Young Jun Youn v Karamouzis
2015 NY Slip Op 31723(U)
September 8, 2015
Supreme Court, Queens County
Docket Number: 700460/2013
Judge: Robert J. McDonald

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

YOUNG JUN YOUN,

Plaintiff,

- against -

CHRISTINA KARAMOUZIS,

Defendant.

Index No.: 700460/2013

Motion Date: 8/4/15

Motion No.: 166

Motion Seq No.: 3

- x

The following papers numbered 1 to 9 read on this motion by defendant for an order pursuant to CPLR 3212 granting defendant summary judgment on the issue of liability and granting defendant summary judgment dismissing the complaint of plaintiff on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d):

	Papers Numbered
Notice of Motion-Affirmation-Exhibits-Memo. of Law	1 - 5
Affirmation in Opposition-Exhibits	6 - 7
Reply Affirmation-Exhibits	8 - 9

This is a personal injury action in which plaintiff seeks to recover damages for injuries allegedly sustained on January 16, 2013 when defendant allegedly struck plaintiff, a pedestrian, with her vehicle in front of 35-28 Farrington Street, Queens County, New York. In his Verified Bill of Particulars, plaintiff alleges injuries to his left knee, right shoulder, and lumbar spine.

Plaintiff commenced this action by filing a summons and complaint on February 8, 2013. Defendant joined issue by service of a Verified Answer dated December 19, 2013. Defendant now moves for an order pursuant to CPLR 3212, dismissing plaintiff's complaint on the grounds that no issue of fact exists regarding liability and/or the injuries claimed by plaintiff fail to satisfy the serious injury threshold requirement of Section 5102(d) of the Insurance Law.

In support of her motion to dismiss plaintiff's complaint on liability grounds, defendant submits a New York City Police Department Complaint Report dated January 16, 2013; a sworn statement from investigating Police Officer Yichuan Li; a copy of plaintiff's MV-104 Report of Motor Vehicle Accident; her Examination Before Trial transcript taken on August 20, 2014; and her own affidavit. At her deposition, defendant testified, inter alia, that plaintiff jumped onto the hood of her vehicle.

In opposition, plaintiff argues that defendant violated Vehicle and Traffic Law 1146 by failing to keep a reasonably careful look out for pedestrians and to use reasonable care to avoid hitting any pedestrian on the roadway. Plaintiff submits his own testimony that his left knee and left thigh area were struck by defendant's vehicle. Plaintiff also contends that defendant's testimony, in which she states that she was not looking immediately prior to pulling out from the parking space, creates an issue of material fact.

In seeking summary judgment, it is well settled that the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (see CPLR §3212[b]; Alvarez v. Prospect Hosp., 68 NY2d 320, 324 [1986]; Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851, 852 [1985]); Zuckerman v. City of New York, 49 NY2d 557, 562 [1980]). The evidence submitted in support of the movant must be viewed in the light most favorable to the non-movant (see Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co., 168 AD2d 610 [2d Dept. 1990]).

Here, there are stark differences in the parties' accounts of the accident that create issues of fact, more specifically issues of credibility, which preclude summary judgment (see Sillman v Twentieth Century Fox F. Corp., 3 NY2d 395, 404 [1957]; Malak v Wynder, 56 AD3d 622, 623-24 [2d Dept. 2008]; Kolivas v Kirchoff, 14 AD3d 493 [2d Dept. 2005]).

In support of the motion to dismiss regarding plaintiff's failure to satisfy the serious threshold requirement, defendant submits an affirmation from counsel; a copy of the pleadings; a copy of plaintiff's verified bill of particulars; a copy of the transcript of plaintiff's examination before trial taken on August 20, 2014; a copy of the affirmed orthopedic medical report of Edward A. Toriello, M.D.; and a copy of the affirmed radiology report of Scott S. Coyne, M.D.

Dr. Toriello performed an orthopedic examination of plaintiff on October 7, 2014. Plaintiff advised Dr. Toriello that he missed ten days from school as a result of the accident in which he injured his neck, lower back, right shoulder, and left knee. Dr. Toriello's examination of plaintiff's lumbar spine, cervical spine, right shoulder, and left knee revealed ranges of motion within normal limits. Dr. Toriello also reviewed plaintiff's MRIs of the right shoulder, lumbar spine, left knee, and right knee. He diagnosed plaintiff with a resolved cervical strain; resolved right shoulder contusion; resolved left knee contusion; and resolved low back strain. He states that the resolved injuries are causally related to the subject accident. Dr. Toriello concluded that plaintiff has no disability, and no medical necessity for physical therapy, orthopedic treatment, or surgery. He also concluded that plaintiff is able to return to his normal activities of daily living without restriction.

Dr. Coyne also reviewed the films and reports of plaintiff's 2013 MRIs of his right shoulder, lumbosacral spine, and left knee. Dr. Coyne concluded that the MRI studies were normal for plaintiff's age and demonstrate no evidence of any osseous or soft tissue abnormality or other trauma causally related to the accident.

Defendant's counsel contends that the evidence submitted is sufficient to establish, prima facie, that plaintiff has not sustained a permanent loss of a body organ, member, function or system and 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 plaintiff, who only missed ten days of school, did not sustain a medically determined injury or impairment of a nonpermanent nature which prevented him, for not less than 90 days during the immediate 180 days following the occurrence, from performing substantially all of his usual daily activities.

In opposition plaintiff submits an affirmation from counsel; the affirmed medical report of Yan Q. Sun, M.D.; his own affidavit; and the MRI report of Ayoob Khodadadi, M.D..

Plaintiff began treating with Dr. Sun on April 10, 2013. At the initial examination, Dr. Sun conducted range of motion testing with a goniometer and found restricted range of motion in plaintiff's right shoulder and left knee. Dr. Sun recently examined plaintiff on June 22, 2015, and found continued restricted range of motion in plaintiff's right shoulder and left

knee. He also found a restricted range of motion in plaintiff's lumbar spine, even though there was no contemporaneous range of motion testing of plaintiff's lumbar spine. Dr. Sun referred plaintiff for MRIs of his right shoulder, left knee, and lumbar spine and opines that the positive objective findings upon the initial and recent examinations of plaintiff are consistent with the MRI findings. Dr. Sun concludes that the physical injuries suffered by plaintiff are permanent in nature and that plaintiff has partial permanent orthopedic disability. He further opines that the injuries are directly caused by the subject accident and are not related to any preexisting and/or degenerative conditions. Dr Sun advised plaintiff that he should discontinue from engaging in any strenuous activities. Dr. Sun opines that the injuries have prevented plaintiff from performing many of the material acts which constitute his usual and customary daily activities.

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 (see Wadford v. Gruz, 35 AD3d 258 [1st Dept. 2006]). "A defendant can establish that 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 defendant's 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 plaintiff's 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 plaintiff 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 defendant is sufficient to meet defendant's prima facie burden by demonstrating that 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]; Carballo v Pacheco, 85 AD3d 703 [2d Dept. 2011]; Ranford v Tim's Tree & Lawn Serv., Inc., 71 AD3d 973 [2d Dept. 2010]).

However, this Court finds that plaintiff raised triable issues of fact by submitting the affirmed medical reports attesting to the fact that plaintiff sustained injuries as a result of the accident, finding that plaintiff had significant limitations in ranges of motion both contemporaneous to the accident and in recent examinations, and concluding that plaintiff's limitations are permanent and resulted from trauma, not preexisting and/or degenerative conditions, causally related to the accident (see Perl v Meher, 18 NY3d 208 [2011]; David v Caceres, 96 AD3d 990 [2d Dept. 2012]; Ortiz v Zorbas, 62 AD3d 770 [2d Dept. 2009]; Azor v Torado,59 AD2d 367 [2d Dept. 2009]).

As such, plaintiff demonstrated an 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]). In light of this finding, the court need not address the 90/180 category.

Plaintiff also explained any gap in treatment by Dr. Sun stating that plaintiff's no fault coverage was denied in April 2013, and therefore, plaintiff was unable to continue treatment even though treatment was necessary to relieve pain (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]).

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

ORDERED, that the motion by defendant for an order granting summary judgment dismissing plaintiff's complaint is denied; and it is further

ORDERED, that this matter remains on the calendar of the Trial Scheduling Part for October 22, 2015.

Dated: Long Island City, N.Y.

September 8, 2015

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ROBERT J. MCDONALD

J.S.C.