

Johnson v Rong Zhong Weng
2018 NY Slip Op 30012(U)
January 4, 2018
Supreme Court, New York County
Docket Number: 160979/2013
Judge: Paul A. Goetz
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ
J.S.C. Justice

PART 22

JOHNSON, GREGORY P.

-v-

WENG, RONG ZHONG

INDEX NO. 160979/2013

MOTION DATE 01/04/2018

MOTION SEQ. NO. 005

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits + 2012 No(s). 1 + 2

Answering Affidavits — Exhibits _____ No(s). 3 + 4

Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is

Defendants American United Transportation II, Inc. and Arturo Quitizaca's ("American United Defendants") motion for summary judgment pursuant to CPLR 3212 on the grounds that the injuries allegedly sustained by Plaintiff Gregory P. Johnson as a result of the February 12, 2011, accident fail to establish a serious injury threshold as defined by Insurance Law § 5102 (d) and Defendant Rong Zhong Weng's cross-motion seeking the same relief on the same grounds and adopting the arguments and evidence submitted by the American United Defendants are decided as follows:

Plaintiff's bill of particulars alleges injuries to his cervical and lumbar spine and head (headaches), and PTSD. Plaintiff's bill of particulars avers that his injuries meet the following Insurance Law § 5102 (d) criteria: permanent loss of use; permanent consequential limitation of use; significant limitation of use; and 90/180-day.

Defendants' neurologist, Dr. Jean-Robeert Desrouleaux, conducted an IME of Plaintiff on February 19, 2015. During his examination of Plaintiff, Dr. Desrouleaux found normal ranges of motion of and negative/normal objective tests for his cervical and lumbar spine. Dr. Desrouleaux conducted a neurological examination of Plaintiff and found that he had a normal examination. Dr. Desrouleaux diagnosed Plaintiff as having resolved, alleged cervical and lumbar spine strain/sprain and that Plaintiff's alleged head injury with headaches was resolved.

Defendants' radiologist, Dr. Mark Decker reviewed MRI's of Plaintiff's cervical spine and brain (both taken on March 3, 2011) on April 15, 2014. Dr. Decker's findings on the MRI of Plaintiff's cervical spine include three longstanding disc bulges with no herniations or fractures that are not causally related to the accident and no evidence to suggest a traumatic injury was sustained. Dr.

Dated: JAN 04 2018

(184)

_____, J.S.C.

1. CHECK ONE: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ
J.S.C. Justice

PART 22

JOHNSON

-v-

WENG

INDEX NO. 160979/2013

MOTION DATE _____

MOTION SEQ. NO. 005

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____

Answering Affidavits — Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is

Decker's findings on the MRI of Plaintiff's brain include "no hemorrhage or intracranial lesion" and no "mass effect, midline shift or extra axial collection." Dr. Decker concludes that there is "[n]o evidence to suggest that a traumatic injury was sustained [by Plaintiff to his brain/head]."

Defendants' submissions fail to eliminate triable issues of fact as to whether Plaintiff sustained a serious injury to his cervical spine. Dr. Desrouleaux concludes that Plaintiff's injury to his cervical spine is resolved strains/sprains but Dr. Decker concludes that Plaintiff's injury to his cervical spine are long standing and not causally related to the accident. These contradictory findings concerning Plaintiff's cervical spine raise triable issues of fact for the jury to resolve (*Karounos v Doulalas*, 153 AD3d 1166 [1st Dept 2017]; *Johnson v Salaj*, 130 AD3d 502 [1st Dept 2015]; *Martinez v Pioneer Transp. Corp.*, 48 AD3d 306 [1st Dept 2008]).

Defendants met their prima facie burden that Plaintiff did not sustain a serious injury to his lumbar spine by Dr. Desrouleaux report finding normal ranges of motion and negative/normal test results and resolved strains/sprains (*Cattouse v Smith*, 146 AD3d 670 [1st Dept 2017]). Defendants submission did not address Plaintiff's claim of PTSD. To the extent that Plaintiff is proceeding with his claim of PTSD, Defendants failed to make a prima facie showing *Reys v Diaz*, 82 AD3d 484 [1st Dept 2011]). Therefore, the burden does not shift to Plaintiff to submit evidence sufficient to raise an issue of fact on whether he sustained a serious injury to his cervical lumbar spine and whether he suffers from PTSD as a result of the accident (*Jackson v Leung*, 99 AD3d 489 [1st Dept 2012]; *Singer v Gae Limo Corp.*, 91 AD3d 526 [1st Dept 2012]).

To the extent that headaches may be considered a serious injury, Defendants' met their prima

Dated: JAN 04 2018

(284)

_____, J.S.C.

1. CHECK ONE: ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ
J.S.C.
Justice

PART 22

JOHNSON

-v-

WENG

INDEX NO. 160979/2013

MOTION DATE _____

MOTION SEQ. NO. 005

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____

Answering Affidavits — Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is

facie burden by submitting Dr. Desrouleaux's report with his observation that Plaintiff had a normal neurological examination and Dr. Decker's findings on the MRI of Plaintiff's head that there was no evidence of a traumatic injury (*cf Pendleton v Bizzoco*, 152 AD3d 711 [2nd Dept 2017]; *Marshall v Marshall*, 117 AD3d 805 [2nd Dept 2014]).

Defendants also met their prima facie burden regarding Plaintiff's 90/180-day claim by submitting Plaintiff's deposition testimony that he was not confined to his home after the accident and he returned to work less than two months after the accident (*Cf Fathi v Sodhi*, 146 AD3d 445 [1st Dept 2017]).

In opposition, Plaintiff failed to raise an issue of fact as to whether he suffered a serious injury as a result of the accident to his lumbar spine and head and as to his 90/180-day claim. Plaintiff submits an October 18, 2016, affirmation from Plaintiff's emergency medicine and internal medicine physician, David H. Delman. Dr. Delman does not address Plaintiff's alleged injury to his lumbar spine and indeed a March 1, 2011, affirmed report from Dr. Delman observes regarding Plaintiff's lumbar spine "[r]ange of motion reveals no pain or tenderness." Dr. Delman's October 18, 2016 affirmation also does not address Plaintiff's alleged injury to his head/headaches. Regarding Plaintiff's 90/180-day claim Plaintiff argues that Defendants failed to meet their burden because they base their application on a doctor's findings upon an examination conducted years after the accident. But, as noted above, Defendants seek dismissal of Plaintiff's 90/180-day claim not based on their doctors' findings but based on Plaintiff's own deposition testimony. Therefore, Plaintiff has failed to raise an issue of fact concerning his allegations of serious injury to his lumbar spine and head and as to his 90/180-day claim.

However, in the event that Plaintiff proves serious injury to his cervical spine or PTSD then he will be

Dated: JAN 04 2018

(394)

_____, J.S.C.

1. CHECK ONE: ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. PAUL A. GOETZ
J.S.C.

PRESENT: _____
Justice

PART 22

JOHNSON
v
WENG

INDEX NO. 160979/2013

MOTION DATE _____

MOTION SEQ. NO. 005

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____

Answering Affidavits — Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is

able to recover for all his claimed injuries including his claim of injuries to his lumbar spine and head (*Karounos v Doulalas*, 153 AD3d 1166 [1st Dept 2017] [holding "[i]f plaintiff establishes a serious injury to her cervical or lumbar spine at trial, she will be entitled to recover damages for any other injuries caused by the accident, even those that do not meet the serious injury threshold."]; *Boateng v Yiyan*, 119 AD3d 424 [1st Dept 2014]; *Caines v Diakite*, 105 AD3d 404 [1st Dept 2013]; *Delgado v Papert Transit, Inc.*, 93 AD3d 457 [1st Dept 2012] [holding "[o]nce a serious injury has been established, it is unnecessary to address additional injuries to determine whether the proof is sufficient to withstand defendants' summary judgment."]).

Accordingly, based on the foregoing it is hereby

ORDERED that Defendants' summary judgment motion and cross motion are GRANTED as to Plaintiff's claims of serious injury to his lumbar spine and head/headaches and as to his 90/180-day claim and DENIED as to Plaintiff's cervical spine and PTSD claims of serious injury; and it is further

ORDERED that the parties are directed to appear for settlement conference in Part 22, at 80 Centre Street, Room 136, at 9:30 on February 20, 2018.

This constitutes the Decision and Order of the Court.

Dated: 1/4/18

(494)

_____, J.S.C.

1. CHECK ONE: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):