

Yuan Chen v Brims

2022 NY Slip Op 33910(U)

November 10, 2022

Supreme Court, New York County

Docket Number: Index No. 155600/2016

Judge: James G. Clynnes

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.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 22M

-----X

YUAN CHEN,
Plaintiff,

- v -

PATRICIA BRIMS, LIU BI WU,
Defendant.

INDEX NO. 155600/2016
MOTION DATE 11/03/2020
MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

-----X

PATRICIA BRIMS
Plaintiff,

- v -

LIU WU
Defendant.

Third-Party
Index No. 595598/2018

-----X

PATRICIA BRIMS
Plaintiff,

- v -

LIU WU
Defendant.

Second Third-Party
Index No. 596044/2020

-----X

HON. JAMES G. CLYNES:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, it is ordered that defendant, Patricia Brims' (Brims) motion for summary judgment against Plaintiff, Yuan Chen, on the grounds that Plaintiff did not sustain

a serious injury under Insurance Law 5102 (d) is denied in part and granted in part, and Plaintiff's cross-motion for summary judgment to Plaintiff on the grounds that Plaintiff sustained a serious injury under Insurance Law 5102 (d) "significant limitation of a body use or function" as to Plaintiff's liver is denied for the reasons that follow.

Plaintiff commenced this action alleging she sustained serious injuries to her neck, chest, pelvis, liver, and vascular system as a result of a motor vehicle accident that took place on January 11, 2016. Following the accident, Plaintiff underwent a surgery on her liver.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). Once this showing has been made, the burden shifts to the non-moving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution (*Licari v Elliott*, 57 NY2d 230 [1982]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad* at 853 [1985]). A defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred by the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a "serious injury" (*Toure v Avis Rent a Car Systems Inc*, 98 NY2d 345, 352 [2002]).

When a "serious injury" claim is raised under Insurance Law 5102 (d), it can be substantiated by a medical expert's assigned numeric percentage of the loss of range of motion showing the extent or degree of the plaintiff's physical limitation. An expert may also offer a qualitative assessment, upon an objective basis, of a plaintiff's condition compared to the normal function, purpose and use of the affected body organ, member, function, or system (*Toure* at 352; *Ramos v Dekhtyar*, 301 AD2d 428 [1st Dept 2003]). The expert must indicate what objective medical tests s/he performed to measure the range of motion restrictions (*Lloyd v Green*, 45 AD3d 373 [1st Dept 2007]).

Brims seeks summary judgment dismissing the complaint on the grounds that Plaintiff did not sustain "serious injuries" under any of the categories within Insurance Law 5102 (d). In support of her motion, Brims proffers the affirmed medical reports of Dr. Marin Tudor, general surgeon, Dr. Marianna Golden, neurologist, and Dr. Stuart Hershon, orthopedic surgeon, as well as Plaintiff's deposition testimony, which was taken on January 16, 2019.

Dr. Tudor examined Plaintiff on March 28, 2019. After reviewing various medical records including Plaintiff's Bill of Particulars, the EMS Report and Plaintiff's hospital records, Dr. Tudor found no disability following the car accident. Although Dr. Tudor found that Plaintiff had normal ranges of motion, Dr. Tudor did not identify the objective medical tests employed in measuring the ranges of motion and did not compare his findings to normal ranges. Therefore, Dr. Tudor's opinion can only be deemed conclusory, thereby rendering his report insufficient to support Brims' claim.

Dr. Golden performed a neurological examination on March 27, 2019. She reviewed Plaintiff's medical records including X-ray reports, CT scan report and EKG report. Range of motion was tested with a goniometer, pursuant to AMA Guidelines. Plaintiff's range of motion of the cervical spine and lumbar spine were normal. Her straight leg raising was negative. In Dr. Golden's opinion, on March 27, 2019, there was no evidence of a disability from a neurological point of view and Plaintiff's cervical spine sprain was resolved.

Plaintiff was examined on March 27, 2019, by Dr. Stuart Hershon, an orthopedic surgeon, whose diagnosis was that "there is no evidence of an orthopedic disability." After reviewing relevant records, including Plaintiff's X-ray reports, hospital records, and CT scan report, and after conducting range of motion tests with a goniometer, pursuant to the AMA Guidelines, Dr. Hershon found Plaintiff's range of motion to the cervical spine, and right and left hip to be normal. Dr. Hershon found that Plaintiff's cervical spine sprain was resolved.

With regard to the cervical spine sprain, strains and sprains are not considered serious injuries within the meaning of Insurance Law 5102 (d) (*Gaddy v Eyler*, 79 NY2d 955 [1992]; *Nagbe v Minigreen Hacking Group*, 22 AD3d 326 [1st Dept 2005]). Plaintiff, in opposition and in support of her cross-motion, does not claim the cervical spine sprain as a serious injury, despite listing neck, chest, and pelvic and perineal pain in her Bill of Particulars. As such, Brims has met the prima facie burden of establishing that Plaintiff has not sustained a serious injury under Insurance Law 5102 (d) regarding cervical spine injuries.

"Whether a limitation of use or function is significant or consequential...relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part" (*Dufel v Green*, 84 NY2d 795 [1995]). In performing physical and neurological examinations of Plaintiff three years after the accident, Brims' experts only discussed the liver injury in their reports to the extent that Dr.

Golden and Dr. Hershon noted the liver lacerations in their review of the CT scans. Because they did not perform objective medical examinations or tests on the liver, their reports do not include conclusions related to that injury. As such, Brims has failed to establish prima facie that Plaintiff's liver injuries do not qualify as "serious injuries" under Insurance Law 5102 (d). While the burden does not shift to Plaintiff, the Court will nonetheless discuss the liver injuries to determine Plaintiff's cross-motion.

In support of Plaintiff's cross-motion that her liver injuries fall under significant limitation of a body use or function pursuant to Insurance Law 5102 (d), Plaintiff relies on Plaintiff's hospital reports and medical records from her treating physicians. The reports and records set forth the following: Plaintiff underwent liver surgery that was medically related to the accident. The Prehospital Care Report Summary indicates that at the scene of the accident, Plaintiff complained of abdominal pain. She was then transported to NY Presbyterian/Weil Cornell Hospital. Plaintiff's "Admit Face Sheet" lists "laceration of liver" as the admitting diagnosis. At the hospital, Plaintiff underwent surgery to stop the bleeding on two sections of the liver. Plaintiff also relies on the affidavit of Dr. Jean Shou, a trauma surgeon at New York Presbyterian/Weil Cornell Medical Center, in which he avers that Plaintiff's injuries resulted from the January 12, 2016 accident. He further avers that Plaintiff's liver injuries were life-threatening and "required immediate operative intervention" (NYSCEF DOC NO 67). Dr. Shou examined Plaintiff on January 22, 2016 for a "post-op" follow up appointment. Dr Shou reported that Plaintiff was still experiencing abdominal pain while recovering from a liver laceration that required interventional radiology embolization. Dr. Shou's report also notes that Plaintiff's Liver Function Tests (LFTs) were normal. While damage to the liver has a profound effect on the functioning of the entire body, and Plaintiff's injury was considerable, the normal liver test was not expounded upon in Dr. Shou's report nor was it discussed in Plaintiff's moving papers. As such, the Court finds that Plaintiff has not made a prima facie showing of entitlement as a matter of law that her liver injury was a "serious injury" under Insurance Law 5102 (d).

Accordingly, it is hereby

ORDERED that defendant Patricia Brims' motion for summary judgment and dismissal of the complaint in her favor based upon plaintiff's failure to meet the serious injury threshold is granted only to the extent that summary judgment is granted in favor of defendant Brims and

against Plaintiff in relation to Plaintiff's claimed injuries to the cervical spine and such claims are dismissed and defendant's serious injury motion is otherwise denied; and it is further,

ORDERED that Plaintiff's cross-motion for summary judgment in her favor and against defendant in relation to Plaintiff's claim that she sustained a serious injury within the meaning of Insurance Law 5102 (d) is denied; and it is further,

ORDERED that within 30 days of entry, counsel for movants shall serve a copy of this Decision and Order upon all parties with notice of entry.

This constitutes the Decision and Order of the Court.

11/10/2022

DATE

James G. Clynes
JAMES G. CLYNES, J.S.C.

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