

Yong v Gokhul

2014 NY Slip Op 33340(U)

August 12, 2014

Supreme Court, Queens County

Docket Number: 700324/2012

Judge: Robert J. McDonald

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ORIGINAL

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

FILED

AUG 26 2014

COUNTY CLERK
QUEENS COUNTY

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

KIL Y. YONG, PAUL R. YANG and YONG
JUNG LEE,

Index No.: 700324/2012

Motion Date: 07/30/14

Motion Cal. No.: 202

Motion Seq.: 5

Plaintiffs,

- against -

KAMLA GOKHUL and CHONG N. YANG,

Defendants.

The following papers numbered 1 to 23 were read on this motion by
defendant, KAMLA GOKHUL, and cross-motion by defendant, CHONG N.
YANG, both for an order pursuant to CPLR 3212 granting summary
judgment in favor of the defendants and dismissing the complaint
of plaintiff, YONG JUNG LEE, on the ground that said plaintiff
did not sustain a serious injury within the meaning of Insurance
Law §§ 5102 and 5104:

Papers
Numbered

Defendant Gokhul's Notice of Motion-Affirmations-
Exhibits-Memo of Law.....1 - 7
Defendant Yang's Cross-Motion.....8 - 10
Plaintiff's Affirmation in Opposition.....11 - 16
Defendants' Affirmations in Reply(2).....17 - 23

In this action for negligence, plaintiffs KIL Y. YONG, PAUL
R. YANG and YONG JUNG LEE, seek to recover damages for personal
injuries they each allegedly sustained as a result of a four-
vehicle chain reaction accident that occurred on September 22,
2011, at approximately 2:30 p.m. on the northbound lanes of the
Van Wyck Expressway near its intersection with Grand Central
Parkway. Plaintiff Kil Y. Yong, alleges that on the date of the
accident he was operating a 2003 Chevrolet and was traveling in
the right lane of the northbound Van Wyck Expressway. He states
that he was at a complete stop behind a construction vehicle in

the right lane when his vehicle was struck in the rear by the vehicle being operated by defendant Chong N. Yang. As a result of the accident, plaintiff Kil Y. Yong allegedly sustained serious physical injuries as did his two passengers, plaintiffs Paul R. Yang and Yong Jung Lee.

Plaintiffs Kil Y. Yong, Paul R. Yang and Yong Jung Lee commenced an action against the drivers of the two vehicles behind his Chong N. Yang in vehicle No. 2 and Kamla Gokhul in Vehicle No. 3 by filing a summons and complaint on February 24, 2012. Issue was joined by defendant Chong N. Yang by service of a verified answer with counterclaim dated May 17, 2012. Plaintiff on the counterclaim, Kil Y. Yong, appeared in this action with the filing of a Notice of Appearance and Verified Reply to Counterclaim dated July 10, 2012. Pursuant to a stipulation of the parties dated January 14, 2013, defendant Gokhul served a late answer with counterclaims. Plaintiff filed a Note of Issue on December 19, 2013. This matter is now on the calendar of the Trial Scheduling Part for November 6, 2014.

Defendants now move for an order pursuant to CPLR 3212(b), granting summary judgment dismissing the complaint of plaintiff Yong Jong Lee on the ground that said plaintiff did not suffer a serious injury as defined by Insurance Law § 5102.

In support of the motion, defendants submit affirmations from counsel, William B. Stock, Esq and counsel William J. Cariello, III, Esq., a copy of the pleadings; a copy of the plaintiff's verified bill of particulars; the affirmed medical reports of board certified neurologist, Dr. Marianna Golden and board certified orthopedic surgeon Dr. Thomas P. Nipper; the affirmed radiological reports of Dr. Bert R. Heyligers; and a copy of the transcript of plaintiff's examination before trial.

In her verified bill of particulars, plaintiff states that as a result of the accident she sustained, inter alia, disc bulges at L3-L4 and L5-S1 and disc herniations at L4-L5, C4-C5, C5-C6 and C6-C7.

The 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. Marianna Golden, a board certified neurologist, retained by the defendant, examined the plaintiff on October 30, 2013. At that time the plaintiff presented with pain in her neck, lower back and right arm. Dr. Golden states that her neurological examination of the plaintiff was normal and based on her physical examination it was her impression that there was no objective evidence of a disability from a neurological point of view and no objective evidence of a disability of any neurological permanency.

Dr. Thomas P. Nipper, an orthopedist retained by the defendants, examined the plaintiff on October 30, 2013. At that time the plaintiff had complaints of pain in her neck, lower back, and right arm. Dr. Nipper's range of motion testing revealed that the plaintiff had no significant limitations of range of motion of the cervical spine, lumbar spine, or right shoulder. His diagnosis was cervical and lumbar spine sprains, resolved; right shoulder sprain, resolved. He states that based upon his clinical evaluation, it is his impression that there is no objective evidence of an orthopedic disability or permanency. He states that the plaintiff is capable of working and may perform her normal activities of daily living without restriction.

Dr. Bert R. Heyligers, a board certified radiologist reviewed the MRI studies of the plaintiff's cervical spine, lumbar spine and right shoulder. He states in his affirmed reports that there he observed herniated discs at C3-4, C4-5 C5-6 and L4-5 and disc bulging at C6-7. He states however that the disc herniations may be chronic in nature. He also observed multilevel degenerative disc disease.

Plaintiff's examination before trial was held on August 21, 2013. At that time, the plaintiff, age 65, testified that she was a passenger in her brother's motor vehicle when he was involved in an accident on September 22, 2011. At that time her brother's vehicle was struck in the rear in a multi-vehicle accident when it was stopped in traffic on the Van Wyck Expressway. She stated that as a result of the impact she had severe neck pain so she went to the emergency room in an ambulance that came to the scene. At the emergency room she received x-rays and was released the same day. The following day she sought treatment at the office of Dr. Sung Dong Kim. She received, physical therapy, chiropractic care and acupuncture treatments for pain in her back and neck. She treated with Dr. Kim three times per week until May 2013. She also treated with Dr Yoo for right shoulder pain. She testified that she also received injections in her neck and back for pain. After the accident she was confined to her home for two days. She states that she still experiences pain in her lower back, neck, right shoulder and right arm.

Defendant's counsel contends that the medical reports of Drs. Nipper, Golden and Heyligers, as well as the plaintiff's deposition testimony, in which she stated that she was only confined to her house for two days following the accident, 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, David J. Lawrence, Esq., submits his own affirmation as well as an affidavit from the plaintiff; the affidavit of chiropractor, Dr. Sung D. Kim; the affirmation of orthopedist, Dr. Daniel J. Yoo; the affidavit of Pain Management Specialist, Dr. Thomas Ragukonis; and the affidavit of radiologist, Dr. John M. Athas.

In her affidavit, Ms. Yong Jun Lee states that on September 22, 2011 she was injured when the vehicle in which she was a passenger which struck in the rear by the vehicle operated by defendant Chong N. Yang. She was seated in the rear and was wearing a seat belt. She was treated and released the same day from the emergency room. The following day she began treating with Dr. Sung D. Kim at New Hope Chiropractic for pain in her neck, right shoulder, and back. She treated with Dr. Kim from September 2011 through March 2012. And had acupuncture treatments from April 2012 through February 2013. She also consulted with orthopedist, Dr. Yoo who gave her a cortisone injection in her right shoulder. She also consulted with neurologist, Dr. Rosenbaum for radiating pain. She states that her MRIs showed herniated discs in her neck and back and a tear in her right shoulder. She states that she stopped treating when her no-fault benefits were terminated.

Dr. Kim, a chiropractor, states in his affidavit that he treated plaintiff from September 23, 2011 through March 31, 2012 when her no-fault benefits were terminated. At her first visit, one day after the accident she exhibited significant loss of range of motion of the cervical and lumbar spines. He recently examined the plaintiff on May 21, 2014 and found that she still had limitations of range of motion of the cervical and lumbar spines. Based upon her MRI records which show bulging and herniated discs and his examination he diagnosed the plaintiff

with post traumatic cervical thoracic and lumbar sprain/strain with herniations and bulging discs casually related to the subject accident. He states that she has sustained permanent impairment of the neck and lower back.

Dr. Yoo states in his affirmation that the plaintiff sustained an injury to her right shoulder that is causally related to the subject accident. He initially saw the plaintiff on October 4, 2011 when she complained of bilateral shoulder pain. He recently examined the plaintiff on May 20, 2014 at which time she continued to have pain in the right shoulder. He stated that her right shoulder injury is causally related to the subject accident and is permanent in nature.

In his affirmation, radiologist, Dr. Athas states that he reviewed MRI films of the plaintiff's cervical and lumbar spines and found that she had disc herniations and disc bulges of the cervical and lumbar spines.

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 defendant's 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 defendants, including the affirmed medical reports of Drs. Nipper, Golden and Heyligers as well as the plaintiff's deposition testimony, in which she stated that she was only confined to her house for two days following the accident, is 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]).


However, this Court finds that the plaintiff raised triable issues of fact by submitting the affirmed medical reports of Drs. Kim, Yoo, Ragukonis and Athas attesting to the fact that the plaintiff had significant limitations in range of motion of her cervical spine, right shoulder and lumbar spine, both contemporaneous to the accident and in a recent examination, and concluding that the plaintiff's limitations were significant and resulted from trauma causally related to the accident (see Perl v Meher, 18 NY3d 208 [2011]; Dixon v Fuller, 79 AD3d 94 [2d Dept. 2010]; 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 of his cervical spine 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 ADd 606 [2d Dept. 2011]; Compass v GAE Transp., Inc., 79 AD3d 1091 [2d Dept. 2010]; Evans v Pitt, 77 AD3d 611 [2d Dept. 2010]).

In addition, the plaintiff and Dr. Kim adequately explained the gap in treatment by submitting affidavits stating that no-fault had terminated plaintiff's coverage and plaintiff could not afford to pay for it out-of-pocket (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 defendant, Kamola Gokhul, and the cross-motion of defendant, Chong N. Yang, for an order granting summary judgment dismissing the complaint of plaintiff, Yong Jung Lee, is denied.

Dated: August 12, 2014
Long Island City, N.Y.



ROBERT J. MCDONALD
J.S.C.