

Kim v Aromov

2013 NY Slip Op 31855(U)

August 6, 2013

Sup Ct, Queens County

Docket Number: 4916/2011

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

- - - - - x

PRISCILLA KIM, CHRIS PANG, DANIEL H. PARK and YI M. GUO

Plaintiffs,

- against -

Index No.: 4916/2011

Motion Date: 07/17/13

Motion Nos.: 60 and 61

Motion Seq.: 5 and 6

GEORGE AROMOV, FRITZBERT BELMONT, MOHOMMAD ASIF and STAVROS VLACHOS,

Defendants.

- - - - - x

The following papers numbered 1 to 26 were read on this motion by defendants, GEORGE AROMOV, FRITZBERT BELMONT, MOHOMMAD ASIF and STAVROS VLACHOS, for an order pursuant to CPLR 3212 granting defendants summary judgment and dismissing the complaint of plaintiff, CHRIS PANG, on the ground that said plaintiff did not sustain a serious injury within the meaning of Insurance Law §§ 5102 and 5104:

Papers
Numbered

Defendant AROMOV/BELMONT'S Notice of Motion.....	1 - 7
Defendant ASIF/VLACHOS'S Notice of motion.....	8 - 13
Plaintiff's affirmation in Opposition.....	14 - 20
Defendants' Affirmations in Reply(2).....	21 - 26

This is a personal injury action in which plaintiffs, PRISCILLA KIM, CHRIS PANG, DANIEL H. PARK and YI M. GUO, seek to recover damages for injuries they each sustained on November 21, 2010, as a result of a motor vehicle accident which took place near the intersection of Greenpoint Avenue and the service road of the Long Island Expressway. Plaintiff Kim initially commenced an action for negligence against defendants on January 24, 2011 under Index No. 4916/2011. A second action was commenced by plaintiffs Pang, Park and Guo against the same defendants on

October 8, 2011, under Index No. 700694/2011. Plaintiffs Kim, Pang, Park and Guo were passengers in the taxi cab owned by defendant Vlachos and operated by defendant Asif. By order dated February 27, 2012, this Court granted the motion of defendants George Aromov and Fritzbert Belmont for an order consolidating the two actions. By order dated July 30, 2013, this Court granted the motion of defendants Mohommad Asif and Stavros Vlachos for an order pursuant to CPLR 3212 granting summary judgment and dismissing the complaint of plaintiffs Daniel H. Park and Yi M. Guo. By order dated August 1, 2013, this Court granted the motion of plaintiff Priscilla Kim for an order pursuant to CPLR 3212(b), granting partial summary judgment on the issue of physical injury and dismissing the defendants' affirmative defense alleging that Ms. Kim did not sustain a serious injury within the meaning of Insurance Law § 5102(d).

Defendants now move for an order pursuant to CPLR 3212(b), granting summary judgment dismissing the complaint of plaintiff Chris Pang on the ground that said plaintiff did not suffer a serious injury as defined by Insurance Law § 5102.

In support of the motion, defendants submit affirmations from counsel, Cynthia Hung, Esq. and Djordje Caran, Esq; a copy of the pleadings; plaintiff's verified bill of particulars; the affirmed medical reports of board certified neurologist, Dr. Vladimir Zlatnik, board certified orthopedic surgeon, Dr. Robert Israel, and radiologist Dr. Audrey Eisenstadt; and the transcript of the examination before trial of the plaintiff Chris Pang; and the uncertified records concerning plaintiff's treatment in the emergency room at Elmhurst Hospital Center.

In his verified bill of particulars, plaintiff, CHRIS PANG, states that as a result of the accident he sustained, inter alia, right shoulder strain and sprain; right shoulder tear; and herniated discs at C5-6 and L5-S1.

Plaintiff contends that he sustained a serious injury as defined in Insurance Law § 5102(d) in that he 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 his 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. Robert Israel, a board certified orthopedic surgeon retained by the defendant, examined Mr. Pang, age 27, on December 11, 2012. The plaintiff presented with pain in his lower back and right shoulder. He reported that he is employed as a mutual fund analyst and did not miss any time from work as a result of the accident. Dr. Israel performed objective and comparative range of motion testing and found no limitations of range of motion of the plaintiff's cervical spine and lumbar spine. There were also demonstrated limitations of range of motion of the right shoulder. Dr Israel's impression was that the orthopedic evaluation was entirely within normal limits and there were no positive findings. He states that the plaintiff is capable of work activities and activities of daily living. He states that there is no permanency and there are no residuals relative to the subject accident.

Dr. Zlatnik performed an independent neurological examination of the plaintiff on December 1, 2012. The plaintiff told Dr. Zlatnik that he was a restrained front seat passenger in a taxi cab when the cab was involved in an accident. He stated that he injured his neck, back and right shoulder. Plaintiff was taken to the emergency room at Elmhurst Hospital where he was treated and released the same day. At Dr. Zlatnik's office the plaintiff presented with "some upper back pain, some shoulder pain on the right and back pain on exertion." Range of motion testing of the cervical spine and lumbo-sacral spine was normal and showed no limitations of range of motion. Dr. Zlatnik concluded that there was no neurological permanency or disability emanating from the accident.

Dr. Eisenstadt reviewed the MRI films of the plaintiff's right shoulder, lumbar spine and cervical spine and found disc herniations at C5-6 and L5-S1 which she found to have been caused by degenerative disc disease which pre-dated the incident of November 21, 2010. The MRI of the right rotator cuff did not show a tear and the labrum was intact. She stated that there were no post-traumatic changes causally related to the subject accident.

Plaintiff, Chris Pang, testified at an examination before trial held on October 19, 2012, that as a result of the collision, the cab in which he was riding flipped over and landed on its side. He stated that he immediately felt pain in his right arm, right shoulder, neck and lower back. He was treated in the emergency room and released. Subsequently, he treated with Dr. Tak. He received physical therapy 2 or 3 times a week for a five to six months. He stated that he lost no time from work as a result of the accident.

Defendant's counsel contends that the medical reports of Drs. Israel, Eisenstadt and Zlatnik as well as the plaintiff's deposition testimony stating that he missed no time from work as a result of the accident 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 his 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, David J. Lawrence, Esq., submits his own affirmation as well as the sworn affidavit of plaintiff Chris Pang dated June 13, 2013; a copy of plaintiff's verified bill of particulars; the affirmed medical reports and treatment records of Dr. Tak; the affirmed radiological report of radiologist Dr. Ayooob Khodadadi; and the disciplinary record of Dr. Israel stating that he is precluded from conducting Independent Medical Examinations commencing June 7, 2013.

In his affidavit the plaintiff states that once his no-fault benefits were terminated, he had to stop treating because he could not afford to pay for care and treatment from his own pocket. He states that his private insurance would not cover treatment after a motor vehicle accident.

In his affirmed report, Dr. Tak states that he first examined the plaintiff on November 22, 2010, one day after the accident. At that time the plaintiff had significant limitations of range of motion of the cervical spine, right shoulder and lumbar spine. While plaintiff was undergoing physical therapy treatments, Dr. Tak conducted follow-up examinations on December 23, 2010, January 7, 2011, March 4, 2011, July 20, 2011 and April 13, 2013. He states that on all subsequent examinations, plaintiff's complaints, as well as his testing results were essentially unchanged and he still had restricted range of motion of the cervical and lumbar spines and left shoulder. At the most recent examination on April 10, 2013, Mr. Pang had 15% loss of range of motion in the cervical spine, 16% in the right shoulder and up to 33% in the lumbar spine. Dr. Tak concluded that as a result of the subject accident, the plaintiff sustained permanent injuries causally related to the accident and that the injuries sustained will lead to partial permanent disability.

Dr. Tak also stated that Mr. Pang stopped treating at his facility because his no fault benefits were cut off and he could not afford to pay for treatment on a regular basis out of pocket.

Dr Khodadadi states that his review of the MRI records indicate herniated discs at L4-L5 and C5-C6 and a tear in the right shoulder.

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 competent proof submitted by the defendant, including the affirmed medical reports of Drs. Israel, Eisenstadt and Zlatnik is sufficient to meet defendants' 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 report of Drs. Tak and Khodadadi, 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 resulted from trauma causally related to the accident (see Perl v Meher, 18 NY3d 208[2011]; Dixon v Fuller, 79 AD3d 94 [2d Dept. 2010]; 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 of his right shoulder, cervical and lumbar spines 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]).

In addition, Dr. Tak adequately explained the gap in plaintiff's treatment, stating that the plaintiff's no fault benefits had been terminated and he could not afford to pay out of pocket for continued treatments (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 defendants' motion for an order granting summary judgment dismissing the complaint of plaintiff CHRIS PANG is denied.

Dated: August 6, 2013
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.