

In Jae Jang v Omar

2008 NY Slip Op 31768(U)

June 10, 2008

Supreme Court, New York County

Docket Number: 0104384/2005

Judge: Deborah A. Kaplan

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

PRESENT: Hon. Deborah A. Kaplan
Justice

PART 22

Index Number : 104384/2006

JANG, IN JAE

vs.

OMAR, HASSAN KHWAJA

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

DEBORAH A. KAPLAN
J.S.C.

INDEX NO. _____

MOTION DATE 4-2-08

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion is for summary judgment

PAPERS NUMBERED

1

2

3

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

for summary judgment

dismissing the complaint on the ground that the Plaintiff did not sustain a "serious injury" as defined by Insurance Law § 5102(d), is granted in accordance with the attached Opinion.

This constitutes the Decision and Order of the Court.

FILED

JUN 25 2008

NEW YORK
COUNTY CLERK'S OFFICE

Dated: June 10, 2008

Deborah A. Kaplan
DEBORAH A. KAPLAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK : IAS PART 22

----- X

IN JAE JANG,

Plaintiff,

INDEX NO.
 104384/06

-against-

HASSAN KHWAJA OMAR, YBS CORP., JOHN
 DOES 1-10, and ABC CORPORATIONS 1-10,

Defendants.

----- X

DEBORAH KAPLAN, J.:

This is an action to recover damages for personal injuries allegedly sustained by plaintiff in an automobile accident on April 14, 2004. While traveling on the Queensboro Bridge toward Manhattan, his vehicle was struck in the rear by a vehicle owned by defendant YBS Corp. ("YBS") and operated by defendant Hassan Khwaja Omar ("Omar"). The defendants move pursuant to CPLR 3212 for an order granting summary judgment dismissing plaintiff's complaint on the ground that he did not suffer a "serious injury" as defined in Insurance Law § 5102(d).

In order to obtain summary judgment the movant must establish his defense or cause of action sufficiently to warrant a court's directing judgment in his favor as a matter of law, and must do so by tender of evidentiary proof in admissible form (see Zuckerman v. City of New York, 49 NY2d 557, 562 [1980]). To defeat defendants' motion plaintiff "must meet the statutory threshold requirement of establishing a 'serious injury' by competent, admissible medical evidence" (see McLoyrd v. Pennypacker, 178 AD2d 227, 228 [1st Dept 1991], app den 79 NY2d 754 [1992], rearg den 79 NY2d 1016 [1992]). "Statements and reports by plaintiff's examining and treating physicians which are unsworn, or which are not affirmed to be true under penalty of perjury, do not meet that test [citations omitted]" (*id.*).

"Only in the event of a 'serious injury' as defined in the statute, can a person initiate suit against the car owner or driver for damages caused by the accident" (Pommells v. Perez, 4 NY3d 566, 571 [2005]). Insurance Law § 5102(d) defines serious injury as follows:

"Serious injury" means a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; 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; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

In support of their motion, defendants submit the reports of their doctors. In June and September 2004, Audrey Eisenstadt, M.D., a board-certified radiologist, reviewed MRI examinations of plaintiff's right shoulder, left elbow, lumbar spine and cervical spine. Dr. Eisenstadt made the following findings: plaintiff's right shoulder was entirely normal; the left elbow revealed a sprain of the lateral collateral ligament and/or common extensor tendon, no focal tear or joint effusion, no clear post-traumatic changes and no permanent sequela associated with the accident; the lumbar spine was entirely normal; and the cervical spine revealed dessication at the C 5-6 intervertebral disc level, a degenerative process which predated plaintiff's accident, bulging at the same level, which is not a traumatic abnormality, no osseous, ligamentous or disc abnormalities attributable to the April 14, 2004 accident and no post-traumatic abnormalities (see Eisenstadt affirmations, defendants' moving papers, exhibit C).

Gregory Montalbano, M.D., a board-certified orthopedist, examined plaintiff on August 3, 2007 and reviewed his medical records. Noting that plaintiff did not go to the emergency room after his accident or miss any time from work, Dr. Montalbano found that plaintiff did not sustain an injury to his right shoulder, elbows or lumbar spine as a result of his accident and that plaintiff likely suffered a strain/sprain to his cervical spine which has resolved. Dr. Montalbano concluded that plaintiff's examination was normal and showed no objective orthopedic findings of any permanent injury or disability (see Montalbano affirmation, defendants' moving papers, exhibit D).

The Court finds that the defendants have met their burden on this motion by producing

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.

In opposition, the plaintiff contends that defendants' motion must be denied because his MRI tests and reports clearly raise issues of fact as to whether he sustained a serious injury within the meaning of the Insurance Law. To support this contention, the plaintiff points to the following: a series of tests conducted by Yu Family Chiropractic which yielded unremarkable results (see plaintiff's exhibit 1); an MRI report from Steven Brownstein, M.D., a Board certified radiologist, who found protruded disc herniations posteriorly at the C4-C5 and C5-C6 discs (*id.*); a medical report from Chang H. Lee, M.D. who found that plaintiff complained of stiffness and tenderness (*id.*); an affirmation from Jen F. Lee, M.D., who states that he is licensed to practice medicine in New Jersey, that he treated plaintiff for a right shoulder labral ligament tear along with left elbow lateral epicondylitis and tear of the common extensor tendon, that plaintiff elected to undergo surgical treatment for his right shoulder and that plaintiff suffers from a partial permanent instability with persistent pain, weakness and "limitation of his activities of daily living with his right shoulder and left elbow" (see plaintiff's exhibit 2); four affirmations from Michael L. Amoroso, M.D., who also states that he is licensed to practice medicine in New Jersey and that MRIs of plaintiff's right shoulder, left elbow, lumbar spine and cervical spine revealed that plaintiff sustained a tear of the anterior glenoid labrum, a high grade partial tear of the proximal aspect of the common extensor tendon with an intact underlying radial collateral ligament, an annular bulge at L4-L5, a mild central spinal stenosis at L3-L4 and protruded disc herniations posteriorly at the C4-C5 and C5-C6 discs (see plaintiff's exhibit 3); an affidavit from plaintiff notarized in New Jersey wherein he states that after the accident he suffered from a headache, pain radiating down to both shoulders, pins and needles sensation over both arms and ankles, neck pain, back pain, right shoulder pain and left elbow pain, details his treatment and tests and states that even after surgery he continues to have pain in his right shoulder which makes it difficult to drive, lift his right arm, sleep, hold a shoulder bag on his right side, extend

his right arm, exercise at the gym, and swim or play golf as he did before the accident (see plaintiff's exhibit 5); a letter from Dr. Jen F. Lee dated July 25, 2007 (plaintiff's exhibit 6), later replaced by an affidavit notarized in New Jersey on February 27, 2008, in which Dr. Lee states that plaintiff "is presently left with a partial permanent instability with persistent pain, weakness, and limitation in his activities of daily living with his right shoulder and left elbow."

Drs. Eisenstadt and Montalbano, who state that they are licensed to practice medicine in the State of New York, have submitted affirmations pursuant to CPLR 2106 in support of defendants' motion setting forth their findings.(see defendants' exhibits C and D). Plaintiff does not claim that he went to the emergency room or that he lost any time from work immediately after his accident (see plaintiff's affidavit, plaintiff's exhibit 5). At his examination before trial, he testified that he was not confined to his home until after he had surgery on October 21, 2004, when he was so confined for ten days or less (see defendants' exhibit I, pp 57-59).

The reports from Yu Family Chiropractic, the MRI report from Dr. Brownstein, the medical reports from Dr. Chang H. Lee, the affirmation from Dr. Jen F. Lee, the affirmations from Dr. Amoroso, plaintiff's affidavit, the letter from Dr. Jen F. Lee and the replacement affidavit from Dr. Lee dated February 27, 2008, are all inadmissible. The reports relied on by plaintiff are neither sworn to nor affirmed. The affirmations from Drs. Jen F. Lee and Amoroso may not be considered on this motion because neither doctor claims to be licensed to practice medicine in the state of New York (see CPLR 2106; Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 2106 [1997]). The affidavits from plaintiff and Dr. Jen F. Lee fail as evidence because they were notarized in New Jersey and are not accompanied by a certificate authenticating the authority of the one administering the oath (see CPLR 2309[c] and Real Property Law § 299-a [1]). Although the defective affidavits can be corrected *nunc pro tunc* (see Moccia v. Carrier Car Rental, Inc., 40 AD3d 504 [1st Dept 2007]), plaintiff has at no time offered to do so and, as a result, the affidavits will not be considered (see In re Family Offense Proceeding, 44 AD3d 332 [1st Dept 2007]).

For these reasons, the court finds that plaintiff has failed to meet his burden.

Accordingly, it is hereby

ORDERED that defendants' motion for an order granting summary judgment dismissing plaintiff's complaint is granted; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

This constitutes the decision and order of the court.

DATED: June 10, 2008

Deborah Kaplan
DEBORAH A. KAPLAN
J.S.C.

FILED
JUN 25 2008
NEW YORK