submits the Claims Search Report which indicates that the plaintiff had three prior accidents; February 28, 1992, March 19, 2002 and April 9, 2003 (Exhibit "I").

Here the defendant has come forward with sufficient evidence to support his claim that the plaintiff has not sustained a "serious injury" requiring the plaintiff to demonstrate that he has sustained a "serious injury" (*Gaddy v Eycler*, 79 NY2d 955).

Plaintiff was deposed on September 24, 2008. He indicated that he has not worked since 1999 when he worked part-time for his cousin [9]. He had a "stent put in, angioplasty" one month before the deposition and was on disability since 2000 for an "aortic valve replacement" which was done in 1998 [13, 14]. The plaintiff had a prior job related accident for which he received a Workers Compensation bulk award in 1992 when he injured his back, it was herniations, bulging discs, and pinched nerves [15,16, 22]. He was in another motor vehicle accident between 1992 and 1999 when as a driver he sued and the case was settled [19, 20]. He suffered a neck and back injury but did not undergo surgery [21,22]. As a result of this accident he sustained a "red mark" on his shoulder and he believed his shoulder "was a little swollen" [49,50]. He was given "an injection" in his "rear end" for the pain in his neck and shoulder, but was not prescribed a neck or back brace [51]. Plaintiff's Honda van which was involved in the accident was operable and plaintiff later picked up his car and drove home [53]. Two or three days after the accident was when the plaintiff sought medical attention by going to a medical center in "Forest Hills" referred to him by his friend "John". [55]. He remained in bed during this hiatus [82]. Once at the center he saw a doctor and he complained about his "[n]eck and shoulder" [56]. He was prescribed medication for the pain, and told he would have physical therapy, acupuncture, and chiropractic care [57]. He went to the Queens Brooklyn Medical Center two or three times a week for five or six months until the medical benefits were denied [60]. He saw the doctor one or twice a month and was referred to a Dr. Berkowitz for surgery on his shoulder in July [63]. He was not referred for an MRI because he had "a mechanical valve" [64] but was sent for a CAT scan for his neck and left shoulder one month after the accident [64]. Dr. Berkowitz recommended surgery on his left shoulder [66] which was performed July 2007 [67] at New York Hospital of Queens [68]. The surgery was "85 percent" successful [69,70, 73]. He claimed that he can no longer use his left hand for driving and now uses his right hand to steer

[77,78].

The plaintiff submits an affirmation dated November 5, 2009 signed by Dr. John J. McGee, D.O., Board Certified in Physical Medicine and Rehabilitation. Dr. McGee initially saw the plaintiff on April 13, 2007 and his affirmation is based on his “Final Reevaluation” of October 26, 2009. In his evaluation he finds that the plaintiff’s cervical spine range of motion is diminished, although he fails to indicate whether his reported diminution of plaintiff’s range of motion was based on an objective test. So too is the diminished range of motion of plaintiff’s left shoulder. In Dr. McGee’s “DIAGNOSIS” he states that “[b]ased on the physical examination and MRI findings” the plaintiff had “Left Shoulder Arthroscopy surgery 07/20/07”. Dr. McGee as part of his prognosis writes “The patient states that he was completely asymptomatic in regards to the muscle-skeletal ligamentous pain prior to the injuries sustained on 04.14.2007.” He writes that the patient’s complaints and “symptoms correlate to the mechanism of the injuries described.” Dr. McGee opines that the plaintiff “continues to have pain and restriction in motion in the Cervical affected Extremities. **Prognosis Poor.**”

The plaintiff submits another affirmation signed November 16, 2009, by Dr. John J. McGee, D.O. In this affirmation Dr. McGee writes that it is his opinion that the plaintiff “has and will continue to have permanent deformities, permanent recurrent pain, permanent limitation of motion, permanent limitation of his activities of daily living, permanent limitations of his ability exercise, [*sic*] do housework and chores, bend or lift anything heavy anymore. I believe that the accident of April 10, 2007 is the competent cause for the post-traumatic cervical sprain, disc herniation of C6-7 level; cervical radiculopathy at C7 on the left side; left shoulder sprain; left rotator cuff syndrome, the necessity to undergo a course of physical therapy, acupuncture and chiropractic adjustments and left shoulder arthroscopic surgery on July 20, 2007; and for the permanent deformities as described above.”

The plaintiff submits an affirmation by Dr. Dov J. Berkowitz, M.D., a Board Certified Orthopedic Surgeon, dated October 20, 2009. In this affirmation Dr. Berkowitz recites that the plaintiff has “an aortic valve replacement in 1998 and a right shoulder arthroscopy.” He indicates that he saw the plaintiff on June 14, 2007 when he examined the left shoulder. He does not indicate what test was used but states that forward flexes and abduct were half of the normal range of motion. He states that the “CT scan report of the left shoulder dated 05/10/07 was available for my review showing no abnormalities. Unfortunately, the patient was unable to get an MRI to his left shoulder which would be more definitive secondary to the aortic valve replacement.” Dr. Berkowitz performed the “arthroscopic procedure to this left shoulder with decompression” on July 20, 2007. He last examined the plaintiff on October 5, 2009 and found plaintiff was able to forward flex “about 150 degrees and abduct to about 120 degrees. He was able to passively go further but with difficulty. He was able to internally rotate about 45 degrees (normal is 80) and externally rotate about 30 degrees (normal is 45).” It is apparent from the use of the word “about” that no objective test was employed to determine his range of motion as indicated. Dr. Berkowitz states “In Summary” that the plaintiff “remains with significant limitations of movement in his left shoulder although his overall pain level has improved.”

There is a second affirmation by Dr. Berkowitz dated November 19, 2009. He states that he conducted a range of motion tests as indicated in his affirmation dated October 20, 2009. He does not indicate whether those tests were objective. Dr. Berkowitz opines with a reasonable degree of medical certainty that the plaintiff “has and will continue to have, permanent recurrent pain, permanent limitations of motion, permanent limitations of his activities of daily living, permanent limitation of his ability to exercise or lift heavy objects.”

To establish that the plaintiff has suffered a permanent or consequential limitation of use of a body organ or member and/or a significant limitation of use of a body function or system, the plaintiff must demonstrate more than “a mild, minor or slight limitation of use” and is required to provide objective medical evidence of the extent or degree of limitation and its duration (*Booker v Miller*, 258 AD2d 783; *Burnett v Miller*, 255 AD2d 541). Resolution of the issue of whether “serious injury” has been sustained involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part (*Dufel v Green*, 84 NY2d 795). Upon examination of the papers and exhibits submitted this Court finds that the plaintiff has raised triable factual issues as to whether the plaintiff has “permanent consequential” and “significant limitation” categories.

The question presented as to the difference between the conflicting measurements of plaintiff’s ability to move creates an issue of fact for the jury (*Martinez v Pioneer Transportation Corp.*, 48 AD3d 306).

Generally, an unexplained cessation of medical treatment may be fatal to the plaintiff’s claim of a significant or permanent consequential limitation (*Baez v Rahamatali*, 24 AD3d 256 *aff’d* 6 NY2d 868) A diagnosis of permanency having been sustained by the plaintiff obviates the need for further treatment and, therefore, there is no “gap” in treatment (*Pommells v Perez*, 4 NY3d 566). Also, a finding by the treating physician that continued treatment would be merely palliative can be considered a sufficient explanation for cessation of treatment (*Toure v Avis Rent A Car Systems*, 98 NY2d 345; *Turner-Brewster v Arce*, 17 AD3d 189). The plaintiff in his deposition testimony indicated that he stopped treatment because he was denied medical benefits.

The plaintiff has failed to demonstrate that he has a “medically determined” injury or impairment which has prevented him from performing all of his usual and customary daily activities for at least 90 of the first 180 days following the accident. (*Ayotte v Gervasio*, 81 NY2d 1062; *Johnson v Berger*, 56 AD3d 725; *Roman v Fast Lane Car Service, Inc.*, 46 AD3d 535). The plaintiff had testified at his deposition that he stopped working in 2000 because of his heart ailment.

Regarding the “permanent loss of use” of a body organ, member or system the plaintiff must demonstrate a total and complete disability which will continue without recovery, or with intermittent disability for the duration of the plaintiff’s life (*Oberly v Bangs Ambulance, Inc.*, 96 NY2d 295). The finding of “Permanency” is established by submission of a recent examination (*Melino v Lauster*, 195 AD2d 653 *aff’d* 82 NY2d 828). The mere existence of a herniated disc even a tear in a tendon is not evidence of serious physical injury without other objective evidence (*Sapienza v Ruggiero*, 57 AD3d 643; *Piperis v Wan*, 49 AD3d 840). Merely referring to the

plaintiff's "subjective quality of the plaintiff's pain does not fall within the objective definition of serious physical injury" (*Saladino v Meury*, 193 AD2d 727, *see, Craft v Brantuk*, 195 AD2d 438). The plaintiff sustained his burden by presenting the affirmations of his doctors.

Regarding "permanent limitation" of a body organ, member or system the plaintiff must demonstrate that he has sustained such permanent limitation (*Mickelson v Padang*, 237 AD2d 495). The word "permanent" is by itself insufficient, and it can be sustained only with proof that the limitation is not "minor mild, or slight" but rather "consequential" (*Gaddy v Eyer*, 79 NY2d 955). Once the question has been raised, in order for the plaintiff to sustain proof of permanency, he must demonstrate the existence of such injury through objective medical tests which demonstrate the duration and extent of the injuries alleged (*Gobas v Dowigiallo*, 287 AD2d 690). The plaintiff has sustained his burden by presenting the affirmation of his doctors.

The "significant limitation of use of a body function or system" requires proof of the significance of the limitation, as well as its duration (*Dufel v Green*, 84 NY2d 795; *Fung v Uddin*, 60 AD3d 992; *Hoxha v McEachern*, 42 AD3d 433; *Barrett v Howland*, 202 AD2d 383). The plaintiff has sustained his burden by presenting the affirmation of his doctors.

The plaintiff's physicians in their affirmations do not mirror the statutory language of the Insurance Law. While it may be "safer" for a physician to adopt the statutory language in his affirmation in support of the plaintiff's claims, it may be less meaningful to them in terms of their scientific background.

Accordingly, the defendant's motion is denied as plaintiff has demonstrated that he sustained a "serious injury" within the meaning of N.Y. Insurance Law § 5102(d).

So Ordered.

Dated: February 17, 2010

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Robert J. McDonald, J.S.C.