Xue Juan Zhuang v Garaci

2011 NY Slip Op 30308(U)

January 20, 2011

Sup Ct, Queens County

Docket Number: 23367/08

Judge: James J. Golia

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Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: Honorable **JAMES J. GOLIA** Justice | IAS TERM, PART 33

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XUE JUAN ZHUANG, Plaintiff(s),

-- against --

RONALD W. GARACI AND NOREEN T. GERACI, Defendant(s).

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Index No: 23357/08

Motion Date: 09/09/10

Cal. No: 24

Sequence No. 1

The following papers numbered 1 to 18 read on this motion by defendants for an order granting summary judgment dismissing the complaint pursuant to CPLR 3211(a)(7) and 3212, on the grounds that plaintiff has not sustained a serious injury within the meaning of Insurance Law §§ 5102 and 5104. Third party defendants Manuel Juncal Jr., and Morgos Dynasty East, LLC cross move for an order dismissing the third party complaint.

	PAPERS NUMBERED
Notice of Motion, Affirmation, Exhibits (A-H).....................................	1 - 4
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Upon the foregoing papers it is ordered that this motion is determined as follows:

Plaintiff Xue Juan Zhang, a passenger in a van owned by her then employer Morgos Dynasty East, LLC and driven by Manuel Juncal Jr., a co-worker, allegedly sustained serious injuries on October 20, 2006, when the van was hit by a motor vehicle owned by Ronald W. Geraci and operated by Noreen T. Geraci, at the intersection of Manetta Hill Road and Edgewood Gate, in Nassau County. Plaintiff was transported by ambulance to North Shore University Hospital,

Plainview, where she was treated in the emergency room and released the same day.

Ms. Zhuang commenced this action against Ronald W. Geraci and Noreen T. Geraci on September 18, 2008, and defendants served an answer and commenced a third party action against Morgos Dynsaty East, LLC and Manuel Juncal Jr. for common law indemnification or contribution. The note of issue was filed on January 29, 2010. Defendants now move for summary judgment dismissing the complaint on the grounds that the plaintiff has not sustained a serious injury within the meaning of Insurance Law § 5102(d). This motion was timely served on April 30, 2010. Third party defendants have timely cross moved to dismiss the third party complaint in the event that defendants' motion to dismiss is granted.

The issue of whether a plaintiff has made a prima facie showing of serious injury is a matter of law, to be determined by the court in the first instance (*Licari v Elliott*, 57 NY2d 230, [1982]; *Charles v U.S. Fleet Leasing*, 140 AD2d 481 [1988]). A defendant can establish that the plaintiff's injuries are not serious by submitting affirmations or affidavits of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim (*see Grossman v Wright*, 268 AD2d 79, 84 [2000]; *Turchuk v Town of Wallkill,* 255 AD2d 576 [1998]). Once this is established, the burden shifts to the plaintiff to come forward with evidence to overcome the defendant's submissions by demonstrating a triable issue of fact as to whether a serious injury was sustained within the meaning of the Insurance Law (*Gaddy v Eyler*, 79 NY2d 955 [1992]).

Defendants in support of their motion defendants submit a copy of the pleadings, the demand for a bill of particulars, the bill of particulars, a copy of plaintiff's August 25, 2009 deposition testimony, and the affirmed reports of three physicians. Defendants' claim that plaintiff did not miss any substantial time from work as a result of the accident is not supported by the evidence submitted herein. Plaintiff asserts that at the time of the accident she worked in a restaurant, six days a week from 10:15 A.M. to 10:00 P.M., packing take-out food orders, and earned $1600.00 a month. In her bill of particulars, plaintiff stated that she was confined to bed for 3 months after the accident, that she was confined to her home from October 20, 2006 to February 28, 2007; and unable to pursue her occupation, and that she is partially disable to date. In response to a question as to the length of time she was incapacitated from her employment she stated "Not applicable".

At her deposition plaintiff stated that immediately following

the accident, she was taken by ambulance to the hospital where she was treated in the emergency room; that there was no interpreter present; that she was given a prescription for a pain reliever but did not fill it, as she did not have the funds to pay for medication; that her boss picked her up and she waited at the restaurant until approximately 11:00 P.M. for a ride home; that she attempted to work that day but could not stand due to pain; that she stayed home the next day and then returned to work for approximately one week; that she did not work thereafter at that restaurant or else where for approximately four months due to pain in her knees, back, neck and wrist. She stated that after four months she resumed working, part-time two days a week at a restaurant "upstate", and then worked at a restaurant in Garden City for about a month, packing take-out food orders. She stated that she had not worked full time for two years; that due to the injuries she sustained in the accident she can no longer stand for long periods of time; that she cannot carry heavy things due to a problem with her wrist; that she cannot sit for long periods of time; and that she cannot walk for long periods of time. She stated that following the accident she was confined to her home for approximately four months other than going to the doctor, but that she was not confined to her bed.

Ms. Zhang stated that she went to a facility known as Excellent Medical within a month after the accident, where she was seen by a physician who arranged for an MRI, and that she received physical therapy there, three times a week for approximately one year, until that facility closed. She stated that approximately one year after the accident her attorney referred her to another facility where she was examined by Dr. Tsai Chao, and she then went for physical therapy approximately three times a week until May 2009, at which time the insurance coverage was exhausted.

Defendants have made a prima facie showing that the plaintiff did not sustain a serious injury within the meaning of the Insurance Law § 5102(d) (*Toure v Avis Rent-A-Car Sys. Ins.*, 98 NY2d 345 [2002]). Defendants submit the affirmed reports of three physicians. Dr. Andrew Weiss, an orthopedist, based on an October 8, 2009 examination of plaintiff, including range of motion tests, and the examination of her medical records, opined that "1. sprain cervical spine, thoracolumbosacral spine resolved by objective clinical criteria at the time of this evaluation. 2. No clinical evidence for cervical, thoracic, or lumbosacral radiculopathy by objective clinical criteria at the time of this evaluation. 3. Contusion chest wall resolved by objective clinical criteria at the time of this evaluation. 4. Sprain right shoulder resolved by objective clinical criterial at the time of this evaluation. 5. Sprain/contusion left knee resolved by objective clinical criteria

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at the time of this evaluation". He further opined "I find no residuals. There is no evidence of permanence in this case. This claimant may continue working full time without restrictions as a packer. She is not disabled from that occupation. She may participate in all activities of daily living without restrictions. From an orthopaedic standpoint there is no medical necessity for any further diagnostic testing or treatment. Prognosis in this case is good...I find no clinical evidence for a herniated disc at T1-T2 by objective clinical criteria at the time of this evaluation. In my opinion a bulging disc is a normal variant and does not represent a pathological condition in this claimant. Anterior spondylosis at C6-7 within reasonable medical certainty is not related to this accident. Straightening of the cervical spine may be due simply to placement of the claimant in MRI machine. Straightening of the lumosacral spine may be due simply to placement of the claimant in an MRI machine. I do find normal active range of motion of the claimant's neck, back, right shoulder and left knee at the time of this evaluation."

Dr. Chandra Sharma, an neurologist, based on an October 8, 2009 examination of plaintiff, as well as an examination of the plaintiff's medical records opined that "cervical and lumbar sprain/strain resolved", normal neurological examination" and that "[t]here are no neurological limitations to continuation of usual work and activities of daily living. There are no neurological manifestations of disc bulges or disc herniations."

Dr. Audrey Eisenstadt a radiologist, at the request of the defendants' insurer, stated in a report dated October 6, 2007, that she had reviewed the MRI of Ms. Zhuang's cervical spine taken on November 30, 2006, and the MRI of Ms. Zhuang's lumbar spine taken on December 14, 2006, and stated that a review of the MRI of the lumbar spine performed eight weeks following the accident revealed a degeneration at the L5-S1 intevertebral disc level. She opined that "[t]his is a drying out and loss of disc substance, a degenerative process, which could not have occurred in less than six months time and clearly predates the accident. Bulging is seen at this level as well. Bulging is not a traumatic abnormality. It is degeneratively induced, related to ligamentous laxity. No osseous, ligamentous or intervertbral disc changes are seen attributable to the 10/20/06 accident. No post-traumatic abnormalities are identified."

Dr. Eisenstadt stated that a review of the cervical spine MRI revealed evidence of "straightening of the cervical lordosis, a nonspecific finding, frequently related to patient position and comfort for the examination. Osteophyte formation is scene at the C6-7 inteverbral disc level." She opined that "[t]his bony

overgrowth could not have occurred in less than six months time and clearly predates the 10/20/06 accident. Desiccation of several cervical intevertebral discs is noted. This is a drying out and loss of disc substance, a degenerative process, greater than three months in origin and could not have occurred in the time interval between examination and injury. It is indicative of pre-existing, degenerative disc disease. Bulging of multiple intevertebral discs is noted. Bulging is not a traumatic abnormality. It is degeneratively induced, related to ligamentous laxity. Likely bulging is seen at the T1-2 level as well. A superimposed disc herniation is seen at the C5-6 level. The C5-6 intevertebral disc is the most common level in the population for degenerative disc disease to occur. Degenerative disc disease is a frequent etiology of disc herniations. This patient has pre-existing intevertebral disc changes in the lower cervical spine with bulging, dessication and osteophyte formation noted. These degeneative changes predispose to the small disc herniation as seen in this case. No thecal or neural impingement is associates with this likely degenerative herniation."

Ms. Zhuang in opposition submits an affidavit written in English, in which she states that she only speaks Mandarin Chinese. Plaintiff also submits an affidavit of translation from Lu Zhuang, who states that Zhuang is fluent in English and Mandarin Chinese languages and that the words stated by Zhuang in her affidavit were translated from Mandarin Chinese to English from English to Mandarin Chinese. Since the affidavit of translation fails to set forth Lu Zhuang's qualifications as a translator, and as Ms. Zhuang is not conversant in the English language, the court will not consider Ms. Zhuang's affidavit or that of Lu Zhuang (See CPLR 2101[b]).

Plaintiff also submits, in opposition, an unaffirmed by Dr. S. Khan from the October 30, 2006 medical examination at Excellent Medical, PC located at 136-81 Roosevelt Avenue, Flushing, New York, which, based on a stated series of range of motion tests, revealed limitations in mobility and recommended a course of follow-up medical treatment, including physical therapy, acupuncture, painkilling medication, and neurological and orthopedic examinations. This unsworn report is not in admissible form (*see Grasso v Angerami*, 79 NY2d 813, [1991]; *Bernier v Torres*,_____AD3d_ _____, 2010 NY Slip Op 9201, 2010 NY App. Div. LEXIS 9296 [Dec. 14, 2010]) and therefore is insufficient to establish that Ms. Zhuang sustained a medically determined injury which prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for at least 90 of the 180 days following the occurrence of the accident (see, Insurance Law §5102(d); *Licari v Elliott*, 57 NY2d 230, 236, *supra; see also*

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Sainte-Aime v Ho, 274 AD2d 569 [2000]).

Plaintiff also submits an affidavit from Dr. Tsai Chao, who examined Ms. Zhuang on July 9, 2008. Dr. Chao states that he reviewed her medical records from Excellent Health, and that based upon his physical examination, including range of motion test which revealed limitations in mobility, he recommended a course of follow-up medical treatment, including physical therapy, painkilling medication, and sent for MRIs. Dr. Chao performed a physical examination of Ms. Zhuang on July 9, 2009, and found the following: "neck pain intensified at the end of range of motion in all directions; positive Spurling test on the right side; muscle spasm and tenderness at the bilateral cervical paraspinal muscles; posterior tenderness between C5 and C7 spinous processes; tenderness of the right acromioclavicular joint; range of motion limitation because of right shoulder pain; positive drop sign; lumbar spine range of motion limitation due to lower back pain; muscle spasm and tenderness at right lumbosacral paraspinal muscles; midline structure tenderness between L2 and L5 spionous processes; positive straight leg elevation test which was positive on the right side at 60 degrees and on the left side at 70 degrees; and tenderness of right wrist and increased pain on passive range of motion at flexion and extension of the right wrist." He states that a range of motion test was performed for the cervical and lumbar spines; and the shoulder, and set forth the limitations in the range of motion, which deviated from the listed normal ranges. He stated that Ms. Zhuang complained of "neck pain, lower back pain, both knees, right shoulder and right wrist pain" since the October 20, 2006 accident. He diagnosed the following conditions: "cervical sprain and strain; right shoulder contusion with strain and sprain' lower back pain with lumbar sprain and strain and contusion; contusion and sprain of both knees with right prepatellar bursitis; right wrist contusion and strain; narrowing of C4-5, C5-6 and C6-7 disc spaces; osteoarthritic changes of the cervical spine at C5-C6 and C6-C7 levels; and straightening of the lordic curve of the cervical spine compatible with muscular spasm; and muscular spasm of the lumbar spine; post-concussion syndrome; cervocogenic headache; post-traumatic cervical sprain; jaw injury; post-traumatic thoraric sprain; post-traumatic lumbar sprain; shoulder sprain; contusion in the anterior chest wall; knee sprain; possible cervical radiculopathy; possible cervical disc syndrome; possible lumbar radiculopathy; possible lumbar disc syndrome; and possible rotator cuff tear; straightening of the usual lordosis; disc bulge at the L5-S1 level where disc material is seen to approximate the ventral epidural fat, which appears directly displaced by annulus fibrosus of the disc; straightening of the cervical lordosis; bulging discs from C4 to C7 with coexistant central disc herniation identing from the dural sac and nearly in

contact with the spinal cord at C4-C5; anterior spondylosis at C6-C7; and apparent central disc herniation at T1-T2".

Dr. Chao opined that the disc pathology diagnosed via the MRIs was casually related to the accident of October 26, 2006, and were not degenerative, and were consistent with clinical presentation, and that these injuries were of a permanent nature. He stated that he treated Ms. Zhuang at his office from July 2008 through May 14, 2009, and that she thereafter continued with home exercises. He stated that treatment at his office stopped because her no-fault insurance stopped covering treatment and she could not afford to pay for treatment on her own. In addition he stated that her condition had become chronic, and opined that "the injuries diagnosed would inhibit the patient's ability to carry out normal activities of daily living such as bending, picking up objects from the floor, shifting to and from a seated position, sitting up from a supine position, sitting or standing for prolonged periods, and engaging in recreational activities".

Plaintiff submits an affidavit of Dr. Alan Greenfield, a radiologist, who performed the MRI on plaintiff on November 30, 2006, and stated his findings based upon the MRI, and an affidavit of Dr. Alan Rothpearl, a radiologist, who on December 14, 2006 interpreted the MRI performed on Ms. Zhuang's lumbar spine. Neither Dr. Rothpearl nor Dr. Greenfield offers any opinion as to the cause of the disc herniation or buldges revealed by the MRI.

It is noted that the first 15 items included in Dr. Chao's diagnosis repeats, word for word, the 15 initial impressions reported by Dr. Khan on October 30, 2006, and while the remaining items repeats, word for word, the impressions stated by Dr. Greenfield who interpreted the MRI of the cervical spine taken on November 30, 2006 and the impressions stated by Dr. Rothpearl who interpreted the MRI of the lumbar spine taken on December 14, 2006. Dr. Chao thus does not offer any independent diagnosis of Ms. Zhuang's alleged physical condition.

Although Dr. Chao's affidavit notes specific losses of range of motion in plaintiff's spine at the time he first examined her on July 9, 2009, and opines that plaintiff suffered serious and permanent injuries which were casually related to the accident (*Lopez v Senatore,* 65 NY2d 1017, 1020, [1985]), he fails to refute defendants' evidence of a preexisting degenerative condition. It is insufficient for him to merely state, without more, that said condition was not degenerative. As a result, Dr. Chao's opinion must be regarded as speculative at best (*see e.g., Giraldo v Mandanici*, 24 AD3d 419 [2005]). Accordingly, the proof presented by plaintiff is insufficient to raise triable issues of fact

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regarding her claims of serious injury. Defendants, thus, are entitled to summary dismissal of the complaint (*see Carrasco v Mendez,* 4 NY3d 566, [2005]; *Toure v Avis Rent A Car Sys., supra; Husbands v Levine,* ____AD3d____,2010 NY Slip Op 9888, 2010 NY App. Div. LEXIS 9853 [Dec. 28, 2010]; *Nieves v Michael*, 73 AD3d 716, [2010]).

Accordingly, defendants' motion for summary judgment dismissing the complaint is granted. Third party defendants' motion for summary judgment dismissing the third party complaint for common law indemnification or contribution is also dismissed.

Dated: January 20, 2010 ....

JAMES J. GOLIA, J.S.C.