

Kyong Chung v PV Holding Corp.

2017 NY Slip Op 31335(U)

May 22, 2017

Supreme Court, Queens County

Docket Number: 707664/14E

Judge: Cheree A. Buggs

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Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS**
Justice

IAS PART 30

KYONG CHUNG,

Index No. 707664/14E

Plaintiff,

Motion
Date: March 8, 2017

-against-

Motion Cal. No. 46

PV HOLDING CORP. AND PAUL FLOYD
JACOB,

Motion Sequence No. 3

Defendants.

FILED
JUN - 1 2017
COUNTY CLERK
QUEENS COUNTY

The following e-file papers numbered 28-32 submitted and considered on this motion by defendant PV Holding Corp. and Paul Floyd Jacob for an Order pursuant to CPLR 3212 dismissing the plaintiff's verified complaint upon the ground that the plaintiff's causes of action are preempted and barred under 49 USC § 30106 and upon the ground that plaintiff failed to demonstrate that she suffered a serious injury under the New York State Insurance Law.

	<u>Papers Numbered</u>
Notice of Motion-Affidavits-Exhibits.....	EF 28-29
Affirmation-Affidavits-Exhibits.....	EF 30-31
Reply Affirmation-Affidavits-Exhibits.....	EF 32

The branch of the motion of defendant PV Holding Corp. seeking an Order pursuant to CPLR 3212 dismissing the action based upon 49 USC § 30106 is granted. The remaining branch of the motion of defendant Paul Floyd Jacob for summary judgment pursuant to CPLR 3212 on the ground that the plaintiff failed to demonstrate that she suffered a serious injury under the New York State Insurance Law is granted to the extent that plaintiff's claim of serious injury under the 90/180 day category is dismissed.

Plaintiff, Kyong Chung (hereinafter “Chung”) filed a summons and verified complaint on October 21, 2014. She alleged that she suffered serious injuries as a result of an accident which occurred on June 25, 2014 at the intersection of Linden Place and 32nd Avenue, County of Queens, State of New York, due to the negligence of the defendants, PV Holding Corp. (hereinafter “PV Holding”) and Paul Floyd Jacob (hereinafter “Jacob”) in among other things, the ownership and operation of its vehicle. PV Holding filed a verified answer with affirmative defenses on December 24, 2014 and Jacob filed a verified answer with affirmative defenses on December 21, 2015. Plaintiff filed a Note of Issue on July 27, 2016. Discovery was not complete at that time and defendant moved to strike the note of issue. The motion was resolved by the So-Ordered Stipulation of Court-Attorney Referee Kerrian Finnegan dated August 26, 2016, wherein additional discovery was directed and the time to submit the motion for summary judgment was extended to December 22, 2016. This motion is timely.

PV Holding and Jacob make this application for an Order pursuant to CPLR 3212 dismissing the plaintiff’s verified complaint upon the ground that the plaintiff’s causes of action are preempted and barred under 49 USC § 30106 and upon the ground that plaintiff failed to demonstrate that she suffered a serious injury under the New York State Insurance Law.

In support of the motion, PV Holding and Jacob submitted the affirmation of Nicholas J. Accurso dated December 21, 2016; a copy of the police accident report; a copy of Chung’s summons and verified complaint; the verified answers of PV Holding and Jacob; So-Ordered Stipulation of Court-Attorney Referee Kerrian Finnegan dated August 26, 2016; New York State Department of Motor Vehicles Certified Document Center request dated January 7, 2015; April 7, 2015 Motor Vehicle Commission certification of driver’s license/registration information inquiry; rental agreement between PV Holding and Jacob dated April 22, 2014; Chung’s verified bill of particulars dated June 3, 2015; deposition transcript of Chung dated April 11, 2016; records of New York Hospital Queens admission June 25, 2014; independent radiological review reports of Dr. Jessica F. Berkowitz dated September 9, 2016; and the independent orthopedic report of Dr. Robert S. Goldstein dated October 25, 2016.

Chung alleged in her verified bill of particulars that the accident occurred on June 25, 2014 at the intersection of Linden Place and 32nd Avenue in the County of Queens, State of New York. As a result of the accident, she claimed she suffered serious injuries to her left shoulder, neck and back. She alleged that as a result of the accident, she suffered serious injuries under the permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system and the 90/180 day categories of the Insurance Law. She further alleged that she sustained economic loss in excess of basic economic loss and will incur future medical and other necessary expenses exceeding five million dollars.

Chung testified with the assistance of a Korean Interpreter on April 11, 2016. She testified in sum and substance that as a result of the accident, she left the scene of the accident in an ambulance and went to New York Hospital Flushing Hospital in Queens with complaints of pain in

her lower back. The day following the accident she presented to an acupuncturist for treatment for her lower back. She received acupuncture twice a week for a month. She treated with Dr. Jason three times and then New York Pain Clinic, describing the pain in her lower back as “persistent”. She received acupuncture, chiropractic treatment, physical therapy, and pain management three times a week. She stated that she stopped treating when the insurance would no longer cover the treatments. She also treated with an orthopedist, who recommended that she receive an injection in her shoulder, however, she refused the injection. She claimed sustained injuries to her left shoulder, neck and back and that she underwent MRI testing to these areas. She was employed as a nail technician and she attested that following the accident she took off five days from work and took off intermittently.

Analysis

The Court will first address the merits of PV Holding’s contention that the action should be barred plaintiff’s causes of action are preempted and barred under 49 USC § 30106.

The portion of the motion of defendant PV Holding Corp. for an Order dismissing the verified complaint of Kyong Chung pursuant to CPLR section 3212 based upon 49 USC § 30106, the Graves Amendment is granted without opposition (*Khan v MMCA Lease, LTD*, 100 AD3d 833 [2d Dept 2012]; *Graham v Dunkley*, 50 AD3d 55 [2d Dept 2008]; compare *Anglero v Hanif* 140 AD3d 905 [2d Dept 2016]; *Lynch v Baker*, 138 AD3d 695 [2d Dept 2016]). PV Holding has demonstrated that as the owner of the leased vehicle which is the subject of the accident it is entitled to the protection afforded under the Graves Amendment 49 USC §30106 (see *Graham v Dunkley*, 50 AD3d 55 [2d Dept 2008]).

The Court need not address the merits of the remaining branch of the motion for summary judgment as it pertains to PV Holding, however the motion shall be addressed on the merits as to defendant Jacob. The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering admissible evidence to eliminate any material issues of fact from the case. (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]).

Independent Radiological Report of Dr. Jessica F. Berkowitz

Dr. Jessica F. Berkowitz reviewed the MRI of Chung’s left shoulder taken on August 1, 2014 at Springfield Radiology. According to her September 9, 2016 report, the study revealed an intraosseous cyst in the humeral head, which in her opinion was developmental or degenerative and not related to the accident.

Dr. Berkowitz also reviewed the MRI of Chung’s cervical spine taken on August 8, 2014 at Springfield Radiology. In her report dated September 9, 2016 the doctor’s opinion, the study revealed minimal disc bulge at C5-6 degenerative and unrelated to the accident.

Dr. Berkowitz also reviewed the MRI of Chung’s lumbar spine taken on August 15, 2014 at

Springfield Radiology. Dr. Berkowitz opined in her report dated September 9, 2016 that the study revealed disc bulges and changes, chronic and degenerative and unrelated to the accident.

Independent Orthopedic Report of Dr. Robert S. Goldstein

Dr. Robert S. Goldstein performed an independent orthopedic medical examination on Chung on October 25, 2016. The doctor reviewed the verified bill of particulars and various medical records prior to performing an examination. Range of motion was tested with a goniometer. According to Dr. Goldstein Chung's range of motion was the following:

Cervical Spine- flexion 45 degrees (45 degrees normal); extension 45 degrees (45 degrees normal); lateral rotation right and left 90 degrees (90 degrees normal); lateral bending right and left 45 degrees (45 degrees normal).

Bilateral Shoulders-abduction 180 degrees right and left (180 degrees normal); forward elevation 180 degrees right and left (180 degrees normal); external rotation 0-80 degrees right and left (0 to 80 degrees normal); internal rotation to the level of T8 on the left and right (T8 normal).

Lumbar Spine-flexion 90 degrees (90 degrees normal); extension 25 degrees (25 degrees normal); lateral bending 25 degrees right and left (normal 25 degrees).

Straight leg raising was normal at 90 degrees (90 degrees normal). In Dr. Goldstein's opinion Chung suffered from lumbar, cervical and left shoulder strains and sprains which had all resolved.

With his submissions, Jacob has established his prima facie case that Chung did not suffer a serious injury under the New York State Insurance Law. Therefore, Chung must come forward with admissible evidence to raise a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Friends of Animals-v Assoc. Fur Mfrs*, 46 NY2d 1065 [1979]). In opposition, Chung submitted the affirmation of Ji-Hyong Lee, Esq. dated February 22, 2017; Chung's summons and verified complaint; PV Holding and Jacob's verified answer; Chung's verified bill of particulars; affirmation of Dr. Yan Q. Sun; Chung's affirmation with certificate of accuracy of Steve Park dated February 17, 2017; and Chung's MRI reports.

In opposition, the Court finds that plaintiff Kyong Chung has raised a triable issue of fact by demonstrating that she suffered a serious injury to her left shoulder under the permanent consequential limitation of use of a body organ or member and/or significant limitation of use of a body function or system categories of the Insurance Law, however she failed to demonstrate a serious injury under the 90/180 day categories of the Insurance Law (*see Pomells v Perez*, 4 NY3d 566 [2005]; *Khan v Finchler*, 33 AD3d 966 [2d Dept 2006]).

Therefore, the branch of the motion of defendant PV Holding Corp. seeking an Order pursuant to CPLR 3212 dismissing the action based upon 49 USC § 30106 is granted. The remaining branch of the motion of defendant Paul Floyd Jacob for summary judgment pursuant to

CPLR 3212 on the ground that the plaintiff failed to demonstrate that she suffered a serious injury under the New York State Insurance Law is granted to the extent that plaintiff's claim of serious injury under the 90/180 day category is dismissed.

This constitutes the decision and Order of the Court.

Dated: May 22, 2017



Hon. Chereé A. Buggs, JSC

FILED
JUN 01 2017
COUNTY CLERK
QUEENS COUNTY