

Seunghee Kang v Schmalz

2022 NY Slip Op 31231(U)

April 13, 2022

Supreme Court, New York County

Docket Number: Index No. 160899/2017

Judge: Lisa S. Headley

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LISA S. HEADLEY PART 22M

Justice

-----X
SEUNGHEE KANG,

Plaintiff,

- v -

LISA SCHMALZ, RICHARD SCHMALZ,

Defendant.

LISA SCHMALZ

Plaintiff,

-against-

ROLANDO REYES

Defendant.

INDEX NO. 160899/2017
MOTION DATE 08/31/2021
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

Third-Party
Index No. 595527/2018

The following e-filed documents, listed by NYSCEF document number (Motion 001) 24, 25, 26, 27, 28, 29, 30, 31, 32, 34, 35, 36, 37, 38, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59 were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, it is hereby ORDERED that third-party defendant Rolando Reyes' (hereinafter "Third-Party Defendant" or "movant") motion for summary judgment dismissing the complaint on the ground that Plaintiff Seunghee Kang's (hereinafter "Plaintiff Kang") claimed injuries do not satisfy the "serious injury" threshold under New York Insurance Law §5102 is denied.

Plaintiff Kang commenced this action to recover damages for personal injuries sustained as a result of a motor vehicle accident that occurred on December 28, 2015 on the Park Avenue Viaduct near 40th Street in New York, New York. Plaintiff Kang alleges that she sustained serious injuries as defined under New York Insurance Law §5102, including injuries to her lumbar spine.

In support of the motion, third-party defendant submits the objective findings of expert independent medical examiner orthopedic surgeon, Dr. Arnold T. Berman, MD, Dr. Jessica F. Berkowitz, M.D. a board-certified radiologist, and Plaintiff Kang's deposition testimony. Dr. Arnold T. Berman, MD, who examined Plaintiff Kang on October 17, 2019 determined, inter alia, that plaintiff Kang's cervical spine examination demonstrated a normal range of motion, and her lumbar spine, also revealed a normal range of motion. Additionally, Dr. Berman's examination concluded plaintiff does not have spasm, tenderness to palpation or pain on her ranges of motion. Dr. Berman also concluded there were no objective findings to substantiate plaintiff's subjective

complaints of lumber spine pain on examination, and that plaintiff Kang could participate in all activities of daily living, and work full time without restrictions. Furthermore, Dr. Berman concluded plaintiff Seunghee Kang did not sustain any permanent injury and has no disability as a result of the subject accident that occurred on December 28, 2015.

Dr. Jessica F. Berkowitz, M.D. a board-certified radiologist reviewed Plaintiff Kang's MRI examination on July 17, 2019. Dr. Berkowitz's examination of plaintiff Kang's MRI performed on February 12, 2016, revealed, *inter alia*, no disc bulges or herniations are present. Furthermore, no neural foraminal stenosis is noted, bone marrow signal and location of the conus medullaris and paraspinal soft tissue are unremarkable, and there is no instability with flexion or extension. Lastly, Dr. Berkowitz concluded there is no evidence of acute traumatic injury to the lumbar spine, and the MRI examination reveals no causal relationship between the claimant's alleged accident and the findings on the MRI examination.

In opposition, Plaintiff Kang submits deposition testimony, medical reports including the MRI findings from Dr. David R. Payne, M.D., Aric Hausknecht, M.D., a physician who specializes in neurology, Dr. Matthew Grim, a pain management specialist, Dr. Bong Jin Huh, an orthopedic surgeon, Dr. Won S. Yoo a chiropractic doctor, and Dr. Franco P. Cerabona, M.D.

Dr. Payne's examination on February 13, 2016, of Plaintiff Kang's MRI affirmed the findings of Dr. Aric Hausknecht, M.D.'s examination of plaintiff Kang on February 12, 2016. Dr. Payne's examination, revealed, *inter alia*, a bulging disk at both L3/4 and L4/5 with thecal sac impingement. A central herniation at L5/S1 with impingement upon the thecal and originating S1 roots. Additionally, Dr. Payne's examination revealed upper lumbar lordotic reversal on flexion position sequence without change in alignment, and lower lumbar lordotic exaggeration on extension position sequence without change in alignment. Dr. Aric Hausknecht's examination of plaintiff Kang, revealed, *inter alia*, L3-L4 disc bulge, L4-L5 disc bulge, L5-S1 disc herniation with S1 nerve root impingement. Additionally, Dr. Hausknecht stated with reasonable degree of medical certainty, plaintiff Kang's condition is causally related to the motor vehicle accident that occurred on December 28, 2015, and that plaintiff is partially disabled and has been advised to restrict her activities.

Dr. Matthew P. Grimm, M.D. examined plaintiff Kang multiple times. Dr. Grimm's examinations, revealed, *inter alia*, on March 10, 2016, significant facet loading pain on examination in the L3-S1 distribution, straight leg raise- stretch response elicited back pain only. Visual inspection of plaintiff Kang's back revealed no abnormalities, range of motion extension at 5-10 degrees with pain at the end range (Normal 25 degrees), flexion 70 degrees with pain at the end range (Normal 85-90 degrees), left lateral flexion 20 degrees pain at end range (Normal 25 degrees), and right lateral flexion 15 degrees pain at the end range (Normal 25 degrees). Dr. Grimm recommended continued conservative treatment with physical therapy and anti-inflammatories. On May 24, 2016, the examination revealed, MRI dated February 12, 2016, shows bulging at L3-L4, L4-L5, and herniation at L5-S1 with thecal sac impingement at the originating S1 nerve roots. Dr. Grimm again recommended continued conservative treatment with physical therapy and anti-inflammatories. On September 20, 2016, Dr. Grimm stated plaintiff Kang should continue conservative treatment with physical therapy and anti-inflammatories. On November 2, 2016, Dr. Grimm reported plaintiff Kang has denied any changes in pain since last visit, and Dr. Grimm recommended continued conservative treatment with physical therapy and anti-inflammatories.

Dr. Franco Cerabona, M.D. a board-certified orthopedic surgeon examined plaintiff Kang on July 13, 2020, which revealed, *inter alia*, a somewhat antalgic gait pattern, difficulty walking on her toes especially on the left side. Examination of the lumbar spine revealed range of motion

of lumbar spine forward flexion of 75 degrees (Normal 90 degrees), extension 20 degrees (Normal 25 degrees), left lateral flexion 25 degrees (Normal 25 degrees), right lateral flexion is 10 degrees (Normal 25 degrees), left rotation is 15 degrees (Normal 30 degrees), and right rotation is 10 degrees (Normal 20 degrees). Additionally, Dr. Cerabona concluded within a reasonable degree of medical certainty that plaintiff Kang has suffered an injury that is permanent in nature. Furthermore, it is Dr. Cerabona's medical opinion within a reasonable degree of medical certainty that plaintiff's condition will likely deteriorate over time and may require surgical intervention for worsening symptomatology as plaintiff Kang ages.

In a supplemental affirmation in opposition to summary judgment, plaintiff Kang submits Dr. Matthew Grimm's affirmation enclosing his medical records, and records of Be Well Chiropractic which were unavailable at the time of filing the original affirmation in opposition.

In reply, third-party defendant Reyes argues, *inter alia*, that he has properly met his burden regarding the issues of serious injury. More specifically, Dr. Berman's examinations were comprised of objective testing which third-party defendant argues is sufficient to meet their burden of proof, and plaintiff's subjective complaints cannot serve as a sole basis for serious injury.

I. Cross Motion by Third-Party Plaintiff Lisa M. Schmalz

In support of third-party plaintiff's cross motion, third-party plaintiff Schmalz adopts and joins in all of the arguments submitted by third-party defendant Rolando Reyes. More specifically, third-party plaintiff Schmalz adopts and joins in the arguments that plaintiff Kang has failed to satisfy the threshold serious injury requirements of the Insurance Law. Third-party plaintiff's argument as far as joining and adopting that portion of third-party defendant Rolando Reyes' arguments as to liability is of no moment, as defendant Reyes arguments are devoid of any mention of liability.

In opposition to the third-party defendant's motion, plaintiff argues, defendants have failed to meet their burden. More specifically, plaintiff has submitted *prima facie* evidence of a serious injury to defeat summary judgment based upon the evidence and reports from various medical professionals.

Discussion

"In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility." *Garcia v. J.C. Duggan, Inc.*, 180 A.D.2d 579, 580 (1st Dep't 1992), *citing Dauman Displays, Inc. v. Masturzo*, 168 A.D.2d 204 (1st Dep't 1990). As such, summary judgment is rarely granted in negligence actions unless there is no conflict at all in the evidence. *See, Ugarriza v. Schmieder*, 46 N.Y.2d 471, 475-476 (1979).

Here, upon examination of the papers submitted to this Court, third-party defendant Rolando Reyes' motion is denied because there are issues of fact precluding summary judgment, such as conflicting medical reports pertaining to the "serious injury" threshold under *New York Insurance Law § 5102(d)*, and whether the injuries to Plaintiff Kang are permanent in nature and whether the Plaintiff is currently without limitation. As such, third-party defendant Rolando Reyes' motion for summary judgment on the issue of whether the Plaintiff sustained a serious injury must be denied as issues of fact exist.

Accordingly, it is

ORDERED that third-party defendant Rolando Reyes' motion for summary judgment

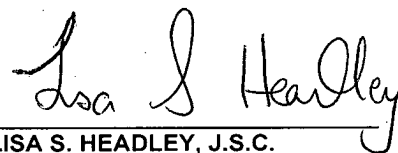
dismissing the complaint on the ground that the plaintiff SeungHee Kang claimed injuries do not satisfy the "serious injury" threshold under *New York Insurance Law § 5102(d)* is DENIED; and it is further

ORDERED that third-party plaintiff Lisa M. Schmalz's cross motion against third-party defendant Rolando Reyes is DENIED; and it is further

ORDERED that any requested relief sought not expressly addressed herein has nonetheless been considered and is denied; and it is further

ORDERED that within 30 days of entry, defendant shall serve a copy of this decision/order upon plaintiff with notice of entry.

This constitutes the Decision/Order of the Court.



LISA S. HEADLEY, J.S.C.

4/13/2022

DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE