

Yong Hee Bae v Frisina
2012 NY Slip Op 30535(U)
February 28, 2012
Supreme Court, Queens County
Docket Number: 8384/2009
Judge: Robert J. McDonald
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 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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YONG HEE BAE, Index No.: 8384/2009
Plaintiff, Motion Date: 02/09/12
- against - Motion No.: 3
Motion Seq.: 1

SALVATORE FRISINA,
Defendant.

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The following papers numbered 1 to 12 were read on this motion by defendant, SALVATORE FRISINA, for an order pursuant to CPLR 3212 granting defendant summary judgment and dismissing the complaint of YONG HEE BAE on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law §§ 5102 and 5104:

Papers
Numbered

Notice of Motion-Affidavits-Exhibits.....1 - 5
Affirmation in Opposition-Affidavits-Memorandum of Law.....6 - 10
Reply Affirmation.....11 - 12

This is a personal injury action in which plaintiff, YONG HEE BAE, seeks to recover damages for injuries he sustained as a result of a motor vehicle accident that occurred on August 25, 2006 at the intersection of 162nd Street and 43rd Avenue, Queens County, New York.

At the time of the accident, the plaintiff alleges that she was operating her vehicle northbound on 162nd Street and was stopped at a red light waiting to make a right turn onto the eastbound lanes of 43rd Avenue. The defendant's vehicle which was in the lane to the left of her also began making a right turn in front of plaintiff and impacted her vehicle. As a result of the

impact plaintiff claims that she injured her neck, back and left knee. The plaintiff commenced this action by filing a summons and complaint on April 2, 2009. Issue was joined by service of defendant's verified answer dated August 5, 2009.

Defendant now moves for an order pursuant to CPLR 3212(b), granting summary judgment dismissing the plaintiff's complaint on the ground that plaintiff did not suffer a serious injury as defined by Insurance Law § 5102.

In support of the motion, defendant submits an affirmation from counsel, Joseph G. Gallo, Esq.; a copy of the pleadings; plaintiff's verified bill of particulars; the affirmed medical reports of orthopedic surgeon, Dr. Leon Sultan and radiologist Melissa Sapan Cohn; and a copy of the transcript of the examination before trial of plaintiff Yong Hee Bae.

In her verified bill of particulars, plaintiff states that as a result of the accident she sustained, inter alia, disc herniations at C2-C3, C3-C4, C4-C5, L4-L5 and a bulging disc at C5-C6. Plaintiff states that she was confined to bed for 1 month after the accident and confined home approximately 120 days and intermittently.

Plaintiff contends that she sustained a serious injury as defined in Insurance Law § 5102(d) in that she sustained a permanent loss of use of a body organ, member function or system; a permanent consequential limitation or use of a body organ or member; a significant limitation of use of a body function or system; and a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff from performing substantially all of the material acts which constitute her 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.

Dr. Leon Sultan, a board certified orthopedic surgeon, retained by the defendant, examined Ms. Bae on January 31, 2011. Plaintiff presented with pain to the neck, back and left shoulder. Dr. Sultan performed quantified and comparative range of motion tests. He found that the plaintiff had no limitations of range of motion in the cervical spine, left shoulder and thoracolumbar spine. He concluded that his examination "does not confirm any ongoing causally related orthopedic or neurological impairment in regard to the accident of August 25, 2006. He states that the examination revealed plaintiff to be "orthopedically stable and neurologically intact." He also states that there is no correlation between his examination and the

plaintiff's MRI findings which indicated multiple cervical and lumbar disc herniations.

Dr. Melissa Sapan Cohn, a board certified radiologist, reviewed the MRI studies of the plaintiff's cervical spine and lumbosacral spine performed in October 2006. With respect to the cervical spine, Dr. Cohn states that there is no evidence of disc herniation or disc bulge and no other disc pathology. In her opinion the MRI was essentially normal with no evidence of disc herniation or trauma related injury. With respect to the MRI of the lumbar spine, she found only disc dessication and minimal disc bulging at L4-L5 which she attributed to degenerative changes. She stated that the disc bulge was not related to trauma.

In her examination before trial taken on October 27, 2010, plaintiff stated that immediately after the accident she exited her vehicle and spoke to the defendant driver. She also spoke to the police officer at the scene, declined medical attention and returned to her home. Three days after the accident she sought medical attention at Bestian Medical Center. She received physical therapy treatment at Bestian four or five times per week from August through November 2006 for pain in her neck and back. She stated that she stayed home one or two days after the accident and stayed home two or three days a week after that. She stated that at the present time the only limitation she has is in lifting heavy items.

Defendant's counsel contends that the medical reports of Drs. Sultan and Cohn are sufficient to establish, prima facie, that the plaintiff has not sustained a permanent consequential limitation or use of a body organ or member; a significant limitation of use of a body function or system; or a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff from performing substantially all of the material acts which constitute her 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.

In opposition, plaintiff's attorney Michael D. Robb, Esq., submits his own affirmation as well as the affirmation of Dr. Yong S. Tak. In his affirmed report dated November 22, 2011, Dr. Tak states that he first examined the plaintiff on August 29, 2006 at which time he found that she had severe pain in her neck, back, left shoulder and possible rotator cuff tear. Her range of motion of the cervical spine, lumbar spine and right shoulder was significantly limited at that

time. He treated Ms. Bae regularly after that time. In his reevaluation examination conducted on November 18, 2011, he found that the plaintiff still exhibited pain in her cervical spine, lumbosacral spine. His objective and comparative testing showed that plaintiff had limitations of range of motion of the cervical spine, lumbar spine and left shoulder. He found that the plaintiff had cervical disc herniation, lumbar disc herniation and sprain/strain of the left shoulder. He concludes that the injuries which are causally related to the subject accident are considered permanent in nature.

On a motion for summary judgment, where the issue is whether the plaintiff has sustained a serious injury under the no-fault law, the defendant bears the initial burden of presenting competent evidence that there is no cause of action (Wadford v. Gruz, 35 AD3d 258 [1st Dept. 2006]). "[A] defendant can establish that a plaintiff's injuries are not serious within the meaning of Insurance Law § 5102 (d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (Grossman v Wright, 268 AD2d 79 [1st Dept. 2000]). Whether a plaintiff has sustained a serious injury is initially a question of law for the Court (Licari v Elliott, 57 NY2d 230 [1982]).

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 (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]). Where defendants' motion for summary judgment properly raises an issue as to whether a serious injury has been sustained, it is incumbent upon the plaintiff to produce evidentiary proof in admissible form in support of his or her allegations. The burden, in other words, shifts to the plaintiff to come forward with sufficient evidence to demonstrate the existence of an issue of fact as to whether he or she suffered a serious injury (see Gaddy v. Eyler, 79 NY2d 955 [1992]; Zuckerman v. City of New York, 49 NY2d 557[1980]; Grossman v. Wright, 268 AD2d 79 [2d Dept 2000]).

Here, the proof submitted by the defendants, including the affirmed medical reports of Drs. Cohn and Sultan is sufficient to meet its prima facie burden by demonstrating that the plaintiff did not sustain a serious injury within

the meaning of Insurance Law § 5102(d) as a result of the subject accident (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]).

However, this Court finds that the plaintiff raised triable issues of fact by submitting the affirmed medical reports of Dr. Tak attesting to the fact that the plaintiff had significant limitations in range of motion both contemporaneous to the accident and in a recent examination, and concluding that the plaintiff's limitations were significant and permanent and resulted from trauma causally related to the accident (see Ortiz v. Zorbas, 62 AD3d 770 [2d Dept. 2009]; Azor v Torado, 59 ADd 367 [2d Dept. 2009]). As such, the plaintiff raised a triable issue of fact as to whether she sustained a serious injury under the permanent consequential and/or the significant limitation of use categories of Insurance Law § 5102(d) as a result of the subject accident (see Khavosov v Castillo, 81 AD3d 903 [2d Dept. 2011]; Mahmood v Vicks, 81 ADd 606 [2d Dept. 2011]; Compass v GAE Transp., Inc., 79 AD3d 1091 [2d Dept. 2010]; Evans v Pitt, 77 AD3d 611 [2d Dept. 2010]; Tai Ho Kang v Young Sun Cho, 74 AD3d 1328 743 [2d Dept. 2010]).

In addition, the plaintiff adequately explained the gap in her treatment by submitting a verification of counsel's affirmation stating that no-fault had stopped her benefits and she did not have private insurance to pay for further treatment (see Abdelaziz v Fazel, 78 AD3d 1086 [2d Dept. 2010]; Tai Ho Kang v Young Sun Cho, 74 AD3d 1328 [2d Dept. 2010]; Domanas v Delgado Travel Agency, Inc., 56 AD3d 717 [2d Dept. 2008]; Black v Robinson, 305 AD2d 438 [2d Dept. 2003]).

Accordingly, for the reasons set forth above, it is hereby

ORDERED, that the motion of the defendant SALVATORE FRISINA for an order granting summary judgment dismissing plaintiff's complaint is denied.

Dated: February 28, 2012
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.