

Yea Kang v Demelio

2012 NY Slip Op 31806(U)

July 9, 2012

Supreme Court, Queens County

Docket Number: 13832/2010

Judge: Robert J. McDonald

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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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YEA KANG, Index No.: 13832/2010
Plaintiff, Motion Date: 07/05/12
- against - Motion Nos.: 12
ROCCO DEMELIO, Motion Seq.: 2
Defendant.

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The following papers numbered 1 to 15 were read on this motion by defendant ROCCO DEMELIO for an order pursuant to CPLR 3212 granting the defendant summary judgment and dismissing the plaintiff's complaint on the ground that plaintiff has not sustained 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.....6 - 11
Reply Affirmation.....12 - 15

This is a personal injury action in which plaintiff, YEA KANG, seeks to recover damages for injuries he allegedly sustained on April 28, 2010, as a result of a motor vehicle accident that occurred when the truck driven by the defendant made a left turn at the intersection of Northern Boulevard and 210th Street, Queens County, New York and collided with the plaintiff's vehicle.

The defendant now moves for an order pursuant to CPLR 3212 dismissing the plaintiff's complaint on the ground that the injuries claimed by the plaintiff fail to satisfy the serious injury threshold requirement of Section 5102(d) of the Insurance Law.

In support of the motion, the defendant submits an affirmation from counsel, Andrea E. Ferrucci, Esq., a copy of the pleadings; plaintiff's verified bill of particulars; a copy of the transcript of plaintiff's examination before trial; the affirmed medical report of orthopedist, Dr. Jonathan D. Glassman, and the affirmed reports of radiologist, Dr. Sheldon P. Feit.

In his verified bill of particulars, the plaintiff, age 50, states that as a result of the accident he required arthroscopic surgery of the right knee due to a torn meniscus. He also alleges that he sustained herniated discs at L4-5 and L5-S1 and disc bulges at C5-C6 and C6-C7. The plaintiff contends that he sustained a serious injury as defined in Insurance law §5102(d).

The plaintiff, was examined by orthopedist, Dr. Jonathan D. Glassman, on November 30, 2011, a physician retained by the defendant. At that time the plaintiff reported to Dr. Glassman that his neck and lower back were okay but that he still experiences discomfort in the right knee. Dr. Glassman performed quantified and comparative range of motion tests. On examination he found no limitations of range of motion of the cervical spine, lumbar spine and right knee. Dr. Glassman states that based upon his examination of the plaintiff, his impression was that plaintiff sustained a sprain of the cervical spine - resolved; a sprain of the lumbar spine - resolved; and status post-arthroscopy of the right knee. He states that the plaintiff does not have any disability at this time and that he is capable of working without restrictions or limitations.

Dr. Feit states that after reviewing the MRI studies of the plaintiff's cervical and lumbosacral spine he observed disc bulges at C5-C6, C6-C7, L5-S1 and L4-L5 but states that the bulges are due to pre-existing degenerative changes which are not post-traumatic. He states that no post-traumatic changes are identified and there are no abnormalities causally related to the accident of April 28, 2010. With respect to the MRI of the right knee, Dr. Feit states that he did not observe a meniscal tear.

In his examination before trial, taken on October 4, 2011, the plaintiff testified that he was transported from the scene by ambulance and taken to the emergency room at Flushing Hospital where he was treated and released the same day. At the hospital he had complaints of pain in his right knee, neck, and lower back. He testified that he is employed as a high school science teacher and missed one day of work following the accident. His arthroscopic surgery was performed in August 2010 during his school vacation time. The plaintiff commenced physical therapy on the day of the accident and continued for eight months. The last

time he went for physical therapy was in January 2011. He states that he still experiences pain in his neck, back and right knee on a regular basis.

Defendant's counsel contends that the affirmed medical reports of Drs. Glassman and Feit, as well as the EBT testimony of the plaintiff, stating that he only missed one day of work after the accident, are sufficient to establish, prima facie, that the defendant has not sustained a permanent loss of a body organ, member, function or system; that he has not sustained a permanent consequential limitation of a body organ or member or a significant limitation of use of a body function or system. Counsel also contends that the plaintiff, who was not confined to bed or home for more than a few days after the accident, did not sustain a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff, for not less than 90 days during the immediate one hundred days following the occurrence, from performing substantially all of his usual daily activities.

In opposition, plaintiff's attorney, Changhyun Conrad Park, Esq., submits an affidavit from the plaintiff dated May 15, 2012; an affirmation from orthopedic surgeon, Dr. Seldes; and affirmed MRI reports from radiologists, Dr. Ayoob Khodadadi and Dr. Richard Rizzuti.

In his affidavit, Mr. Kang states that following the accident he began to suffer from severe and persistent neck pain, back pain and right knee pain. He attended physical therapy sessions three times per week for eight months at Koam Physical Therapy and was referred to orthopedic surgeon Dr. Seldes who performed arthroscopic surgery on his right knee on August 13, 2010. After eight months he discontinued physical therapy because his no-fault benefits were discontinued. He states that he presently still suffers from daily pain in the neck, back and right knee due to the injuries he sustained in the accident.

Dr. Khodadadi, a radiologist reviewed the MRI of the plaintiff's right knee and observed evidence of an oblique tear involving the posterior horn of the medial meniscus. Dr. Rizzuti examined the MRI studies the plaintiff's cervical and lumbosacral spine and observed disc bulges at C5-6, C6-7, L4-5 and L5-S1 impinging on the nerve root.

The plaintiff also submits the affirmed medical report of orthopedic surgeon, Dr. Richard Seldes, who states that when he first examined the plaintiff on June 1, 2010, one month after the accident and when he re-examined the plaintiff on April 23, 2012, his objective testing revealed significantly reduced range of

motion in plaintiff's cervical spine, lumbar spine, and right knee. He states that plaintiff suffered a torn meniscus as a result of the accident for which he performed arthroscopic surgery. He states that the injuries to the right knee, lower back and neck are permanent and have resulted in a permanent consequential limitation of use caused by the subject accident. He also states that the plaintiff discontinued physical therapy as his no-fault benefits ran out and further medical treatment would only be palliative in nature as the injuries are permanent.

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]).

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 defendant, including the affirmed medical reports of Drs. Glassman and Feit, as well as the plaintiff's examination before trial in which he testified that he only missed one day of work after the accident, were 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 Drs. Seldes, Rizzuti and Khodadadi, attesting to the fact that the plaintiff sustained bulging discs in the cervical and lumbar

spine and a meniscal tear of the right knee as a result of the accident and finding that the plaintiff had significant limitations in range of motion of his right knee, cervical spine and lumbar spine, 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 Perl v. Meher, 18 NY3d 208 [2011]; David v Caceres, 2012 NY Slip Op 5132 [2d Dept. 2012]; Martin v Portexit Corp., 2012 NY Slip Op 5088 [1st Dept. 2012]; 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 he 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 AD3d 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 treatment by submitting his own affidavit stating that no-fault had stopped his benefits. In addition, Dr. Seldes opined that any further treatments would be palliative in nature (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 defendant's motion for an order granting summary judgment dismissing plaintiff's complaint is denied.

Dated: July 9, 2012
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.