

APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND DEPARTMENT

Klejdi Dizdari v. Cheun Chhon

72 A.D.3d 875 (N.Y. App. Div. 2d Dep't 2010) · Decided April 20, 2010

SUMMARY

The Appellate Division, Second Department, reversed an order granting the defendants summary judgment in a personal-injury action. The court held that the plaintiff raised a triable issue of fact as to whether he sustained a serious injury under Insurance Law § 5102(d), based on medical evidence concerning cervical and lumbar spine injuries and an explanation for the gap in treatment.

CASE DETAILS

COURT	Appellate Division of the Supreme Court of the State of New York, Second Department
WRITING FOR THE COURT	Rivera, J.P.; Florio, J.; Miller, J.; Chambers, J.; Roman, J.
JURISDICTION	New York
DECIDED	April 20, 2010
DISPOSITION	reversed
PROCEDURAL POSTURE	The plaintiff appealed from an order granting the defendants summary judgment dismissing the personal-injury complaint for failure to establish a serious injury under Insurance Law § 5102(d).
STANDARD OF REVIEW	The court reviewed the grant of summary judgment de novo, determining whether the defendants established their prima facie entitlement to judgment as a matter of law and whether the plaintiff raised a triable issue of fact.
PRECEDENTIAL VALUE	Published appellate decision
PARTIES	Klejdi Dizdari v. Cheun Chhon, Defendants

TOPICS

- personal injury
- insurance
- standard of review
- appellate procedure

PRACTICE AREAS

- personal injury
- automobile no-fault insurance
- summary judgment
- appellate procedure

QUESTIONS PRESENTED

1. Whether the defendants established prima facie entitlement to summary judgment by showing that the plaintiff did not sustain a serious injury under Insurance Law § 5102(d).
2. Whether the plaintiff raised a triable issue of fact concerning serious injury under the significant limitation of use and permanent consequential limitation of use categories.
3. Whether the plaintiff adequately explained the lengthy gap in his medical treatment.

HOLDINGS

1. Although the defendants met their prima facie burden, the plaintiff raised a triable issue of fact through his treating physician's affirmation concerning whether he sustained serious cervical and lumbar injuries under the significant limitation of use and permanent consequential limitation of use categories of Insurance Law § 5102(d).
2. The plaintiff adequately explained the lengthy gap in his treatment through Dr. Levin's affirmation, so the treatment gap did not warrant summary judgment for the defendants.

FACTUAL BACKGROUND

The plaintiff claimed cervical and lumbar spinal injuries arising from the subject accident. The defendants submitted proof that he did not sustain a serious injury within the meaning of Insurance Law § 5102(d), satisfying their prima facie burden. The plaintiff opposed the motion with an affirmation from treating physician Dr. Nathan Levin, who relied on contemporaneous and recent examinations and MRI reports showing a cervical disc bulge and lumbar disc herniations, and opined that the injuries and range-of-motion limitations were permanent and accident-related. Dr. Levin also explained the lengthy gap in the plaintiff's treatment.

PROCEDURAL HISTORY

The Supreme Court, Queens County, granted the defendants' motion for summary judgment and dismissed the complaint. The Appellate Division reversed the order and denied the motion.

DISPOSITION

reversed

CASES CITED

- Toure v. Avis Rent A Car Sys., 98 N.Y.2d 345 (2002)
- Gaddy v. Eyler, 79 N.Y.2d 955, 956-957 (1992)
- Kearse v. New York City Tr. Auth., 16 A.D.3d 45, 49-50 (2d Dep't 2005)
- Nisanov v. Kiriyyenko, 66 A.D.3d 655 (2d Dep't 2009)
- Su Gil Yun v. Barber, 63 A.D.3d 1140 (2d Dep't 2009)
- Pearson v. Guapisaca, 61 A.D.3d 833 (2d Dep't 2009)
- Williams v. Clark, 54 A.D.3d 942 (2d Dep't 2008)

- Casey v. Mas Transp., Inc., 48 A.D.3d 610 (2d Dep't 2008)
- Acosta v. Rubin, 2 A.D.3d 657 (2d Dep't 2003)
- Pommells v. Perez, 4 N.Y.3d 566, 577 (2005)
- Eusebio v. Yannetti, 68 A.D.3d 919 (2d Dep't 2009)
- Gaviria v. Alvarado, 65 A.D.3d 567 (2d Dep't 2009)
- Bonilla v. Tortoriello, 62 A.D.3d 637 (2d Dep't 2009)

OPINION

PER CURIAM.

In an action, inter alia, to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Queens County (McDonald, J.), entered October 23, 2009, which granted the defendants' motion for summary judgment dismissing the complaint on the ground that he did not sustain a serious injury within the meaning of Insurance Law § 5102 (d).

Ordered that the order is reversed, on the law, with costs, and the defendants' motion for summary judgment dismissing the complaint on the ground that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) is denied.

The defendants met their prima facie burden of showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the subject accident (see *Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 956-957; see also *Kearse v New York City Tr. Auth.*, 16 AD3d 45, 49-50 [2005]).

In opposition, the plaintiff raised a triable issue of fact through the affirmation of his treating physician, Dr. Nathan Levin, as to whether he sustained a serious injury to the cervical and/or lumbar regions of his spine, under the significant limitation of use and/or permanent consequential limitation of use categories of Insurance Law § 5102 (d) as a result of the subject accident (see *Nisanov v Kiriyyenko*, 66 AD3d 655 [2009]; *Su Gil Yun v Barber*, 63 AD3d 1140 [2009]; *Pearson v Guapisaca*, 61 AD3d 833 [2009]; *Williams v Clark*, 54 AD3d 942 [2008]; *Casey v Mas Transp., Inc.*, 48 AD3d 610 [2008]; *Acosta v Rubin*, 2 AD3d 657 [2003]).

Dr. Levin opined, based on his contemporaneous and recent examinations of the plaintiff, as well as on his review of the plaintiffs magnetic resonance imaging reports, which showed, inter alia, a disc bulge in the cervical spine and disc herniations in the lumbar spine, that the plaintiff's lumbar and cervical injuries and observed range of motion limitations were permanent and causally related to the subject accident.

Contrary to the defendants' assertions, the plaintiff adequately explained, through the affirmation of Dr. Levin, the reason for the lengthy gap in his treatment history (see *Pommells v Perez*, 4 NY3d 566, 577 [2005]; *Eusebio v Yannetti*, 68 *876AD3d 919 [2009]; *Gaviria v Alvarado*, 65

AD3d 567 [2009]; Bonilla v Tortoriello, 62 AD3d 637 [2009]). Rivera, J.P., Florio, Miller, Chambers and Roman, JJ., concur.

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