

Hwang v Kobobel

2013 NY Slip Op 32504(U)

October 11, 2013

Supreme Court, Queens County

Docket Number: 24817/2011

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

JANET W. HWANG, Index No.: 24817/2011
Plaintiff, Motion Date: 09/03/13
- against - Motion No.: 81
Motion Seq.: 1
DWAYNE KOBABEL,

Defendant.

- - - - - x

The following papers numbered 1 to 14 were read on this motion by defendant, DWAYNE KOBABEL, for an order pursuant to CPLR 3212 granting defendant summary judgment and dismissing the plaintiff's complaint on the ground that the plaintiff, JANET W. HWANG, 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 - 5
Affirmation in Opposition-Affidavits-Exhibits.....6 - 11
Reply Affirmation.....12 - 14

This is a personal injury action in which plaintiff, JANET W. HWANG, seeks to recover damages for injuries she sustained as a result of a motor vehicle accident that occurred on September 12, 2010, at the intersection of Northern Boulevard and 207th Street, Queens County, New York. Plaintiff claims that her vehicle was struck in the intersection by the defendant's vehicle while defendant was making a left turn from Northern Boulevard onto 207th Street.

The plaintiff commenced this action by filing a summons and complaint on October 31, 2011. Issue was joined by service of the defendant's verified answer dated January 11, 2012. A note of

issue was filed by the plaintiff on January 23, 2013. The matter is presently on the calendar in the Trial Scheduling Part for November 19, 2013. 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, Tracy Morgan, Esq; a copy of the pleadings; a copy of plaintiff's verified bill of particulars; the affirmed medical report of orthopedist, Dr. Salvatore Corso; and a copy of the transcript of the plaintiff's examination before trial.

Plaintiff contends that as a result of the accident she sustained, *inter alia*, herniated discs at T7-T8 and L4-L5 as well as internal derangement of the right knee, derangement of the cervical spine and derangement of the lumbar spine.

Plaintiff asserts 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. Salvatore Corso, an orthopedist retained by the defendants, examined the plaintiff on November 8, 2012. Plaintiff reported to him that she was a restrained driver in a vehicle that was involved in a motor vehicle accident two years earlier on September 12, 2010. She reported that she sustained injuries to her neck, right shoulder, right knee and lower back. She presented on the date of the examination with complaints of neck, right shoulder, right knee and lower back pain. Dr. Corso tested the plaintiff's range of motion using a goniometer and found that the plaintiff had no limitations of range of motion of the cervical spine, right shoulder, thoracolumbar spine or right knee. He diagnosed the plaintiff as status post cervical and lumbar sprain, resolved; status post right shoulder sprain, resolved; and status post right knee sprain, resolved. Dr. Corso states that based upon his examination "there is no evidence of orthopedic disability."

In her examination before trial taken on August 24, 2012, the plaintiff, Janet W. Hwang, age 26, testified that she presently works as a bank examiner at the Federal Reserve Bank of New York. At the time of the accident she was employed at Sumito Trust and Banking as a compliance analyst. She stated that she was involved in a motor vehicle accident on September 12, 2010 while driving a 2005 Avalon owned by her brother. At approximately 4:00 p.m. she was proceeding westbound on Northern Boulevard with her friend heading to a restaurant. As she approached 207th Street, traveling at a rate of 30 - 40 miles per hour, she felt a hard impact to the front of her vehicle. The defendant, who was proceeding eastbound on Northern Boulevard was attempting to make a left turn onto 207th Street and struck her vehicle in the intersection with the front of his car. She immediately felt pain to her back and right knee. The following day she went to Dr. Sung J. Pahng for medical treatment due to pain in her back, right shoulder and right shoulder. Dr. Pahng reviewed her MRIs and told her that she had herniations in her thoracic and lumbar spines and had issues with her cervical spine and right knee. She started a course of physical therapy with Dr. Pahng for her neck, back, and right knee which lasted until November or December of 2011. She stopped treating because she was only getting temporary relief and the therapy was no longer helping her. She testified that following the accident she missed one day from work and then between three months and six months after the accident she missed an additional five to ten days due to injuries she sustained in the accident. She continues to have pain on a daily basis her lower back and occasionally to her right shoulder.

Defendant's counsel contends that the medical report of Dr. Corso, together with the plaintiff's testimony at her examination before trial that she only missed one day of work following the accident, are sufficient to demonstrate 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 Leo Rosales, Esq., submits his own affirmation as well as the affidavit of plaintiff, Janet W. Hwang, the affirmed MRI reports of radiologist, Dr. Richard Rizzuti; the affirmed medical reports of Dr S.J. Pahng; and Dr. Pahng's the treatment records concerning Ms. Hwang.

In her affidavit, dated July 30, 2013, plaintiff states that as a result of the impact her body jerked forward and back and her right knee hit the dashboard and her neck and back hit the seat. The day following the accident she began physical therapy treatments with Dr. Pahng which lasted for fifteen months. She states that despite the physical therapy she still has pain in her neck and back which interferes with her activities of daily living. She states that once her no-fault benefits were terminated she stopped treating as she could not afford to pay for treatments out of pocket and could not afford the co-payments charged by her private insurance company.

Dr. Richard Rizzuti, a radiologist, reviewed the MRI films of plaintiff's lumbar spine and thoracic spine taken on October 13, 2010 and October 28, 2010, respectively. The MRIs of the thoracic spine and lumbosacral spine indicated posterior disc herniations at T7-8 and L4-5 both of which were impinging on the spinal cord.

In his affirmations, Dr. Pahng states that he first examined the plaintiff in connection with the injuries sustained in the accident on the day following the accident. On that day he found that he plaintiff had significant loss of range of motion of the cervical and lumbar spines. He states that she stopped treating with him because her no-fault insurance was terminated and she could not afford to pay privately. He recently re-examined the plaintiff on June 28, 2013, conducted range of motion tests and found that he plaintiff still had significant loss of range of motion of the cervical, thoracic and lumbar spines which are permanent in nature and all causally related to her motor vehicle accident of September 12, 2010. He states that the plaintiff has a permanent partial disability of which improvement is not expected beyond her present plateaued state.

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 report of Dr. Corso and the plaintiff's testimony at her examination before trial stating that she only missed one day from work immediately following the accident are 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. Pahng and Rizzuti attesting to the fact that the plaintiff sustained herniated discs in the lumbar and thoracic spine as a result of the accident and finding that the plaintiff had significant limitations in range of motion of her thoracic and lumbar spines 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, 96 AD3d 990 [2d Dept. 2012]; Martin v Portexit Corp., 98 AD3d 63 [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. Phang 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 Dwayne Kobobel for an order granting summary judgment dismissing the complaint of plaintiff Janet W. Hwang is denied.

Dated: October 11, 2013
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.