

Hyun Kyoo Kim v Denike
2015 NY Slip Op 30664(U)
April 14, 2015
Supreme Court, Queens County
Docket Number: 8691/13
Judge: Howard G. Lane
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

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 (Paqano 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, Hyun Kyoo Kim did not suffer a "serious injury" as defined in Section 5102(d), for all categories.

The affirmed report of defendants' independent examining neurologist, Vladimir Zlatnik, M.D., indicates that an examination conducted on October 7, 2014 revealed a diagnosis of: normal neurological exam. He opines that there is no neurological disability and plaintiff can perform activities of daily living. Dr. Zlatnik concludes that there is no need for further neurological testing or treatment.

The affirmed report of defendants' independent evaluating radiologist, Audrey Eisenstadt, M.D., indicates that an MRI of the Lumbar Spine dated December 14, 2011 indicates an impression of: disc dessication and disc bulging which are degenerative in nature.

Additionally, defendants established a *prima facie* case for the category of "90/180 days." The plaintiff's verified bill of particulars indicates that: plaintiff Hyun Kyoo Kim was not confined to bed or house as a result of the accident. Such evidence shows that the plaintiff was not curtailed from nearly all activities for the bare minimum of 90/180, required by the statute.

The aforementioned evidence amply satisfied defendants' initial burden of demonstrating that plaintiff did not sustain a

"serious injury." Thus, the burden then shifted to plaintiff 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, Hyun Kyo Kim raises a triable issue of fact

In opposition to the motion, plaintiff submitted: an attorney's affirmation, an affirmation and a sworn narrative report of plaintiff's physician, Sang Y. Lee, M.D., plaintiff's own affidavit, and unsworn MRI reports of plaintiff's physician, Ayoub Khodadadi, 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 regarding 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 of the cervical spine (Pajda v. Pedone, 303 AD2d 729 [2d Dept 2003]). Plaintiff has established a causal connection between the accident and the cervical spine injuries. The affirmation submitted by plaintiff's physician, Sang Y. Lee, M.D., sets forth the objective examination, tests, and review of medical records which were performed contemporaneously with the accident to support his conclusion that the plaintiff suffered from significant injuries, to wit: range of motion limitations of the cervical spine. Dr. Lee's affirmation details plaintiff's symptoms, including neck pain. He further opines that the injuries sustained by the plaintiff in the accident were causally related to the motor vehicle accident of October 3, 2011. 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 Lee provides that a recent examination by Dr. Lee on January 5, 2015 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 of the cervical spine. He further opines that the cervical spine injuries are permanent in nature, causally related to the subject motor vehicle accident, **"not caused by degenerative conditions,"** and result in a permanent limitation in the plaintiff's cervical spine range of

motion. 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]).

Additionally, despite defendants' contentions that there is an unexplained gap in treatment (the Court of Appeals held in Pommells v. Perez, 4 NY3d 566 [2005], that a plaintiff who terminates therapeutic measures following the accident, while claiming "serious injury," must offer some reasonable explanation for having done so), the Court finds that the gap in treatment is explained by Dr. Lee in his affirmation wherein he states that: "Mr. Kim's no-fault benefits were denied effective February 9, 2012 due to maximal medical improvement. Although, Mr. Kim did experience some temporary relief, his range of motion was still restricted and I felt that he had reached a plateau with regard to the neck and back. Any further treatments would only be palliative in nature." Such is a sufficient explanation (see, Jules v. Barbecho, 55 AD3d 548 [2d Dept 2008]).

Since there are triable issues of fact regarding whether the plaintiff sustained a serious injury to his 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]).

Therefore, plaintiff's submissions are sufficient to raise a triable issue of fact (see, Zuckerman v. City of New York, 49 NY2d 557 [1980]).

Accordingly, the defendants' motion for summary judgment is denied.

The clerk is directed to enter judgment accordingly.

Dated: April 14, 2015

.....
Howard G. Lane, J.S.C.