

Lee v Smith

2011 NY Slip Op 31236(U)

May 9, 2011

Supreme Court, Queens County

Docket Number: 14646/2009

Judge: Robert J. McDonald

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SHORT FORM ORDER

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

HANNAH LEE, an infant by her mother
and Natural Guardian, CINDY LEE, and
CINDY LEE, individually, and EUNICE
CHOI, an infant by her Mother and
Natural Guardian, SOON OH PARK, and
SOON OH PARK, individually,

Index No.: 14646/2009
Motion Date: 03/10/2011
Motion No.: 20
Motion Seq.: 2

Plaintiffs,

- against -

VINCENT B. SMITH and BARBARA T. SMITH,

Defendants.

- - - - - x

The following papers numbered 1 to 12 were read on this motion by
defendants Vincent B. Smith and Barbara T. Smith. for an order,
pursuant to CPLR 3212, granting summary judgment and dismissing
the complaint of infant plaintiffs Hannah Lee and Eunice Choi on
the ground that each plaintiff did not sustained a serious injury
within the meaning of Insurance Law §§ 5102 and 5104:

Papers
Numbered

- Notice of Motion-Affidavits-Exhibits - Memo of Law..1 - 4
Affirmation in Opposition-Affidavits-Exhibits.....5 - 8
Reply Affirmation.....9 - 12

This is a personal injury action in which infant plaintiffs,
Hannah Lee and Eunice Choi, seek to recover damages for injuries
they sustained as a result of a motor vehicle accident that
occurred on January 3, 2007 at approximately 2:40 p.m. at the
intersection of 64th Avenue and 185th Street, Queens County, New
York.

At the time of the accident, the infant plaintiffs were 12 year old female pedestrians going home from school. As they traveled eastbound along 64th Avenue, crossing its intersection with 185th Street they were struck by a motor vehicle owned by defendants Vincent B. Smith and Deborah T. Smith s/h/a Barbara T. Smith and operated by defendant Vincent B Smith. The Smith vehicle had been traveling westbound on 64th Avenue and was making a left turn onto 185th Street when the subject accident occurred. Hannah Lee sustained injuries to her neck, lower back, left wrist and left hip. Eunice Choi sustained injuries to the cervical spine, lumbar spine, left knee, left hip and right elbow.

The plaintiffs commenced an action against the defendants by filing a Summons and Verified Complaint on June 3, 2009. Issue was joined by service of defendants' Verified Answer dated July 10, 2009.

Defendants move for an order pursuant to CPLR 3212 dismissing the complaint against them on the ground that the injuries claimed by each infant plaintiff fail to satisfy the serious injury threshold requirement of Section 5102(d) of the Insurance Law.

In support of the motion, the defendants submit an affidavit from counsel, Andrea E. Ferrucci, Esq.; a copy of the pleadings; plaintiffs' verified bill of particulars; a copy of the transcript of each plaintiff's examination before trial; the affirmed medical reports of Dr. Maria Audrie DeJesus; and the affirmed medical reports of Dr. Michael J. Katz.

In the verified Bill of Particulars the plaintiff, Hannah Lee states that as a result of the accident she sustained, inter alia, disc herniation at L1-2; L2-3; L5-S1; disc bulge at L3-4; C3-4; C4-5; C5-6 and left sided carpal tunnel syndrome. Plaintiff Eunice Choi alleges that she sustained, inter alia, disc herniation at C2-3; C4-5; C5-6; C6-7; L1-2; L4-5 disc bulge at C3-4; L5-S1. In the Bill of Particulars plaintiffs contend that they each sustained a serious injury as defined in Insurance law §5102(d).

Plaintiff Hannah Lee was examined by Dr. Maria Audrie DeJesus, a board certified neurologist, who was retained by the defendant. Hannah was age 15 at the time. In her examination of March 8, 2010, Dr. DeJesus performed quantified and comparative range of motion tests. She found that the plaintiff had no limitations of range of motion in both the cervical spine and the lumbar spine. Dr. DeJesus concluded by stating: "there is no

objective evidence of any disability. From a neurologic standpoint, there is no need for treatment."

Hannah Lee was also examined by Dr. Katz, a board certified orthopedic surgeon on March 22, 2010. Upon quantified examination, Dr. Katz found that the plaintiff had no limitations of range of motion in the cervical spine, lumbar spine, left hip and left wrist. Dr. Katz concludes that, Ms. Lee sustained cervical strain, lumbosacral sprain, left hip contusion and left carpal tunnel syndrome. He states, "currently she shows no signs or symptoms of permanent loss of use relative to the musculoskeletal system and relative to the accident of January 3, 2007. She is currently not disabled.

Plaintiff Eunice Choi was examined by Dr. Maria Audrie DeJesus, a board certified neurologist, who was retained by the defendant. Eunice was age 15 at the time. In her examination of March 8, 2010, Dr. DeJesus performed quantified and comparative range of motion tests. She found that the plaintiff had no limitations of range of motion in the cervical spine and lumbar spine. Dr. DeJesus concluded by stating: "There is no objective evidence of any disability. From a neurologic standpoint, there is no need for treatment."

Eunice Choi was also examined by Dr. Katz, a board certified orthopedic surgeon on March 22, 2010. Upon quantified examination, Dr. Katz found that Ms. Choi had no limitations of range of motion in the cervical spine, lumbar spine, right elbow left hip and left knee. Dr. Katz concludes that, Ms. Choi sustained, cervical strain, lumbosacral sprain, left hip contusion and left carpal tunnel syndrome. He stated that the injuries diagnosed are cervical strain, right elbow contusion, left knee contusion and left hip contusion. "Her prognosis is excellent. Currently she shows no signs or symptoms or permanence relative to the musculoskeletal system and relative to the accident to January 3, 2007. She is currently not disabled. She is capable of her full time studies. She is capable of her activities of daily living."

In her examination before trial taken on December 29, 2009, plaintiff Hannah Lee testified that on the date of the accident she was walking home from school with two other girls. When she came to the intersection of 64th Avenue and 185th Street she stopped on the sidewalk and looked both ways before crossing. There was no traffic control device at that corner. She stated that when she began to cross the street, "out of nowhere a car comes by, like, like, I didn't see any cars, and my other friend just started running ahead of us for some reason, and then I

looked left, right before the car hit me, that's when I saw the car." She was struck on the left hip, landed on the hood of defendants' vehicle and rolled off, landing on her back. She stated that she bruised her left hip and hurt her lower back. She left the scene in an ambulance, was taken to the emergency room at New York Hospital, had x-rays taken of her left leg and released the same day. Subsequently, she began physical therapy at the Flushing Pain Management Center and continued to go for three days a week for one year after which the treatments stopped. She stated that she only missed on or two days of school as a result of the accident but she was excused from regular gym activities for a month or two. She stated that she has no problems with her leg at the present time but her lower back still hurts her on occasion. She stated that there are no activities other than stretching that she can't do now as a result of the accident.

In her examination before trial taken on December 29, 2009, Eunice Choi testified that on the date of the accident she was walking down 64th Avenue, going home from school. She was in seventh grade at the time and was walking with Hannah Lee and Jenny Choi. When the girls reached 158th Street she looked left because 185th Street is a one way street to see if any cars were coming. When she saw that no cars were coming she crossed the street. While she was crossing a car coming from her left on 64th Avenue hit her. The car was turning left from 64th Avenue to 185th Street. The car hit her left knee. She landed face down in the street. When the ambulance came to the scene she told them her left knee and her neck hurt. At the emergency room they x-rayed her legs and told her that she had sustained a sprained left knee. Subsequent to her release she was treated by Dr. Lee at Flushing Pain Management. She continued having physical therapy with Dr. Lee three times a week for one year. She stated that at the present time her left knee hurts about twice a week and her neck gets stiff about three times a month. She testified that as a result of the accident she was confined home for one or two days and she lost one day from school. She didn't participate in sports at school for about one month after the accident.

Defendants' counsel contends that the medical reports of the defendants' doctors as well as the deposition testimony of the plaintiffs are sufficient to establish, prima facie, that each plaintiff has not sustained a permanent loss of a body organ, member, function or system; that each one has not sustained a permanent consequential limitation of a body organ or member or a significant limitation of use of a body function or system. Counsel also contends that each plaintiff has not sustained a medically determined injury or impairment of a nonpermanent

nature which prevented the plaintiff, for not less than 90 days during the immediate one hundred days following the occurrence, from performing substantially all of her usual daily activities.

In opposition, plaintiff's attorney, Joshua I. Fiscus, Esq., submits the affirmed radiological reports of Dr. Ayoob Khodadadi in which he found, inter alia, with respect to Hannah Lee that a review of her MRI studies of the lumbar and cervical spine indicated disc herniation at L1-2, L2-3 and L5-S1 and well as a disc bulge at L3-4 and C3-4 through C5-6. With respect to Eunice Choi, after reviewing the MRI films Dr. Khodadadi found bulges at L1-2, L5-S1 and C3-4 and C6-7. and disc herniations at L3-4, C2-3, and C4-5 through C6-7.

Plaintiffs also submit the affirmed medical report of their treating physician, Dr. Sang Y. Lee. Dr. Lee examined Hannah Lee on January 9, 2007, 6 days after the accident and found, based upon objective testing of range of motion, that she had limitations of range of motion of the cervical and lumbar spines. On re-examination on December 3, 2010 he again found limitations of range of motion in the cervical and lumbar spines. He found that her injuries were causally related to the motor vehicle accident of January 3, 2007 and that the partial disabilities were permanent.

Plaintiff Eunice Choi was also examined by Dr. Lee on January 9, 2007. At that time Dr. Lee found that Eunice had significant limitations of range of motion of the cervical and lumbar spines. Dr Lee re-examined Eunice on December 3, 2010 and utilizing objective testing found that she had significant range of motion limitations of the neck and lumbosacral spine. Dr Lee stated that Eunice suffered a permanent partial disability of her cervical spine and lumbar spine with significant limitation of use. He stated that her musculoskeletal system has been permanently and irreversibly damaged. Dr. Lee also stated that both plaintiffs were discharged from treatment after he reached the conclusion that they had each reached maximum medical improvement and that additional physical therapy would be palliative.

On a motion for summary judgment, where the issue is whether the plaintiff has sustained a serious injury under the no-fault law, the defendant bears the initial burden of presenting competent evidence that there is no cause of action (Wadford v. Gruz, 35 AD3d 258 [1st Dept. 2006]). "[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 [1st Dept. 2000]). Whether a plaintiff has sustained a serious injury is initially a question of law for the Court (Licari v Elliott, 57 NY2d 230 [1982]).

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 (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]). Where defendants' motion for summary judgment properly raises an issue as to whether a serious injury has been sustained, it is incumbent upon the plaintiff to produce evidentiary proof in admissible form in support of his or her allegations. The burden, in other words, shifts to the plaintiff to come forward with sufficient evidence to demonstrate the existence of an issue of fact as to whether he or she suffered a serious injury (see Gaddy v. Eyler, 79 NY2d 955 [1992]; Zuckerman v. City of New York, 49 NY2d 557[1980]; Grossman v. Wright, 268 AD2d 79 [2d Dept 2000]).

Here, the proof submitted by the defendants, including the affirmed medical reports of Drs. Katz and DeJesus were sufficient to meet defendants' prima facie burden by demonstrating that each plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (see Toure v Avis Rent A Car Sys., 98 NY2d 345[2002]; Gaddy v Eyler, 79 NY2d 955[1992]; Luckey v Bauch, 17 AD3d 411[2005]; Paul v Trerotola, 11 AD3d 441[2d Dept. 2004]; Mastaccioula v Sciarra, 11 AD3d 434 [2d Dept. 2004]). It is well settled that the mere existence of a bulging or herniated disc is not conclusive evidence of a serious injury in the absence of objective evidence of a related disability or restriction (see Kearse v New York City Tr. Auth., 16 AD3d 45[2d Dept. 2005]; Fauk v Jenkins, 301 AD2d 564 (2d Dept. 2003)).

However, this Court finds that the plaintiffs raised triable issues of fact by submitting the affirmed medical reports of Drs. Lee and Khodadadi attesting to the fact that each plaintiff sustained bulging and herniated discs which caused significant limitations of range of motion to lumbar spine and cervical spine both contemporaneous to the accident and in a recent examination, and concluding that each plaintiff's limitations were significant and permanent and

resulted from trauma causally related to the accident (see Ortiz v. Zorbas, 62 AD3d 770 [2d Dept. 2009]; Azor v Torado, 59 ADd 367 [2d Dept. 2009]). As such, each infant plaintiff raised a triable issue of fact as to whether she sustained a serious injury under the permanent consequential and/or the significant limitation of use categories of Insurance Law § 5102(d) as a result of the subject accident (see Khavosov v Castillo, 81 AD3d 903[2d Dept. 2011]; Mahmood v Vicks, 81 AD3d 606[2d Dept. 2011]; Compass v GAE Transp., Inc., 79 AD3d 1091[2d Dept. 2010]; Evans v Pitt, 77 AD3d 611 [2d Dept. 2010]; Tai Ho Kang v Young Sun Cho, 74 AD3d 1328 743 [2d Dept. 2010]).

In addition, Dr. Lee adequately explained the gap in each plaintiff's treatment by stating that she had reached the point of maximum medical improvement (see Gaviria v. Alvarado, 65 AD3d 567 [2d Dept. 2009]; Bonilla v. Tortori, 62 AD3d 637 [2d Dept. 2009]).

Accordingly, for the reasons set forth above, it is hereby

ORDERED, that the defendants' motion for an order dismissing the complaint of infant plaintiff Eunice Choi and infant plaintiff Hannah Lee is denied.

Dated: May 9, 2011
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.