

Wang v Guzman

2007 NY Slip Op 32581(U)

August 15, 2007

Supreme Court, Kings County

Docket Number: 0019393/2004

Judge: Gloria Dabiri

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At an IAS Term, Part 39 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 15th day of August 2007.

P R E S E N T:

HON. GLORIA M. DABIRI,

Justice.

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Zhu Wang,

Plaintiff(s),

- against -

Luz Guzman As Administrator of the Estate of Decedent, Kevin Auyeung, Junel Georges, Sverian Cruz, Pedro P. Cruz, Lindsay K. Margarum, Elrac Inc.,

Defendant(s).

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The following papers numbered 1 to 3 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed_____	_____1_____
Opposing Affidavits (Affirmations)_____	_____2_____
Reply Affidavits (Affirmations)_____	_____3_____
_____Affidavit (Affirmation)_____	_____
Other Papers_____	_____

Upon the forgoing papers defendants Sverian Cruz and Pedro P. Cruz seek an order, pursuant to CPLR 3212, granting summary judgment in defendants' favor and dismissing the plaintiff's complaint for a failure to meet the "serious injury" threshold requirement of Insurance Law § 5102(d).

Defendants establish, *prima facie*, that the plaintiff Zhu Wang did not sustain a serious injury, under the categories of (1) permanent loss of use of a body organ, member, function or system, (2) permanent consequential limitation of use of a body organ or member and (3) significant limitation of use of a body function or system, as a result of the March 31, 2003 automobile accident (Insurance Law 1502[d]; *Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyley*, 79 NY2d 955 [1992]). Defendants submit the sworn report of Dr. Norman J. Sobol, a licensed neurologist, dated April 19, 2007. Dr. Sobol quantifies the plaintiff's range of motion, compares it to what is normal and concludes that plaintiff suffered no limitations in her cervical spine or lumbar spine. Dr. Sorbol diagnosed plaintiff with "[c]ervical and lumbar sprain/ strain, resolved," and opined that plaintiff is not disabled, nor suffers a permanent injury.

Additionally, defendants submit the sworn report of Dr. David L. Milbauer, dated April 21, 2007. Dr. Milbauer affirms that he reviewed a CT scan of plaintiff's cervical spine, taken April 15, 2003, and found no indication that a traumatic injury was sustained in the accident of March 31, 2003. Dr. Milbauer states that at C5-C6 there is a small right-sided posterior disc-osteophyte complex, mildly encroaching upon the canal. Dr. Milbauer opines that plaintiff's injuries at C5-C6 are degenerative and longstanding in nature, and concludes that such condition predated the subject accident.

Plaintiff's bill of particulars alleges that she was "confined to bed and home for 90 of the first 180 days following the accident and was unable to attend work or perform any of

her customary and usual activities as a result of the injuries sustained in this accident.” In further support of their motion, defendants provide portions of plaintiff’s deposition testimony and argue that such testimony reflects that plaintiff was not employed at the time of subject accident and did not begin working until six months later. Defendants maintain that plaintiff cannot establish that her claimed 90 day confinement was medically directed, as the “treatment records and reports plaintiff produced and exchanged thus far contain no medical directive.” Defendants do not supply the referenced records. Accordingly, the defendants fail to make out a *prima facie* case with respect to the plaintiff’s claim of serious injury based on the 90/180 day category (*Hoxha v McEachern*, – NYS2d – , 2007 WL 2002986; *Lopez v Geraldino*, 35 AD3d 398, 399 [2006]; *Talabi v Diallo*, 32 AD3d 1014 [2006]; Insurance Law 5102[d]; see *Toussaint v Claudio*, 23 AD3d 268 [2005]; *Ellis v Emerson*, 34 AD3d 1334 [2006]; *Stokes v Brown*, 2 AD 3d 1373 [2003]). Moreover, Dr. Sobol renders a diagnosis of “cervical and lumbar sprain/ strain, *resolved*” and states that “*further treatment* would be excessive.”

As to the sufficiency of the plaintiff’s submissions in opposition to the motion, plaintiff fails to raise a triable issue of fact. Plaintiff submits an affidavit of Dr. Michael D’Avanzo, dated June 29, 2007, a licensed chiropractor with Northern Brooklyn Chiropractic, which incorporates his June 19, 2007 report. Dr. D’Avanzo’s affidavit states, in relevant part, that the plaintiff received treatment at Northern Brooklyn Chiropractic from July 21, 2003 through April 26, 2004, at which point she was advised that “she had reached

the maximum benefits possible [and] that she should do home exercises.” Based upon his June 19, 2007 examination of plaintiff, Dr. D’Avanzo asserts that plaintiff suffers a decreased range of motion in her cervical and dorsolumbar spine, with the most notable deficits being 56% of normal in right lateral flexion and 50% of normal dorsolumbar spine extension. Dr. D’Avanzo opined that plaintiff suffered a mild permanent, partial disability and has reached maximum chiropractic improvement. He further avers that plaintiff “sustained a significant limitation of use and permanent functional limitations regarding her cervical spine and lumbar spine as per clinical examinations and CT studies” and that the cause of her injuries was the March 31, 2003 accident.

Plaintiff further submits the affirmed report of Dr. Sean Cotter, dated April 26, 2004, also a chiropractor with Northern Brooklyn Chiropractic. Dr. Cotter indicates that his first examination of the plaintiff, performed on July 21, 2003, revealed a loss in range of motion within multiple planes of the cervical spine and dorsolumbar spine and with decreases in motion ranging from 50% to 72% percent of normal. A second range of motion study was performed on April 26, 2004 and revealed continued cervical and dorsolumbar deficits, as significant as 67% of normal. Dr. Cotter opines that plaintiff suffered a significant limitation of spinal function as a direct result of injuries sustained in the subject motor vehicle accident. Dr. Cotter performed other orthopedic tests on the plaintiff. Dr. Cotter states that plaintiff was discharged from active treatment “having made improvement.” He avers “[h]owever, the nature of the injuries diagnosed will require the patient to seek symptomatic care as

necessary despite being discharged from active care.” Dr. Cotter opined, with reasonable chiropractic certainty, that plaintiff suffered a moderate permanent, partial disability as a result of the March 31, 2003 accident.

Plaintiff also supplies the report of Dr. Mark Freilich, a radiologist, based upon his review of plaintiff’s April 15, 2003 CT scan. Although a certification from Ultra Diagnostic Imaging, P.C. pursuant to CPLR 3122-a is provided, the report itself is unsworn and thus without probative value (*Nociforo v Penna*, 2007 NY Slip Op 06220 [2007]; *Porto v Blum*, 39 AD3d 614 [2007]). Further, Drs. D’Avanzo and Cotter, who both include the findings of Dr. Freilich’s report in their own sworn reports, do not indicate whether they personally reviewed the CT scan. Thus, both doctors improperly rely upon the unsworn report of Dr. Freilich in reaching their conclusions (*Friedman v U-Haul Truck Rental*, 216 AD2d 266, 267 [1995]; *Magarin v Kropf*, 24 AD3d 733, 734 [2005]; *Phillips v Zilinsky*, 39 AD3d 728, 729 [2007]).

In opposition, plaintiff fails to raise a triable issue of fact. Dr. D’Avanzo’s conclusion that the plaintiff’s injuries were casually related to the March 31, 2003 accident is rendered speculative by his failure to address the findings contained in the report of defendants’ radiologist that plaintiff’s injury preexisted the accident of March 31, 2003 (*Phillips v Zilinsky*, 39 AD3d 728, 729 [2007]; *Giraldo v Mandanici*, 24 AD3d 419 [2005]). Furthermore, plaintiff alleges in her bill of particulars to have suffered, *inter alia*, bulging discs at C3-C4, C4-C5, C6-C7, and L3-L4, as well as, a herniation/ bony ridge complex at

C5-C6 indenting the thecal sac. However, defendants' expert reviewed plaintiff's CT scan, taken shortly after plaintiff's accident, and concluded that they showed only a small right-sided posterior disc-osteophyte complex at C5-C6, mildly encroaching upon the canal. Plaintiff submits no competent medical evidence to raise an issue of fact with regard to defendants' experts' findings (*Gaddy*, 79 NY2d at 991-992; *Sammur v Davis*, 16 AD3d 658, 659 [2005]; *see Navedo v Jaime*, 32 AD3d 788 [2006]).

Were the court required to reach the sufficiency of the plaintiff's submissions with regard to her claim that she was prevented from performing substantially all of her usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident, it would conclude that plaintiff also fails to raise a triable issue of fact (Insurance Law 5102[d]). Plaintiff fails to submit objective evidence substantiating the existence of a medically-determined injury which caused the alleged limitation of her activities (*Sainte-Aime v Suwai Ho*, 274 AD2d 569, 570 [2000]; *Toure v Avis Rent a Car Sys.*, 98 NY2d 345, 357 [2002]; *Pierre v Nanton*, 279 AD2d 621, 622 [2001]). Accordingly, it is hereby

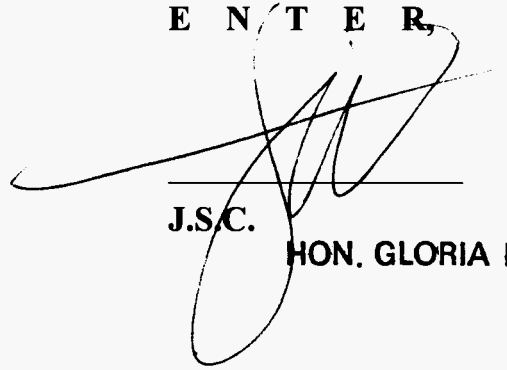
ORDERED, that such portions of defendants' motion as seeks summary judgment on plaintiff's claim based upon the 90/180 category of "serious injury" is denied, and it is further

ORDERED, that defendants' motion in all other respects is granted and for all purposes in this action [CPLR 3212(g)] the plaintiff has not sustained a "serious injury" within the

permanent loss of a body organ, member, function or system; permanent consequential loss of a body organ or member; or significant limitation of a use of a body function or system categories of Insurance Law 5102[d], and it is further

ORDERED, that the Note of Issue is to be filed on or before September 21, 2007.

E N T E R,

A handwritten signature in black ink, appearing to be 'Gloria Dabiri', written over a horizontal line. The signature is stylized and cursive.

J.S.C.

HON. GLORIA DABIRI