

Okjoon Lee v Kolomvos

2021 NY Slip Op 33944(U)

October 8, 2021

Supreme Court, Queens County

Docket Number: Index No. 714206/2017

Judge: Lourdes M. Ventura

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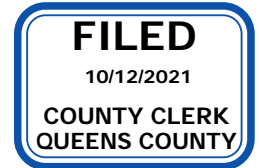
This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK - QUEENS COUNTY

Present: HONORABLE LOURDES M. VENTURA, J.S.C.
-----X

IAS Part 37



OKJOON LEE and JONG D. LIM,
Plaintiffs,

Index
Number: 714206/2017

-against-

Motion
Date: July 12, 2021

STAMATIA KOLOMVOS and
MICHAIL S. KOLOMVOS,
Defendants.

Motion
Seq. No.: 2

-----X

The following electronically filed (EF) papers read on this Motion by Defendants Stamatia Kolomvos and Michail S. Kolomvos for an Order: pursuant to CPLR 3211(a)(2), 3211(a)(7) and 3212 granting the Defendants judgment dismissing the complaint of the Plaintiff Okjoon Lee, and for such other and further relief as to the Court may seem just and proper.

	Papers
	<u>Numbered</u>
Notice of Motion - Affirmation - Exhibits.....	EF 23-29
Opposition to Motion - Affirmation - Exhibits.....	EF 33-38
Affirmation in Reply - Exhibits.....	EF 39

Upon the foregoing papers, it is Ordered that Defendants' Motion is determined as follows:

Plaintiff Okjoon Lee (hereinafter "Plaintiff Lee") commenced the above-entitled action to recover for personal injuries allegedly sustained in an automobile collision on July 7, 2017 where plaintiff Lee alleges as a result, of the collision it suffered a serious injury as defined pursuant to Insurance Law §§ 5102, 5104(a).

Defendants filed this motion seeking *inter alia* an Order pursuant to CPLR 3211(a)(2), 3211(a)(7) and 3212 granting the Defendants judgment dismissing the complaint of the Plaintiff Lee. Defendants aver that Plaintiff Lee has not suffered a "serious injury" as required by the Insurance Law and cannot, as a result, make out a prima facie case against the Defendants.

Plaintiffs oppose Defendants' motion and aver *inter alia* Defendants' summary judgment motion is untimely and Defendants failed to show good cause for their delay; Defendants have failed to meet their prima facie burden to be entitled for summary judgment as a matter of law; there are numerous issues of fact raised by Plaintiff Lee that would justify denial of the motion in its entirety; Plaintiff Lee suffered serious injuries within the meaning of Insurance Law §5102(d); and Plaintiff Lee has demonstrated with sufficiency that the injuries sustained are permanent and any medical treatments are palliative in nature.

In support Defendants' motion relies *inter alia* upon the following evidence: a copy of the Summons and Complaint filed in the instant action, the Bill of Particulars, Defendants' answer, Plaintiff Lee's examination before trial testimony, medical report from Stuart Springer, M.D. ("Dr. Springer"). Dr. Springer's report dated August 26, 2020 states that plaintiff Lee was examined on August 26, 2020 and in relevant part states:

"In my professional opinion, based upon a comprehensive physical examination, case history and review of the examinee's file, my impression is:

- Cervical spine sprain/strain resolved
- Thoracic spine sprain/strain resolved
- Lumbar spine sprain/strain resolved
- Right shoulder sprain/strain resolved
- Left shoulder sprain/strain resolved

Treatment to date has been reasonable, necessary and accident related. The claimant is able to work and perform all activities of daily living without restrictions."

In opposition, Plaintiff Lee submits *inter alia* the following evidence in support of its motion: Plaintiff Lee's affidavit, MRI report dates August 21, 2017, and affirmation from Jaeho Shin, D.C. ("Dr. Shin"). Dr. Shin's report states that plaintiff lee was examined on July 8, 2017 and March 1, 2021 and the report in relevant part states:

"The injuries Plaintiff OKJOON LEE sustained from the accident of July 7, 2017 are permanent in nature. The injuries to Plaintiff OKJOON LEE's cervical spine and lumbar spine are all solely related to the motor vehicle accident of July 7, 2021. 20. The patient will likely have lifelong orthopedic problems including: pain, difficulty with activities of daily living, and activity and lifestyle modifications. This may lead to office-based treatment with repeat injections or physical therapy periodically. Plaintiff OKJOON LEE's injuries are permanent, and he has a permanent partial orthopedic disability.

24. The patient's injuries from the accident of July 7, 2017 are permanent in nature to a reasonable degree of medical certainty and have resulted in the permanent

consequential limitation of use of a body organ or member. These injuries have resulted in a permanent consequential limitation of use of the patient's cervical spine and lumbar spine. This is a significant limitation of use of the body function or system; more specifically, this is a significant limitation of use of the patient's cervical spine and lumbar spine.”

The Court finds that the conflicting medical reports submitted by the parties raise triable issues of fact as to whether the Plaintiff Lee sustained a “serious injury” within the meaning of Insurance Law § 5102(d) (see *Wilcoxon v. Palladino*, 122 AD3d 727 [2d Dept 2014]).

Defendants aver that Plaintiff Lee’s opposition is deficient as a matter of law because plaintiff and the Dr Shin relied upon the unsworn MRI report from Robert Waxman, M.D. (hereinafter “Dr. Waxman”). The Court is unpersuaded by this argument. It is well settled that a Defendant may submit unsworn medical reports and records of the injured plaintiff's physicians in support of a motion for summary judgment in order to demonstrate the lack of a serious injury within the meaning of the no-fault law; in so doing, however, the Defendant opens the door for the plaintiff to rely upon these same unsworn or unaffirmed reports and records in opposition to the motion. Here, Defendants submit a report from Dr. Springer in support, who within his report states that he relied on Dr. Waxman’s MRI report. Thus, Defendants opened the door for the Plaintiff to reply upon the same unsworn report by Dr. Waxman.

Defendants also argue that Plaintiff Lee did not sustain a medically determined injury or impairment that prevented her from performing substantially all of the material acts constituting her customary daily activities during at least 90 of the first 180 days following the alleged accident.

To establish a serious injury under the 90/180 category of NYIL § 5102(d), a “plaintiff must establish that he or she ‘has been curtailed from performing his [or her] usual activities to a great extent’” rather than “some slight curtailment” (*Lanzarone v Goldman*, 80 AD3d 667, 669 [2d Dept 2011]; *DeFilippo v White*, 101 AD2d 801, 803 [2d Dept 1984]).

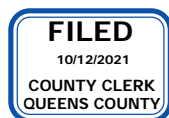
Here, Defendants has failed to establish, *prima facie*, that Plaintiff Lee did not suffer a serious injury under the 90/180 category of NYIL § 5102(d). Defendants rely on Plaintiff Lee’s deposition testimony to establish, *prima facie*, entitlement to judgment as a matter of law under the 90/180 category. However, Plaintiff Lee’s testimony did not address its usual and customary daily activities “during the specific relevant time frame” and “did not compare . . . pre-accident and post-accident activities during that relevant time frame” (see, *Hall v Stargot*, 187 AD3d 996, 996 [2d Dept 2020]; *Reid v Edwards-Grant*, 186 AD3d 1741, 1742 [2d Dept 2020]; *Jong Cheol Yang v Grayline N.Y. Tours*, 186 AD3d 1501, 1502 [2d Dept 2020]).

As Defendants have failed to establish their *prima facie* entitlement to judgment as a matter of law as to Plaintiff Lee’s claim of a serious injury under the 90/180 category, the Court “need not consider the sufficiency” of Plaintiff Lee’s opposition papers (*see, Hall*, 187 AD3d at 996, *supra*; *Owens-Stephens v PTM Mgmt. Corp.*, 191 AD3d 691 [2d Dept 2021]; *Ali v Williams*, 187 AD3d 1107 [2d Dept 2020]). Accordingly, the branch of Defendants’ motion seeking summary judgment dismissing Plaintiff’s claim of a serious injury under the 90/180 of NYIL § 5102(d) is denied (*see, id.*).

Accordingly, Defendants Stamatia Kolomvos and Michail S. Kolomvos motion is denied in its entirety. Any other requested relief not expressly addressed herein has nonetheless been considered by this Court and is hereby denied.

This shall constitute the Decision and Order of the Court.

Dated: October 8, 2021



A handwritten signature in black ink, appearing to read "L. Ventura".

HON. LOURDES M. VENTURA, J.S.C.