

Cheow v Cheng Lin Jin
2016 NY Slip Op 30757(U)
April 5, 2016
Supreme Court, Queens County
Docket Number: 14942/13
Judge: Robert J. McDonald
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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

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

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MEI F. CHEOW AND POW CHOO CHUNG,	Index No.:	14942/13
Plaintiff,	Motion Date:	6/8/15
- against -	Motion No.:	15
CHENG LIN JIN AND SKYLINER TRAVEL,	Motion Seq.:	7
Defendant.		

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The following papers numbered 1 to 11 read on this Order to Show Cause by defendants for an order pursuant to CPLR 221(a) and (e), granting defendants leave to renew, and upon renewal modifying the Court's September 8, 2015 Order by granting defendants' motion for summary judgment against plaintiff Pow Choo Chung (plaintiff):

Papers Numbered

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This is an action for personal injuries arising out of an accident that occurred on June 3, 2013 at the intersection of Woodhaven Boulevard and Wetherole Street in Queens County, New York.

By way of relevant background, plaintiffs commenced this action by filing a summons and verified complaint on August 6, 2013. Defendants joined issue by service of a Verified Answer dated October 10, 2013. Pursuant to this Court's Order dated October 22, 2014, plaintiff was to appear for an independent medical examination by Dr. Douglas Cohen on December 26, 2014. Plaintiff failed to appear. By Order dated January 29, 2015,

plaintiff was precluded from introducing evidence as to her injuries and damages at the time of trial. In an Order dated June 24, 2014, the preclusion order was vacated and plaintiff was directed to submit to an independent medical examination by Dr. Cohen no later than August 31, 2015. The Note of Issue and Certificate of Readiness were also vacated, and plaintiffs were directed to file a new Note of Issue and Certificate of Readiness no later than October 12, 2015. Defendants then moved for an order pursuant to CPLR 3212, dismissing plaintiff's complaint on the ground that the injuries claimed by plaintiff fail to satisfy the serious injury threshold requirement of Section 5102(d) of the Insurance Law.

By Order dated September 8, 2015 and entered September 17, 2015, this Court denied defendants' motion for summary judgment with leave to renew upon the completion of discovery. Specifically, this Court's prior Order found that defendants failed to satisfy their prima facie burden, but permitted defendants to renew their motion as it appeared plaintiff had not submitted for an independent medical examination. Defendants now seek to renew the prior Order denying summary judgment.

A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and . . . shall contain reasonable justification for the failure to present such facts on the prior motion." (CPLR 2221[e][2], [3]; see Coll v Padilla, 5 AD3d 716 [2d Dept. 2004]; Rizzotto v Allstate Ins. Co., 300 AD2d 562 [2d Dept. 2002]). A motion to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation (see May v May, 78 AD3d 667 [2d Dept. 2010]; Renna v Gullo, 19 AD3d 472 [2d Dept. 2005]). The question of what constitutes a reasonable justification and the answering of this question is within the Supreme Court's discretion (see Rowe v NYCPD, 85 AD3d 1001 [2d Dept. 2011]). Leave to renew should be denied unless the moving party offers a reasonable excuse as to why the additional facts were not submitted on the original application (see Fardin v 61st Woodside Assoc., 125 AD3d 59 [2d Dept. 2015]; Singh v. Avis Rent A Car Sys., Inc., 119 AD3d 76 [2d Dept. 2014]; Commisso v Orshan, 85 AD3d 845 [2d Dept. 2011]).

In support of the motion, defendants now submit Dr. Stephen Lastig's report evaluating an MRI of plaintiff's cervical spine dated April 20, 2015 and Dr. Douglas Cohen's independent medical examination report dated August 12, 2015. Counsel for defendants, Gregory Regensburg, Esq., contends that defendants were not in possession of the two medical reports at the time of the prior motion.

In opposition, counsel for plaintiff, Brooke Lombardi, Esq., argues that renewal should be denied because, inter alia, defendants failed to sufficiently explain why the newly proffered evidence was not available at the time of the original motion. Counsel further argues that defendants could have obtained the new evidence with the exercise of diligence.

Based on history of this matter including the prior orders of this Court regarding certain discovery, this Court grants defendants' application to renew their prior motion for summary judgment on the issue of serious injury.

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 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 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]).

In her Verified Bill of Particulars, plaintiff alleges injuries to her lumbar spine, cervical spine, thoracic spine, left shoulder, and right shoulder, including disc herniations, disc bulges, and bilateral shoulder derangement. Plaintiff asserts 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 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. Lastig reviewed plaintiff's lumbar spine MRI results dated July 19, 2013 and concluded that the multilevel disc pathology is most likely degenerative in origin. He reviewed plaintiff's left shoulder MRI results dated July 19, 2013, and stated that he did not see any evidence of a fracture, bone contusion, rotator cuff tear or labral tear. Dr. Lastig concluded that there were no findings on this study which are causally related to the subject accident. He also reviewed plaintiff's cervical spine MRI results taken on July 11, 2013. He found that there is evidence of multilevel degenerative disc disease with multilevel disc space narrowing and desiccation. He also found a small shallow midline disc herniation at the C3-C4 level.

On August 12, 2015, Dr. Cohen performed a neurosurgical evaluation of plaintiff who appeared with an interpreter from her attorney's office. She informed Dr. Cohen that she has developed numbness going down from her neck into both arms and in her back into both legs. She also has weakness in both her arms and her legs. She underwent injections and physical therapy after the subject accident. Dr. Cohen identifies that records he reviewed and performed a physical examination of plaintiff. Dr. Cohen concludes that plaintiff has significant give-way weakness, but no focal findings consistent with a specific radiculopathy or myelopathy. He states that plaintiff sustained a sprain of the cervical spine and lumbar spine as a result of the accident, but there is no evidence of a causally related disc herniation causing a radiculopathy, nerve root compression, or objective neurosurgical deficit.

In opposition, plaintiff contends that defendants still failed to meet their prima facie burden as the reports are conclusory in nature. Additionally, plaintiff points out that Dr. Cohen's report does not show that plaintiff did not sustain restricted range of motion which constitutes a significant limitation.

This Court agrees with plaintiff in that defendants have not provided sufficient evidence to make out their prima facie burden. Specifically, Dr. Cohen's report states that plaintiff complains of neck pain with both cervical flexion and extension and that she complains of lower back pain with lumbar flexion and extension. Dr. Cohen fails to provide any quantitative range of motion results although he concludes that there is no evidence of causally related radiculopathy or further deficit. This Court finds that Dr. Cohen's report fails to demonstrate that the sprains did not result in causally related restricted range of motion that resulted in a significant limitation of use.

As such, Dr. Cohen's report is insufficient to eliminate all triable issues of fact (see Katanov v County of Nassau, 91 AD3d 723 [2d Dept. 2012]; Artis v Lucas, 84 AD3d 845 [2d Dept. 2011]; Borras v Lewis, 79 AD3d 1084 [2d Dept. 2010]; Smith v Hartman, 73 AD3d 736 [2d Dept. 2010]). Thus, defendants failed to make a prima facie showing of entitlement to judgment as a matter of law that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d), tendering sufficient evidence to demonstrate the absence of any material issues of fact (see Winegrad v New York Univ. Med. Ctr., 64 NY2d 851[1985]; Reynolds v Wai Sang Leung, 78 AD3d 919 [2d Dept. 2010]).

Where a defendant fails to meet the defendant's prima facie burden, the court will deny the motion for summary judgment regardless of the sufficiency of the opposition papers (see Ayotte v Gervasio, 81 NY2d 1062 [1993]; Barrera v MTA Long Island Bus, 52 AD3d 446 [2d Dept. 2008]; David v Bryon, 56 AD3d 413 [2d Dept. 2008]).

Accordingly, and based on the foregoing it is hereby

ORDERED, that defendants' motion to renew is granted and upon the renewal defendants' motion for summary judgment is denied.

Dated: Long Island City, NY
April 5, 2016

ROBERT J. McDONALD
J.S.C.