

Kaur v Cardona

2012 NY Slip Op 32791(U)

November 1, 2012

Supreme Court, Queens County

Docket Number: 122/11

Judge: Bernice Daun Siegal

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Short Form Order

NEW YORK STATE SUPREME COURT – QUEENS COUNTY
Present: HONORABLE BERNICE D. SIEGAL IAS TERM, PART 19
Justice

-----X
Amarjeet Kaur,

Plaintiff,

-against-

Juan Cardona and Claudia Salazar,

Defendants.
-----X

Index No.: 122/11
Motion Date: 8/1/12
Motion Cal. No.: 15
Motion Seq. No.: 2

The following papers numbered 1 to12 read on this motion for an order pursuant to CPLR 3212 granting defendants summary judgment and dismissing the plaintiff’s Complaint on the grounds that plaintiff Amarjeet Kaur did not incur a “serious injury” as defined under NY Insurance Law §5102(d) and as such has no cause of action under NY Insurance Law §5104(a).

	PAPERS NUMBERED
Notice of Motion - Affidavits-Exhibits.....	1 - 4
Affirmation in Opposition.....	5 - 9
Reply.....	10 - 12

Upon the foregoing papers, it is hereby ordered that the motion is resolved as follows:

Facts

The defendant s Juan Cardona and Claudia Salazar move for summary judgment pursuant to CPLR §3212 on the grounds that plaintiff Amarjeet Kaur (“Kaur”) did not sustain a serious injury under Insurance Law § 5102(d). Plaintiff allegedly sustained personal injuries as a result of a motor vehicle accident on April 2, 2009. The Bill of Particulars alleges that as a result of the accident, Kaur

suffered injuries to her left and right shoulders and her cervical and lumbar spine. On June 1, 2009, Kaur, as a pedestrian, was struck by a vehicle.

Analysis

Defendant's motion for summary judgment pursuant to CPLR § 3212 dismissing Plaintiff's cause of action is denied as more fully set forth below.

Threshold

Defendants move for summary judgment in its favor on the ground that Plaintiff did not sustain a "serious injury" within the meaning of the Insurance Law § 5102(d). The statutory provision states, in pertinent part that a "serious injury" is defined as:

A personal injury which results in...significant disfigurement;...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 party from performing substantially all of the material acts which constitute such a person's customary daily activities for not less than ninety days during one hundred eighty days immediately following the occurrence of the injury or impairment.

Insurance Law § 5102(d)

It has been well established that in a motion for summary judgment the proponent must tender evidentiary proof in admissible form to eliminate any material issues of fact, and if the proponent succeeds, the burden then shifts to the party opposing the motion to submit evidentiary

proof in admissible form. (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980].)

Accordingly, when moving for summary judgment on threshold, the burden is on the defendant to make a prima facie showing that the injuries plaintiff sustained as a result of the subject accident are not serious as defined within the meaning of Insurance Law § 5102(d). (*Toure v. Avis Rent A Car Sys.*, 98 N.Y.2d 345 [Ct App. 1982]; *Lewis v. John*, 81 A.D.3d 905 [2nd Dept. 2011].) A Defendant may meet his or her prima facie burden by submitting affidavits or affirmations of medical experts, who, through objective medical testing, conclude that plaintiff's injuries are not serious. (See *Magarin v. Kropf*, 24 A.D.3d 733 [2nd Dept. 2005]; *see also Gaddy v. Eyler*, 79 N.Y.2d 955, 956 [1992]; *Morris v. Edmond*, 48 A.D.3d 432 [2nd Dept. 2008].)

Where the defendant fails to meet his or her prima facie burden, the motion will be denied, and the court need not review plaintiff's paper's in opposition. (*Cosica v. 938 Trading Corp.* 283 A.D.2d 538 [2nd Dept. 2001].)

Defendants met their initial burden of establishing that Kaur did not sustain a serious injury to her cervical spine through the submission of the affirmation of Dr. Leon Sultan, an Orthopedic Surgeon. Dr. Sultan compared the results elicited from the goniometer testing to the normal range of motion testing and found that Kaur's range of motion tests were within normal limits and Kaur was not disabled as a result of the subject accident. Therefore, the moving defendants' made a prima facie showing that Kaur did not sustain a serious injury within the meaning of insurance law § 5102(D). The burden now shifts to Kaur to demonstrate the existence of a triable issue of fact as to whether she sustained a serious injury. (*Matthews v. Cupie Transp. Corp.*, 302 A.D.2d 566, 567 [2nd Dept. 2003]; *see also Gaddy*, 79 N.Y.2d at 957; *Greene v. Miranda*, 272 A.D.2d 441 [2nd Dept. 2000]). If a bodily limitation is substantial in degree but

only fleeting in duration, it does not qualify as a serious injury under the statute. (*Partlow v. Meehan*, 155 A.D.2d 647, 648 [2nd Dept. 1989]; see also *McCleary v. Hefter*, 194 A.D.2d 594 [2nd Dept. 1993]; *Ciaccio v. J & R Home Improvements*, 149 A.D.2d 558 [2nd Dept. 1989]).

However, in opposition to the within motion, the plaintiff has raised a triable issue of fact as to whether she sustained a serious injury to her left shoulder through, inter alia, the affirmed medical reports of Dr. Ayoob Khodadi, a Radiologist, Dr. Yan Q. Sun, an Orthopedic Surgeon and Chang Yo Chi (“Chi”), a Licensed Physical Therapist.

Chi, who examined the plaintiff following the accident on April 8, 2009 asserts that Kaur had restricted range of motion of her cervical spine and left shoulder following the accident. Chi, using objective medical testing, established that the plaintiff sustained a loss of range of motion as a result of the subject accident. Dr. Sun, who examined the plaintiff on April 21, 2012 asserts that Kaur has restricted range of motion of her left shoulder.¹ Dr. Sun asserts that the restriction in range of motion of her left shoulder is as a result of the April 2, 2009 accident and not the subsequent accident on June 1, 2009.

Defendants’, in reply, contend that plaintiff’s injuries were as a result of the June 1, 2009 accident and not the subject accident. With respect to the June 1, 2009 accident, the court notes that the defendant failed to offer sufficient evidence to establish that the plaintiff’s injuries were caused by a subsequent accident. (*Bozza v. O’Neill*, 43 A.D.3d 1094 [2nd Dept 2007].)

Furthermore, the testimony of plaintiff’s doctors clearly establishes a basis upon which a jury could reasonably conclude that the injured plaintiff sustained a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject motor vehicle accident, rather than as a

¹The court notes that Dr. Sun failed to address plaintiff’s alleged cervical spine injury.

result of a subsequent accident that occurred on June 1, 2009. (*Lalla v. Connolly*, 17 A.D.3d 322 [2nd Dept 2005].)

The affirmations of Chi and Dr. Sun reveal significant restrictions in plaintiff's range of motion of her left shoulder. In addition, Dr. Khodadadi affirmed that a review of the MRI studies show a partial tear of the supraspinatus tendon of plaintiff's left shoulder. Accordingly, plaintiff submitted evidence raising a triable issue of fact as to whether the alleged injuries to her left shoulder were a serious injury under the permanent consequential limitation of use or significant limitation of use categories of Insurance Law § 5102(d). (*See Perl v. Meher*, 18 NY3d 208 [2011].) The plaintiff also submitted evidence raising a triable issue of fact as to whether those alleged injuries were caused by the accident. (*Id.*; *see Jaramillo v. Lobo*, 32 AD3d 417, 418 [2nd Dept 2006].)

In addition, defendants' own expert, Dr. Sultan, noted that plaintiff suffered an approximately 14% loss of range of motion to her shoulder (155-160 degrees where normal is 170-180 degrees). (*Omar v Bello*, 13 A.D.3d 430 [2nd Dept 2004].)

Finally, Kaur adequately explained the gap in treatment by stating that no-fault benefits were terminated. (*Jean-Baptiste v. Tobias*, 88 A.D.3d 962 [2nd Dept 2011]; *Abdelaziz v. Fazel*, 78 A.D.3d 1086 [2nd Dept 2010].)

For the reasons set forth above, defendants' motion for summary judgment on the issue of "serious injury" is denied.

Conclusion

For the reason set forth above, defendants' motion for summary judgment, pursuant to CPLR § 3121 dismissing Kaur's cause of action is hereby denied.

Dated: November 1, 2012

Bernice D. Siegal, J. S. C.