

Yi v Zheng

2019 NY Slip Op 34352(U)

July 10, 2019

Supreme Court, Suffolk County

Docket Number: Index No. 17-607827

Judge: Joseph C. Pastorella

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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.

NYSCEF DOC. NO. 31

SHORT FORM ORDER

RECEIVED NYSCEF: 07/29/2019

INDEX No. 17-607827

CAL. No. 18-01619MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

MOTION DATE 2-6-19
ADJ. DATE 4-3-19
Mot. Seq. # 001 - MD

-----X
BRIAN G. YI,

Plaintiff,

- against -

MEI Z. ZHENG,

Defendant.
-----X

DOUGLAS KAPLAN, ESQ.
Attorney for Plaintiff
124 N. Merrick Avenue
Merrick, New York 11566

MCCABE, COLLINS, MCGEOUGH,
FOWLER, LEVINE & NOGAN, LLP
Attorney for Defendant
346 Westbury Avenue
P.O. Box 9000
Carle Place, New York 11514

Upon the following papers read on this e-filed motion for summary judgment: Notice of Motion/Order to Show Cause and supporting papers dated January 2, 2019; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers dated March 6, 2019; Replying Affidavits and supporting papers dated March 15, 2019; Other Sur-Reply dated March 19, 2019; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion by defendant for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a “serious injury” as defined in Insurance Law § 5102 (d) is denied.

This is an action to recover damages for personal injuries sustained by plaintiff when his vehicle collided with a vehicle owned and operated by defendant. The accident allegedly occurred on November 25, 2016, at the intersection of New York Avenue and Alderfield Lane, in Melville, New York. By his bill of particulars, plaintiff alleges that, as a result of the subject accident, he sustained serious injuries and conditions, including a torn anterior cruciate ligament (ACL) of the left knee and bulging discs in the cervical and lumbar regions.

Defendant moves for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a “serious injury” as defined in Insurance Law § 5102 (d).

Yi v Zheng

Index No. 17-607827

Page 2

Insurance Law § 5102 (d) defines “serious injury” as “a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person’s 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 order to recover under the “permanent loss of use” category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (*Oberly v Bangs Ambulance*, 96 NY2d 295). To prove the extent or degree of physical limitation with respect to the “permanent consequential limitation of use of a body organ or member” or a “significant limitation of use of a body function or system” categories, either a specific percentage of the loss of range of motion must be ascribed, or there must be a sufficient description of the “qualitative nature” of plaintiff’s limitations, with an objective basis, correlating plaintiff’s limitations to the normal function, purpose and use of the body part (*see Perl v Meher*, 18 NY3d 208, 936 NYS2d 655 [2011]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*Licari v Elliott*, 57 NY2d 230; *Cebron v Tuncoglu*, 109 AD3d 631).

On a motion for summary judgment, the defendant has the initial burden of making a prima facie showing, through the submission of evidence in admissible form, that the injured plaintiff did not sustain a “serious injury” within the meaning of Insurance Law § 5102 (d) (*see Gaddy v Eyler*, 79 NY2d 955; *Akhtar v Santos*, 57 AD3d 593). The defendant may satisfy this burden by submitting the plaintiff’s deposition testimony and the affirmed medical report of the defendant’s own examining physician (*see Moore v Edison*, 25 AD3d 672; *Farozes v Kamran*, 22 AD3d 458). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, *supra*; *Boone v New York City Tr. Auth.*, 263 AD2d 463).

Here, defendant made a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) through the affirmed report of her examining physician (*see Bailey v Islam*, 99 AD3d 633; *Sierra v Gonzalez First Limo*, 71 AD3d 864; *Staff v Yshua*, 59 AD3d 614). On July 12, 2018, approximately one year and eight months after the subject accident, defendant’s examining orthopedist, Dr. Craig Ordway, examined plaintiff and performed certain orthopedic and neurological tests, including the straight leg raising test, the Lachman’s test, the McMurray’s test, and the Slocum’s test. Dr. Ordway found that all the test results were negative or normal, and that there were no spasm in plaintiff’s cervical region and no effusion in his left knee. Dr. Ordway also performed range of motion testing on plaintiff’s cervical and lumbar regions and left knee, using a goniometer to measure his joint movement, and found that he exhibited normal joint function. Dr. Ordway opined that plaintiff had no orthopedic disability at the time of the examination (*see Willis v New York City Tr. Auth.*, 14 AD3d 696).

Further, at his deposition, plaintiff testified that following the accident, he missed approximately two to three weeks from work. He testified that he underwent a left knee arthroscopy in January 2017.

Yi v Zheng
Index No. 17-607827
Page 3

Following the surgery, he missed two to three weeks from work. He testified that there is no activity that he is unable to perform because of the accident, except for exercising, jogging, and driving and sitting for a long time. Plaintiff's deposition testimony established that his injuries did not prevent him from performing "substantially all" of the material acts constituting his customary daily activities during at least 90 out of the first 180 days following the accident (*see Burns v McCabe*, 17 AD3d 1111; *Curry v Veletz*, 243 AD2d 442).

Thus, defendant met her initial burden of establishing that plaintiff did not sustain a permanent consequential limitation of use of a body organ or member or significant limitation of use of a body function or system, and that he was not prevented from performing substantially all of her usual and customary daily activities for 90 of the first 180 days following the accident within the meaning of Insurance Law § 5102 (d) (*see Gonzalez v Green*, 24 AD3d 939).

The burden, therefore, shifted to plaintiff to raise a triable issue of fact (*see Gaddy v Eylar, supra*). A plaintiff claiming injury within the "limitation of use" categories must substantiate his or her complaints of pain with objective medical evidence showing the extent or degree of the limitation of movement caused by the injury and its duration (*see Ferraro v Ridge Car Serv.*, 49 AD3d 498; *Mejia v DeRose*, 35 AD3d 407; *Laruffa v Yui Ming Lau*, 32 AD3d 996; *Cerisier v Thibiu*, 29 AD3d 507). To prove significant physical limitation, a plaintiff must present either objective quantitative evidence of the loss of range of motion and its duration based on a recent examination of the plaintiff or a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (*see Perl v Meher, supra; Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345; *Rovelo v Volcy*, 83 AD3d 1034). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*see Licari v Elliott, supra; Cebron v Tuncoglu, supra*).

Plaintiff opposes the motion, arguing moving defendant's expert report is insufficient to meet her burden on the motion. Plaintiff also argues that the medical reports prepared by his treating physicians raise a triable issue as to whether he suffered injury within the "significant limitation of use" category of Insurance Law § 5102 (d). In opposition, plaintiff submits the affirmed reports of Dr. Alan Ng, the affirmed magnetic resonance imaging (MRI) examination reports of Dr. B.V. Reddy, and the affirmed operation report of Dr. Daniel Yoo.

Dr. Ng's report set forth plaintiff's complaints and the findings, including significant limitation in his cervical and lumbar regions and left knee joint function measured during range of motion testing performed at his initial consultation on December 7, 2016, 12 days after the subject accident. In January 2017, March 2017, and August 2017, Dr. Ng performed range of motion testing on plaintiff's cervical and lumbar regions and left knee and found a significant restriction to the range of motion in those regions. On February 6, 2019, approximately two years and two months after the subject accident, when Dr. Ng re-examined plaintiff and performed range of motion testing on his cervical and lumbar regions and left knee, he quantified specific limitations in the range of motion in those regions. This evidence is sufficient to raise a triable issue of fact as to whether the plaintiff sustained a serious injury as defined by Insurance Law § 5102 (d) (*see Perl v Meher, supra; Gooden v Joseph*, 137 AD3d 1215; *Gussack v McCoy*, 72 AD3d 644; *Casiano v Zedan*, 66 AD3d 730). In addition, as defendant has failed to

NYSCEF DOC. NO. 31

RECEIVED NYSCEF: 07/29/2019

Yi v Zheng
Index No. 17-607827
Page 4

establish, prima facie, a lack of causation, the burden does not shift to plaintiff to raise a triable issue of fact regarding causation or to explain any gap in treatment (see *Pommells v Perez, supra; Magnano v DiMisa*, __AD3d__ [2d Dept, June 26, 2019]; *Lambropoulos v Gomez*, 166 AD3d 952; *Rivera v Ramos*, 132 AD3d 655).

Accordingly, defendant's motion for summary judgment dismissing the complaint is denied.

Dated: July 10, 2019


HON. JOSEPH C. PASTORESSA, J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION