

Lee v Kent

2013 NY Slip Op 30197(U)

January 30, 2013

Sup Ct, Queens County

Docket Number: 20814/2011

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

SOONAE LEE, Index No.: 20814/2011
Plaintiff, Motion Date: 01/09/13
- against - Motion No.: 1
Motion Seq.: 2

JENNIFER KENT,
Defendant.

- - - - - x

The following papers numbered 1 to 16 were read on this motion by defendant, JENNIFER KENT, for an order pursuant to CPLR 3212, granting defendant summary judgment and dismissing the plaintiff's complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law §§ 5102 and 5104:

	<u>Papers</u> <u>Numbered</u>
Notice of Motion-Affidavits-Exhibits.....	1 - 7
Affirmation in Opposition-Affidavits-Exhibits.....	8 - 13
Reply Affirmation.....	14 - 16

This is a personal injury action in which plaintiff, Soonae Lee, seeks to recover damages for injuries she allegedly sustained as a result of a motor vehicle accident that occurred on April 9, 2010 on South Oyster Bay Road approximately ten to twenty feet south of the eastbound exit ramp of the Northern State Parkway, Nassau County, New York. The plaintiff alleges that she was injured when her vehicle was struck in the rear by the vehicle owned and operated by defendant Jennifer L. Kent.

The plaintiff commenced this action by filing a summons and complaint on March 9, 2011. Issue was joined by service of defendant's verified answer dated December 15, 2010. Defendant

now moves 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, Andrea E. Ferrucci, Esq., a copy of the pleadings; plaintiff's verified bill of particulars; the affirmed medical report of board certified neurologist, Dr. Howard B. Reiser; the affirmed orthopedic medical report of Dr. Edward A. Toriello; the affirmed radiological report of Dr. Alan B. Greenfield; and a copy of the transcript of the examination before trial of plaintiff, Soonae Lee.

In her verified bill of particulars, plaintiff states that as a result of the accident she sustained, inter alia, a torn rotator cuff of the right shoulder, focal tear involving right supraspinatus tendon, swelling of the AC joint of the right shoulder, herniated discs at L4-L5, L5-S1 and C6-C7, and ventral bulging at C4-C5 and C6-C7. Plaintiff states that she was confined to her bed for several days following the incident and to her home for some weeks thereafter.

Plaintiff contends that she sustained a serious injury as defined in Insurance Law § 5102(d) in that she sustained a permanent loss of use of a body organ, member function or system; 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.

Dr. Edward A. Toriello, a board certified orthopedist retained by the defendant, examined Ms. Lee, age 59, on May 10, 2012. She told Dr. Toriello that as a result of the accident of April 9, 2010, she injured her neck, lower back, left knee and right shoulder. She denied prior injuries to these areas of her body. Dr. Toriello stated that the plaintiff continued to complain of low back and right shoulder pain. Dr. Toriello performed quantified and comparative range of motion tests. He found that the plaintiff had no limitations of range of motion in the cervical spine, right shoulder, left shoulder, right elbow, left elbow, right wrist and right hand, left wrist and left hand, lumbosacral spine, right knee and left knee. His impression was that the plaintiff revealed evidence of a resolved cervical

hyperextension injury, resolved right shoulder strain and resolved low back strain. He states that the plaintiff reveals no evidence of disability from any orthopedic injury sustained in the accident. He states that the plaintiff is presently able to perform the duties of her occupation.

Dr. Howard B. Reiser, a board certified neurologist, retained by the defendant, examined the plaintiff on July 27, 2012. Plaintiff told Dr. Reiser that she was driving a van taking co-workers to her business in a nail salon when her vehicle sustained a rear impact. At the time of the examination she reported continued pain in both knees, lower back, right shoulder and right hand. She told Dr. Reiser that she did not miss any time off from work as a result of the accident. He did not take any range of motion measurements but he states that based upon his examination his impression was that Ms Lee presented with ongoing subjective symptoms including intermittent pain in her knees, sharp pain in the center of her lower back, diffuse muscular pain and right shoulder pain as well as discomfort and numbness in the right hand. However, he states that his neurological examination revealed no objective deficits. He states that there are no ongoing symptoms that would correlate with findings of cervical and lumbar disc herniations. Dr. Reiser concludes, based upon the plaintiff's history and his physical examination and review of submitted records that there was no evidence of any objective ongoing neurological disorder causally related to the incident of April 9, 2010.

Dr. Greenfield reviewed the MRI of the plaintiff's right shoulder, cervical spine and lumbar spine. As to the right shoulder he states that the rotator cuff tendons show no signs of partial or complete tearing. He stated that although there are degenerative changes there are no findings on the study which can be attributed to an accident occurring on April 9, 2010. With respect to the lumbar spine and cervical spine images, he states that there are no disc herniations and no findings which can be attributed to the accident in question.

Plaintiff, Soonae Lee, the owner and manager of a nail salon in Plainview, New York, testified at an examination before trial held on March 22, 2012. She stated that on the date of the accident she was operating a Ford Windstar Van when her vehicle was hit in the rear on South Oyster Bay Road. She stated that as a result of the impact her chest and stomach made contact with the steering wheel and both knees struck the dashboard. Her head hit against the headrest. Following the accident, which occurred at approximately 9:00 a.m. she declined treatment by the EMTs and drove the van to her store. That evening she had pain in her

knees, lower back and right shoulder so she sought treatment at Samsung Pain Management on Northern Boulevard in Flushing. She began a course of physical therapy at Samsung for pain to her neck, shoulder and lower back. She stated that for the first six months she attended physical therapy three times a week. Subsequently, she went twice a month and she stated that she still goes to therapy once a month. She stated that she was referred for MRI imaging for both shoulders, cervical and lumbar spine. She testified that she was told by an orthopedist, Dr. Chang, that she needed surgery for her right shoulder, however, she decline the surgery because her symptoms were improving over time. She stated that prior to the accident she worked six days a week but as a result of the accident she now works five days a week. She also stated that she worked the day after the accident and did not miss any other days from work. She stated that even with pain she went to work because she had to operate her store. She states hat she currently still experiences pain in her right shoulder, neck and lower back.

The plaintiff testified that she was involved in a prior motor vehicle accident on February 25, 2005 where she injured her right leg, lower back and neck. At that time she was a pedestrian hit by a vehicle. She was also involved in a prior accident on October 28, 2006 where her vehicle was struck in the rear while she was stopped at a red traffic signal. She injured her head and neck in that accident. She testified that she was involved in a third prior accident on September 27, 2007. She stated that prior to this accident she never injured her shoulders or knees.

Defendant's counsel contends that the medical reports of Drs. Greenfield, Toriello and Reiser, as well as 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, Douglas Kaplan, Esq., submits his own affirmation as well as an affirmation from Dr. Benjamin Chang, and an affirmation from radiologist Dr. Ayoob Khodadadi.

Dr. Benjamin Chang states in his affirmed report, dated January 7, 2013, that he first evaluated the plaintiff with respect to the accident in question on April 12, 2010, three days post-accident and has treated her up to the present time. At the time of the first evaluation, Ms. Lee presented with pain in the neck, back, right shoulder and right wrist. He conducted objective and comparative range of motion testing at the initial examination and found that the plaintiff exhibited significant limitations of range of motion of the cervical spine, lumbar spine, right and left shoulders and right and left wrists. His initial diagnoses was posttraumatic neck strain/sprain, back sprain/strain and contusion to the right wrist and shoulder. Dr. Chang states that he referred the plaintiff for MRI imaging and for physical therapy and began an extended course of treatment. He reviewed the MRI findings which included rotator cuff tear of the right shoulder and disc herniations at L4-5 and L5-S1.

Dr. Chang's most recent examination of the plaintiff took place on November 19, 2012. She stated that she still had continued shoulder pain and although the range of motion limitations were improved in the plaintiff's neck and back she still exhibited a 22% loss of range of motion of the right shoulder. He concludes that the plaintiff suffered a torn rotator cuff as a result of the April 9, 2010 accident as well as posttraumatic cervical sprain with disc herniation, bulges and spasm, post traumatic lumbar sprain with disc herniation. He states that these conditions were not pre-existing. He concludes that as these conditions have persisted for well over two years following the accident, the conditions are permanent in nature. He concludes that the plaintiff has sustained as a result of the accident of April 9, 2010, a permanent consequential limitation of use of her right shoulder and right wrist and her neck, cervical spine, lower back and lumbar spine and significant limitation of use of body functions, specifically, the normal use and movement of her right shoulder, right wrist, cervical and lumbar spine.

Dr. Ayoub Khodadadi, a radiologist, submits an affirmation stating that he reviewed the MRI films of the plaintiff's lumbar spine, right shoulder and cervical spine and found that the plaintiff sustained inter alia, a focal tear involving the supraspinatus tendon of the right shoulder, herniated disc at C6-C7 bulging discs at C4-5 and C6-7 and herniated discs at L4-5 and L5-S1 levels.

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 competent proof submitted by the defendant, including the affirmed medical reports of Drs. Greenfield, Toriello and Reiser, as well as the plaintiff's deposition testimony in which she stated that she returned to work the day following the accident, are sufficient to meet defendants' 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]; Carballo v Pacheco, 85 AD3d 703 [2d Dept. 2011]; Ranford v Tim's Tree & Lawn Serv., Inc., 71 AD3d 973 [2d Dept. 2010]).

However, this Court finds that the plaintiff raised triable issues of fact by submitting the affirmed medical reports of Drs. Chang and Khodadadi attesting to the fact that the plaintiff sustained bulging and herniated discs in the cervical and lumbar spine as well as a torn rotator cuff of the right shoulder as a result of the accident and finding that the plaintiff had significant limitations in range of motion of her cervical spine, lumbar spine, right shoulder and right wrist 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]).

Although the plaintiff testified that she was involved in several prior accidents in which she previously injured her neck and back she specifically stated that she never injured her right or left shoulder in any of the prior accidents and Dr. Chang stated that the injuries were not pre-existing. In addition, although the plaintiff showed improvement in range of motion measurements in her most recent examination, as stated above, she continued to have a 22% loss of range of motion of the right shoulder.

Lastly, based upon the affirmation of Dr. Chang and the plaintiff's deposition there was no gap in treatment as she stated that her treatments with Dr., Chang have continued up to the time of her examination before trial.

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

ORDERED, that the motion by Jennifer L. Kent for an order granting summary judgment dismissing the complaint of plaintiff Soonae Lee pursuant to Insurance Law §§ 5102 and 5104 is denied.

Dated: January 30, 2013
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.