

Yi Chen v Clark

2015 NY Slip Op 30840(U)

April 2, 2015

Supreme Court, Bronx County

Docket Number: 307014/11

Judge: Wilma Guzman

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
IAS PART 7**

Index No. 307014/11
Motion Calendar No.2
Motion Date: 11/17/15

YI CHEN,

PlaintiffS,

-against-

HENRY CLARK and CRYSTAL THOMPSON ,

Defendant,

DECISION/ ORDER
Present:
Hon. Wilma Guzman

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion and cross motion for summary judgment:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion, Affirmation in Support, and Exhibits thereto.....	1
Affirmation in Opposition of Motion and Exhibits thereto.....	2
Reply Affirmation	3

Upon the foregoing papers and after due deliberation, and following oral argument, the decision/order on this motion is as follows:

Defendants Henry Clark and Crystal Thompson (hereinafter referred to as movants) move this court, pursuant to CPLR §3212, for an order seeking summary judgment dismissing all affirmative defenses or cross claims against movants on the grounds that Plaintiff Yi Chen does not meet the burden of a substantial injury under Insurance Law sections § 5102(d)¹ and §5104(a). Plaintiff has submitted written opposition to this motion.

Plaintiff commenced this action seeking damages for injuries allegedly sustained as the result

¹ (d) "Serious injury" means a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; 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 person from performing substantially all of the material acts which constitute such person's 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.

of a motor vehicle accident, which occurred on August 22, 2010.

In support of the motion for judgment, a defendant may rely either on sworn statements of the defendant's examining physician or the unsworn reports of the plaintiff's examining physician. Pagano v. Kingsbury, 182 A.D.2d 268, 587 N.Y.S.2d 692 (2nd Dept. 1992); also an affirmed physician's report, being in admissible form and showing that a plaintiff was not suffering from any disability or consequential injury from the accident would be sufficient to satisfy a defendant's burden of proof and shift to the plaintiff the burden of establishing the existence of a triable issue of fact. See Gaddy v. Eyler, 79 N.Y.2d 955, 582 N.Y.S.2d 990 (1992). In addition defendant can establish a prima facie case that plaintiff's injuries were not serious through the affidavit of the physician who examined the plaintiff and concluded that plaintiff had a normal examination. When the movant has made such a showing, the burden shifts and it then becomes incumbent upon the plaintiff to produce prima facie evidence in admissible form to support the claim of serious injury. See Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986). To raise a triable issue of fact as to whether a herniated disc constitutes a serious injury, a plaintiff is required to provide objective evidence of the extent or degree of the alleged physical limitations resulting from the [injury] and there duration' (Noble v. Ackerman, 252 A.D.2d 392, 394). In lieu thereof, "[a]n expert's qualitative assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system" (Toure v. Avis Rent a Car Systems, Inc., 98 N.Y.2d 345, 350.).

Defendant has met the burden of prima facie entitlement to summary judgment through the submission of the affidavit of Dr. Jay Nathan, who reviewed the plaintiff's medical records and who, after performing an independent orthopedic examination of the plaintiff on September 12, 2012, noted normal ranges of motion in the plaintiff's lower extremities, upper extremities, cervical spine, lumbar spine, and thoracolumbar spine. Dr. Nathan opined that any substantial limitations in claimant's range of motion had been resolved. However, Dr. Nathan does also claim that the injuries sustained and the reported accident are causally related. Dr. Jeffrey Warhit, who reviewed claimant's MRI of the cervical spine taken on September 28, 2010, opined that the plaintiff's MRI was negative

for fracture, disc herniation or disk bulging, and that there was no evidence of a traumatic injury to the cervical spine.

Plaintiff's submission of the medical reports from DR. Spencer A. Colden, Dr. Mary Hu and Dr. Arden Kaisman is sufficient to raise a triable issue of fact.

Dr. Mary Hu, radiologist, reviewed the cervical spine MRI and a lumbosacral spine MRI scan of the Plaintiff, Yi Chen. Dr. Hu opined that the cervical spine MRI scan revealed an intervertebral disk bulge at C5-C6, an intervertebral disk herniation and mild encroachment of the neural foramina at C6-C7. After reviewing plaintiff's lumbosacral spine MRI, Dr. Hu opined the MRI revealed an intervertebral disk bulge and encroachment of the neural foramina at L4-L5; intervertebral disk herniation, central spinal canal stenosis and encroachment of the neural foramina at L5-S1.

Dr. Arden Kaisman, an anesthesiologist, treated plaintiff with epidural steroid injections on August 3, 2011, August 17, 2011, and September 14, 2011. Dr. Kaisman opined that the plaintiff sustained a significant and permanent limitation to his cervical and lumbar spine as a direct result of the motor vehicle accident that occurred on August 22, 2010. Dr. Kaisman also reviewed Plaintiff's cervical spine and lumbosacral spine MRIs and opined that plaintiff's injuries are acute and causally related to the accident. Dr. Kaisman further opined, that plaintiff's cervical and lumbar spine MRIs did not reveal any degenerative or chronic changes.

Dr. Spencer A. Colden, plaintiff's treating physician, conducted a range of motion examination on the plaintiff on October 9, 2010, and opined that plaintiff sustained significant limitations in using his cervical and lumbosacral spine as well as bilateral upper extremities and right knee. Plaintiff had pain, tenderness, muscle pain, and decreased range of motion of the neck, back, shoulder and knee. Dr. Colden also ordered a EMG/NCV, which revealed a sub-acute bilateral C5 and C6 radiculopathies. Dr. Colden prescribed physical therapy treatments for plaintiff, and recommended that claimant refrain from any physical activities and to stay home for a period of at least three to four months while physical therapy continued. Plaintiff testified he reduced his work hours as a result of his pain. Further, he testified inability to performed certain tasks he performed prior to the accident.

Plaintiff has submitted medical records contemporaneous with the subject accident Contra Camilo v. Villa Livery Corp., 118 A.D.3d 586 (1st Dept. 2014); Perl v. Meher, 18 N.Y. 3d 208

(2011), and these reports were relied upon by movants doctors. See Thompson v. Abassi, 15 A.D.3d 95 (1st Dept. 2005). Plaintiff has raised an issue of fact as to whether the plaintiff sustained a substantial injury. Subject motion is issue determination and must be decided once the issue of fact is resolved.


Accordingly, it is

ORDERED that defendants Clark and Thompson's motion for summary judgment under Insurance Law §5102(d) is hereby denied

ORDERED that defendants Clark and Thompson serve a copy of this order upon all parties with notice of entry, within thirty(30) days of this order.

This constitutes the decision of the court.

DATE **APR - 2 2015**



HON. WILMA GUZMAN, JSC.