Zhan-Jiu Qui v Gear Trans Corp.
2016 NY Slip Op 32073(U)
July 18, 2016
Supreme Court, Queens County
Docket Number: 3596/2014
Judge: Robert J. McDonald

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

- x

ZHAN-JIU QUI,

Plaintiff,

- against -

GEAR TRANS CORP. and JUAN PUMA,

Defendants.

- x

Index No.: 3596/2014

Motion Date: 6/28/16

Motion No.: 114

Motion Seq No.: 3

The following papers numbered 1 to 9 read on this motion by defendants for an order pursuant to CPLR 3212, granting defendants summary judgment and dismissing plaintiff's complaint on the ground that plaintiff fails to meet the serious injury threshold requirement of Insurance Law § 5102(d):

	Papers Numbered
Notice of Motion-Affirmation-Exhibits	1 - 4
Affirmation in Opposition-Exhibits	5 - 7
Reply Affirmation	8 - 9

This is a personal injury action in which plaintiff seeks to recover damages for injuries he allegedly sustained in a motor vehicle accident that occurred on November 28, 2011 on 3rd Avenue near its intersection with East 39th Street, New York County, New York. Plaintiff alleges that as a result of the accident he sustained serious injuries to his right knee, left shoulder, left hand, left thumb, left wrist, cervical spine, thoracic spine, lumbar spine, and head.

Plaintiff commenced this action by filing a summons and complaint on March 12, 2014. Defendants joined issue by service of an answer dated April 8, 2014. Defendants now move for an order pursuant to CPLR 3212, dismissing plaintiff's complaint on the ground that the injuries claimed by him fail to satisfy the serious injury threshold requirement of Section 5102(d) of the Insurance Law.

In support of the motion, defendants submit an affirmation from counsel, Eitan Z. Magendzo, Esq.; a copy of the pleadings; a copy of plaintiff's verified bill of particulars; a copy of the transcript of plaintiff's examination before trial taken on March 30, 2015; a copy of the Note of Issue; a copy of the affirmed medical report of Vladimir Zlatnik, M.D.; a copy of the affirmed orthopedic medical report of Lisa Nason, M.D.; and a copy of the Police Accident Report (MV-104AN).

At his examination before trial, plaintiff testified that he was involved in an accident on November 28, 2011 when he was struck by the door of defendants' vehicle while he was riding a bicycle. He fell on the left side of his body. He was taken to Bellevue Hospital by ambulance and was kept overnight. Three days after the accident, he began receiving physical therapy. He stopped treating at the physical therapy facility when the doctor told him he could no longer treat there. He received physical therapy, acupuncture, and heat treatment on his neck, back, left shoulder, and left wrist. He also received an injection to his left wrist. He missed more than one year of work as a result of the subject accident. At the deposition, he complained of a diminished memory, neck pain, and pain to his left elbow. He can no longer bend down, lift heavy things, or go jogging. He was involved in two prior accidents in 2006 and 2008 in which he injured his neck and back.

Dr. Zlatnik examined plaintiff on May 11, 2015. Dr. Zlatnik states that he only reviewed plaintiff's verified bill of particulars. Plaintiff presented with neck pain, left arm pain, and left shoulder pain without radiation to extremities. Dr. Zlatnik notes that there is muscle spasm detected in the cervical, thoracic, and lumbar spine areas. Dr. Zlatnik performed range of motion testing using a goniometer and found decreased ranges of motion in plaintiff's cervical spine, thoracic spine, and lumbosacral spine. He states that the ranges of motion were at least partially self-restricted as plaintiff performed better ranges of motion when observed candidly during the examination. Dr. Zlatnik concludes that there is no evidence of a permanent injury from a neurological perspective, and plaintiff is able to function and perform all activities of daily living.

Dr. Nason performed an independent orthopedic evaluation of plaintiff on May 11, 2015. She notes that plaintiff presented with complaints of pain in the cervical spine, left shoulder, left hand, left wrist, thoracic spine, and lumbar spine. Dr. Nason reviewed only plaintiff's verified bill of particulars. She performed range of motion testing with a goniometer on plaintiff's cervical spine, left shoulder, left hand and wrist,

left thumb, thoracic spine, and lumbar spine. She found all normal ranges of motion. Dr. Nason concludes that there is no evidence of residuals or permanency, and plaintiff is able to perform his usual occupation and activities of daily living without restrictions.

Defendants' counsel contends that the evidence submitted is sufficient to establish, prima facie, that plaintiff has not sustained an injury which resulted in dismemberment; significant disfigurement; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; or significant limitation of use of a body function or system. Counsel also contends that plaintiff, who alleges that he missed about one year of work as a result of the accident, but was not directed by any doctor to curtail his work activities, did not sustain a medically determined injury or impairment of a nonpermanent nature which prevented him, for not less than 90 days during the immediate 180 days following the occurrence, from performing substantially all of his usual daily activities.

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 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 opposition, plaintiff submits an affirmation from counsel, Patrick Griesbach, Esq.; a copy of this Court's Order dated May 2, 2016; an uncertified copy of the Bellevue Hospital record; copies of Dr. Surendranath K. Reddy's medical records with a business records certification; and copies of Dr. Mingxu Xu's affirmed medical reports.

Counsel first alleges that defendants failed to meet defendants' prima facie burden because, inter alia, Dr. Zlatnik, who examined plaintiff over three years after the subject accident, found range of motion deficits. Additionally, Dr. Zlatnik's and Dr. Nason's range of motion results, which were conducted on the same day, are contradictory. As such, defendants failed to demonstrate that plaintiff did not sustain a significant limitation of use of a body function or system or a permanent consequential limitation of use of a body organ or member. Counsel further contends that defendants failed to show that plaintiff did not sustain an injury which prevented him from performing his usual and customary acts during the first 90 out of 180 days after the incident as neither Dr. Nason nor Dr. Zlatnik reviewed any medical records or reports relating to plaintiff's treatment one year after the incident.

Upon a review of the motion papers, opposition, and reply thereto, this Court finds that the conclusion that plaintiff had no disability or impairment was directly contradicted by Dr. Zlatnik's recorded objectively-measured limitations in range of motion (see Ambroselli v Team Massapequa, Inc., 88 AD3d 927 [2d Dept. 2011]; Ballard v Cunneen, 76 AD3d 1037 [2d Dept. 2010]; Sainnoval v Sallick, 78 AD3d 922 [2d Dept. 2010]). Although Dr. Zlatnik states that the restrictions in range of motion were partially self-restricted, he never opines as to what extent the positive findings are self-imposed. Additionally, Dr. Zlatnik failed to address the muscle spasms detected in plaintiff's cervical, thoracic, and lumbar spine areas. Regarding the 90/180 category, neither doctor addressed the possibility that plaintiff had a medically determined injury or impairment immediately following the accident that affected his activities during the first 180 days (see Che Hong Kim v Kossoff, 90 AD3d 969 [2d Dept. 2011]; Talabi v Diallo, 32 AD3d 1014 [2d Dept. 2006]; DiDomenico v Kocur, 2016 NY Slip Op 04171 [2d Dept. 2016]).

Based on the foregoing, 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, for the reasons set forth above, it is hereby,

ORDERED, that the motion by defendants for an order granting summary judgment dismissing plaintiff's complaint is denied; and it is further

ORDERED, that this matter remains on the calendar of the Trial Scheduling Part for September 21, 2016.

Dated: July 18, 2016
Long Island City, N.Y.

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ROBERT J. MCDONALD
J.S.C.