Dae Kyoo Kim v Lemon Transp. Corp.
2016 NY Slip Op 31135(U)
June 9, 2016
Supreme Court, Queens County
Docket Number: 700646/14
Judge: Timothy J. Dufficy

ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY **PART 35**
Justice

DAE KYOO KIM AND DO HYUN CHO,

Plaintiff,

Index No.: 700646/14
Mot. Date: 3/22/16

-against-

Mot. Cal. No. 92
Mot. Seq. 4

LEMON TRANSPORTATION CORP. and NASEER AHMAD,

Defendants.

LEMON TRANSPORTATION CORP. and NASEER AHMAD,

Third-Party Plaintiffs,

-against-

ABDELRAHIOM ETESSAMI, FARSHAD ETESSAMI, TRAH GRAPHIX NY, INC. and MINGO J. SINGLETON,

Third-Party Defendants.

The following papers read on this motion by defendants **LEMON TRANSPORTATION CORP. and NASEER AHMAD** for an order pursuant to CPLR 3212 granting summary judgment in their favor dismissing the complaint on the basis that the plaintiffs did not sustain a "serious injury" under Insurance Law §5102(d).

	PAPERS NUMBERED
Notice of Motion-Affirmation-Exhibits	EF 26-38
Affirmation in Opposition-Exhibits	EF 40-42
Affirmation in Opposition-Exhibits	EF 45 -46
Reply Affirmation.....	Not efiled

Upon the foregoing papers, it is ordered that the motion is denied in part and granted in part, as set forth below.

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In this action seeking damages for personal injuries allegedly sustained in a motor vehicle accident that occurred on July 31, 2013, defendants move for an order granting summary judgment dismissing plaintiffs's complaint and all cross-claims on the basis that the plaintiffs did not sustain a "serious injury" under Insurance Law §5102(d).

As a general proposition, the proponent of a summary judgment motion of this type must make a prima facie showing of entitlement to summary judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. (See Licari v Elliot, 57 NY 2d 230 [1982]; Alvarez v Prospect Hospital, 68 NY2d 320 1986]; Zuckerman v City of New York, 49 NY 2d 557 [1980]). The defendant's motion papers must demonstrate, through admissible medical evidence, which may include medical reports and records and affidavits and/or affirmed reports of medical examinations, including range-of-motion testing, that address all of the plaintiff's claims, that the plaintiff did not sustain functional limitations which would constitute either a permanent consequential limitation of use of a body organ, member, a significant limitation of use of body function or system, or a medically determined injury or impairment of a non-permanent nature that prevented the plaintiff from performing substantially all of the material, acts which constituted his or her usual customary daily activities for not less than 90 days during the 180 days immediately following the subject accident. (See Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]; Choi v Guerrero, 82 AD3d 1080 [2d Dept. 2011]; Jilani v Palmer, 83 AD3D 786 [2d Dept. 2011]). The failure to make a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see e.g. Reed v Righton Limo, Inc., 82 AD3D 1070 [2d Dept. 2011]; Joris v UMF Car & Limo Service, 82 AD3d 1050 [2d Dept. 2011]; Keenum v Atkins, 82 AD3d 843 [2d Dept. 2011]; Pero v Transervice Logistics, 83 AD3d 681 [2d Dept. 2011]).

Here, the defendants' moving papers present proof in admissible form, inter alia, the affirmed report of the defendants' examining physician, neurologist Jean-Robert Desrouleaux, M.D. Dr. Desrouleaux examined both plaintiffs, finding no functional limitations in either. Based upon the foregoing, the defendants provided proof demonstrating, prima facie, the absence of any condition in the plaintiffs that might have arguably meet the serious injury threshold of Insurance law §5102(d). Thus, the burden

shifts to the plaintiffs to demonstrate the existence of a triable issue of fact. (See Gaddy v Eyler, supra).

Plaintiffs in opposition, submits the affirmed report of treating physician Yan Q. Sun, M.D., as to plaintiff Dae Kyoo Kim, and Benjamin Chang, M.D., as to plaintiff Do Hyun Cho, based upon their past treatment of the plaintiffs and their re-examination of the plaintiffs - on December 26, 2015 (Kim) and February 22, 2016 (Cho). The Court is constrained to note that when plaintiff Kim visited Dr. Sun, he complained only of severe pain to his right knee. When plaintiff Kim presented to the defendants' physicians, he complained of left shoulder, bilateral knee, cervical and left elbow pain.

As to plaintiff Dae Kyoo Kim, Dr. Sun adequately documents and quantifies the functional impairments sustained by plaintiff Kim, based upon objective testing which includes quantified range-of-motion findings of deficits to the right knee. He quantifies his findings and compares them with normative values, based upon objective range-of-motion deficits in the allegedly injured parts of the body (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 AD3d 367 [2d Dept. 2009]). Thus, plaintiff Kim has met his burden.

As to plaintiff Cho, Dr. Chang's report is sketchy, and fails to demonstrate the required objective evidence. He includes only one range of motion reading on plaintiff Cho's lumbar spine of 80 percent out of 90 percent, and ignores the balance of Cho's complaints regarding the cervical spine and left shoulder. This is insufficient.

Based upon the foregoing, plaintiff Kim has amply demonstrated, that there exists a triable issue of fact as to whether he sustained a serious injury under the categories alleged under 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 [2d Dept. 2010]). Thus, the defendants' motion granting summary judgment in their favor dismissing the complaint as to plaintiff Dae Kyoo Kim on the ground that the did not sustain a "serious injury" under Insurance Law §5102(d) is denied.

Plaintiff Cho has failed to make that showing and his cause of action is dismissed

as against the defendants. Thus, the defendants' motion granting summary judgment in their favor and dismissing the complaint as to plaintiff Dae Kyoo Cho on the ground that he did not sustain a "serious injury" under Insurance Law §5102(d) is granted.

Accordingly, for all of the foregoing reasons, it is hereby,

ORDERED, that the defendants' motion is denied as to plaintiff DAE KYOO KIM; and it is further

ORDERED, that the motion by defendants is granted as to plaintiff DO HYUN CHO; and only plaintiff Cho's complaint is dismissed as against the defendants.

The foregoing constitutes the decision and order and judgment of this Court.

Dated: May 9, 2016

TIMOTHY J. DUFFICY, J.S.C.

FILED

MAY 18 2016

COUNTY CLERK
QUEENS COUNTY