

Young v Kwan

2010 NY Slip Op 30612(U)

March 18, 2010

Supreme Court, Queens County

Docket Number: 18512/08

Judge: Robert J. McDonald

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SHORT FORM ORDER

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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

MAY VUONG,

Index No.: 18512/08

Plaintiff,

Motion Date: 3/18/10

- against -

Motion No.: 42

BING S. KWAN,

Motion Seq.: 3

Defendant.

- - - - - x

The following papers numbered 1 to 7 were read on this motion by the defendant for an Order pursuant to CPLR 3211 and 3212 for summary judgment dismissing the instant complaint upon the grounds that the plaintiff did not sustain "serious injury" as set forth in Insurance Law 5102 and 5104:

	<u>Papers Numbered</u>
Defendant's Notice of Motion-Affirmation-Affidavit(s)- Service-Exhibit(s)	1-4
Affirmation in Opposition - Exhibit(s)	5-6
Reply Affirmation	7

Upon the foregoing papers it is ordered that this motion is determined as follows:

The underlying action is one for serious personal injuries allegedly sustained in a motor vehicle accident on October 16, 2006 on Main Street near its intersection with 40th Road, County of Queens.

At that time and place, plaintiff May Vuong, was operating a 1999 Honda motor vehicle. As plaintiff was driving on Main Street she brought her vehicle to a stop for a red light. Defendant, driving a 2004 Honda motor vehicle collided with the rear of

plaintiff's vehicle.

The defendant claims that the plaintiff did not sustain "serious injury".

"Serious Injury" Insurance Law §5102(d):

Serious injury means a personal injury which result in ... 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 constitutes 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.

Whether a plaintiff has sustained a serious injury is initially a question of law for the Court (*Licari v Elliott*, 57 NY2d 230). Initially it is defendant's obligation to demonstrate that the plaintiff has not sustained a "serious injury" by submitting affidavits or affirmations of its medical experts who have examined the litigant and have found no objective medical findings which support the plaintiff's claim (*Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345; *Grossman v Wright*, 268 AD2d 79). If the defendant's motion raises the issue as to whether the plaintiff has sustained a "serious injury" the burden shifts to the plaintiff to prima facie demonstrate through the production of evidence sufficient to demonstrate the existence of a "serious injury" in admissible form, or at least that there are questions of fact as to whether plaintiff suffered such injury (*Gaddy v Eyler*, 79 NY2d 955; *Bryan v Brancato*, 213 AD2d 577).

The defendant submits the affirmation of Dr. Michael J. Katz, M.D. a Board Certified Orthopedic Surgeon dated June 29, 2009 in which he states that in his examination of the plaintiff's cervical spine he found no tenderness or paravertebral muscle spasm, and her sensation is intact in the C5-T1 innervated segments. Her range of motion with regard to her cervical spine was normal. Similarly, in his examination of her Lumbar Spine he found her gait was normal, there was no paravertebral muscle spasm. Her range of motion with regard to her lumbar spine was normal. The doctor's comment that "She explained initially how there was no damage to the vehicle, just scratches, and then goes on to state that the impact was very hard. I really don't understand how those two statements could both be true" is beyond his expertise and therefore will not be considered by this Court. The doctor opines "It is entirely

possible that the changes that were seen on her MRIs were all preexisting and old" however, the statement that "it is entirely possible" is not couched in admissible language as one made within his opinion as a orthopedic surgeon.

The defendant also submits three copies of the identical affirmation by Dr. Allen Rothpearl, M.D. a Board Certified Radiologist dated July 26, 2007. Dr. Rothpearl examined the MRI of the plaintiff's cervical spine conducted on November 15, 2006. Dr. Rothpearl notes early disc degeneration and bulges at C4-C5 and C5-C6. He candidly states that the degeneration "is an extremely ubiquitous finding" and "within a reasonable degree of medical certainty, unrelated to the accident of 10/16/2006."

Insurance Law 5102 is the legislative attempt to "weed out frivolous claims and limit recovery to serious injuries" (*Toure v Avis Rent-A-Car Systems, Inc.*, 98 NY2d 345, 350).

Under Insurance Law 5102(d) a permanent consequential limitation of use of a body organ or member qualifies as a "serious injury", however, the medical proof must establish that the plaintiff suffered a permanent limitation that is not minor slight, but rather, is consequential which is defined as an important or significant limitation.

Here the defendant has come forward with sufficient evidence to support his claim that the plaintiff has not sustained a "serious injury" (*Gaddy v Eyler*, 79 NY2d 955).

The plaintiff does not submit any current medical affirmations in support of her allegation that she sustained a "serious injury". Instead, she relies on the argument that the defendant has failed to meet the threshold required before she obliged to demonstrate that she has sustained a "serious injury".

Contrary to the plaintiff's assertion, the defendant through the affirmation of Dr. Katz demonstrated that she did not sustain a "serious injury" of her cervical and lumbar spine.

It is noted in Dr. Katz' report that the plaintiff had a prior motor vehicle accident which is not disclosed in the plaintiff's earlier medical reports. Dr. Katz notes that the injury described by the plaintiff is "soft tissue injuries that have resolved through the passage of time."

To establish that the plaintiff has suffered a permanent or consequential limitation of use of a body organ or member and/or a significant limitation of use of a body function or system, the

plaintiff must demonstrate more than "a mild, minor or slight limitation of use" and is required to provide objective medical evidence of the extent or degree of limitation and its duration (*Booker v Miller*, 258 AD2d 783; *Burnett v Miller*, 255 AD2d 541). Resolution of the issue of whether "serious injury" has been sustained involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part (*Dufel v Green*, 84 NY2d 795). Upon examination of the papers and exhibits submitted this Court finds that the plaintiff has failed to raise triable factual issue as to whether the plaintiff has "permanent consequential" and "significant limitation" categories.

The plaintiff has failed to demonstrate that she has a "medically determined" injury or impairment which has prevented his from performing all of his usual and customary daily activities for at least 90 of the first 180 days following the accident. (*Ayotte v Gervasio*, 81 NY2d 1062; *Johnson v Berger*, 56 AD3d 725; *Roman v Fast Lane Car Service, Inc.*, 46 AD3d 535).

Regarding the "permanent loss of use" of a body organ, member or system the plaintiff must demonstrate a total and complete disability which will continue without recovery, or with intermittent disability for the duration of the plaintiff's life (*Oberly v Bangs Ambulance, Inc.*, 96 NY2d 295). The finding of "Permanency" is established by submission of a recent examination (*Melino v Lauster*, 195 AD2d 653 *aff'd* 82 NY2d 828). The last medical affirmation submitted by the plaintiff was from January 18, 2007 from Dr. David Rabinovici, M.D. which indicates that the plaintiff was experiencing headaches, neck and back discomfort.

Regarding "permanent limitation" of a body organ, member or system the plaintiff must demonstrate that she has sustained such permanent limitation (*Mickelson v Padang*, 237 AD2d 495). The word "permanent" is by itself insufficient, and it can be sustained only with proof that the limitation is not "minor mild, or slight" but rather "consequential" (*Gaddy v Eyler*, 79 NY2d 955).

The "significant limitation of use of a body function or system" requires proof of the significance of the limitation, as well as its duration (*Dufel v Green*, 84 NY2d 795; *Fung v Uddin*, 60 AD3d 992; *Hoxha v McEachern*, 42 AD3d 433; *Barrett v Howland*, 202 AD2d 383).

The defendant's motion for summary judgment based on the fact that the plaintiff had not sustained "serious injury" as defined in Insurance Law 5102 is granted.

Accordingly, the defendant's motion is granted and the plaintiff's case is dismissed.

So Ordered.

Dated: Long Island City, N.Y.
March 18, 2010

ROBERT J. MCDONALD
J.S.C.