

Chin Yeh v Restagno
2017 NY Slip Op 30282(U)
February 10, 2017
Supreme Court, Queens County
Docket Number: 8597/2013
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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CHIN YEH AND HSIAO HSIU YEH, Index No.: 8597/2013

Plaintiffs, Motion Date: 2/1/17

- against - Motion No.: 161

DOMINICK RESTAGNO, LYNN RESTAGNO, AND Motion Seq.: 2
 JENNY YEH,

Defendants.

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The following papers numbered 1 to 11 read on this motion by defendant JENNY YEH for an order pursuant to CPLR 3212, granting defendant summary judgment and dismissing the complaint on the grounds that plaintiff HSIAO HSIU YEH did not sustain a serious injury within the meaning of Insurance Law §§ 5104(a) and 5102(d); and on this cross-motion by co-defendants DOMINICK RESTAGNO and LYNN RESTAGNO for same:

	<u>Papers Numbered</u>
Notice of Motion-Affirmation-Exhibits.....	1 - 4
Notice of Cross-Motion.....	5 - 6
Affirmation in Opposition-Exhibits.....	7 - 9
Reply Affirmation.....	10 - 11

In this negligence action, plaintiffs seek to recover damages for personal injuries allegedly sustained by plaintiff Hsiao Hsiu Yeh (Mrs. Yeh) as a result of a motor vehicle accident that occurred on August 12, 2012 on the eastbound Northern Boulevard at or near its intersection with Douglaston Parkway, in Queens County, New York. In the verified bill of particulars, Mrs. Yeh alleges that she sustained serious injuries, including, inter alia, central vestibular dysfunction; C3-C4 central disc herniation indenting thecal sac; C4-C5 disc bulge; L1-L2 disc bulge; L4-L5 broad based disc herniation; T2-T3 intervertebral disc bulge; and aggravation and worsening of pre-existing conditions.

Plaintiffs commenced this action by filing a summons and complaint on January 25, 2013. Defendants Dominick Restagno and Lynn Restagno appeared via service of an answer with cross-claim dated May 24, 2013. Defendant Jenny Yeh interposed a verified answer with cross-claims on October 7, 2015. Plaintiff filed a Note of Issue on July 28, 2016. Defendants now move for an order pursuant to CPLR 3212(b), granting summary judgment and dismissing the complaint on the ground that Mrs. Yeh did not suffer a serious injury as defined by Insurance Law § 5102.

In support of the motion, defendant submits an affirmation from counsel, Megan C. Sampson, Esq.; a copy of the pleadings; a copy of the verified bill of particulars; a copy of the so ordered stipulation extending the time to move for summary judgment; a copy of the transcript of the examination before trial of Mrs. Yeh ; and a copy of the affirmed medical report of Dr. Igor Rubinshteyn.

At her deposition, taken on April 8, 2016, Mrs. Yeh testified that she was involved in the subject accident. She did not lose consciousness and did not sustain any cuts as a result of the accident. Two days following the accident, she sought treatment at a clinic in Flushing. She complained of pain in her neck and back, along with dizziness. She was given pain medication. She had MRIs take of her neck and back on two occasions. She was given physical therapy, chiropractic care, and acupuncture. She would receive treatment three times per week for five to six months. She ended treatment after six months because her no-fault insurance coverage ended. She never injured her neck or back prior to the subject accident. At the time of the accident, she was a housewife. As a result of the accident, she can no longer vigorously exercise.

Dr. Rubinshteyn examined Mrs. Yeh on August 12, 2016. Mrs. Yeh presented with current complaints of pain in her neck, middle back, and lower back. She also reported experiencing weakness and numbness. Dr. Rubinshteyn identifies the medical records he reviewed and performed objective range of motion testing using a goniometer. He found full range of motion in Mrs. Yeh's cervical spine, thoracic spine, and lumbar spine. All other objective testing was negative. Dr. Rubinshteyn concludes that Mrs. Yeh has degenerative joint disease of the cervical spine, thoracic spine, and lumbar spine. He further opines that there is no objective evidence of any causally related orthopedic disability based on the physical examination and his review of medical documentation.

Defendant's counsel contends that the medical report and transcripts of the deposition testimony are sufficient to demonstrate that Mrs. Yeh did not sustain a permanent consequential limitation of use of a body organ or member; a significant limitation of use of a body function or system; or a medically determined injury or impairment of a nonpermanent nature which prevented Mrs. Yeh 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.

In opposition, plaintiffs submit an affirmation from counsel, Bobby Walia, Esq.; a copy of Dr. Benigno R. Sales' certified records; copies of the affirmed medical reports from Drs. Benjamin Chang and Mary Hu; and a copy of the transcript of the examination before trial of plaintiff Chin Yeh.

Mrs. Yeh first presented to Dr. Sales on August 25, 2012 with complaints of neck pain, mid back pain, lower back pain, difficulty walking after sitting, headaches, dizziness, nausea, and insomnia. He performed range of motion testing which revealed limited ranges of motion in Mrs. Yeh's cervical spine, thoracic spine, and lumbar spine. Straight leg raising testing was positive. He recommended a physical therapy program on a three times a week interval. He opined that her injuries were causally related to the subject accident. He noted that Mrs. Yeh is subject to frequent exacerbation of symptoms as a result of the chronic joint dysfunction.

Dr. Hu also submits an affirmation stating that she reviewed the MRI films of Mrs. Yeh's cervical spine dated September 21, 2012, thoracic spine dated September 29, 2016, and lumbar spine dated September 22, 2012. Dr. Hu found, inter alia, disc herniations at C3-C4, C5-C6, C6-C7, L3-L4, and L5-S1. She also found disc bulges at C4-C5 and L2-L3.

Most recently on July 7, 2016, Dr. Chang re-evaluated Mrs. Yeh. Dr. Chang noted limited ranges of motion in Mrs. Yeh's cervical spine and lumbar spine. He concludes that the injuries were directly and causally related to the subject accident and that her current condition is permanent. Additionally, the injuries have resulted in a reduction in the normal range of motion and pain may persist upon the performance of ordinary functions.

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 the 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]).

Here, the competent proof submitted by defendant, including the affirmed medical report of Dr. Rubinshteyn and Mrs. Yeh's deposition testimony, is sufficient to meet defendant's prima facie burden by demonstrating that plaintiff 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]; Carballo v Pacheco, 85 AD3d 703 [2d Dept. 2011]; Ranford v Tim's Tree & Lawn Serv., Inc., 71 AD3d 973 [2d Dept. 2010]).

Although plaintiffs' counsel contend that Dr. Rubinshteyn's medical report is inadmissible because a certified translator was not present during Mrs. Yeh's examination, Dr. Rubinshteyn notes that Mr. Yeh served as a translator. Additionally, Mrs. Yeh has not put forth an affidavit stating that she did not understand Dr. Rubinshteyn's instructions. As Mrs. Yeh is in the best position to contest the reliability of the Dr. Rubinshteyn's report, but failed to do so, this Court will consider Dr. Rubinshteyn's report.

However, in opposition, this Court finds that plaintiffs raised triable issues of fact as to whether Mrs. Yeh sustained a serious injury by submitting the certified records of Dr. Sales

and the affirmed medical reports of Drs. Chang and Hu attesting to the fact that Mrs. Yeh sustained injuries as a result of the subject accident, finding that Mrs. Yeh had significant limitations in ranges of motion both contemporaneous to the accident and in a recent examination, and concluding that the 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]).

Additionally, Mrs. Yeh adequately explained the gap in her treatment by stating that her no-fault insurance benefits ran out (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, Mrs. Yeh demonstrated issues of fact as to whether she 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]).

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

ORDERED, that the summary judgment motion by defendant JENNY YEH is denied; and it is further

ORDERED, that the summary judgment cross-motion by defendants DOMINICK RESTAGNO and LYNN RESTAGNO is likewise denied.

Dated: February 10, 2017
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C