

Wang Ling Xie v 128 Mott St. Trading Corp.

2007 NY Slip Op 31687(U)

June 6, 2007

Supreme Court, New York County

Docket Number: 0115203/2005

Judge: Deborah A. Kaplan

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. DEBORAH A. KAPLAN
Justice

PART 22

WANG LING XIE

INDEX NO. 115203/05

- v -

MOTION DATE 4-02-07

128 MOTT STREET TRADING CORP., WILSON
CHAN

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to 4 were read on this Motion by defendants for summary judgment on the threshold "serious injury" issue (Insurance Law 5102(d)) and this Cross-motion by plaintiff for summary judgment on liability.

PAPERS NUMBERED

Notice of Motion – Affidavits – Exhibits

1

Notice of Cross Motion – Affidavits – Exhibits

2

Affirmation In Opposition

3

Affirmation in Reply

4

Cross-Motion: Yes No

In this action to recover damages for injuries sustained in a motor vehicle accident, it is alleged that on May 8, 2004, on Mott Street in Manhattan, plaintiff Wan Ling Xie was struck while standing on the sidewalk by a vehicle being driven by defendant Wilson Chan and owned by defendant 128 Mott Street Trading Corp.

Plaintiff commenced the instant action claiming, *inter alia*, that she sustained serious injuries as defined by Insurance Law § 5102(d) - i.e. "permanent consequential limitation of use of a body function or system." The defendants now move for summary judgment dismissing the complaint on the ground that plaintiffs did not sustain a serious injury within the meaning of Insurance Law § 5102(d). Plaintiff cross-moves for summary judgment on the issue of liability.

To prevail on a motion for summary judgment, the moving party must produce evidentiary proof in admissible form sufficient to show the absence of any material issue of fact and the right to judgment as a matter of law. See Kosson v Algaze, 84 NY2d 1019 (1995); Alvarez v Prospect Hospital, 68 NY2d 320 (1986); Winegrad v New York Univ. Med Ctr., 64 NY2d 851 (1985); Zuckerman v City of New York, 49 NY2d 557 (1980). Where, as here, a defendant seeks summary judgment on the threshold "serious injury"

issue under “No-Fault threshold” issue (Insurance Law § 5102(d)), he or she bears the initial burden of establishing the absence of a “serious injury” as a matter of law. This is because, in enacting Insurance Law § 5102(d), the Legislature intended to weed out frivolous claims and limit recovery to significant injuries arising from motor vehicle accidents. See Pommells v Perez, 4 NY3d 566 (2005); Toure v Avis Rent A Car Systems, 98 NY2d 345 (2002); Licari v Elliot, 57 NY2d 230 (1982).

If the moving party makes the requisite showing, the burden then shifts to the opposing party to come forward with proof in admissible form to raise a triable issue of fact requiring a trial. See Kosson v Algaze, *supra*; Alvarez v Prospect Hospital, *supra*; Winegrad v New York Univ. Med Ctr., *supra*; Zuckerman v City of New York, *supra*. The party opposing a motion for summary judgment on the threshold “serious injury” issue must come forward with objective proof of his or her injury to raise a triable issue. See Toure v Avis Rent A Car Systems, *supra*; Dufel v Green, 84 NY2d 795 (1995). Subjective complaints alone are not sufficient. See Toure v Avis Rent A Car Systems, *supra*; Gaddy v Eyles, 79 NY2d 955 (1992).

In this case, the defendants have produced evidentiary proof in admissible form sufficient to show the absence of any material issue of fact and the right to judgment as a matter of law. Specifically, they produced the pleadings, and the affirmed reports of Dr. Ravi Tikoo, a board certified neurologist, who examined the plaintiff on July 12, 2006, Dr. Barry Katzman, a board certified orthopedic surgeon, who examined plaintiff on July 13, 2006 and Dr. Richard Heiden, a board certified radiologist who reviewed plaintiff's MRI's.

In his report, Dr. Tikoo details the objective tests he performed during his examination which indicated normal neurological functioning. In particular, his report states that there were “no objective findings to substantiate these complaints.” Dr. Tikoo opines that “she does not have significant clinical evidence of neuropathy, radiculopathy, or disc herniation.”

After performing an orthopedic IME of the plaintiff, Dr. Katzman concluded that, notwithstanding the plaintiff's reports of neck and back pain, he found “resolved cervical strain, resolved thoracic strain, resolved lumbar strain, resolved left shoulder strain, resolved right and left elbow strain, resolved right and left wrist strain, resolved left hip strain, resolved right and left knee strain.” All tests showed normal functioning and range of motion.

Dr. Heiden reviewed plaintiff's MRI report of her left shoulder dated May 17, 2004 and the MRI report of her cervical spine dated June 19, 2004. The shoulder MRI revealed only degenerative tendinopathy of the supraspinatus tendon, no joint effusion, no bone bruise or fracture, no evidence of dislocation or hemorrhage. In regard to the cervical spine

MRI, Dr. Heiden concludes that "there is no evidence of spinal cord injury or spinal canal collections. There are no recent or post-traumatic abnormalities in the cervical region casually related or assisted with the 05/08/04 accident."

The defendants' proof entitles them to judgment as a matter of law on the threshold issue of "serious injury", thereby shifting the burden to the plaintiff. In opposition to the motion, the plaintiff submits an affirmation of Dr. Tsai C. Chao, dated January 11, 2007 in which he certifies his previous reports, the accident report, the pleadings and plaintiff's and defendant Wilson Chan's deposition testimony.

Dr. Chao's report states that he performed a physical examination as well as reviewing the plaintiff's MRI results, along with the records maintained in his office. Dr. Chao explains that he first examined the plaintiff on May 15, 2004 where he found her to suffer "from myofascial pain in neck and shoulders, left shoulder impingement syndrome, right elbow medial and lateral epicondylitis, low back pain, right greater trochanter bursitis, right ankle sprain, and a concussion." He suggested that the plaintiff undergo physical therapy three times a week.

On November 17, 2004, Dr. Chao re-examined plaintiff and found that plaintiff was partially disabled as a result of the accident and issued a disability certificate. In response to this motion Dr. Chao re-evaluated plaintiff on December 17, 2006, and found significant restrictions of range of motion - cervical spine extension was decreased from 80 to 40 degrees, right side rotation decreased from 80 to 65 degrees, left side rotation decreased from 80 to 70 degrees, left side bending decreased from 45 to 40 degrees and cervical flexion was decreased from 60 to 55 degrees. He also found tenderness at spinous process between C6-C7 level and bilateral cervical paraspinal muscles. The plaintiff's medical submissions show when the tests were performed, the objective nature of the tests, what the normal range of motion should be and that the plaintiff's limitations were significant. See Milazzo v Gesner, 33 AD3d 317 (1st Dept. 2006); Vasquez v Reluzco, 28 AD3d 365 (1st Dept. 2006). Dr. Chao concluded that plaintiff's injuries were casually related to the accident of May 8, 2004 and that she is mildly and partially incapacitated. Thus, plaintiff has met her burden.

Accordingly, the defendants' motion for summary judgment dismissing the complaint on the ground that the plaintiffs did not sustain "serious injury" within the meaning of Insurance Law § 5102(d) is denied.

The plaintiff also moves for summary judgment on the issue of liability. It is well settled that "every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right of way to all vehicles upon the roadway." See Vehicle and Traffic Law §1152(a).

In support of plaintiff's motion for liability, she proffers her deposition testimony which establishes that while standing on the sidewalk she was struck by the rear of defendants' vehicle while it was entering a parking spot. This proof satisfies the plaintiff's burden on the motion and creates a prima facie case of liability against the defendants.

In opposition to the motion, the defendants come forward with evidentiary proof in admissible form that raises a triable issue of fact. See Alvaraz v Prospect Hospital, supra; Zuckerman v City of New York, supra. Specifically, they have proffered defendant Wilson Chan's testimony which contradicts plaintiff's version of events, specifically that plaintiff was crossing the street and not on the sidewalk when she was struck. This alternative version of events creates a triable issue of fact. See McFadden v Bruno, -AD3d ---, 2007 Slip.Op. 00989 (1st Dept. February 6, 2007); Natale v Woodstock, 35 AD3d 1128 (3rd Dept. 2006); Silverman v Clark, 35 AD3d 1 (1st Dept. 2006). Therefore, the plaintiff is not entitled to summary judgment on the issue of liability.

For these reasons and upon the foregoing papers, it is,

ORDERED that the motion of the defendants for summary judgment on the issue of whether plaintiff sustained a "serious injury" as defined by Insurance Law §5102(d) is denied; and it is further,

ORDERED that the plaintiff's motion for summary judgment on the issue of liability is denied; and it is further,

ORDERED that the parties are directed to appear for the scheduled Mediation, Med-2, 80 Centre Street, New York, New York at 9:30 a.m. (June 26, 2007)

This constitutes the Decision and Order of the Court.

FILED
JUN 19 2007
COUNTY CLERK'S OFFICE
NEW YORK

Dated: June 6, 2007

Deborah Kaplan
Deborah A. Kaplan
DEBORAH A. KAPLAN

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Check if appropriate: DO NOT POST