

Ma v Elrac, Inc.

2013 NY Slip Op 30057(U)

January 14, 2013

Sup Ct, Queens County

Docket Number: 8694/2011

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

GUOMING MA and SIQIAO ZHAO, Index No.: 8694/2011
Plaintiffs, Motion Date: 01/10/13
- against - Motion No.: 3

ELRAC, INC., EAN TRUST, KEVIN DROSSEL, Motion Seq.: 1
TARDO TAXI, INC., FASE CORP. and SUNTO
CHOWDHURY,
Defendants.

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The following papers numbered 1 to 15 were read on this motion by
defendants TARDO TAXI, INC., FASE CORP. and SUNTO CHOWDHURY, and
cross-motion of defendant, KEVIN DROSSEL, for an order pursuant
to CPLR 3212 granting the defendant 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 - 7
Cross-motion-Affidavits-Exhibits.....8 - 11
Affirmation in Opposition to Motion and Cross-Motion.12 - 16
Reply Affirmations(2).....17 - 21

This is a personal injury action in which plaintiffs,
seek to recover damages for personal injuries they each allegedly
sustained on August 24, 2010, as a result of a motor vehicle
accident that occurred at 126th Street and 36th Avenue, Queens
County, New York. At the time of the accident both plaintiffs
were rear seat passengers in a taxi cab operated by Sunto
Chowdhury which collided with a rental vehicle operated by Kevin
Drossel.

Defendants now move for an order pursuant to CPLR 3212
dismissing the complaint of plaintiff SIQIAO ZHAO on the ground

that the injuries claimed by said plaintiff fail to satisfy the serious injury threshold requirement of Section 5102(d) of the Insurance Law. In support of the motion, defendants TARDO TAXI, INC., FASE CORP. and SUNTO CHOWDHURY submit an affirmation from counsel, Cynthia Hung, Esq; a copy of the pleadings; plaintiff's verified bill of particulars; a copy of the transcript of plaintiff's examination before trial; a copy of the medical report of neurologist, Dr. Maria Audrie De Jesus and the affirmed report of radiologist, A. Robert Tantleff.

Defendant, KEVIN DROSSEL, cross-moves for the same relief. Counsel submits a stipulation of discontinuance against defendants ELRAC INC and EAN TRUST dated June 18, 2012. Counsel for defendant Drossel states that for the sake of judicial economy he incorporates and adopts all statements of fact and law set forth in the main motion filed by co-defendants for summary judgment dismissing plaintiff Zhao's complaint for failure to meet the serious injury threshold requirement mandated by Insurance Law § 5102(d). In addition, Drossel's counsel, Matthew R. Bruzzese, Esq. submits an additional IME conducted on plaintiff Zhao by orthopedist, Dr. Robert L. Michaels on January 5, 2012.

In her verified bill of particulars, plaintiff Zhao, age 21, states that as a result of the accident she sustained a hematoma of the right side of the forehead, a concussion, post-concussion syndrome, post-traumatic stress disorder, disc herniation at L4-L5 and disc bulges at L3-L4 and L5-S1. Ms. Zhao contends that she sustained a serious injury as defined in Insurance Law §5102(d).

The plaintiff was examined on February 6, 2012 by neurologist Dr. Maria Audrie De Jesus, a physician retained by the defendants. The plaintiff reported to Dr DeJesus that she was a rear seat passenger in a taxi cab when the accident occurred. She stated that she was transported from the scene in an ambulance to New York Hospital where she stayed overnight and was treated for forehead and facial abrasions. She presented with on and off neck pain and occasional localized lower back pain.

Dr. De Jesus performed quantified and comparative range of motion tests. On examination she found no limitations of range of motion of the plaintiff's cervical spine and lumbar spine. Dr. De Jesus states that based upon her examination of the plaintiff, her impression was that plaintiff sustained post-concussion syndrome which was resolved, and injury to the cervical and lumbar spines which had also resolved. She states that "there is no evidence of neurological permanency or disability. The plaintiff may perform all normal activities of daily living with no restrictions. She is able to work without boundaries."

Dr. Tantleff, a radiologist retained by the defendants, examined the MRI studies of the plaintiff's cervical spine and lumbar spine. He stated that MRIs were both normal and unremarkable without evidence of any definable or significant disc bulge, protrusion or herniation. He stated that there was no evidence of acute or recent injury or post-traumatic abnormality in either the cervical or lumbar spine.

Ms. Zhao was also attended an IME by orthopedist Dr. Robert L. Michaels on January 5, 2012 at the request of the defendants. At that time she told Dr. Michaels that she had pain in her neck and back. Dr. Michaels performed quantified and comparative range of motion tests. On examination he found no limitations of range of motion of the plaintiff's cervical spine and thoracolumbar spine. He stated that there were no allegations of knee or leg injury. He diagnosed Ms. Zhao with cervical and thoracolumbar sprain, both resolved. He concludes that based upon his examination "the plaintiff exhibits no objective evidence of an orthopedic disability. There is no evidence of permanency. Prognosis is good."

In her examination before trial, taken on December 7, 2011, the plaintiff, who was age 19 at the time of the accident, testified that at the time of the accident she and her husband were restrained rear seat passengers in a taxicab which was taking them home from LaGuardia Airport. According to her testimony the taxi cab struck the rear of the vehicle in front of it which had been stopped waiting to make a left turn. When the impact occurred she struck her knees, leg, lower legs, face and head on the plastic partition in the cab. She was removed from the scene in an ambulance and transported to New York Queens Hospital where she observed that her knees and lower leg were bruised and her face was bleeding. She complained at that time of pain to her head, neck, knees and legs. One week after the accident she began a course of physical therapy with Dr. Jingling Tang. She continued physical therapy for approximately six months at a rate of two or three times per week. She was also referred for MRIs of her back and lower neck. She testified that she was told that she had a herniated disc in her neck and back. She did not have any other medical treatment for her injuries other than the physical therapy from Dr. Tang. She discontinued treatment when her no-fault benefits were terminated. She stated that there is no activity that she cannot do any longer as a result of the accident although she does continue to have neck pain on a daily basis. She stated that for the three months immediately following the accident she was able to perform her routine daily activities and she was not confined to her bed or home.

Defendants' counsel contends that the affirmed medical reports of Drs. Michaels, Tantleff and De Jesus as well as the EBT testimony of the plaintiff, stating that her activities were not curtailed immediately following the accident, are sufficient to establish, prima facie, that the plaintiff 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, who was not confined to bed or home after the accident, 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, Richard H. Rosenberg, Esq., submits his own affirmation as well as affirmed initial and follow-up examination reports from Dr. Tang and an affirmed MRI report from radiologist, Dr. Hu. The records submitted from New York Hospital Queens are unaffirmed and uncertified and therefore not in admissible form.

Dr. Tang, a physiatrist, submits a report dated August 31, 2010 based upon his initial evaluation of Ms. Zhao which took place 7 days after the subject accident. He states that the plaintiff exhibited restricted range of motion of the cervical spine and lumbosacral spine as well as the knees. The thoracic spine range of motion was normal. He concludes that plaintiff's physical injuries including strain/sprain of the cervical, dorsal and lumbosacral spines, post-concussion syndrome were causally related to the subject accident. He recommended that she start physical therapy at that time and referred her for MRIs.

The report of board certified radiologist, Dr. Mary Hu, dated September 8, 2012 States that she reviewed MRI imaging of Ms. Zhao's lumbar spine and cervical spine. The lumbar spine MRI revealed a disc herniation at L4-5, and disc bulges at L3-4 and L5-S1. The cervical MRI revealed a small central disc herniation at C4-5 and disc bulges at C5-6, and C-7. She states that in her opinion the findings are consistent with the trauma of an automobile accident. She states that there is no disc degeneration observed on the lumbar spine and the disc degeneration on the cervical spine is not related to the accident and is clinically insignificant.

In his physiatric follow-up report, Dr. Tang states that he re-examined the plaintiff on October 5, 2012. He states that at that time the plaintiff still had complaints of sharp neck and

shoulder pain. He stated that after six months of physical therapy she terminated her treatments due to limited insurance coverage. His objective and comparative range of motion testing revealed that the plaintiff still had significant range of motion limitations of the cervical spine and lumbosacral spine. Dr. Tang concludes that based upon the fact that the traumatic event occurred two years ago on August 24, 2010, plaintiff's current limitations and complaints are causally related to the subject accident and chronic and permanent in nature. He states that the plaintiff sustained significant limitations in the use of the cervical and lumbosacral spine.

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 defendants, including the affirmed medical reports of Drs. Tantleff, De Jesus and Michaels as well as the plaintiff's examination before trial in which she testified that her routine daily activities were not affected by her injuries in the three months following the accident 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 Dr.

Tang and Dr. Hu attesting to the fact that the plaintiff sustained bulging discs in the cervical and thoracolumbar spine as a result of the accident and finding that the plaintiff had significant limitations in range of motion of his cervical spine and thoracolumbar spine, 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, Dr. Tang and the plaintiff adequately explained the gap in plaintiff's treatment stating that no-fault had stopped the plaintiff's benefits and the plaintiff had limited ability to pay for treatment (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 Tardo Taxi, Inc., Fase Corp. and Sunto Chowdhury and the cross-motion by defendant Kevin Drossel for an order granting summary judgment dismissing the complaint of plaintiff Siqiao Zhao is denied.

Dated: January 14, 2013
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.