

Yoon Jung Kim v Carpio
2012 NY Slip Op 30954(U)
April 11, 2012
Supreme Court, Queens County
Docket Number: 4479/2011
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

YOON JUNG KIM,

Index No.: 4479/2011

Plaintiff,

Motion Date: 03/29/12

- against -

Motion No.: 19

Motion Seq.: 1

ANDERS CARPIO and KRYSTAL GALLAGHER,

Defendants

- - - - - x

The following papers numbered 1 to 13 were read on this motion by defendants, ANDERS CARPIO and KRYSTAL GALLAGHER, for an order pursuant to CPLR 3212 granting defendants summary judgment and dismissing the complaint of YOON JUNG KIM on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law §§ 5102 and 5104:

Papers
Numbered

Notice of Motion-Affidavits-Exhibits-Memorandum of Law...1 - 6
 Affirmation in Opposition-Affidavits-Exhibits.....7 - 10
 Reply Affirmation.....11 - 13

This is a personal injury action in which plaintiff, YOON JUNG KIM, seeks to recover damages for injuries she sustained as a result of a motor vehicle accident that occurred on October 19, 2010, on Northern Boulevard at or near its intersection with Utopia Parkway, Queens County, New York.

At the time of the accident, the plaintiff was operating her vehicle eastbound on Northern Boulevard intending to make a left turn onto Utopia Parkway when her vehicle was struck by the vehicle being operated by defendant KRYSTAL GALLAGHER and owned by defendant ANDERS CARPIO. Plaintiff was allegedly injured as a result of the impact.

The plaintiff commenced this action by filing a summons and complaint on February 23, 2011. Issue was joined by service of defendants' verified answer dated April 26, 2011. Defendants now move for an order pursuant to CPLR 3212(b), granting summary judgment dismissing the plaintiff's complaint on the ground that plaintiff did not suffer a serious injury as defined by Insurance Law § 5102.

In support of the motion, defendant submits an affirmation from counsel, Marcella Gerbasi Crewe, Esq; a copy of the pleadings; plaintiff's verified bill of particulars; a copy of the transcript of the plaintiff's examination before trial; and the affirmed medical reports of Dr. Isaac Cohen, a board certified orthopedic surgeon and Dr. Steven L. Mendelsohn, a board certified radiologist.

In her verified bill of particulars, plaintiff, Yoon Jung Kim, age 54, states that as a result of the accident she sustained, inter alia, a partial tear of the right rotator cuff requiring arthroscopic surgery and posterior disc herniations at C5-C6, C6-C7, C7-T1, L4-L5 and L5-S1 with impingement.

Plaintiff contends that she sustained a serious injury as defined in Insurance Law § 5102(d) in that she sustained a permanent consequential limitation or use of a body organ or member; a significant limitation of use of a body function or system; and a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff from performing substantially all of the material acts which constitute her 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.

The plaintiff, was examined on October 18, 2011 by Dr. Isaac Cohen, a board certified orthopedic surgeon, retained by the defendants. In his affirmed report, he states that plaintiff stated that she injured her left knee, right shoulder, neck and back in the accident. At the time of the examination she was still experiencing pain in her right shoulder neck and back. Dr. Cohen performed quantified and comparative range of motion tests. He found that the plaintiff had no limitations of range of motion in the cervical spine, lumbosacral spine, right shoulder, and left knee. Dr. Cohen diagnosed plaintiff with a resolved cervical strain, resolved lumbosacral strain and resolved left knee contusion and concluded that plaintiff was "status post right shoulder arthroscopy." He concluded that the plaintiff sustained

mild soft tissue complaints that resolved uneventfully. He states that based upon his examination and his review of the plaintiff's MRI studies, the right shoulder arthroscopic surgery was due to preexisting AC joint degeneration and congenital problems that were not accident related. He states that there is no indication of permanency and that plaintiff may continue to work without restrictions.

Dr. Steven Mendelsohn a radiologist, examined the MRI studies of the plaintiff's cervical spine, right shoulder and left knee. In his affirmed reports he states that he observed disc herniations at C3-4 C4-5, C5-6 and C6-7 due to degenerative changes. He states that the MRI of the cervical spine revealed no evidence of focal herniation or any abnormality causally related to the accident of October 19, 20010. With respect to the right shoulder he observed a normal rotator cuff. He concluded that there was some acromioclavicular degeneration otherwise the MRI of the right shoulder was normal. With respect to the MRI of the left knee he observed no meniscal or ligamentous tear.

In her examination before trial, plaintiff testified that the day following the accident she sought treatment at Park Pain Clinic at which time she was examined by Dr. Park. She began a course of physical therapy at the Park Clinic where she attended for two or three months. Three months after the accident she had arthroscopic surgery performed on her right shoulder by Dr. Sun. She then began physical therapy with Dr. Yom which lasted for two months. Because she felt no improvement she began acupuncture treatments with Dr. Ham which continued up until the present time. Plaintiff testified that she also receives injections for pain in her shoulder and knee. Plaintiff further testified that as a result of the accident she missed two to three weeks from work.

Defendant's counsel contends that the medical reports of Drs. Cohen and Mendelsohn, together with the plaintiff's deposition testimony, are sufficient to establish, prima facie, that the plaintiff has not sustained a permanent consequential limitation or use of a body organ or member; a significant limitation of use of a body function or system; or a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff from performing substantially all of the material acts which constitute her 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 opposition, plaintiff's attorney Marc A. Williams, Esq., submits his own affirmation as well as the affidavit of plaintiff Kim and the affirmed medical reports of orthopedic surgeon Yan Q. Sun, and a medical report of Dr. Isaac Cohen with respect to a different plaintiff in an unrelated action

Dr. Sun states that he first examined the plaintiff on February 9, 2011 four months post-accident. At that time, after performing objective and comparative range of motion testing on the plaintiff's right shoulder and reviewing the MRIs, he found that she suffered from severely limited range of motion, significant abnormal clinical findings and trauma related structural damage. Dr. Sun states that he performed arthroscopic surgery on February 11, 2011 during which he observed a partial tear of the right shoulder supraspinatus tendon. He re-evaluated the plaintiff on January 18, 2012, at which time she still exhibited significant limitations of range of motion of the of the right shoulder. He concludes that the plaintiff's injuries are permanent in nature, have resulted in a permanent consequential limitation of use of the right shoulder, and are causally related to the motor vehicle accident.

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 defendants including the affirmed medical reports of Drs. Mendelsohn and Cohen and the pre-trial testimony of the plaintiff was sufficient to meet its prima facie burden by demonstrating that the 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]).

However, this Court finds that the plaintiff raised triable issues of fact by submitting the affirmed medical report of Dr. Sun attesting to the fact that the plaintiff had significant limitations in range of motion of her right shoulder contemporaneous to the accident and in a recent examination, and concluding that the plaintiff's limitations were significant and permanent and resulted from trauma causally related to the accident (see Salman v Rosario, 87 AD3d 482 [1st Dept. 2011][plaintiff's objective evidence of injury, four months post-accident, was sufficiently contemporaneous to establish that plaintiff had suffered a serious injury within the meaning of the statute]; Ortiz v. Zorbas, 62 AD3d 770 [2d Dept. 2009]; Azor v Torado, 59 ADd 367 [2d Dept. 2009]).

Plaintiff also testified at her examination before trial that she was treated continuously through the date of the deposition and only stopped when told that her treatments would be palliative in nature and because her no-fault benefits were terminated. As such, the 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, 2011 NY Slip Op 653 [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]).

Although defendant's radiologist, Dr. Mendelsohn opined that the plaintiff's knee and back injuries were caused by

degeneration, the Courts have held that even if the plaintiff's doctor does not specifically address the findings in the reports submitted by the defendants that the abnormalities in the tested areas were degenerative, rather than traumatic, the findings of the plaintiff's doctor that plaintiff's injuries were indeed traumatic and were causally related to the collision, is sufficient as it implicitly addressed the defendants' contentions that the injuries were degenerative (see Fraser-Baptiste v New York City Transit Authority, 81 AD3d 878 [2d Dept. 2011]; Harris v Boudart, 70 AD3d 643 [2d Dept. 2010]).

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

ORDERED, that the defendant's motion for an order granting summary judgment dismissing plaintiff's complaint is denied.

Dated: Long Island City, N.Y.
April 11, 2012

ROBERT J. MCDONALD
J.S.C.