Li v Zheng
2015 NY Slip Op 32339(U)
November 12, 2015
Supreme Court, Queens County
Docket Number: 23298/2013
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

GAN LI,

Plaintiff,

- against -

PEI NAN ZHENG and XUEJUAN ZHANG,

Defendants.

- x

Index No.: 23298/2013

Motion Date: 10/26/15

Motion No.: 100

Motion Seq No.: 1

The following papers numbered 1 to 6 read on this motion by defendants for an order pursuant to CPLR 3212 granting defendants summary judgment and dismissing the complaint of plaintiff on the ground that plaintiff fails to meet the serious injury threshold requirement of Insurance Law § 5102(d):

	Papers Numbered
Notice of Motion-Affirmation-Exhibits	1 - 4
Affirmation in Opposition-Exhibits	5

This is a personal injury action in which plaintiff seeks to recover damages for injuries he allegedly sustained on May 20, 2011 on Sutter Avenue at or near its intersection with 114th Street, in Queens County, New York when he was struck on his bicycle by the motor vehicle operated by defendant Pei Nan Zheng and owned by defendant Xuejuan Zhang. Plaintiff alleges that as a result of the accident he sustained serious injuries.

Plaintiff commenced this action by filing a summons and verified complaint on December 24, 2013. Defendants joined issue by service of a verified answer dated February 4, 2014. Defendants now move for an order pursuant to CPLR 3212, dismissing the complaint on the ground that the injuries claimed by plaintiff fail to satisfy the serious injury threshold requirement of Section 5102(d) of the Insurance Law.

In support of the motion, defendants submits an affirmation from counsel, William B. Stock, Esq.; a copy of the pleadings; a copy of plaintiff's verified bill of particulars; the affirmed neurology medical report by Marianna Golden, M.D.; the affirmed orthopedic medical report by Richard Weiss, M.D.; and the affirmed no-fault neurological medical exam report of Marc C. Homonoff, M.D. dated September 21, 2011.

On September 17, 2014, Dr. Golden performed an independent neurologic examination on plaintiff. Plaintiff presented with current complaints of pain in the lower back, right hand, and right leg. Dr. Golden identifies the records she reviewed and concludes that there is no objective evidence of a disability from a neurologic point of view. She states that plaintiff is capable of working and may perform his normal activities of daily living without any neurologic restrictions or any limitations. There is no objective evidence of any neurologic permanency and there is no objective clinical evidence of radiculopathy. She further states that plaintiff is neurologically intact with normal reflex, motor, and sensory examinations.

Dr. Weiss performed an independent orthopedic examination on plaintiff also on September 17, 2014. Dr. Weiss notes that plaintiff presented with pain in the lower back. Dr. Weiss identifies the records he reviewed and performed range of motion testing on plaintiff using a goniometer. Dr. Weiss found normal ranges of motion in plaintiff's cervical spine, lumbar spine, right wrist/hand, right hip/leg, and left hip/leg. He diagnosed plaintiff with cervical, thoracic and lumbar spine sprains resolved; right wrist/hand sprain, resolved; and bilateral hip/leg sprains, resolved. He states that there is no clinical evidence of radiculopathy. Dr. Weiss opines that there is no objective evidence of an orthopedic disability or permanency, and plaintiff is capable of working and may perform his normal activities of daily living without restriction.

Dr. Homonoff examined plaintiff on July 14, 2011 and found that plaintiff is capable of resuming full daily activity including returning to work. He states that there is no need for further treatment or diagnostic testing and there is no permanency regarding plaintiff's claimed injuries.

Defendants' counsel contends that the evidence submitted is sufficient to establish, prima facie, that plaintiff has not sustained a permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; or significant limitation of use of a body function or system. Counsel also contends that plaintiff,

who alleges that he was confined to bed for two months and confined to home for three months, 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, Paul Maiorana, Esq.; a copy of the police accident report; his own affidavit; a copy of his verified bill of particulars; a copy of transcript of his examination before trial taken on July 22, 2014; a copy of the medical records from Jamaica Hospital Center; the affirmed medical report of Komerath Jayasekharan, M.D.; the medical records from Cornell Medical, P.C.; affirmations from radiologist John T. Rigney, M.D.; and the affirmed medical report of Jordan Sudberg, M.D.

Plaintiff was transported from the scene of the accident by ambulance to Jamaica Hospital Center where he first sought medical treatment. In the emergency room he complained of pain in his neck and back and dizziness. On May 27, 2011, he sought further medical treatment at Cornell Medical, P.C. During the initial evaluation, Dr. Jay Komerath performed range of motion testing and found limitations in range of motion of plaintiff's cervical and lumbo-sacral spine. Dr. Komerath states that the injuries were causally related to the subject accident. Plaintiff continued to treat at Cornell Medical, P.C. until March 8, 2012 at which time it was determined that he had reached the maximum medical improvement that treatment alone would provide.

On March 30, 2011 an x-ray was performed by Dr. John T. Rigney on plaintiff's cervical and lumbar spine which revealed a straightening of the cervical curvature and expanded left L5 transverse process forming a pseudoarticulation with the left sacral ala and straitening of the lumbar curvature. On June 23, 2011, an EMG/NCV study was performed by Dr. David W. Rabinovici on plaintiff's cervical and lumbar spine which revealed cervical radiculopathy and right lumbosacral radiculopathy.

Most recently, on August 19, 2015, Dr. Jordan Sudberg at United Rehabilitation Center performed an examination of plaintiff. Dr. Sudberg performed range of motion testing using a goniometer and found continued limitations in range of motion of plaintiff's cervical and thoracolumbar spine. There was also a loss of range of motion in plaintiff's bilateral shoulders. Dr. Sudberg states that there is a causal relationship between the subject accident and plaintiff's claimed injuries and that physical activities such as lifting, carrying, bending, pulling,

prolonged periods of standing on feet or sitting, and climbing stairs are restricted. He further states that plaintiff will need extensive follow-up therapy, acupuncture, and/or surgery to return him to a state prior to the subject accident.

Defendants have not submitted a reply.

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 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 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 defendants is sufficient to meet defendants' 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 and certified medical reports attesting to the fact that plaintiff sustained injuries as a result of the accident and finding that plaintiff had significant limitations in ranges of motion both contemporaneous to the accident and in a recent examination (see Perl v Meher, 18 NY3d 208 [2011]; David v Caceres, 96 AD3d 990 [2d Dept. 2012]; Martin v Portexit Corp., 98 AD3d 63 [1st Dept. 2012]; Azor v Torado,59 AD2d 367 [2d Dept. 2009]; Ortiz v Zorbas, 62 AD3d 770 [2d Dept. 2009]).

As such, plaintiff demonstrated issues 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]).

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

ORDERED, that the motion by defendants 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 February 4, 2016.

Dated: November 12, 2015
Long Island City, N.Y.

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ROBERT J. MCDONALD
J.S.C.