Yang v Choi
2013 NY Slip Op 32863(U)
October 30, 2013
Sup Ct, Queens County
Docket Number: 10450/11
Judge: Howard G. Lane

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IAS PART 6**
Justice

WON JOON YANG,

Plaintiff,

-against-

JOON HO CHOI and KI HYUN YANG,

Defendants.

Index No. 10450/11

Motion
Date September 13, 2013

Motion
Cal. No. 138

Motion
Sequence No. 2

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Upon the foregoing papers it is ordered that this motion and cross motion by defendants for summary judgment dismissing the complaint of plaintiff pursuant to CPLR 3212, on the ground that plaintiff, Won Joon Yang has not sustained a serious injury within the meaning of Insurance Law § 5102(d) is decided as follows:

This action arises out of an automobile accident that occurred on February 6, 2010. Defendants have submitted proof in admissible form in support of the motion and cross motion for summary judgment for all categories. Defendants submitted, inter alia, affirmed reports from three (3) physicians (an independent examining neurologist, an independent examining orthopedist, and an independent evaluating radiologist), and plaintiff's own verified bill of particulars.

APPLICABLE LAW

Under the "no-fault" law, in order to maintain an action for personal injury, a plaintiff must establish that a "serious

injury" has sustained (Licari v. Elliot, 57 NY2d 230 [1982]). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to judgment as a matter of law (Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]; Winegrad v. New York Univ. Medical Center, 64 NY2d 851 [1985]). In the present action, the burden rests on defendants to establish, by the submission of evidentiary proof in admissible form, that plaintiff has not suffered a "serious injury" (Lowe v. Bennett, 122 AD2d 728 [1st Dept 1986], affd, 69 NY2d 701, 512 NYS2d 364 [1986]). When a defendant's motion is sufficient to raise the issue of whether a "serious injury" has been sustained, the burden shifts and it is then incumbent upon the plaintiff to produce prima facie evidence in admissible form to support the claim of serious injury (Licari v. Elliot, supra; Lopez v. Senatore, 65 NY2d 1017 [1985]).

In support of a claim that plaintiff has not sustained a serious injury, a defendant may rely either on the sworn statements of the defendant's examining physician or the unsworn reports of plaintiff's examining physician (Pagano v. Kingsbury, 182 AD2d 268 [2d Dept 1992]). Once the burden shifts, it is incumbent upon plaintiff, in opposition to defendant's motion, to submit proof of serious injury in "admissible form". Unsworn reports of plaintiff's examining doctor or chiropractor will not be sufficient to defeat a motion for summary judgment (Grasso v. Angerami, 79 NY2d 813 [1991]). Thus, a medical affirmation or affidavit which is based on a physician's personal examination and observations of plaintiff, is an acceptable method to provide a doctor's opinion regarding the existence and extent of a plaintiff's serious injury (O'Sullivan v. Atrium Bus Co., 246 AD2d 418 [1st Dept 1998]). Unsworn MRI reports are not competent evidence unless both sides rely on those reports (Gonzalez v. Vasquez, 301 AD2d 438 [1st Dept 2003]; Ayzen v. Melendez, 749 NYS2d 445 [2d Dept 2002]). However, in order to be sufficient to establish a prima facie case of serious physical injury the affirmation or affidavit must contain medical findings, which are based on the physician's own examination, tests and observations and review of the record rather than manifesting only the plaintiff's subjective complaints. It must be noted that a chiropractor is not one of the persons authorized by the CPLR to provide a statement by affirmation, and thus, for a chiropractor, only an affidavit containing the requisite findings will suffice (see, CPLR 2106; Pichardo v. Blum, 267 AD2d 441 [2d Dept 1999]; Feintuch v. Grella, 209 AD2d 377 [2d Dept 2003]).

In any event, the findings, which must be submitted in a competent statement under oath (or affirmation, when permitted) must demonstrate that plaintiff sustained at least one of the

categories of "serious injury" as enumerated in Insurance Law § 5102(d) (Marquez v. New York City Transit Authority, 259 AD2d 261 [1st Dept 1999]; Tompkins v. Budnick, 236 AD2d 708 [3d Dept 1997]; Parker v. DeFontaine, 231 AD2d 412 [1st Dept 1996]; DiLeo v. Blumberg, 250 AD2d 364 [1st Dept 1998]). For example, in Parker, supra, it was held that a medical affidavit, which demonstrated that the plaintiff's threshold motion limitations were objectively measured and observed by the physician, was sufficient to establish that plaintiff has suffered a "serious injury" within the meaning of that term as set forth in Article 51 of the Insurance Law. In other words, "[a] physician's observation as to actual limitations qualifies as objective evidence since it is based on the physician's own examinations." Furthermore, in the absence of objective medical evidence in admissible form of serious injury, plaintiff's self-serving affidavit is insufficient to raise a triable issue of fact (Fisher v. Williams, 289 AD2d 288 [2d Dept 2001]).

DISCUSSION

A. Defendants established a prima facie case that plaintiff did not suffer a "serious injury" as defined in Section 5102(d) for all categories.

The affirmed report of defendants' independent examining neurologist, Marianna Golden, M.D., indicates that an examination of plaintiff on August 1, 2012 revealed a diagnosis of: normal neurologic examination. She opines that the prognosis is good and that there is no permanency. Dr. Golden concludes that plaintiff can perform his activities of daily living and attend school without restrictions.

The affirmed report of defendants' independent examining orthopedist, Thomas Nipper, M.D., indicates that an examination of plaintiff on August 1, 2012 revealed a diagnosis of: resolved cervical and lumbar spine sprain/strain, resolved right shoulder sprain, and resolved right elbow sprain. He opines that the prognosis is good and that there is no objective evidence of orthopedic disability. Dr. Nipper concludes that plaintiff can perform his activities of daily living and attend school without restrictions.

The affirmed report of defendants' independent evaluating radiologist, Audrey Eisenstadt, M.D., indicates that an MRI of the Right Elbow taken on February 18, 2010 revealed an impression of: normal MRI of the right elbow.

The affirmed report of defendants' independent evaluating radiologist, Audrey Eisenstadt, M.D., indicates that an MRI of the Right Shoulder taken on February 18, 2010 revealed an impression of: no evidence of recent changes or posttraumatic injury and degenerative changes at the acromioclavicular joint.

Additionally, defendants established a prima facie case for the category of "90/180 days". The plaintiff's own verified bill of particulars indicates that he was not confined to bed or house and did not miss any time from school.

The aforementioned evidence amply satisfied defendants' initial burden of demonstrating that plaintiff did not sustain a "serious injury". Thus, the burden then shifted to said plaintiffs to raise a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law (see, Gaddy v. Eyler, 79 NY2d 955 [1992]). Failure to raise a triable issue of fact requires the granting of summary judgment and dismissal of the complaint (see, Licari v. Elliott, supra).

B. Plaintiff raises a triable issue of fact for all categories except for the ninth category of "90/180 days."

In opposition to the motion and cross-motion, plaintiff submitted: an attorney's affirmation; plaintiff's own affidavit; an affirmation and medical records of plaintiff's treating doctor, David Mun, M.D.; and affirmations and sworn reports of plaintiff's radiologists, Ayoob Khodadadi, M.D., William A. Weiner, M.D., and Steve B. Loskik, M.D.

A medical affirmation or affidavit which is based upon a physician's personal examinations and observation of plaintiff, is an acceptable method to provide a doctor's opinion regrading the existence and extent of a plaintiff's serious injury (O'Sullivan v. Atrium Bus Co., 246 AD2d 418, 688 NYS2d 167 [1st Dept 1980]). The causal connection must ordinarily be established by competent medical proof (see, Kociocek v. Chen, 283 AD2d 554 [2d Dept 2001]; Pommels v. Perez, 4 NY3d 566 [2005]). Plaintiff submitted medical proof that was contemporaneous with the accident showing range of motion limitations (Pajda v. Pedone, 303 AD2d 729 [2d Dept 2003]). Plaintiff has established a causal connection between the accident and the injuries. The affirmation submitted by plaintiff's treating physician, David Mun, M.D., sets forth the objective examination, tests, and review of medical records which were performed contemporaneously with the accident (less than two weeks after the accident) to support his conclusion that the plaintiff suffered from significant injuries, to wit: cervical spine and lumbar spine range of motion limitations. Dr. Mun's

affirmation details plaintiff's symptoms, including neck pain, lower back pain, right shoulder and right elbow pain. He further opines that the injuries sustained by the plaintiff in the accident were causally related to the subject motor vehicle accident on February 6, 2010. Furthermore, plaintiff has provided a recent medical examination detailing the status of his injuries at the current point in time (Kauderer v. Penta, 261 AD2d 365 [2d Dept 1999]). The affirmation of Dr. Mun provides that a recent examination by Dr. Mun on June 7, 2013 sets forth the objective examination, tests, and review of medical records which were performed to support his conclusion that the plaintiff suffers from significant injuries, to wit: range of motion limitations in the cervical spine and lumbar spine. He further opines that the injuries are permanent in nature and causally related to the motor vehicle accident of February 6, 2010. Clearly, the plaintiff's experts' conclusions are not based solely on the plaintiff's subjective complaints of pain, and therefore are sufficient to defeat the motion (DiLeo v. Blumber, supra, 250 AD2d 364, 672 NYS2d 319 [1st Dept 1998]).

Since there are triable issues of fact regarding whether the plaintiff sustained a serious injury to his lumbar spine and cervical spine, plaintiff is entitled to seek recovery for all injuries allegedly incurred as a result of the accident (Marte v. New York City Transit Authority, 59 AD3d 398 [2d Dept 2009]).

However, plaintiff has failed to come forward with sufficient evidence to create an issue of fact as to whether he sustained a medically-determined injury which prevented him from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than 90 of the 180 days immediately following the underlying accident (Savatarre v. Barnathan, 280 AD2d 537 [2d Dept 2001]). The record must contain objective or credible evidence to support the plaintiff's claim that the injury prevented plaintiff from performing substantially all of his customary activities (Watt v. Eastern Investigative Bureau, Inc., 273 AD2d 226 [2d Dept 2000]). When construing the statutory definition of a 90/180-day claim, the words "substantially all" should be construed to mean that the person has been prevented from performing his usual activities to a great extent, rather than some slight curtailment (see, Gaddy v. Eyler, 79 NY2d 955; Licari v. Elliott, 57 NY2d 230 [1982]; Berk v. Lopez, 278 AD2d 156 [1st Dept 2000], lv denied 96 NY2d 708 [2001]). Plaintiff fails to include experts' reports or affirmations which render an opinion on the effect the injuries claimed may have had on the plaintiff for the 180-day period immediately following the accident. As such, plaintiff's

submissions were insufficient to establish a triable issue of fact as to whether plaintiff suffered from a medically determined injury that curtailed him from performing his usual activities for the statutory period (Licari v. Elliott, 57 NY2d 230, 236 [1982]). Accordingly, plaintiff's claim that his injuries prevented him from performing substantially all of the material acts constituting his customary daily activities during at least 90 of the first 180 days following the accident is insufficient to raise a triable issue of fact (see, Graham v. Shuttle Bay, 281 AD2d 372 [1st Dept 2001]; Hernandez v. Cerda, 271 AD2d 569 [2d Dept 2000]; Ocasio v. Henry, 276 AD2d 611 [2d Dept 2000]).

Therefore, plaintiff's submissions are insufficient to raise a triable issue of fact on the claim of "90/180 days" (see, Zuckerman v. City of New York, 49 NY2d 557 [1980]).

Accordingly, the threshold motion is denied as to all categories except for the ninth category of "90/180 days."

The clerk is directed to enter judgment accordingly.

Movant shall serve a copy of this order with Notice of Entry upon the other parties of this action and on the clerk. If this order requires the clerk to perform a function, movant is directed to serve a copy upon the appropriate clerk.

Defendant, Ki Hyun Yang's cross motion seeking summary judgment against him on liability as there are no triable issues of fact is denied. This action arises out of a two-car motor vehicle accident occurring on February 6, 2010 whereby plaintiff, Won Joon Yang was allegedly seriously injured when, while a passenger in a vehicle owned and operated by defendant, Ki Hyun Yang, said vehicle was involved in a collision with a vehicle owned and operated by defendant, Joon Ho Choi in Queens, New York.

Defendant, Ki Hyun Yang established a prima facie case that there are no triable issues of fact regarding liability. In support of the motion, defendant Ki Hyun Yang presents, inter alia: the examination before trial transcript testimony of plaintiff himself, the examination before trial transcript testimony of defendant, Ki Hyun Yang who testified, inter alia that: the passenger side of his vehicle was struck by the other vehicle, he never saw the other vehicle prior to the contact, after the accident, the driver of the other vehicle told him that he never saw his vehicle prior to the accident; and the examination before trial transcript testimony of co-defendant, Joon Ho Choi wherein he testified that: he could not see because his view to his left was blocked by parked vehicles, the vehicle

that he had the accident with came from the direction that he could not actually see, and he did not see the other vehicle for the first time until he heard the collision. Defendant Yang established a prima facie case that the co-defendant Choi entered into the roadway despite being unable to see oncoming traffic and as a result, his vehicle impacted with the side of the defendant Yang's vehicle.

In opposition, plaintiff and co-defendant Joon Ho Choi raised triable issues of fact on liability. In opposition, plaintiff and co-defendant Choi raise material issues of fact as to whether co-defendant Ki Hyun Yang was contributorily negligent and issues regarding proximate cause. The examination before trial transcript testimony of co-defendant, Joon Ho Choi established that he did not enter the roadway from the parking lot but rather was stopped when his vehicle was struck by the co-defendant's vehicle and he could see the tops of vehicles passing in the direction the co-defendant was traveling from.

Accordingly, as there are triable issues of fact as to inter alia, how the accident occurred, negligence, and proximate cause, the case must not be dismissed summarily.

This constitutes the decision and order of the Court.

Dated: October 30, 2013

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Howard G. Lane, J.S.C.