

Grinev v Young Shing Trading Co., Inc.

2022 NY Slip Op 31544(U)

May 11, 2022

Supreme Court, Kings County

Docket Number: Index No. 511863/18

Judge: Lillian Wan

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 17

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LANA GRINEV,

Index No.: 511863/18
Motion Seq. No. 03

Plaintiff,

- against -

DECISION AND ORDER

YOUNG SHING TRADING CO., INC. and
EDGAR S. ANDRADE,

Defendants.

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Recitation, as required by CPLR § 2219(a), of the papers considered in the review of the defendants’ motion for summary judgment.

The following e-filed documents, listed by NYSCEF document number (Motion 03) 41-54 and 74-85 were read on this motion for summary judgment.

The defendants seek an order granting summary judgment and dismissal of the plaintiff’s complaint, pursuant to CPLR § 3212, claiming that the plaintiff’s injuries fail to meet the “serious injury” threshold as required by Insurance Law § 5102(d). After oral argument, and upon careful consideration of the parties’ submissions, the defendant’s motion is denied.

This action arises from a motor vehicle accident that occurred on December 23, 2015 at the intersection of Woodhaven Blvd. and Queens Blvd. in the County of Queens, City and State of New York. The plaintiff alleges that as a result of the accident she sustained injuries including, inter alia, to her right leg, cervical, lumbar and thoracic spine and right shoulder. In support of their motion, the defendants submit the pleadings, the plaintiff’s deposition transcript, the affirmed report of Dr. Edward A. Toriello, dated September 23, 2020, a board-certified orthopedic surgeon, and the affirmed report of Dr. Daniel J. Feuer, dated October 13, 2020, who is board certified in Psychiatry and Neurology. The defendants also submit the affirmed reports of Dr. Melissa Sapan Cohn, a board-certified radiologist, dated May 14, 2021, who reviewed the MRIs of the plaintiff’s cervical and lumbosacral spine performed on January 28, 2016 and December 31, 2019; right knee performed on February 17, 2016; right leg performed on February 25, 2016; right thoracic spine performed on January 3, 2020; and x-rays of the plaintiff’s cervical and lumbosacral spine and right knee performed on November 27, 2019. Dr. Sapan Cohn opined that the injuries were not traumatic in origin, and were degenerative in nature. As to the MRI of the right leg, performed on February 25, 2016, Dr. Sapan Cohn concluded that there was a “[p]ossible minimal strain of the gastrocnemius and proximal soleus muscles...without evidence to confirm that they are of a traumatic etiology.”

Dr. Toriello examined the plaintiff on September 23, 2020, and found normal objective testing of the plaintiff's cervical, thoracic and lumbosacral spine, right and left shoulders, elbows, wrists and hands, and knees. He found that his examination of the plaintiff's right knee revealed a series of well-healed 1-cm. scars, and that the plaintiff's right calf was 2.5 cm. larger than her left calf. Dr. Toriello concluded that the plaintiff had resolved cervical and low back strain, resolved right shoulder contusion, resolved thoracic strain and resolved right calf muscle strain. He did not state whether the plaintiff's injuries were caused by the accident, but noted that the plaintiff had been involved in a prior motor vehicle accident on May 25, 2000¹, with complaints of injuries to her neck, lower back and knees, for which she received treatment "for a significant period of time following the accident." Dr. Toriello also noted that the plaintiff was involved in a subsequent accident on November 27, 2019, which she alleged caused injuries to her neck, thoracic spine, lower back and knees.

Dr. Feuer examined the plaintiff on or about October 13, 2020, and found normal objective testing relating to the plaintiff's head, cervical and lumbar spines, and an otherwise normal neurological examination. He noted that there were no clinical findings to support a diagnosis of radiculopathy of the cervical and lumbosacral spine. Dr. Feuer opined that "[a]bsolute values associated with EMG/NCV testing are significantly conflicting...and do not support a diagnosis of radiculopathy." In reaching his conclusion, Dr. Feuer not only relied on his own examination of the plaintiff, but also on the EMG/NCV reports of the plaintiff's treating physicians. His report did not give an opinion as to causation, and noted the plaintiff's prior and subsequent motor vehicle accidents involving alleged injuries to the plaintiff's cervical, thoracic and lumbar spine.

In opposition, the plaintiff submits the medical record from Elmhurst Hospital, including the date of the accident through July 7, 2021; the medical records from Liberty Physical Medicine & Rehabilitation P.C., which include the EMG/NCV testing reports of Dr. Benjamin M. Chang indicating results suggestive of L5-S1 radiculopathy; MRI reports from Advanced Radiology dated February 17, 2016 relating to the plaintiff's right knee, and February 25, 2016 relating to the plaintiff's right leg; the reports of Dr. Ernesto D. Seldman, a board-certified orthopedic surgeon, dated February 8, 2016 and March 3, 2016, relating to the plaintiff's right leg; and the medical records from New York Presbyterian-Columbia University Hospital, from February of 2016 through January of 2017, where the plaintiff was treated for severe varicose veins of the right lower leg, and underwent surgical repair by Dr. Nicholas Morrissey, a vascular surgeon, on June 13, 2016. The plaintiff also submits the non-privileged portion of the plaintiff's legal file from a prior motor vehicle accident that occurred on May 30, 2005.

The plaintiff argues that the defendants' medical experts, Drs. Toriello and Dr. Feuer, who reviewed numerous medical records of the plaintiff's treating physicians, ignore the

¹ In her opposition papers the plaintiff asserts that the previous accident date was May 30, 2005, not May 25, 2000.

findings of Dr. Chang, that the plaintiff sustained L5-S1 radiculopathy based on the results of EMG/NCV testing, as well as trigger points bilaterally of her cervical, thoracic and lumbar paraspinal muscles. The plaintiff further argues that the defendants' submissions are deficient concerning the plaintiff's right leg injury, which allegedly caused the varicose veins in that extremity to become more severe, requiring an ablation surgery and subsequently a series of injections to relieve ongoing pain, swelling and discomfort relating to this condition. The plaintiff also contends that the injuries sustained in the 2005 motor vehicle accident were resolved, and that she was completely asymptomatic up to the time of the subject accident.

A motion for summary judgment is granted in favor of the moving party where there are no material issues of fact, and as a result, the moving party is entitled to judgment as a matter of law. *Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986). As the proponent of the summary judgment motion, the defendants have the initial burden of establishing that the plaintiff did not sustain a serious injury under the categories of injury claimed in his Bill of Particulars. *See Toure v Avis Rent A Car Sys.*, 98 NY2d 345 (2002). A defendant can satisfy the initial burden by relying on statements of defendants' examining physician, or plaintiff's sworn testimony, or by the affirmed reports of plaintiff's own examining physicians. *See Pagano v Kingsbury*, 182 AD2d 268 (2d Dept 1992). Once the defendants have made a prima facie showing that the plaintiff did not sustain a serious injury, the burden shifts to the plaintiff to come forward with evidence to overcome the defendants' submissions by demonstrating that a triable issue of fact exists that the plaintiff sustained a serious injury. *See Gaddy v Eyler*, 79 NY2d 955 (1992).

In the instant case, the reports of Drs. Toriello, Feuer and Sapan Cohn were sufficient to meet defendants' prima facie burden of demonstrating that plaintiff's injuries were not caused by the subject accident. *See Toure v Avis Rent A Car Sys.*, 98 NY2d 345; *Gaddy v Eyler*, 79 NY2d 955; *Fest v Agnew*, 68 AD3d 1051 (2d Dept 2009). The defendant has submitted competent medical evidence establishing prima facie that the plaintiff's alleged injuries do not constitute a serious injury within the meaning of Insurance Law § 5102(d). *See Hayes v Vasilios*, 96 AD3d 1010 (2d Dept 2012); *Staff v Yshua*, 59 AD3d 614 (2d Dept 2009); *Rodriguez v Huerfano*, 46 AD3d 794 (2d Dept 2007).

However, in opposition, the plaintiff's submissions raise a triable issue of fact as to whether she suffered a serious injury as a result of the accident. *See Lopez v Senatore*, 65 NY2d 1017 (1985); *see also Khorami v Gizmo Cab Corp.*, 240 AD2d 470 (2d Dept 1997). Specifically, the plaintiff has raised issues of fact concerning the injury to her right leg, involving swelling, pain and discomfort and worsening of varicose veins, which she claims were traumatically exacerbated by the accident, and required surgical intervention. The defendant's medical expert, Dr. Sapan Cohn, opined that she could not confirm whether or not the injury had a traumatic etiology. The examination by Dr. Toriello, the defendants' medical expert, indicated that the plaintiff's right calf was swollen, and was 2.5 cm larger than her left leg. He also

observed a series of 1 cm. scars along the plaintiff's right calf. Likewise, the findings made by Dr. Chang that the plaintiff had sustained L5-S1 radiculopathy as a result of the accident were disputed by Dr. Feuer, who opined that based on his examination of the plaintiff and review of the EMG/NCV, the plaintiff did not have radiculopathy. Further, Dr. Chang's findings that the plaintiff had trigger points in her cervical, thoracic and lumbar paraspinal muscles are contradicted by Dr. Toriello, who concluded that all testing of those areas was normal.

Contrary to the defendants' contentions, the plaintiff's reliance on the unsworn and uncertified MRI reports of the right leg performed on February 25, 2016, and the right knee performed on February 17, 2016, was proper since the defendants' examining doctors referred to the records in their affirmed reports. *See Zarate v McDonald*, 31 AD3d 632 (2d Dept 2006); *Ayzen v Melendez*, 299 AD2d 381 (2d Dept 2002).

Accordingly, it is hereby

ORDERED, that defendant's motion for summary judgment (Motion 03) is **DENIED**.

This constitutes the decision and order of the Court.

DATED: May 11, 2022



HON. LILLIAN WAN, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020.