

Khan v Wohab

2016 NY Slip Op 30756(U)

April 8, 2016

Supreme Court, Queens County

Docket Number: 4577/2014

Judge: Robert J. McDonald

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spine and lumbar spine, including disc herniations, disc bulges, and radiculopathy. Plaintiff Ferdousi Khan (Ms. Khan) alleges injuries to her cervical spine and lumbar spine, including disc herniations, disc bulges, and radiculopathy.

Plaintiffs commenced this action by filing a summons and complaint on March 18, 2014. Issue was joined by service of defendant's answer with counterclaim dated April 17, 2014. Mr. Khan, plaintiff on the counterclaim, interposed a reply to counterclaim dated April 14, 2015. Defendant now moves for an order pursuant to CPLR 3212(b), granting summary judgment and dismissing plaintiffs' complaint on the ground that plaintiffs did not suffer a serious injury as defined by Insurance Law § 5102. Mr. Khan also moves also moves for an order pursuant to CPLR 3212(b), granting summary judgment and dismissing Ms. Khan's complaint on the ground that she did not suffer a serious injury as defined by Insurance Law § 5102.

In support of the motion, defendant submits an affirmation from counsel, Keri A. Wehrheim, Esq.; a copy of the pleadings; a copy of the verified bill of particulars; affirmed medical reports from orthopedic surgeon, Robert Y. Pick, M.D.; affirmed radiological reports from Michael D. Winn, M.D.; and copies of the transcripts of the examinations before trial of Mr. Khan and Mrs. Khan, both taken on March 26, 2015.

Plaintiffs assert that they sustained a serious injury as defined in Insurance Law § 5102(d) in that they each sustained a fracture; a permanent loss of use of a body organ, member function or system; a permanent consequential limitation of use of a body organ or member; a significant limitation of use of a body function or system; a disfiguring scar; and a medically determined injury or impairment of a nonpermanent nature which prevented plaintiffs from performing substantially all of the material acts which constitute their 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. Pick examined Mr. Khan on June 3, 2015. Mr. Khan reported to Dr. Pick that he was involved in motor vehicle accident and was taken by ambulance to Jamaica Hospital Medical Center where he was evaluated, treated, and x-rays were performed of his back and neck. The x-rays revealed no fractures. He was discharged the same day and was advised to rest. Mr. Khan presented to Dr. Pick with current complaints of pain in his low back. Dr. Pick identifies the records he reviewed and performed objective range of motion testing with a goniometer on Mr. Khan's

cervical spine and lumbar spine. Dr. Pick's report reveals normal ranges of motion regarding the cervical spine and lumbar spine. However, he reports a decreased range of motion in Mr. Khan's cervical spine regarding right rotation and left rotation. He attributes such decrease to a voluntary loss of range of motion in light of the remainder of the cervical spine examination, which was normal. Dr. Pick's diagnosis is status post cervical spine sprain/strain, resolved and status post lumbar spine sprain/strain, resolved. He concludes that there is no objective evidence of an orthopedic disability, and Mr. Khan is able to perform the duties of his occupation without restrictions or limitations and is capable of performing all activities of daily living. Dr. Pick states that there is no objective evidence of any orthopedic permanency or residuals.

Dr. Winn reviewed the MRI of Mr. Khan's lumbar spine taken on August 13, 2012. He concludes that there is degenerative spondylosis at L3-L4 and states that it would have predated the subject accident in etiology. He also found a straight appearance to the lumbar spine without the normal lordotic curvature, which he states may be indicative of muscle spasm. As to the initial report for the MRI, Dr. Winn states that he sees no evidence of disc bulging at L5-S1 or L3-L4. Dr. Winn also reviewed the MRI of Mr. Khan's cervical spine taken on August 3, 2012. He found degenerative spondylosis from C4-5 through C6-7, and a disc space narrowing at C5-6 and C6-7. He also found a disc herniation at C5-6 and at C6-7. Dr. Winn concludes that there is a strong likelihood that the herniations are degenerative in nature.

At his deposition, Mr. Khan testified that he was involved in an accident on July 6, 2012. He was never referred for surgery to his neck or back as a result of the accident. He has not sought any further medical attention following the cessation of his physical therapy three months post-accident. He did not miss any time from work as a result of the accident.

Dr. Pick also examined Ms. Khan on June 3, 2015. She reported to Dr. Pick that she was involved in the subject accident and was transported by ambulance to Jamaica Hospital Medical Center where she was evaluated, treated, and x-rays were performed of her back. She was discharged the same day, given medication, and was advised to rest. Ms. Khan presented to Dr. Pick with current complaints of pain in her mid-back and low-back. Dr. Pick identifies that records he reviewed and performed objective range of motion testing with a goniometer on Ms. Khan's cervical spine, thoracic spine, and lumbar spine. Dr. Pick's report reveals all normal ranges of motion. Dr. Pick's diagnosis is status post cervical spine sprain/strain, resolved and status

post lumbar spine sprain/strain, resolved. He concludes that there is no objective evidence of an orthopedic disability, and Ms. Khan is able to perform the duties of her occupation without restrictions or limitations and is capable of performing all activities of daily living. Dr. Pick states that there is no objective evidence of permanency or residuals.

Dr. Winn reviewed the MRI of Ms. Khan's lumbar spine taken on August 13, 2012. He found a straight appearance to the lumbar spine without the normal lordotic curvature, which he states may be indicative of muscle spasm. Dr. Winn also reviewed the MRI of Ms. Khan's cervical spine taken on August 3, 2012. He found degenerative spondylosis from C4-5 through C6-7, and that the cervical spine is straight without the normal lordosis, which could be due to muscle spasm. Regarding the original MRI report, Dr. Winn states that he sees no evidence of a disc herniation at C4-5 or disc bulging at C5-6.

At her deposition, Ms. Khan testified that she did not have any surgery as a result of the accident. She missed less than a week from work as a result of the accident. Her work duties did not change as a result of this accident.

Defendants' counsel contends that the medical reports and plaintiffs' testimony are sufficient to demonstrate that plaintiffs have not sustained a fracture; a permanent loss of use of a body organ, member function or system; a permanent consequential limitation of use of a body organ or member; a significant limitation of use of a body function or system; a disfiguring scar; and a medically determined injury or impairment of a nonpermanent nature which prevented plaintiffs from performing substantially all of the material acts which constitute their 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 plaintiffs submit an affirmation from their counsel, H. Bruce Fischer, Esq.; the affirmed medical reports of Arkadiy Shusterman, D.O.; the radiological reports of Michael D. Green, M.D.; the affirmed MRI reports of Ayooob Khodadadi, M.D.; the affirmed reports of Igor E. Cohen, M.D.; and the MRI report of Paul Bonheim, M.D. Counsel contends that issues of fact exist as to whether plaintiffs sustained a permanent consequential limitation of use of a body organ or member and/or a significant limitation of use of a body function or system as a result of the subject accident.

Mr. Khan initially treated with Dr. Shusterman on July 11, 2012. Straight leg testing was positive and range of motion testing revealed restrictions of motion in both the cervical spine and lumbar spine. Dr. Shusterman opined that the restrictions of motion and complaints of pain are post-traumatic in nature and causally related to the subject accident. Most recently, on January 19, 2016, Dr. Shusterman examined Mr. Khan. Mr. Khan presented with intermittent neck pain, neck muscle stiffness, occasional radiation of pain to his right upper extremity, and lower back pain. His examination revealed continued restrictions of motion in his cervical spine and lumbar spine. Dr. Shusterman opines that Mr. Khan sustained significant and permanent injuries as a result of the subject accident. He states that the injuries are not degenerative in nature, but causally related to the subject accident.

Ms. Khan began treating with Dr. Shusterman on July 11, 2012 as well. Dr. Shusterman performed range of motion testing and found restrictions in motion in Ms. Khan's cervical and lumbar spine. Recently, Dr. Shusterman examined Ms. Khan on January 19, 2016, and found continued restrictions of motion in her cervical and lumbar spine. Dr. Shusterman opines that Ms. Khan has sustained significant and permanent injuries as a result of the subject accident. He states that the injuries are not degenerative in nature.

On a motion for summary judgment, where the issue is whether the plaintiff has sustained a serious injury under the no-fault law, the defendant bears the initial burden of presenting competent evidence that there is no cause of action (Wadford v Gruz, 35 AD3d 258 [1st Dept. 2006]). "[A] defendant can establish that a plaintiff's injuries are not serious within the meaning of Insurance Law § 5102 (d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (Grossman v Wright, 268 AD2d 79 [1st Dept. 2000]). Whether a plaintiff has sustained a serious injury is initially a question of law for the court (Licari v Elliott, 57 NY2d 230 [1982]).

Where defendants' 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]).

This Court finds that the proof submitted by defendant, including the affirmed medical reports of Drs. Pick and Winn, together with the deposition testimony that Mr. Khan did not miss any work and Ms. Khan only missed less than a week of work due to the subject accident, are sufficient to meet defendant's prima facie burden by demonstrating that plaintiffs 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]).

In opposition, the MRI reports of Dr. Green and Dr. Bonheim are not affirmed and therefore inadmissible (see Lazu v Harlem Group, Inc., 89 AD3d 435 [1st Dept. 2011]; Migliaccio v Maraca, 56 AD3d 393 [1st Dept. 2008][statements and reports by the injured party's examining and treating physicians that are unsworn or not affirmed to be true under penalty of perjury do not meet the test of competent, admissible medical evidence sufficient to defeat a motion for summary judgment]). Although the MRI reports of Dr. Khodadadi were affirmed, he fails to provide any opinion regarding the causation of his findings. As such, Dr. Khodadadi failed to provide a causal connection between his findings and the subject accident (see Knox v Lennihan, 65 AD3d 615 [2d Dept. 2009]; Collins v Stone, 8 AD3d 321 [2d Dept. 2004]).

However, this Court finds that plaintiffs raised triable issues of fact by submitting the affirmed medical reports Dr. Shusterman attesting to the fact that each plaintiff sustained injuries as a result of the accident, finding that each plaintiff had significant limitations in ranges of motion both contemporaneous to the accident and in recent examinations, and concluding that their limitations are permanent and causally related to the accident (see Perl v Meher, 18 NY3d 208 [2011]; David v Caceres, 96 AD3d 990 [2d Dept. 2012]; Martin v Portexit Corp., 98 AD3d 63 [1st Dept. 2012]; Ortiz v Zorbas, 62 AD3d 770 [2d Dept. 2009]; Azor v Torado, 59 AD2d 367 [2d Dept. 2009]). Dr. Shusterman also affirmed that plaintiffs' limitations resulted from trauma causally related to the subject accident rather than from degenerative disease.

Although defendants contend that Dr. Shusterman's affirmation is unreliable due to inconsistencies with the normal value provided for the ranges of motion, such differences in normal values appear to be due to Dr. Shusterman's use of an inclinometer rather than a goniometer during certain examinations. Dr. Shusterman also adequately explained the gap in plaintiffs' treatment stating that each plaintiff reached the maximum degree of medical improvement and were discharged from

treatment at his office after their February 27, 2013 examinations (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]).

As such, plaintiffs demonstrated issues of fact as to whether they sustained a serious injury 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 AD3d 606 [2d Dept. 2011]; Compass v GAE Transp., Inc., 79 AD3d 1091 [2d Dept. 2010]; Evans v Pitt, 77 AD3d 611 [2d Dept. 2010]; Tai Ho Kang v Young Sun Cho, 74 AD3d 1328 743 [2d Dept. 2010]). In light of this finding, the court need not address the 90/180 category.

Accordingly, for the reasons set forth above, it is hereby,

ORDERED, that the motion by defendant (seq. no 1) and the motion by plaintiff on the counterclaim (seq. no 2) for an order granting summary judgment are denied; and it is further

ORDERED, that this matter remains on the calendar of the Trial Scheduling Part for May 23, 2016.

Dated: April 8, 2016
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.