

Kim v Aromov

2013 NY Slip Op 31856(U)

August 1, 2013

Sup Ct, Queens County

Docket Number: 4916/2011

Judge: Robert J. McDonald

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

- - - - - x

PRISCILLA KIM, CHRIS PANG, DANIEL H.
PARK and YI M. GUO

Plaintiffs,

- against -

Index No.: 4916/2011

Motion Date: 05/21/13

Motion No.: 76

Motion Seq.: 3

GEORGE AROMOV, FRITZBERT BELMONT,
MOHOMMAD ASIF and STAVROS VLACHOS,

Defendants.

- - - - - x

The following papers numbered 1 to 16 were read on this motion by
plaintiff PRISCILLA KIM for an order pursuant to CPLR 3212
granting partial summary judgment on the issue of serious injury:

Papers
Numbered

KIM Notice of Motion-Affidavits-Exhibits.....	1 - 7
AROMOV/BELMONT Affirmation in Opposition.....	8 - 9
VLACHOS/ASIF Affirmation in Opposition.....	10 -11

This is a personal injury action in which plaintiffs,
PRISCILLA KIM, CHRIS PANG, DANIEL H. PARK and YI M. GUO, seek to
recover damages for injuries they each sustained on November 21,
2010 as a result of a motor vehicle accident which took place
near the intersection of Greenpoint Avenue and the service road
of the Long Island Expressway. Plaintiff Kim initially commenced
an action for negligence against defendants on January 24, 2011
under Index No. 4916/2011. A second action was commenced by
plaintiffs Pang, Park and Guo against the same defendants on
October 8, 2011 under Index No. 700694/2011. Plaintiffs Kim,
Pang, Park and Guo were passengers in the vehicle owned by
defendant Vlachos and operated by defendant Asif. By order dated
February 27, 2012 this Court granted the motion of Defendants

George Aromov and Fritzbert Belmont for an order consolidating the two actions. By order dated July 30, 2013 this Court granted the motion of defendants Mohommad Asif and Stavros Vlachos for an order pursuant to CPLR 3212 granting summary judgment to the dismissing the complaint of plaintiffs Daniel H. Park and Yi M. Guo. Plaintiff Kim now moves for an order pursuant to CPLR 3212(b), granting partial summary judgment on the issue of physical injury and dismissing the defendants' affirmative defense alleging that Ms. Kim did not sustain a serious injury within the meaning of Insurance Law § 5102(d).

In support of the motion, the plaintiff submits the affirmation of counsel, Joseph P. Stoduto, Esq; a copy of the pleadings; a copy of the plaintiff's verified bill of particulars; a copy of the transcript of the examination before trial of Priscilla Kim; a copy of plaintiff's emergency room records from Elmhurst Hospital Center; a copy of the EMS records; a copy of plaintiff's hospital records from New York-Presbyterian Hospital; a radiological report from Dr. Jeffrey Geller; an affirmed medical report from Dr. Ayman Hadhoud and affirmed medical reports from the defendants' independent examining physicians, orthopedic surgeon Dr. Jacquelin Emmanuel and neurologist, Dr. Jean-Robert Desrouleaux.

In her examination before trial, which took place on October 19, 2012, the plaintiff, age 26, testified that she was involved in an automobile accident on November 21, 2010 at approximately 2:00 a.m. At that time she and plaintiffs Pang, Gua and Park were passengers in a taxicab heading to Queens from Manhattan. The taxi was operated by defendant Mohommad Asif. She testified that the Taxi was on Greenpoint Avenue making a left turn at the intersection of Greenpoint Avenue and the LIE when it was struck by the vehicle operated by defendant George Aromov. As a result of the collision the taxi cab was flipped on its side. Ms Kim, who was injured in the collision, left the scene in an ambulance and was transported to the emergency room at Elmhurst Hospital where she received MRIs, CT scans and x-rays due to complaints of pain to her back and both hips. From the emergency room she was transferred to the surgical ICU at New York Presbyterian Columbia Hospital where she was admitted and discharged after six days. When she got home she was confined to bed for 5 - 7 days and confined to her home for a month. Plaintiff, who was employed as a nurse at New York Presbyterian Hospital was not able to return to her position for four months following the accident. She testified that after her discharge from the hospital, she treated with Dr. Jeffrey Geller for physical therapy.

In her verified Bill of Particulars, the plaintiff alleges that she sustained fractures of all Pubic Rami bilaterally; comminuted fractures of the pelvis with distraction of the fracture fragments and widening of the sacroiliac joint. In addition, plaintiff alleges fractures of the left transverse process of L4 and L5 of the lumbar spine.

The EMS records describe the plaintiff as having severe hip pain and severe lower back pain. The radiology records from the emergency room from Elmhurst indicate that the x-rays showed fractures of the left transverse processes of L4 and L5. With respect to the pelvis the x-rays showed fractures through the superior and inferior pubic rami bilaterally. She was transferred to NY presbyterian where she was treated for pelvic fractures. CT scans showed that the fracture of the right superior pubic ramus was comminuted.

Dr. Ayman Hadhoud, a no-fault examiner saw the plaintiff on July 14, 2011 and January 27, 2011. He states in his affirmed reports states that the plaintiff was diagnosed in the hospital following her accident with fractures of the L4 and L5 lumbar spine and fractures of the pubic bone in four sites. He states in his July 14, 2011 report that she was receiving physical therapy twice a week and that she was followed by her orthopedic surgeon for the multiple fractures she sustained in the accident.

Dr. Geller, with whom plaintiff treated after the accident states in his reports that the diagnostic imaging showed multiple pelvic fractures following her accident.

In her affirmed report dated December 3, 2012, Dr. Emmanuel, a board certified orthopedic surgeon, diagnosed the plaintiff with healed fractures of the lumbar spine and healed comminuted fractures of the pelvis.

Dr. Desrouleaux, a board certified neurologist, submits an affirmed medical report stating that he examined the plaintiff on December 3, 2012. He also diagnosed the plaintiff as having healed L4 and L5 left transverse fractures.

Plaintiff's counsel asserts that the undisputed and uncontroverted evidence submitted, including the ambulance call report from the FDNY, the plaintiffs medical and radiological reports from Elmhurst Hospital, as well as the plaintiff's medical and radiology reports from New York Presbyterian Hospital and the affirmed reports of Drs. Geller, Hadhoud, Emmanuel and Desrouleaux demonstrate, prima facie, that as a result of the accident the plaintiff sustained numerous injuries including

multiple traumatically induced fractures. Counsel contends that plaintiff is entitled to summary judgment on the issue of serious injury as the presence of a causally related fracture cannot be fairly disputed. Accordingly, counsel asserts that the defendants' affirmative defense must be dismissed as the plaintiff has established prima facie that she sustained multiple fractures in the accident which is classified as a serious injury under Insurance Law § 5102 (d), and as a result she is therefore entitled to partial summary judgment on the issue of serious injury.

In opposition to the motion, the counsel for defendants Vlachos and Asif claims that the hospital records submitted by the plaintiff are uncertified and not in admissible form pursuant to CPLR 4518(a) as they do not bear a certification or authentication. In addition counsel asserts that the medical records of Dr. Geller are also without probative value as they are not affirmed. Lastly, counsel asserts that the reports of Drs. Hadhoud, Emmanuel and Desrouleaux are also not probative as as none of the examining physicians conclude in their reports that the fractures were causally related to the accident.

Counsel for Aromov and Belmont states that plaintiff failed to provide sufficient proof of her entitlement to summary judgment under Insurance Law § 5102 stating that the courts have held that even if the plaintiff shows proof of a fracture, the plaintiff must also provide evidence, in admissible form, that the fracture is causally related to the accident (citing Diliberto v Barberich, 94 AD3d 803 [2d Dept. 2012]). Counsel contends that none of the plaintiffs submissions provide a causal relationship between the accident and the alleged injuries. In addition counsel contends that plaintiff testified that she was not wearing a seatbelt and therefore there is question of fact as to whether the injuries were sustained as a result of not wearing the seatbelt.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position (see Zuckerman v City of New York, 49 NY2d 557[1980]).

This Court finds, based upon the plaintiff's deposition testimony and the affirmed medical report of Dr. Ayman Hadhoud dated July 14, 2011 that the plaintiff has demonstrated, prima facie, entitlement to judgment as a matter of law under the

serious injury fracture category of Insurance Law § 5102(d) by providing evidence that she sustained a fracture(see Nicholson v Bader, 105 AD3d 719 [2d Dept. 2013]; Kapeleris v Riordan, 89 AD3d 903 [2d Dept. 2011]; Refuse v Magloire, 83 AD3d 685 [2d Dept. 2011]; Elshaarawy v U-Haul Co. of Miss., 72 AD3d 878 [2d Dept. 2010]; Rasporskaya v New York City Tr. Auth., 73 AD3d 727 [2d Dept. 2010]). Although the hospital records and submitted were not certified and the report of Dr. Geller was not affirmed and therefore not in admissible form, the report of Dr. Hadhoud was affirmed. In his report of July 14, 2011 Dr. Hadhoud states that the plaintiff's multiple fractures including two spinal fractures and four pelvic fractures were sustained in the subject accident. The plaintiff, therefore established her prima facie entitlement to summary judgment as a matter of law dismissing the defendants' affirmative defenses, which alleged that she did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident.

This finding does not preclude defendants' expert witness from testifying in mitigation of damages as to the causal connection between the plaintiff's non-use of an available seat belt and the injuries and damages sustained during the damages portion of the trial (see PJI 2:87.1; PJI 2:87.2; Spier v Barker, 35 NY2d 444 [1974]; Barnes v Paulin, 73 AD3d 1107 [2d Dept. 2010]; O'Connor v S & R Medallion Corp., 2 AD3d 176[a seat-belt defense goes strictly to damages, not liability]; Martinez v Novin, 303 AD2d 653 [2d Dept. 2003][whether the injured plaintiff failed to use an available seat belt, and whether any such failure resulted in an exacerbation of the injuries that he suffered are among the issues that may be decided at the trial on the issue of damages]).

In opposition, the defendants failed to provide any evidence to rebut the plaintiff's prima facie case and to raise a triable question of fact. Defendant's have not offered competent evidence at this time showing that any of the plaintiff's injuries were caused by the failure to wear an available seat belt.

Accordingly, for all of the aforesaid reasons, it is hereby,

ORDERED that the plaintiff's motion for summary judgment on the serious injury categories of "fracture" is granted.

Dated: August 1, 2013
Long Island City, N.Y.

ROBERT J. MCDONALD,
J.S.C.