

Lee Yuen v Arka Memory Cab
2010 NY Slip Op 31042(U)
April 22, 2010
Supreme Court, New York County
Docket Number: 113456/2007
Judge: George J. Silver
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

GEORGE J. SILVER

DECENT.

Index Number : 113456/2007

PART 22

YUEN, LEE

vs

ARKA MEMORY CAB

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits .. 1

Answering Affidavits — Exhibits _____ 2

Replying Affidavits _____ 3

PAPERS NUMBERED

FILED

APR 29 2010

NEW YORK COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

In this action to recover for personal injuries allegedly sustained in a motor vehicle accident, Defendants Arka Memory Cab Corp. and Nabil K. Mahmoud ("Defendants") move pursuant to CPLR §3212 for an order granting summary judgment and dismissing the complaint of Plaintiff Lee Yuen ("Plaintiff") on the ground that Plaintiff did not sustain an injury that qualifies as "serious" as defined by New York Insurance Law §5102(d).

Plaintiff contends that on May 13, 2006, at approximately 8:30 a.m., he was stopped at a red light on 47th Street near its intersection with 9th Avenue in New York City when he was struck from behind by a yellow cab. Plaintiff alleges in his Verified Bill of Particulars and Supplemental Bill of Particulars that he underwent left shoulder surgery and sustained injuries to the cervical spine including disc herniations at C3-4, C4-5, C5-6, disc bulge at C6-C7 and central spinal canal stenosis at C3-C6. Plaintiff also alleges injuries to the left shoulder including rotator cuff tear, rim rent tear, subacromial bursal edema, bursitis and impingement.

Under New York Insurance Law §5102(d), a "serious injury" is defined as 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

Dated: 1/5 _____ 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):

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.

"[A] defendant can establish that [a] plaintiff's injuries are not serious within the meaning of Insurance Law §5102 (d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (*Grossman v Wright*, 268 AD2d 79, 83-84 [1st Dept 2000]). If this initial burden is met, "the burden shifts to the plaintiff to come forward with evidence to overcome the defendant's submissions by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law" (*id.* at 84). The Plaintiff is required to present nonconclusory expert evidence sufficient to support a finding not only that the alleged injury is serious within the meaning of §5102(d), but also that the injury was causally related to the accident (*Valentin v Pomilla*, 59 AD3d 184 [1st Dept 2009]).

In support of their motion, Defendants submit the affirmed expert reports of Dr. David A. Fisher and Dr. Gregory Montalbano. Dr. Fisher, a radiologist, reviewed Plaintiff's left shoulder MRI on October 30, 2008. He finds moderate hypertrophic changes at the acromioclavicular joint. Further, Dr. Fisher reports that supraspinatus tendinopathy with a small partial thickness tear is present in the rotator cuff and that there is a small amount of fluid within the subdeltoid bursa. He does not find any tendon retraction, muscle atrophy, joint effusion or labral tear. Dr. Fisher concludes that these findings are typical of degenerative arthritis of the shoulder and are not casually related to the accident. Dr. Fisher also reviewed Plaintiff's cervical spine MRI. He finds that the cervical vertebrates are normal and diffuse degenerative changes are noted throughout, specifically at C3-C4, C4-C5 and C5-C6. These degenerative changes include disc dehydration, disc space narrowing, endplate spurring and mild disc bulges. Dr. Fisher also notes mild effacement of the thecal sac. He does not find any herniations or fractures.

Dr. Montalbano, orthopedic surgeon, examined Plaintiff on August 7, 2009. Dr. Montalbano determined range of motion measurements for Plaintiff's cervical spine of flexion of 60 degrees compared to 60 degrees normal, extension of 20 degrees compared to 45 degrees normal, rotation right and left of 50 degrees compared to 50 degrees normal, and bending lateral left and right of 30 degrees compared to 45 degrees normal. He further measured range of motion for Plaintiff's left shoulder as flexion of 110 degrees compared to 180 degrees normal, abduction of 90 degrees compared to 130 degrees normal, external rotation of 30 degrees compared to 30 degrees normal and internal rotation L5 compared to T7 normal. Dr. Montalbano reviewed Plaintiff's own medical treating physicians' evidence in the form of Dr. Douglas Schottenstein's examination report, MRI reports of Dr. Mary Hu and Dr. Ronald Krinick's left shoulder surgery report. He concludes that this evidence supports his impression that Plaintiff has a pre-existing shoulder condition and a pre-existing degenerative disease

unrelated to the accident.

Defendants' expert reports satisfy their burden of establishing *prima facie* that Plaintiff did not suffer a serious injury (*Yagi v Corbin*, 2007 NY Slip Op 7749 [1st Dept]; *Becerril v Sol Cab Corp*, 50 AD 3d 261, 854 NYS2d 695 [1st Dept 2008]). Plaintiff must now bear the burden of overcoming Defendants' submissions by demonstrating that a serious injury was sustained through the presentation of nonconclusory expert evidence causally linking the serious injury, as defined by New York Insurance Law §5102(d), to the accident in question. (*Grossman v Wright*, 268 AD2d 79, 84 [1st Dept 2000]; *Valentin v Pomilla*, 59 AD3d 184 [1st Dept 2009]).

In opposition, Plaintiff submits Dr. Andrew D. Brown's expert report, Dr. Mary Hu's radiology reports, Dr. Rajpaul Singh's medical records and Plaintiff's own affidavit. Dr. Brown treated Plaintiff on December 6, 2006 through November 2008. Dr. Brown also referred Plaintiff to Dr. Douglas Schottenstein for pain management, Dr. Ronald Krinick for surgical intervention and Dr. Brandon S. Nguyen for further pain management. Dr. Brown concludes that as a result of the accident Plaintiff sustained severe and permanent injuries to his left shoulder marked by tearing of the anterior edge of the supraspinatus tendon, internal derangement with surgically documented rotator cuff tear, bursitis and impingement and loss of strength and range of motion. He also reports that Plaintiff sustained intervertebral disc herniations at C3-C4, C4-C5 and C5-C6 with a disc bulge at C6-C7.

Dr. Brown examined Plaintiff on September 20, 2009 and through objective testing measured cervical flexion of 25 degrees compared to 40 degrees normal, extension of 10 degrees compared to 30 degrees normal, rotation of 65 degrees compared to between 70 and 90 degrees normal. Further range of motion testing on Plaintiff's left shoulder indicated flexion of 135 degrees compared to 180 degrees normal, abduction of 130 degrees compared to between 170 and 180 degrees normal. Dr. Brown concludes that Plaintiff's injuries are permanent, progressive in nature and were directly caused by the motor vehicle accident.

Dr. Hu provides affirmed MRI reports of Plaintiff's left shoulder and cervical spine. Her impression is that Plaintiff's shoulder suffers a rim tear at the articular surface anterior leading edge of supraspinatus tendon, moderate degenerative tendinosis distal 2 cm segment of supraspinatus tendon and minimal subacromial bursal edema. Dr. Hu's impression of Plaintiff's cervical spine includes intervertebral disk herniation and mild central spinal canal stenosis at C3-C4, C4-C5, C5-C6 and a disk bulge at C6-C7.

Dr. Singh's medical records indicate that Plaintiff suffered a left trapezius muscle strain and experienced pain to his cervical spine and left shoulder. Plaintiff also received physical therapy two times a week for four weeks following the accident.

To qualify under the "permanent loss of use of a body organ, member, function or system," the loss must not only be permanent, but must be a total loss of use (*Gaddy v. Eyer*, 79 NY2d 955, 582 NYS2d 990 [1992]; *Oberly v Bangs Ambulance, Inc.*, 96 NY2d 295, 727 NYS2d

378 [2001]. Plaintiff has not demonstrated that he sustained a permanent and total loss of use of his shoulder or cervical spine. Therefore, Defendants' summary judgment motion as to Plaintiff's permanent loss claim under New York Insurance Law §5102(d) is granted.

Under the permanent consequential limitation and significant limitation categories of Insurance Law § 5102[d], Plaintiff must submit medical proof containing "objective, quantitative evidence with respect to diminished range of motion or a qualitative assessment comparing plaintiff's present limitations to the normal function, purpose and use of the affected body organ, member, function or system" (*Gorden v. Tibulcio*, 2008 NY Slip Op 3382 [1st Dept] quoting *John v Engel*, 2 AD3d 1027, 1029 [3rd Dept 2003]). Because Dr. Brown averred that he personally reviewed the MRI films, the positive results stated in his report are properly reviewable on this summary judgment motion (*see Thompson v Abbasi*, 15 AD3d 95 [1st Dept 2005]; *Dioguardi v Weiner*, 288 AD2d 253 [2d Dept 2001]). Dr. Brown's report, which demonstrates a limitation of range of motion supported by objective medical findings that are based upon a recent examination of Plaintiff, raises a triable issue of fact as to whether Plaintiff suffered serious injury within the permanent consequential limitation and/or significant limitation categories of Insurance Law § 5102 [d].

With respect to Plaintiff's claim under the 90/180 category of Insurance Law §5102(d), Plaintiff's injuries must restrict him from performing "substantially all" of his daily activities to a great extent rather than some slight curtailment (*Szabo v. XYZ, Two Way Radio Taxi Ass'n, Inc.*, 700 NYS2d 179 [1999]; *Thompson v. Abbasi*, 788 NYS2d 48 [1st Dept 2005]; *Hernandez v. Rodriguez*, 63 A.D.3d 520 [1st Dept 2009]). Plaintiff's Verified Bill of Particulars states that he was confined to bed for approximately one week following the accident and three weeks following his surgery. This evidence is insufficient to establish a substantial curtailment of Plaintiff's normal activities during the three-month period immediately following the accident as required under the 90/180 category (*Grimes-Carrion v Carroll*, 17 AD3d 296, 794 NYS2d 30 [App. Div. 1st Dept 2005]; *Lopez v Abdul-Wahab*, 2009 NY Slip Op 8685 [1st Dept]; *Rodriguez v Herbert*, 34 AD3d 345, 825 NYS2d 37 [1st Dept 2006]). Accordingly, Defendants' summary judgment motion as to Plaintiff's 90/180 claim under New York Insurance Law §5102(d) is granted as well.

Accordingly, it is hereby

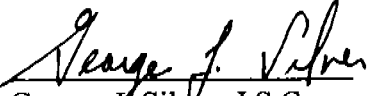
ORDERED that Defendants' motion for summary judgment is granted as to Plaintiff's claim under the permanent loss category of Insurance Law §5102(d); and it is further

ORDERED that Defendants' motion for summary judgment is denied as to Plaintiff's claim under permanent consequential limitation and significant limitation categories of Insurance Law §5102(d); and it is further

ORDERED that Defendants' motion for summary judgment is granted as to Plaintiff's claim under the 90/180 category of Insurance Law §5102(d); and it is further

ORDERED that Defendants are to serve a copy of this order, with Notice of Entry, within 30 days.

This constitutes the decision and order of the court.


George J. Silver, J.S.C.

GEORGE J. SILVER

Dated: April 22, 2010
New York County

FILED
APR 29 2010
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