

Yuet Ting Cheng v Roberts

2020 NY Slip Op 31163(U)

April 21, 2020

Supreme Court, Kings County

Docket Number: 513038/2017

Judge: Debra Silber

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 9**

_____X

YUET TING CHENG,

Plaintiff,

-against-

**KOFFI N. ROBERTS, G&G CAB CORP.
and BRANDON MOREIRA,**

Defendants.

_____X

DECISION / ORDER

**Index No. 513038/2017
Motion Seq. No. 2, 3
Date Submitted: 3/5/20
Cal No. 11, 12**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendants Koffi N. Roberts and G&G Cab Corp.'s motion and defendant Robert Moreira's cross motion for summary judgment.

Papers	NYSCEF Doc.
Notice of Motion, Affirmation and Exhibits Annexed.....	<u>24-32</u>
Notice of Cross Motion, Affirmation and Exhibits Annexed.....	<u>34-40</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>47-55, 57-65</u>
Reply Affirmation.....	<u>67, 69</u>

Upon the foregoing cited papers, the Decision/Order on these motions is as follows:

This is a personal injury action arising out of a motor vehicle accident that took place on June 26, 2016, on Stanhope Street at the intersection with Woodward Street in Queens, NY. At the time of the accident, plaintiff was a passenger in a vehicle owned and operated by defendant Brandon Moreira which was in an accident with a vehicle owned by defendant G&G Cab Corp. and operated by defendant Koffi N. Roberts. Plaintiff was taken from the scene in an ambulance. In her bill of particulars, plaintiff alleges that as a result of the accident, she sustained injuries to her right shoulder and

to her cervical and lumbar spine. Plaintiff had arthroscopic surgery to her right shoulder and months of physical therapy. At the time of the accident, she was thirty-three years old. She claims she was unable to work or do her household chores for approximately seven months after the accident.

Defendants Koffi N. Roberts and G&G Cab Corp. move, and defendant Brandon Moreira cross-moves, for summary judgment dismissing the complaint. They contend that plaintiff did not sustain a “serious injury” as defined by Insurance Law § 5102(d).

Defendants Koffi N. Roberts and G&G Cab Corp. submit the pleadings, plaintiff’s EBT transcript and affirmed reports from an orthopedist, Thomas P. Nipper, M.D. and a radiologist, Scott A. Springer, D.O. Dr. Thomas P. Nipper examined plaintiff on November 8, 2018 and tested her range of motion in her spine and shoulders. He reports that plaintiff had normal range of motion in her cervical and lumbar spine and right shoulder, with otherwise negative test results. He also notes that the MRI reports indicated that all abnormalities on the films were degenerative in nature, with no evidence of a traumatic injury. He concludes that plaintiff’s injuries were only sprains and strains, and they have fully resolved. Dr. Nipper opines that plaintiff did not sustain any significant or permanent injury as a result of the accident.

Dr. Scott A. Springer reviewed the MRIs of plaintiff’s right shoulder, taken on 7/21/16, her lumbar spine, taken on 8/6/16, and her cervical spine, taken on 6/26/16. He states that the films only indicate degenerative changes, with no abnormalities which are causally related to the 6/25/16 accident.

With regard to the 90/180-day category of injury, defendants contend that by eliminating the accident as the cause of the plaintiff’s injuries, defendants have

eliminated all applicable categories of injury in the statute. They note that Dr. Springer, who reviewed the MRI's taken shortly after the accident, found no evidence of any traumatic injury. Further, they note that plaintiff was asked, and testified at her EBT, that she was not told by a doctor to stay home following the accident.

Defendant Brandon Moreira adopts his co-defendants' arguments and exhibits in his cross motion, and further provides an affirmed report from his examining orthopedist, Andrew Miller, M.D., and a radiologist Melissa Sapan Cohn, M.D.

Dr. Andrew Miller examined plaintiff on September 13, 2018 and also reports that plaintiff had a normal range of motion in her cervical and lumbar spine and in her right shoulder, with otherwise negative test results. He concludes that plaintiff had sustained cervical, thoracic and lumbar spine sprains, which had resolved, and was "status post, right shoulder surgery, healed." He finds no evidence of an orthopedic disability.

Dr. Melissa Sapan Cohn reviewed plaintiff's MRIs and reports that they show degenerative changes with no evidence of a traumatic injury.

Conclusions of Law

Defendants have failed to make a prima facie showing that plaintiff was not prevented from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than 90 of the 180 days following the accident (*see Fils-Aime v Colombo*, 152 AD3d 493, 494 [2d Dept 2017] ["defendants' submissions failed to eliminate triable issues of fact as to whether the plaintiff sustained a serious injury under the 90/180-day category of Insurance Law § 5102(d)"]; *Sullivan v Illoge*, 50 AD3d 886 [2d Dept 2008] ["defendants' motion papers did not adequately

address the plaintiff's claim . . . that [he] sustained a medically-determined injury or impairment of a nonpermanent nature which prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident]). Plaintiff testified that she missed seven months of work as a result of the accident, [EBT Page 90] and although she initially said that no doctor told her she could not return to work, [Page 91], which defendants rely on in their motion for proof of their prima facie with regard to the 90/180-day category of injury¹, the very next question at the same EBT was whether she had provided a doctor's note to her employer that she could not return to work, and she said "yes" [EBT Page 91]. She proceeded to explain that there were several notes from her doctor, Dr. Stiler, and then a note clearing her to return to work. She said she had emailed all of these to the human resources department of her company, and still had the e-mails [Pages 91-94]. She further explained that she collected disability insurance, a job benefit, while she was out of work [Page 95-96].

As defendants have failed to make a prima facie case with regard to all of plaintiff's injuries and all of the applicable categories of injury, it is unnecessary to consider the papers submitted by this plaintiff in opposition (see *Yampolskiy v Baron*, 150 AD3d 795 [2d Dept 2017]; *Valerio v Terrific Yellow Taxi Corp.*, 149 AD3d 1140 [2d Dept 2017]; *Koutsoumbis v Paciocco*, 149 AD3d 1055 [2d Dept 2017]; *Aharonoff-Arakanchi v Maselli*, 149 AD3d 890 [2d Dept 2017]; *Lara v Nelson*, 148 AD3d 1128 [2d

¹ Defendants' counsel, Adam Warner's affirmation in support of mot. seq. 3, at Paragraph 8, states (incredibly) "Plaintiff was not told by any of her healthcare providers to miss time from work as a result of the subject accident. (P. 91)

Dept 2017]; *Sanon v Johnson*, 148 AD3d 949 [2d Dept 2017]; *Weisberg v James*, 146 AD3d 920 [2d Dept 2017]; *Marte v Gregory*, 146 AD3d 874 [2d Dept 2017]; *Goeringer v Turrisi*, 146 AD3d 754 [2d Dept 2017]; *Che Hong Kim v Kossoff*, 90 AD3d 969 [2d Dept 2011]).

In any event, had defendants made a prima facie case for dismissal, plaintiff provides medical evidence which overcomes the motion and raises a triable issue of fact. Dr. Stiler's affirmed report and Dr. Berkowitz's affirmed reports create a "battle of the experts" and raise an issue of fact as to whether plaintiff sustained a "serious injury" as a result of the accident (see *Young Chan Kim v Hook*, 142 AD3d 551, 552 [2d Dept 2016]).

Dr. Igor Stiler first treated plaintiff shortly after the accident. He examined her most recently on November 1, 2019. He reports significant restrictions in the range of motion in her right shoulder and in her spine, and diagnoses plaintiff with "chronic right shoulder labral tear, chronic cervical disc herniations with cord impingement and extrusion, chronic lumbar disc herniation with bulges". He states that the plaintiff's injuries were caused by the June 26, 2016 accident and constitute a permanent partial impairment.

Dr. Dov J. Berkowitz performed the arthroscopic surgery on plaintiff's right shoulder on October 9, 2016, and says he repaired SLAP tears and anterior labral tearing. He re-evaluated plaintiff on September 16, 2019. He finds that she still has restrictions in her ability to forward flex and in the external rotation of her shoulder and opines that the injury in the plaintiff's right shoulder and her subsequent treatment was

caused by the motor vehicle accident on June 26, 2016, and that the injury is permanent.

Accordingly, it is **ORDERED** that the motion and cross motion are denied.

This constitutes the decision and order of the court.

Dated: April 21, 2020

ENTER :

A handwritten signature in black ink, appearing to be 'DS' or similar initials, written over a horizontal line.

Hon. Debra Silber, J.S.C.