

Kim v Oucama

2013 NY Slip Op 32793(U)

October 31, 2013

Sup Ct, Queens County

Docket Number: 19883/11

Judge: Bernice D. Siegal

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Short Form Order

NEW YORK STATE SUPREME COURT – QUEENS COUNTY
Present: HONORABLE BERNICE D. SIEGAL IAS TERM, PART 19
Justice

-----X
Jong Hwa Kim and Nam S Lee,

Plaintiffs,

-against-

Essaad Oucama and Tif Bid Operating,

Defendants.
-----X

Index No.: 19883/11
Motion Date: 9/3/13
Motion Cal. No.: 93
Motion Seq. No.: 1

The following papers numbered 1 to 14 read on this motion for an order pursuant to CPLR §3212 granting summary judgment and dismissing the complaint of plaintiffs in as much as Plaintiffs’ alleged injuries cannot meet the serious injury threshold requirement.

	PAPERS NUMBERED
Notice of Motion - Affidavits-Exhibits- Memo of Law.....	1 - 4
Affirmation in Opposition.....	5 - 9
Reply Affirmation.....	10 - 12
Supplemental Affirmation in Opposition.....	13 - 14

Upon the foregoing papers, it is hereby ordered that the motion is resolved as follows:

Facts

Defendants, Essaad Oucama and Tif Bid Operating (collectively referred to as “defendants”) move for summary judgment pursuant to CPLR §3212 on the grounds that Jong

Hwa Kim (“Kim”) and Nam Seok Lee (“Lee”) did not sustain serious injury under Insurance Law §5102(d). Plaintiffs were involved in a motor vehicle accident with defendants’ vehicle on April 16, 2010. The Bill of Particulars alleges that as a result of the accident, plaintiff Kim suffered injuries to the right shoulder, cervical and lumbar spine, and plaintiff Lee suffered injuries to the right knee, cervical and lumbar spine.

Analysis

Defendants’ motion for summary judgment pursuant to CPLR §3212 dismissing plaintiff’s cause of action is denied as more fully set forth below.

Threshold

Defendants move for summary judgment in its favor on the ground that plaintiffs did not sustain a “serious injury” within the meaning of the Insurance Law §5102(d). The statutory provision states, in pertinent part that a “serious injury” is defined as:

A personal injury which results in...significant disfigurement;...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 party from performing substantially all of the material acts which constitute such a person’s customary daily activities for not less than ninety days during one hundred eighty days immediately following the occurrence of the injury of impairment.

Insurance Law §5102(d).

Jong Hwa Kim

Defendants contend that Kim did not sustain a serious injury based on the medical reports of Dr. Yong S. Tak and Dr. Ayoobi Khodadadi. The issue of whether Kim sustained a serious injury

is a matter of law to be determined in the first instance by this court. (*Lucari v. Elliot*, 57 N.Y.2d 230 [1982]; *Porcano v. Lehman*, 225 A.D.2d 430, 431 [2nd Dept. 1998]; *Brown v. Stark*, 205 A.D.2d 725 [2nd Dept. 1994].) The burden is on the defendant to make a prima facie showing that plaintiff's injuries are not serious. (*Toure v. Avis Rent A Car Sys.*, 98 N.Y.2d 345 [Ct App. 1982]; *Sealy v. Riteway-1, Inc.*, 54 A.D.3d 1018 [2nd Dept 2008]; *Meyers v. Bobower Yeshiva Bnei Zion*, 20 A.D.3d 456 [2nd Dept. 2005].) A defendant can meet his or her prima facie burden by submitting the affidavits or affirmations of medical experts, who, through objective medical testing, conclude that plaintiff's injuries are not serious within the meaning of Insurance Law §5102(d). (See *Margarin v. Kropf*, 24 A.D.3d 733 [2nd Dept. 2005]; see also *Gaddy v. Eyler*, 79 N.Y.2d 955, 956 [1992]; *Morris v. Edmond*, 48 A.D.3d 432 [2nd Dept. 2008].)

Defendants met their initial burden of establishing that Kim did not sustain a serious injury through their submission of the affirmations of Dr. David A. Fisher, a Radiologist and Dr. Edward M. Decter, an Orthopedist. (*Jilani v. Palmer*, 83 A.D.3d 786, 787 [2nd Dept. 2011]; *Khaimov v. Armanious*, 85 A.D.3d 978 [2nd Dept. 2001].) Dr. Fisher conducted a radiological review of Kim's right shoulder, lumbar and cervical spine. Dr. Fisher concluded that there was no "radiographic evidence of traumatic or causally related injury" to the right shoulder, lumbar and cervical spine. Dr. Decter measured the range of motion of Kim's right shoulder, lumbar and cervical spine. The ranges of motion were measured using a goniometer and the specific measurements, when compared to the norms, were all within the normal ranges. (*Staff v. Yshua*, 59 A.D.3d 614 [2nd Dept. 2009].) Dr. Decter concluded that Kim sustained "no permanent injuries." Therefore, Dr. Fisher and Dr. Decter's objective tests are sufficient to establish a prima facie case that there was no "significant limitation of use of a body function or system" or

“permanent consequential limitation” under the meaning of Insurance Law §5102(d). (*Kasim v. Defretias*, 28 A.D.3d 611, 612 [2nd Dept. 2006]; *Staff v. Yshua*, 59 A.D.3d 614 [2nd Dept. 2009]; *Kerzhner v. N.Y. Ubu Taxi Corp.*, 17 A.D.3d 410 [2nd Dept. 2005].)

In addition, the defendants provided evidence establishing, prima facie, “that during the 180-day period immediately following the subject accident, [s]he did not have an injury or impairment which, for more than 90 days, prevented [her] from performing substantially all of the acts that constituted [her] usual and customary daily activities.” (*Frederique v. Krapf*, 86 A.D.3d 533 [2nd Dept. 2011].) Specifically, Kim first testified at her Examination Before Trial that she was employed part-time at the time of the accident and returned to work one week following the accident. Later, she testified that she was not confined to bed for any period of time following the accident and was confined to her home for one week.

Through the submission of the affirmed medical reports of defendants’ experts, defendants established that Kim did not sustain a serious injury within the meaning of Insurance Law §5102(d). (*See Pommells v. Perez*, 4 N.Y.3d 566 [2005].) Defendants’ evidence being sufficient to make a prima facie showing that Kim did not sustain a serious injury, the burden of proof shifts to the plaintiff. (*Gladdy v. Eycler*, 79 N.Y.2d 955, 957 [1992]; *Attivissimo v. Kugler*, 226 A.D.2d 658 [2nd Dept. 1996].)

In opposition, plaintiff met her burden to defeat defendants’ motion for summary judgment on the issue of serious injury. Dr. Yong S. Tak, a Physician and Dr. Ayoobi Khodadadi, and Dr. Paul Bonheim, Radiologists, submitted affirmations stating and identifying the objective medical tests used to determine that Kim suffered a “serious injury” and significant limitations of motion. Dr. Tak conducted range of motion examinations on Kim’s right shoulder,

cervical and lumbar spine contemporaneous to the accident and once again on June 7, 2013 that exceeded the minimum degree requirements. Dr. Tak concluded that Kim had suffered and continues to suffer from serious and permanent injuries as a result of this accident. Dr. Khodadadi performed an MRI of Kim's right shoulder, cervical and lumbar spines and discovered herniated or bulging discs. Accordingly, plaintiff submitted evidence raising a triable issue of fact as to whether the alleged injuries to her right shoulder, lumbar and cervical spine were a serious injury under the permanent consequential limitation of use or significant limitation of use categories of Insurance Law §5102(d). (*See Pearl v. Meher*, 18 N.Y.3d 208 [2011].) The plaintiff also submitted evidence raising a triable issue of fact as to whether those alleged injuries were caused by the accident. (*Id.*; *see also Jaramillo v. Lobo*, 32 A.D.3d 417, 418 [2nd Dept. 2006].)

Furthermore, plaintiff adequately explained the gap in treatment by stating that no-fault benefits were terminated. (*Jean- Baptiste v. Tobias*, 88 A.D.3d 962 [2nd Dept. 2011]; *Abdelaziz v. Fazel*, 78 A.D.3d 1086 [2nd Dept. 2010].)

Nam Seok Lee

Defendants contend that Lee did not sustain a serious injury based on the medical reports of Dr. Yong S. Tak and Dr. Ayoobi Khodadadi. The issue of whether Lee sustained a serious injury is a matter of law to be determined in the first instance by this court. (*Lucari v. Elliot*, 57 N.Y.2d 230 [1982]; *Porcano v. Lehman*, 225 A.D.2d 430, 431 [2nd Dept. 1998]; *Brown v. Stark*, 205 A.D.2d 725 [2nd Dept. 1994].) The burden is on the defendant to make a prima facie showing that plaintiff's injuries are not serious. (*Toure v. Avis Rent A Car Sys.*, 98 N.Y.2d 345 [Ct App. 1982]; *Sealy v.*

Riteway-1, Inc., 54 A.D.3d 1018 [2nd Dept 2008]; *Meyers v. Bobower Yeshiva Bnei Zion*, 20 A.D.3d 456 [2nd Dept. 2005].) A defendant can meet his or her prima facie burden by submitting the affidavits or affirmations of medical experts, who, through objective medical testing, conclude that plaintiff's injuries are not serious within the meaning of Insurance Law §5102(d). (See *Margarin v. Kropf*, 24 A.D.3d 733 [2nd Dept. 2005]; see also *Gaddy v. Eyler*, 79 N.Y.2d 955, 956 [1992]; *Morris v. Edmond*, 48 A.D.3d 432 [2nd Dept. 2008].)

Defendants met their initial burden of establishing that Lee did not sustain a serious injury through the submission of the affirmations of Dr. David A. Fisher, a Radiologist and Dr. Edward M. Decter, an Orthopedist. (*Jilani v. Palmer*, 83 A.D.3d 786, 787 [2nd Dept. 2011]; *Khaimov v. Armanious*, 85 A.D.3d 978 [2nd Dept. 2001].) Dr. Fisher conducted a radiological review of Lee's right knee, lumbar and cervical spine. Dr. Fisher concluded that there was no "radiographic evidence of traumatic or causally related injury" to the right knee, lumbar and cervical spine. Dr. Decter measured the range of motion of Lee's right knee, lumbar and cervical spine. The ranges of motion were measured using a goniometer and the specific measurements, when compared to the norms, were all within the normal ranges. (*Staff v. Yshua*, 59 A.D.3d 614 [2nd Dept. 2009].) Dr. Decter concluded that Lee "did not sustain any permanent injury to these body parts," and "is capable of gainful employment." Therefore, Dr. Fisher and Dr. Decter's objective tests are sufficient to establish a prima facie case that there was no "significant limitation of use of a body function or system" or "permanent consequential limitation" under the meaning of Insurance Law §5102(d). (*Kasim v. Defretias*, 28 A.D.3d 611, 612 [2nd Dept. 2006]; *Staff v. Yshua*, 59 A.D.3d 614 [2nd Dept. 2009]; *Kerzhner v. N.Y. Ubu Taxi Corp.*, 17 A.D.3d 410 [2nd Dept. 2005].)

In addition, the defendants provided evidence establishing, prima facie, “that during the 180-day period immediately following the subject accident, [s]he did not have an injury or impairment which, for more than 90 days, prevented [her] from performing substantially all of the acts that constituted [her] usual and customary daily activities.” (*Frederique v. Krapf*, 86 A.D.3d 533 [2nd Dept. 2011].) Specifically, Lee testified at his Examination Before Trial, that he did not miss any time from work following the accident. However, later he testified that he stayed in bed “over the weekend” following the accident, and was not confined to his home for any period of time.

In opposition, plaintiff met his burden to defeat defendants’ motion for summary judgment on the issue of serious injury. Dr. Yong S. Tak, a Physician and Dr. Ayoobi Khodadadi, and Dr. Paul Bonheim, Radiologists, submitted affirmations stating and identifying the objective medical tests used to determine that Lee suffered a “serious injury” and significant limitations of motion. Dr. Tak conducted range of motion examinations on Lee’s right knee, cervical and lumbar spine contemporaneous to the accident and once again on June 7, 2013 that exceeded the minimum degree requirements. Dr. Tak concluded that Lee suffered and continues to suffer from “serious and permanent injuries as a result of this accident.” Dr. Khodadadi performed an MRI of Lee’s right knee, cervical and lumbar spines and discovered herniated or bulging discs. Accordingly, plaintiff submitted evidence raising a triable issue of fact as to whether the alleged injuries to her right shoulder, lumbar and cervical spine were a serious injury under the permanent consequential limitation of use or significant limitation of use categories of Insurance Law §5102(d). (*See Pearl v. Meher*, 18 N.Y.3d 208 [2011].) The plaintiff also

submitted evidence raising a triable issue of fact as to whether those alleged injuries were caused by the accident. (*Id.*; see also *Jaramillo v. Lobo*, 32 A.D.3d 417, 418 [2nd Dept. 2006].)

Furthermore, plaintiff adequately explained the gap in treatment by stating that no-fault benefits were terminated. (*Jean- Baptiste v. Tobias*, 88 A.D.3d 962 [2nd Dept. 2011]; *Abdelaziz v. Fazel*, 78 A.D.3d 1086 [2nd Dept. 2010].)

Conclusion

For the reasons set forth above, defendants' motion for summary judgment pursuant to CPLR §3212 dismissing plaintiffs' causes of action is denied.

Dated: October 31, 2013

Bernice D. Siegal, J. S. C.