

Qian v Shalam

2013 NY Slip Op 31395(U)

June 18, 2013

Sup Ct, Suffolk County

Docket Number: 37145/07

Judge: Paul J. Baisley

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SUPREME COURT - STATE OF NEW YORK
CALENDAR CONTROL PART - SUFFOLK COUNTY

COPY

PRESENT:

HON. PAUL J. BAISLEY, JR., J.S.C.

-----X
HUAYUAN QIAN and DONG L. CHEN,

Plaintiffs,

-against-

JOHN J. SHALAM, ZONGWEN ZOU and JAMAY
CONSTRUCTION, INC.,

Defendants.
-----X

INDEX NO.: 37145/07
CALENDAR NO.: 201202035MV
MOTION DATE: 4/25/13
MOTION SEQ. NO.: 002 MOT D

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Upon the following papers numbered 1 to 16 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-10; Notice of Cross Motion and supporting papers___; Answering Affidavits and supporting papers 11-14; 15-16; Replying Affidavits and supporting papers ___; Other___; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by defendant John J. Shalam (Shalam) for an order pursuant to CPLR Section 3212 granting summary judgment dismissing plaintiff's complaint and all cross claims against Shalam on the grounds that the evidence proves that defendant Shalam was not responsible for the injuries sustained by the plaintiff in the collision is granted. The complaint and all cross claims asserted against defendant John J. Shalam are hereby dismissed; and it is further

ORDERED that defendant Shalam's application seeking an order dismissing plaintiffs' complaint on the basis that plaintiff Huyuan Qian (Qian) did not sustain a serious injury as defined in Insurance Law Section 5102 (d) is denied; and it is further

ORDERED that the action is otherwise severed and continued against the remaining defendants Zongwen Zou and Jamay Construction, Inc.

Plaintiffs' negligence action seeks damages for personal injuries sustained in a four vehicle accident which occurred on December 4, 2004. Plaintiffs claim that Qian was a passenger in a mini-van driven by Dong L. Chen which was struck in the rear by a vehicle driven by defendant Shalam. The force of the impact propelled Chen's vehicle into the rear on the vehicle immediately stopped in front of the plaintiffs' vehicle. Plaintiffs claim that their vehicle was stopped in traffic when the chain reaction collision occurred.

Defendant Shalam claims that his vehicle was stopped behind the plaintiffs' vehicle when it was struck in the rear by a van driven by defendant Zongwen Zou. Defendant Shalam asserts that the force of that impact propelled his vehicle into the rear of plaintiffs' mini-van which was then also propelled into the rear of the preceding vehicle.

Defendant's motion seeks an order dismissing plaintiffs' complaint and all cross claims asserted against Shalam claiming that the undisputed evidence shows that defendant Zou's negligent failure to stop his vehicle before colliding with Shalam's vehicle was the sole proximate cause of the chain reaction collision. Defendant also claims that plaintiff Qian has not sustained a "serious injury" as defined by Insurance Law Section 5102(d). In support of the motion defendant submits an affirmation of counsel reciting relevant portions of the plaintiff Qian's and the defendant Zou's deposition testimony together with medical reports from an examining orthopedist and an examining neurologist. Defendant claims that the deposition testimony establishes that defendant Zou's van struck Shalam's vehicle from behind causing the chain reaction collision. Defendant asserts that no basis exists to find that Shalam was therefore responsible for the collision and the plaintiff Qian's resultant injuries. Defendant also claims that the medical evidence demonstrates as a matter of law the injuries sustained by Qian do not meet the threshold requirements of New York State Insurance Law definition of "serious injury". Defendant's neurologist claims the plaintiff suffers from no neurological deficits and can continue with her daily living activities without restriction. Defendant's orthopedist asserts that based upon his examination there is no objective orthopedic evidence of sequelae relative to the December 14, 2004 accident.

In opposition plaintiffs submit an attorney's affirmation together with an affidavit from Qian's treating chiropractor. Plaintiffs claim that substantial issues of fact must be resolved concerning how the accident occurred and whether defendant Shalam contributed to cause the chain reaction collision sufficient to require a plenary trial. Plaintiffs assert that the deposition testimony of defendant Zou raises factual questions concerning whether Shalam's vehicle struck plaintiffs' mini-van prior to being struck by Zou's van which cannot be determined by the submission of the parties deposition testimony. Plaintiffs also claim that Qian's injuries meet the threshold requirements of "serious injury" as defined by Insurance Law Section 5102 (d). Plaintiff's chiropractor asserts that Qian suffered injuries to the neck and lower back which are permanent and which were proximately caused by the December 4, 2004 accident.

The proponent of a summary judgment motion must make a prima facie showing of entitlement of judgment as a matter of law, tendering sufficient evidence to eliminate any material questions of fact from the case. The award of summary judgment is appropriate only when it is clear that no material and triable issues of fact have been presented (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY3d 395 (1957)). The movant bears the initial burden of proving entitlement to summary judgment (*Winegrad v. NYU Medical Center*, 64 NY2d 851 (1985)). Once such proof has been proffered, the burden shifts to the opposing party who, to defeat the motion, must offer evidence in admissible form, and must set forth facts sufficient to require a trial of any issue of fact (CPLR 3212(b); *Zuckerman v. City of New York*, 49 NY2d 557 (1980)). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v. Associated Fur Manufacturers*, 46 NY2d 1065 (1979)).

The only relevant, admissible evidence submitted by the parties to prove how the accident occurred was the deposition testimony provided by the plaintiff Qian and the defendant Zou. Although, in their opposition papers, the plaintiffs claim that defendant Zou provided testimony during his deposition which raises factual issues concerning whether Shalam's vehicle struck the plaintiffs' mini-van prior to the Zou/Shalam vehicle contact, a review of Zou's testimony reveals only that Zou testified that he "did not know" whether there was such contact. The uncontradicted testimony of the plaintiff Qian establish that the defendant Zou's negligent failure to stop his van together with defendant Zou's admission that he could not timely stop his van prior to striking defendant Shalam's vehicle was the sole proximate cause of the four car chain reaction collision.

During her deposition of May 12, 2010 Qian testified as follows:

Q. How many vehicles in total were involved in this accident?

A. Four.

Q. And when the accident occurred, was your vehicle moving or stopped?

A. Stopped.

Q. For how long were you stopped before the accident happened, approximately?

A. In a very short time, it was when the car in front of us stopped, then we came to a stop. I would say less than 30 seconds. (p. 22, l. 16 to p. 23, l. 3)

Q. How many vehicles, if any, were in front of you, that were involved in this accident, one or more than one?

A. One

Q. And then there were – were there two vehicles behind you?

A. Yes.

Q. The vehicle in front of you at the time of the accident, was that stopped or moving?

A. It was stopped.

Q. And why were you stopped?

A. Because the car in front of us came to a stop, so then that's why we have to stop also.

Q. And do you know why the car in front of you had come to a stop?

A. Because of the heavy traffic.

Q. How many impacts or contacts was your vehicle involved in?

A. Two times.

Q. And the first impact to your vehicle, where was that to?

A. The back.

Q. And how would you describe that impact?

A. I will say very heavy.

Q. Before the impact occurred to the rear of your vehicle, did you hear the sounds of any screeching tires, squealing wheels, honking horns, before the impact to the rear of your vehicle?

A. No, I only hear a bang sound.

Q. And was that bang sound, the sound of a car hitting your car or something else?

A. The sound of other cars, collision.

Q. Did you see the other collision take place before your car was struck?

A. No, because I was looking forward.

Q. And how much time passed from the time you heard a collision behind you, to the time that your vehicle was hit in the rear?

A. I will say in a flash of seconds, the two collisions happened almost at the same time.

Q. By the two collisions, do you mean two collisions to your vehicle or the collision behind you and then the collision to your rear?

A. The two collisions behind, the two collisions, one behind me and the one towards my car. (p. 23, l. 13 to p. 25, l.22)

Based upon this testimony, together with the defendant Zou's admission that he couldn't stop his van prior to colliding with the rear of defendant Shalam's vehicle, the record clearly shows that Zou's negligent failure to stop his vehicle provided the impetus for each of the two preceding stopped vehicles to push forward to strike the vehicle immediately in front of them. Under these circumstances the sole proximate cause of the collision was Zou's negligence and therefore defendant Shalam's motion seeking an order granting summary judgment dismissing the complaint and all cross claims against him must be granted.

With respect to defendant's motion to dismiss the complaint on the basis that plaintiff Qian did not suffer a "serious injury", Insurance Law Section 5102 (d) defines "serious injury" as "a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usage 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 order to recover under the "permanent loss of use" category, the plaintiff must demonstrate a total loss of use of a body organ, member, function or system (*Oberly v. Bangs Ambulance*, 96 NY2d 295, 727 NYS2d 378 (2001)). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member: or a "significant limitation of use of a body function or system" categories, either a specific percentage of the loss of range of motion must be ascribed, or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (*Toure v. Avis Rent a Car*

System, 98 NY2d 345, 746 NYS2d 865 (2000)). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*Licari v. Elliot*, 57 NY2d 230, 455 NYS2d 570 (1982)).

Plaintiffs have submitted sufficient relevant, admissible evidence to raise a triable issue of fact to show that plaintiff Qian sustained a “serious injury” proximately caused by the December 4, 2004 accident. Accordingly defendant’s application to dismiss plaintiffs’ complaint on the basis that Qian did not sustain a “serious injury” pursuant to Insurance Law 5102(d) is hereby denied.

Dated: June 18, 2013

PAUL J. BAISLEY, JR.

J.S.C.