

Alderman v Ahmed

2012 NY Slip Op 31909(U)

July 16, 2012

Sup Ct, Queens County

Docket Number: 19090/2010

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

KUM CHA ALDERMAN, Index No.: 19090/2010
Plaintiff, Motion Date: 06/21/12
- against - Motion No.: 3
JAMAL AHMED AND KOHINOOR AKTHER , Motion Seq.: 1
Defendant.

- - - - - x

JAMAL AHMED AND KOHINOOR AKTHER,
Third-Party Plaintiffs, Index No. 350467/2010
-against-

KIM T. HYUN AND CHONG SUKI,
Third-Party Defendants.

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The following papers numbered 1 to 14 were read on this motion by defendants/third-party plaintiffs, JAMAL AHMED AND KOHINOOR AKTHER, and cross-motion of third-party defendants, KIM T. HYUN AND CHONG SUKI, for an order pursuant to CPLR 3212 granting summary judgment and dismissing the plaintiff's complaint on the ground that plaintiff has not sustained a serious injury within the meaning of Insurance Law §§ 5102 and 5104:

Papers Numbered

- Notice of Motion-Affidavits- Exhibits.....1 - 5
- Notice of Cross-Motion.....6 - 8
- Affirmation in Opposition-Affidavits.....9 - 14

This is a personal injury action in which Plaintiff, Kum Cha Alderman, seeks to recover damages for injuries she allegedly sustained on May 29, 2010, as a result of a motor vehicle accident that occurred on Union Street near the intersection with 34th Avenue when the parked vehicle operated by Kim T. Hyun was

struck in the front by the vehicle operated by Jamal Ahmed. Plaintiff was a rear-seat passenger in Kim T. Hyun's motor vehicle.

Defendants/third-party plaintiffs, Jamal Ahmed and Kohinoor Akther now move for an order, pursuant to CPLR 3212, dismissing the plaintiff's complaint on the ground that the injuries claimed by the plaintiff fail to satisfy the serious injury threshold requirement of Section 5102(d) of the Insurance Law. Third-party defendants Kim T. Hyun and Chong Suki cross-move for the same relief and adopt the papers submitted by Ahmed and Akther.

In support of the motion, the defendants submit an affirmation from counsel, Matthew E. French, Esq., a copy of the pleadings; plaintiff's verified bill of particulars; a copy of the transcript of plaintiff's examination before trial; the affirmed medical report of orthopedist, Dr. Michael J. Katz, and the affirmed report of radiologist, Dr. Steven L. Mendelsohn.

In her verified bill of particulars, the plaintiff, age 67, states that as a result of the accident she required arthroscopic surgery of the right knee due to a torn meniscus and torn anterior cruciate ligament. She also alleges that she sustained herniated discs at the C4-C5 and L5-S1 levels. The plaintiff contends that as a result of the accident in question she sustained a serious injury as defined in Insurance law §5102(d).

The plaintiff, who was employed as a housekeeper, was examined on November 28, 2011 by orthopedist, Dr. Michael J. Katz, a physician retained by the defendants. At that time the plaintiff reported to Dr. Katz that she underwent a right knee arthroscopy on August 20, 2010. She had physical therapy and chiropractic care two to three times per week until the present time. She was involved in a subsequent motor vehicle accident as a pedestrian four months later on September 22, 2010. As a result of the subsequent accident, the plaintiff had left shoulder surgery at New York Hospital and arthroscopic surgery of the left knee. The plaintiff presented with pain to the right knee when standing. Dr Katz performed quantified and comparative range of motion tests. Upon examination he found that the plaintiff had no loss of range of motion in her cervical spine, lumbosacral spine, right and left shoulders, right and left arms, right and left wrists and right knee. His diagnosis was cervical strain - resolved; lumbosacral strain - resolved; bilateral shoulder contusion - resolved; status post arthroscopy right knee - successful; and status post left shoulder arthroscopy - unrelated to event of May 29, 2010. He states that the plaintiff showed no signs or symptoms or permanence relative to the neck, the back,

or either shoulder with reference to the accident of May 2010. He states that after arthroscopic surgery of the right knee she has regained full range of motion without instability. He states that she is capable of gainful employment as a housekeeper but is not working. He states that she had a significant subsequent pedestrian accident on September 22, 2010.

Dr. Mendelsohn states that after reviewing the MRI studies of the plaintiff's lumbar spine, cervical spine, right knee, and right shoulder he observed degenerative bulging at C4-5, L3-4, L4-5, L5-S1, L2-3. He specifically states that he did not observe a disc herniation at L5-S1 and C4-5. As to the cervical spine and lumbar spines, he states that the MRI indicates moderate diffuse age related lumbar degenerative changes and no evidence of focal disc herniation or any other abnormality causally related to the motor vehicle accident to May 29, 2010. With respect to the right knee, he states that the plaintiff only showed evidence of moderate age related meniscal intrasubstance degeneration and no meniscal tear or any abnormality related to the trauma of May 29, 2010. He found the MRI of the right shoulder to be normal with the exception of degenerative changes.

In her examination before trial, taken on September 29, 2011, the plaintiff, age 64, testified that she was employed as a housekeeper but hasn't worked since 2006. She stated that she was a rear seat passenger in the vehicle driven by Kim T. Hyun who was a paid driver taking her to Virginia. They stopped at a Dunkin Donuts on Union Street, Kim parked the vehicle next to the curb, got out and the plaintiff remained in the vehicle. While she was waiting for the driver to return, her vehicle was struck in the front end by the rear portion of a vehicle operated by defendant Jamal Ahmed who was attempting to back into a parking space in front of plaintiff's parked vehicle. The plaintiff did not go to the hospital following the accident, but rather, continued her trip to Virginia.

Because of pain in her lower back, right arm and right knee she began receiving physical therapy with Dr. Kim at Park Chiropractic, a facility she was referred to by her attorney. She also saw Dr. Sun who recommended that she undergo arthroscopic surgery of the right knee. The surgery was performed at Flushing Hospital on August 20, 2010. She testified that on September 22, 2010 she was a pedestrian crossing the street in Flushing when she was hit by a motor vehicle. Sh was taken to New York Queens Hospital and remained for four days. She sustained injuries to her face and jaw as well as a sustaining a fractured left arm which required an open reduction with pins. She continued treating with Dr. Kim after the second accident.

Defendant's counsel, Matthew E. French, Esq., contends that the affirmed medical reports of Drs. Katz and Mendelsohn are sufficient to establish, prima facie, that the defendant has not sustained a permanent loss of a body organ, member, function or system; that she 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 the plaintiff did not sustain 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, Jennifer Church, Esq., submits an affidavit from the plaintiff, dated May 7, 2012; affirmed medical reports from Dr. Chang and Dr. Sun as well as an affirmed MRI report from radiologist, Dr. Ayob Khodadadi.

In her affidavit, Ms. Alderman states that as a result of the accident she was jerked around the vehicle and her right knee hit the door. She states that she sought medical treatment at Liberty Physical Medicine and Rehabilitation and continued going three or four times a week for 3 - 4 months following the accident. She underwent arthroscopic surgery of the right knee performed by Dr. Sun on August 20, 2010. She states that she stopped receiving physical therapy because her no-fault treatments were terminated and she could not afford to pay for the treatment herself. She states that she still suffers from pain in her neck, back, right knee and right shoulder as a result of the injuries sustained in the accident of May 2010. She states that her subsequent accident of September 2010 exacerbated her neck and back injury.

Dr. Khodadadi, a radiologist, reviewed the MRI of the plaintiff's right knee, right shoulder, cervical spine, and lumbar spine, and observed evidence of a tear of the supraspinatus tendon of the right shoulder, an oblique tear of the meniscus of the right knee, a partial tear of the ACL of the right knee, herniated discs at C4-5 and L5-S1. He states that all of the injuries are all causally related to the accident of May 29, 2010 and are not due to degeneration.

The plaintiff also submits the affirmed medical report of orthopedic surgeon, Dr. Yan Sun, who states that he performed arthroscopic surgery on the plaintiff's right knee in August 2010 and repaired a tear in the medial meniscus which he states was

causally related to the accident of May 29, 2010.

Dr. Chang, a physician who has an office at the Liberty Physical Medicine & Rehabilitation P.C. in Jackson Heights, N.Y., first examined the plaintiff on June 10, 2010 with respect to her accident of May 29, 2010. At that time upon performing objective range of motion testing he found that the plaintiff had significant loss of range of motion of the cervical spine, lumbar spine, right shoulder, and right knee. He states that he was aware of plaintiff's subsequent accident and states that she did not injure her right knee and right shoulder in the subsequent accident. He states that on her reexamination of April 24, 2012, he conducted objective and comparative range of motion testing and found that the plaintiff displayed substantial loss of range of motion of the cervical spine, lumbar spine, right shoulder, and right knee. He states that she stopped treating because her no-fault benefits were terminated and she could not afford to pay out-of-pocket. He states that her current injuries to the right knee, right shoulder, and cervical and lumbar spines are permanent and significant and are causally related to the accident of May, 2010.

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]).

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 defendant, including the affirmed medical reports of Drs. Katz and Mendelsohn were

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 reports of Drs. Sun, Chang, and Khodadadi, attesting to the fact that the plaintiff sustained bulging discs in the cervical and lumbar spine, a meniscal tear of the right knee and a torn supraspinatus tendon of the right shoulder as a result of the accident and finding that the plaintiff had significant limitations in range of motion of her right knee, cervical spine, lumbar spine and right shoulder both 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 Perl v. Meher, 18 NY3d 208 [2011]; David v Caceres, 2012 NY Slip Op 5132 [2d Dept. 2012]; Martin v Portexit Corp., 2012 NY Slip Op 5088 [1st Dept. 2012]; Ortiz v Zorbas, 62 AD3d 770 [2d Dept. 2009]; Azor v Torado, 59 ADd 367 [2d Dept. 2009]). 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, 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, the plaintiff adequately explained the gap in treatment by submitting her own affidavit stating that no-fault had stopped her benefits and the plaintiff could not afford to pay for her treatments out-of-pocket (see Abdelaziz v Fazel, 78 AD3d 1086 [2d Dept. 2010]; Tai Ho Kang v Young Sun Cho, 74 AD3d 1328 [2d Dept. 2010]; Domanas v Delgado Travel Agency, Inc., 56 AD3d 717 [2d Dept. 2008]; Black v Robinson, 305 AD2d 438 [2d Dept. 2003]).

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

ORDERED, that the motion by defendants/third-party plaintiffs JAMAL AHMED AND KOHINOOR AKTHER, and cross-motion of third-party defendants, KIM T. HYUN AND CHONG SUKI, for an order pursuant to CPLR 3212 granting summary judgment and dismissing the plaintiff's complaint are denied.

Dated: July 16, 2012
Long Island City, N.Y.

ROBERT J. MCDONALD, J.S.C.