

Chandu v Trezza

2007 NY Slip Op 30411(U)

March 7, 2007

Supreme Court, Queens County

Docket Number: 0002780

Judge: Lawrence Vincent Cullen

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that Austine sustained injuries which include the following: cervical whiplash, cervicobrachial syndrome, lumbosacral disc syndrome, posterior disc herniation at C5-6 impinging on the anterior aspect of the spinal cord, posterior disc herniation at L4-5 impinging on the anterior aspect of the spinal canal and neural foramina bilaterally, bilateral posterior tibial neuropathy, bilateral L5-S1 radiculopathy, radiating neck pain, and restriction of motion in the neck/back region. Defendant contends that these injuries are not "serious" within the meaning of the statute. Plaintiffs oppose the motion and cross-move for summary judgment in their favor on the issue of liability.

It is well settled that the proponent of a motion for summary judgment, where the issue is whether a plaintiff has sustained a serious injury as defined by Insurance Law § 5102[d], has the initial burden of establishing, by competent evidence, that a plaintiff did not sustain a serious injury causally related to the subject accident (Franchini v Palmieri, 1 NY3d 536 [2003]). Once a defendant meets this initial threshold, the burden shifts to the plaintiffs to offer proof, in admissible form, which creates a material issue of fact requiring a trial (id.). Defendant met her initial burden of demonstrating prima facie that neither of the two plaintiffs sustained a serious injury in the subject accident with the affirmed reports of Doctors Andrew B. Weiss, Edward M. Weiland and Craig Warshall.

Dr. Weiss, an orthopedic surgeon, reports that both plaintiffs' cervical and lumbar sprains are resolved. Plaintiff Amber was examined by Dr. Weiss on August 31, 2006, and based upon this examination, Dr. Weiss found "no residual and no evidence of permanence." Based upon objective clinical criteria, Dr. Weiss further noted that this plaintiff's "sprain cervical spine and thoracolumbosacral spine is resolved, and that there is no clinical evidence of cervical or lumbosacral radiculopathy."

Defendant also submitted a report made by a chiropractor who examined plaintiff Amber at the behest of the no-fault insurance company approximately five (5) months after the subject accident. In this report, Dr. Wolin notes that this plaintiff's thoracic and lumbar sprain/strain are resolved.

Dr. Weiland performed a neurological examination of Austine Chandu on May 2, 2006, and in his report, affirms that the neurological examination of Ms. Chandu was within normal limits, and that this plaintiff does not demonstrate any objective neurological disability. Specifically, Dr. Weiland notes that the cervical sprain/strain is resolved, the thoracic spine sprain/strain is resolved, and the lumbosacral sprain/strain is resolved. Dr. Weiland reports that "[He found] no evidence of any lateralizing neurologic deficits at the present time to

correlate with [plaintiff's] subjective complaints . . . [He does] not feel that any further neurological investigational studies nor neurologic treatment modalities are warranted, and that there is no finding of any neurologic residual or permanency based upon her physical examination findings noted."

The affirmed report of Dr. Warshall, was also submitted in support of the motion. Dr. Warshall is a radiologist who reviewed the magnetic resonance imaging film taken of Austine Chandu's cervical and lumbar spine. In his report, Dr. Warshall notes that there are "multilevel pre-existing chronic degenerative changes involving the cervical spine," that there were "no findings that can be causally-related to an accident of 5/24/03," and that "there are no acute traumatic changes identified."

Finally, plaintiff Austine was also examined by a chiropractor at the request of the no-fault insurer approximately five months after the subject accident. Dr. Brian Wolin notes in his report dated October 15, 2003, that this plaintiff's "cervical, thoracic and lumbar sprain/strain is resolved," and that "there is no objective evidence of a causally-related disability." Dr. Wolin concludes that "there is no need for further chiropractic treatment, and that full benefits from chiropractic treatment has been reached and further treatment would be considered excessive."

The submissions in opposition to defendant's motion are insufficient to raise a triable issue of fact as to whether plaintiffs each sustained a serious injury causally related to the subject accident. The affidavit by plaintiffs' attorney has no evidentiary value and is insufficient to defeat the motion (see Zuckerman v City of New York, 49 NY2d 557 [1980]). The affirmation of plaintiffs' expert, which incorporates by reference other unsworn reports, fails to provide sufficient objective medical evidence to establish a serious injury (see Toure v Avis Rent A Car Systems, 98 NY2d 345 [2002]). The expert's findings with respect to cervical and lumbar strains and limitations of motion are inadequate in the absence of proof that these findings were objectively ascertained (see Toure v Avis Rent A Car Systems, supra). The remaining medical submissions of plaintiffs, which amount to unaffirmed reports of other medical personnel who treated the plaintiffs, are equally without probative value (see Grasso v Angerami, 79 NY2d 813 [1991]; Hernandez v Taub, 19 AD3d 368 [2005]; cf. Bycinthe v Kombos, 29 AD3d 845 [2006]). In the absence of objective evidence of injury, the plaintiffs' subjective complaints of pain set forth in their self-serving affidavits are insufficient to raise a triable issue of fact as to whether they each sustained a serious injury as a result of the subject accident (see Ramirez v Parache, 31 AD3d 415 [2006]; Oliva v Gross, 29 AD3d 551 [2006]; Farozes

v Kamran, 22 AD3d 458 [2005]; Ali v Vasquez, 19 AD3d 520 [2005]; Batista v Olivo, 17 AD3d 494 [2005]; Fisher v Williams, 289 AD2d 288 [2001]). In any event, soft tissue injuries consisting of strains and sprains do not qualify as serious under the no-fault statute (see Licari v Elliott, 57 NY2d 230 [1982]; Waldbaum v Dong Kook Chang, 175 AD2d 204 [1991]).

Finally, there is no evidence to demonstrate that either plaintiff sustained a medically-determined injury or impairment which prevented either of them from performing substantially all of the material acts constituting their normal daily activities for no less than 90 of the first 180 days following the accident (see Gaddy v Eyler, 79 NY2d 955 [1992]; Lauretta v County of Suffolk, 273 AD2d 204 [2000]).

Therefore, the motion to dismiss the complaint on the grounds that neither plaintiff sustained a serious injury in the subject accident, is granted.

Cross Motion

The cross motion for summary judgment in favor of plaintiffs on the issue of liability is denied as academic (see Parente v Kang, 2007 WL 530207; Young v Gonzalez, 19 AD3d 408 [2005]).

Dated: March 7, 2007

LAWRENCE V. CULLEN, J.S.C.

