

Lee v Unitech Design, Inc.

2012 NY Slip Op 31212(U)

April 27, 2012

Sup Ct, Queens County

Docket Number: 1265/10

Judge: Howard G. Lane

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE**
Justice

IAS PART 6

YONG K. LEE and KI MUN LEE,

 Plaintiffs,

 -against-

UNITECH DESIGN, INC. and YONG JIN
GIM,

 Defendants.

Index No. 1265/10

Motion
Date April 10, 2012

Motion
Cal. No. 11

Motion
Sequence No. 4

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Upon the foregoing papers it is ordered that this motion by defendants for summary judgment dismissing the complaint of plaintiffs, Yong K. Lee and Ki Mun Lee, pursuant to CPLR 3212, on the ground that plaintiffs have not sustained a serious injury within the meaning of the Insurance Law § 5102(d) is decided as follows:

This action arises out of an automobile accident that occurred on December 11, 2009. Defendants have submitted proof in admissible form in support of the motion for summary judgment for both plaintiffs. Defendants have submitted inter alia, affirmed reports from two independent examining and/or evaluating physicians (an orthopedist and a radiologist) and plaintiffs' own verified bill of particulars.

APPLICABLE LAW

Under the "no-fault" law, in order to maintain an action for personal injury, a plaintiff must establish that a "serious injury" has been sustained (Licari v. Elliot, 57 NY2d 230 [1982]). The proponent of a motion for summary judgment must

tender sufficient evidence to show the absence of any material issue of fact and the right to judgment as a matter of law (Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]; Winegrad v. New York Univ. Medical Center, 64 NY2d 851 [1985]). In the present action, the burden rests on defendants to establish, by the submission of evidentiary proof in admissible form, that plaintiff has not suffered a "serious injury" (Lowe v. Bennett, 122 AD2d 728 [1st Dept 1986], affd, 69 NY2d 701, 512 NYS2d 364 [1986]). When a defendant's motion is sufficient to raise the issue of whether a "serious injury" has been sustained, the burden shifts and it is then incumbent upon the plaintiff to produce prima facie evidence in admissible form to support the claim of serious injury (Licari v. Elliot, supra; Lopez v. Senatore, 65 NY2d 1017 [1985]).

In support of a claim that plaintiff has not sustained a serious injury, a defendant may rely either on the sworn statements of the defendant's examining physician or the unsworn reports of plaintiff's examining physician (Pagano v. Kingsbury, 182 AD2d 268 [2d Dept 1992]). Once the burden shifts, it is incumbent upon plaintiff, in opposition to defendant's motion, to submit proof of serious injury in "admissible form". Unsworn reports of plaintiff's examining doctor or chiropractor will not be sufficient to defeat a motion for summary judgment (Grasso v. Angerami, 79 NY2d 813 [1991]). Thus, a medical affirmation or affidavit which is based on a physician's personal examination and observations of plaintiff, is an acceptable method to provide a doctor's opinion regarding the existence and extent of a plaintiff's serious injury (O'Sullivan v. Atrium Bus Co., 246 AD2d 418 [1st Dept 1998]). Unsworn MRI reports are not competent evidence unless both sides rely on those reports (Gonzalez v. Vasquez, 301 AD2d 438 [1st Dept 2003]; Ayzen v. Melendez, 749 NYS2d 445 [2d Dept 2002]). However, in order to be sufficient to establish a prima facie case of serious physical injury the affirmation or affidavit must contain medical findings, which are based on the physician's own examination, tests and observations and review of the record rather than manifesting only the plaintiff's subjective complaints. It must be noted that a chiropractor is not one of the persons authorized by the CPLR to provide a statement by affirmation, and thus, for a chiropractor, only an affidavit containing the requisite findings will suffice (see, CPLR 2106; Pichardo v. Blum, 267 AD2d 441 [2d Dept 1999]; Feintuch v. Grella, 209 AD2d 377 [2d Dept 2003]).

In any event, the findings, which must be submitted in a competent statement under oath (or affirmation, when permitted) must demonstrate that plaintiff sustained at least one of the categories of "serious injury" as enumerated in Insurance Law

§ 5102(d) (Marquez v. New York City Transit Authority, 259 AD2d 261 [1st Dept 1999]; Tompkins v. Budnick, 236 AD2d 708 [3d Dept 1997]; Parker v. DeFontaine, 231 AD2d 412 [1st Dept 1996]; DiLeo v. Blumberg, 250 AD2d 364 [1st Dept 1998])). For example, in Parker, supra, it was held that a medical affidavit, which demonstrated that the plaintiff's threshold motion limitations were objectively measured and observed by the physician, was sufficient to establish that plaintiff has suffered a "serious injury" within the meaning of that term as set forth in Article 51 of the Insurance Law. In other words, "[a] physician's observation as to actual limitations qualifies as objective evidence since it is based on the physician's own examinations". Furthermore, in the absence of objective medical evidence in admissible form of serious injury, plaintiff's self-serving affidavit is insufficient to raise a triable issue of fact (Fisher v. Williams, 289 AD2d 288 [2d Dept 2001]).

DISCUSSION

A. Defendants established a prima facie case that plaintiff, Yong K. Lee and plaintiff, Ki Mun Lee did not suffer a "serious injury" as defined in Section 5102(d).

Yong K. Lee

The affirmed report of defendants' independent examining orthopedist, Isaac Cohen, M.D., indicates that an examination conducted on May 17, 2011 revealed a diagnosis of: status post motor vehicle accident, status post left arthroscopy, left knee contusion resolved, and cervical and lumbosacral strains, resolved. He opines that the physical examination is essentially unremarkable and that examination of the left knee joint is essentially unremarkable. Dr. Cohen concludes that the surgical arthroscopy of the left shoulder was related to a preexistent condition and at the time of the evaluation, the plaintiff is performing his normal activities in an unrestricted fashion and his prognosis is good.

The affirmed report of defendants' independent examining radiologist, Melissa Sapan Cohn, M.D., indicates that an MRI of the cervical spine taken on February 2, 2010 indicates an impression of: extremely poor quality study and straightening of the normal cervical lordosis. She opines that there is no definitive evidence to confirm the presence of disc herniation.

The affirmed report of defendants' independent examining radiologist, Melissa Sapan Cohn, M.D., indicates that an MRI of the lumbosacral spine taken on January 26, 2010 indicates an impression of: mild degenerative changes at L4-5 and L5/S1.

Ki Mun Lee

The affirmed report of defendants' independent examining orthopedist, Isaac Cohen, M.D., indicates that an examination conducted on May 3, 2011 revealed a diagnosis of: status post motor vehicle accident, cervical and lumbosacral strains, resolved, bilateral shoulder contusion, resolved and preexistent AC joint arthritis, bilaterally. He opines that at the time of the evaluation, there is no evidence of active disability, sequela or permanency related to the subject accident and he notes degenerative changes in both the cervical and lumbosacral spines. Dr. Cohen concludes that plaintiff is capable of performing his normal pre-loss activities without restrictions.

The affirmed report of defendants' independent examining radiologist, Melissa Sapan Cohn, M.D., indicates that an MRI of the right shoulder taken on January 8, 2010 indicates an impression of: supraspinatus and subscapularis tendinosis versus partial interstitial tearing and subacromial subdeltoid bursitis. She concludes that the injury is due to wear and tear and does not represent an acute trauma related injury.

The affirmed report of defendants' independent examining radiologist, Melissa Sapan Cohn, M.D., indicates that an MRI of the left shoulder taken on December 21, 2009 indicates an impression of: acromioclavicular joint hypertrophic degenerative changes and supraspinatus and subscapularis tendinosis versus partial interstitial tearing. She concludes that the injury is due to wear and tear and does not represent an acute trauma related injury.

Additionally, defendants established a prima facie case for the category of "90/180 days". The plaintiff, Yong K. Lee's verified bill of particulars indicates that plaintiff, Yong K. Lee was only confined to bed and home for approximately one day. The plaintiff, Ki Mun Lee's verified bill of particulars indicates that plaintiff, Ki Mun Lee had "substantial periods" of bed confinement and home confinement immediately following the subject accident.

The aforementioned evidence amply satisfied defendants' initial burden of demonstrating that plaintiffs did not sustain a "serious injury". Thus, the burden then shifted to plaintiffs to

raise a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law (see, Gaddy v. Eyler, 79 NY2d 955 [1992]). Failure to raise a triable issue of fact requires the granting of summary judgment and dismissal of the complaint (see, Licari v. Elliott, supra).

B. Plaintiff Yong K. Lee raises a triable issue of fact for all categories except for the category of "90/180 days." Plaintiff, Ki Mun Lee fails to raise a triable issue of fact.

In opposition to the motion, plaintiff Yong K. Lee submitted: an attorney's affirmation; an affirmation of plaintiff's treating physician, Richard M. Seldes, M.D.; plaintiff's own affidavit; and affirmations and sworn reports of plaintiff's radiologist, Ayoub Khodadadi, MD regarding plaintiff's cervical spine, lumbar spine, left knee, and left shoulder.

In opposition to the motion, plaintiff Ki Mun Lee submitted: an attorney's affirmation; an affirmation and sworn narrative reports of plaintiff's physician, David Mun, M.D.; an unaffirmed narrative report of plaintiff's radiologist, Richard A. Heiden, M.D. regarding plaintiff's right shoulder; an affirmation of plaintiff's physician, Ayoub Khodadadi, M.D. regarding the MRI of plaintiff's right shoulder; unsworn narrative reports of plaintiff's radiologist, Steve B. Losik, M.D.; an affirmation of plaintiff's pain management physician, Chang H. Kang, M.D.; and a sworn affirmation and MRI report of the plaintiff's cervical spine by plaintiff's radiologist, John Himelfard, M.D.

A medical affirmation or affidavit which is based upon a physician's personal examinations and observation of plaintiff, is an acceptable method to provide a doctor's opinion regarding the existence and extent of a plaintiff's serious injury (O'Sullivan v. Atrium Bus Co., 246 AD2d 418, 688 NYS2d 167 [1st Dept 1980]). The causal connection must ordinarily be established by competent medical proof (see, Kociocek v. Chen, 283 AD2d 554 [2d Dept 2001]; Pommels v. Perez, 4 NY3d 566 [2005]). Plaintiff, Yong K. Lee submitted medical proof that was contemporaneous with the accident showing range of motion limitations of the left shoulder and left knee (Pajda v. Pedone, 303 AD2d 729 [2d Dept 2003]). Plaintiff has established a causal connection between the accident and the left shoulder and left knee injuries. The affirmation submitted by plaintiff's treating physician, Richard Seldes, M.D. sets forth the objective examination and tests which were performed contemporaneously with the accident (ie. about one month after the accident) to support his conclusion that the plaintiff suffered from significant

injuries, to wit: range of motion limitations in the left shoulder and left knee. Dr. Seldes opines that the injuries sustained by the plaintiff in the accident were causally related to the motor vehicle accident of December 11, 2009 and are not from degenerative diseases. Additionally, the affirmation and sworn report of plaintiff's radiologist, Ayoob Khodadadi, M.D. indicates that an MRI of the left knee taken on January 9, 2010 revealed "gaping tear posterior horn medial meniscus". Additionally, the affirmation and sworn report of plaintiff's radiologist, Ayoob Khodadadi, M.D. indicates that an MRI of the left shoulder taken on December 19, 2009 revealed an impression of: low acromion, partial tear, supraspinatus tendon, and possible encroachment. Furthermore, plaintiff has provided a recent medical examination detailing the status of his injuries at the current point in time (Kauderer v. Penta, 261 AD2d 365 [2d Dept 1999]). The affirmation of Dr. Seldes provides that a recent examination by Dr. Seldes on November 14, 2011, sets forth the objective examination and tests which were performed to support his conclusion that the plaintiff suffers from significant injuries, to wit: range of motion limitations of the left shoulder and left knee. He further opines that the injuries are permanent in nature and causally related to the motor vehicle accident of December 11, 2009. Clearly, the plaintiff's experts' conclusions are not based solely on the plaintiff's subjective complaints of pain, and therefore are sufficient to defeat the motion (DiLeo v. Blumber, supra, 250 AD2d 364, 672 NYS2d 319 [1st Dept 1998]).

Despite defendants' contentions, any "gap in treatment" regarding plaintiff Yong K. Lee is explained by the affirmation of Richard M. Seldes M.D., who affirms that Mr. Lee was unable to continue treatment after June 24, 2010 because no-fault coverage was denied and plaintiff's own affidavit wherein he avers that he stopped treating because his no-fault benefits were denied and the treatments he received were merely palliative in nature (see, Jules v. Barbecho, 55 AD3d 548 [2d Dept 2008]).

Since there are triable issues of fact regarding whether the plaintiff, Yong K. Lee sustained a serious injury to his left knee and left shoulder, plaintiff, Yong K. Lee is entitled to seek recovery for all injuries allegedly incurred as a result of the accident (Marte v. New York City Transit Authority, 59 AD3d 398 [2d Dept 2009]).

However, the plaintiff, Yong K. Lee failed to come forward with sufficient evidence to create an issue of fact as to whether the plaintiff sustained a medically-determined injury which prevented him from performing substantially all of the material

acts which constituted his usual and customary daily activities for not less than 90 of the 180 days immediately following the underlying accident (Savatarre v. Barnathan, 280 AD2d 537). The record must contain objective or credible evidence to support the plaintiff's claim that the injury prevented him from performing substantially all of his customary activities (Watt v. Eastern Investigative Bureau, Inc., 273 AD2d 226). The plaintiff's doctors fails to state any restriction of the plaintiff's daily and customary activities caused by the injuries sustained in the subject accident in the first 180 days following the accident. Plaintiff's expert merely states in a conclusory assertion that the injuries plaintiff suffered have prevented him "from performing many of the material acts which constitute her [sic] usual and customary daily activities since the date of the motor vehicle accident of December 11, 2099". Plaintiff's submissions were insufficient to establish a triable issue of fact as to whether plaintiff suffered from a medically determined injury that curtailed him from performing his usual activities for the statutory period (Licari v. Elliott, 57 NY2d 230, 236 [1982]). Accordingly, plaintiff's unsubstantiated claim that his injuries prevented him from performing substantially all of the material acts constituting his customary daily activities during at least 90 of the first 180 days following the accident is insufficient to raise a triable issue of fact (see, Graham v. Shuttle Bay, 281 AD2d 372 [2001]; Hernandez v. Cerda, 271 AD2d 569 [2000]; Ocasio v. Henry, 276 AD2d 611 [2000]).

Therefore, plaintiff, Yong K. Lee's submissions are insufficient to raise a triable issue of fact on the category of "90/180 days" (see, Zuckerman v. City of New York, 49 NY2d 557 [1980]).

Accordingly, the defendants' motion for summary judgment is denied as against plaintiff, Yong K. Lee for all categories except that of "90/180 days."

Plaintiff Ki Mun Lee fails to raise a triable issue of fact as there is an unexplained Gap or Cessation In Treatment

The Court of Appeals held in Pommels v. Perez, 4 NY3d 566, 2005 WL 975859 (2005) that a plaintiff who terminates therapeutic measures following the accident, while claiming "serious injury", must offer some reasonable explanation for having done so. The affirmations submitted by plaintiffs' doctors do not provide any explanation for the approximate 1¼ year gap between plaintiff's medical treatment in July 2010 and plaintiff's re-evaluation by Dr. Mun in October 2011 (Medina v. Zalmen Reis & Assocs., 239 AD2d 394 [2d Dept 1997]).

Additionally, plaintiffs' attorney's affirmation is not admissible probative evidence on medical issues, as plaintiffs' attorney has failed to demonstrate personal knowledge of the plaintiff's injuries (Slona v. Schoen, 251 AD2d 319 [2d Dept 1998]).

Moreover, plaintiff's self-serving affidavit is "entitled to little weight, and [is] certainly insufficient to raise a triable issue of fact" (see, Zoldas v. Louise Cab Corp., 108 AD2d 378, 383 [1st Dept 1985]).

Therefore, plaintiffs' submissions are insufficient to raise a triable issue of fact (see, Zuckerman v. City of New York, 49 NY2d 557 [1980]).

Accordingly, summary judgment is granted in favor of defendants regarding plaintiff Ki Mun Lee and the complaint is dismissed as against plaintiff Ki Mun Lee.

The clerk is directed to enter judgment accordingly.

Movant shall serve a copy of this order with Notice of Entry upon the other parties of this action and on the clerk. If this order requires the clerk to perform a function, movant is directed to serve a copy upon the appropriate clerk.

This constitutes the decision and order of the Court.

Dated: April 27, 2012

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Howard G. Lane, J.S.C.