

Dorr v Roberts

2007 NY Slip Op 30704(U)

April 4, 2007

Supreme Court, Suffolk County

Docket Number: 0027745/2004

Judge: Arthur G. Pitts

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Supreme Court of the State of New York
IAS Part 43- County of Suffolk

PRESENT:

HON. ARTHUR G. PITTS

JUSTICE OF THE SUPREME COURT

ANNE DORR and PETER DORR,

Plaintiffs,

-against-

SONOVIA E. ROBERTS,

Defendant.

ORIG. RETURN DATE: 11/13/06

FINAL SUBMIT DATE: 2/1/07

MOTION SEQ. NO.: 001-MD

PLTF'S/PET'S ATTY:

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Upon the following papers numbered 1 to 25 read on this motion / summary judgment Notice of Motion/OSC and supporting papers 1-11; Notice of Cross-Motion and supporting papers ____; Affirmation/affidavit in opposition and supporting papers 12-23; Affirmation/affidavit in reply and supporting papers 24-25 Other ____; (~~and after hearing counsel in support of and opposed to the motion~~) it is,

ORDERED that defendant Sonovia E. Roberts' motion for summary judgment is denied under the circumstances presented herein. (CPLR 3212; Insurance Law 5102 (d))

This action arose out of a motor vehicle accident that occurred on January 3, 2000 in which plaintiff Anne Dorr allegedly sustained a serious personal injury. Plaintiff Peter Dorr, her spouse, has brought a derivative claim. As a basis of the instant motion, the defendant asserts that the plaintiff has not sustained such serious injury as defined by Insurance Law 5102 (d).

Said section provides in part that "serious injury means a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred and eighty days immediately following the occurrence of the injury or impairment." (Insurance Law 5102 (d)) In the context of the plaintiff's claims, the term "consequential" means important or significant (*Kordana v. Pomellito*, 121 A.D.2d 783, 503 N.Y.S.2d 198 , 200 [3rd Dept. 1986] , App. Dis. 68 N.Y.2d 848, 508 N.Y.S.2d 425) The

term, "significant" as it appears in the statute has been defined as "something more than a minor limitation of use" and the term "substantially all" has been construed to mean "that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment." (*Licari v. Elliott*, 57 N.Y.2d 230, 455 N.Y.S.2d 570 [1982])

On a motion for summary judgment to dismiss the complaint for failure to set forth a prima facie case of serious injury as defined by Insurance Law 5102 (d), the initial burden is on the defendant "to present evidence, in competent form, showing that the plaintiff has no cause of action." (*Rodriguez v. Goldstein*, 182 A.D.2d 396, 582 N.Y.S.2d 395, 396 [1st Dept. 1992]) Once the defendant has met the burden, the plaintiff must then, by competent proof, establish a prima facie case that such serious injury exists. (*DeAngelo v. Fidel Corp. Services, Inc.*, 171 A.D.2d 588, 567 N.Y.S.2d 454, 455 [1st Dept. 1991]) Such proof in order to be in a competent or admissible form, shall consist of affidavits or affirmations. (*Pagano v. Kingsbury*, 182 A.D.2d 268, 587 N.Y.S.2d 692 [2nd Dept. 1992]) The proof must be viewed in a light most favorable to the non-moving party. (*Cammarere v. Villanova*, 166 A.D.2d 760, 562 N.Y.S.2d 808, 810 [3rd Dept. 1990])

The plaintiff has alleged by way of her bill of particulars that she has sustained the following injuries: Herniated disc at C5-6 effacing the ventral CSF space and contacting the cord; aggravation and/or exacerbation of cervical radiculopathy necessitating multiple epidural steroid injections; cervical facet arthropathy; cervical spine sprain; post traumatic headaches; aggravation and/or exacerbation of right shoulder derangement; right shoulder impingement syndrome; tendonitis, right shoulder; subdeltoid bursitis, right shoulder; reactive anxiety and depression.

The defendant, in support of the instant motion has submitted the affirmed reports of C.M. Sharma, M.D., a neurologist and S. Farkas, M.D., an orthopedist and the unaffirmed reports of Graig Warshall, M.D., a neuroradiologist and Hugh Xian, M.D. a neurologist. The unaffirmed reports of Dr. Warshall and Dr. Xian will be considered because they were prepared by them as the plaintiff's treating physicians. (*Itkin v. Devlin*, 286 A.D.2d 477, 729 N.Y.S.2d 537 [2nd Dept 2001])

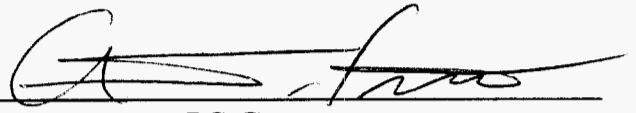
Dr. Sharma conducted an examination of the plaintiff on August 2, 2006 and also had an opportunity to review relevant medical records. After such examination and review he concluded that "there is no clinical evidence of muscle atrophy, reflex asymmetries, sensory changes, disc pathology or motor weakness. On examination, Ms. Dorr has no neurological problems. There are no neurological limitations to work and pre-accident daily activities." He further provided in his report that the plaintiff had normal posture with normal flexion of the neck, spine, lumbar spine with no atrophy of the arms and legs. Dr. Farkas examined the plaintiff on August 10, 2006 and also had an opportunity to review relevant medical records. He diagnosed her with a resolved cervical sprain and reached said conclusion by conducting an examination which revealed normal range of motion of the cervical spine. Notwithstanding the findings of Dr. Sharma and Dr. Farkas, it has consistently been held that a defendant's moving papers are insufficient for purposes of a motion for summary judgment based upon a plaintiff's failure to set forth a prima facie case of serious injury when the affirmed

medical reports relied upon fail to provide the objective testing performed to arrive at their conclusions. (*Walters v. Papanastassiou*, 31 A.D.3d 439, 819 N.Y.S.2d 48 [2nd Dept 2006]) In the matter at bar, neither Dr. Sharma nor Dr. Farkas set forth the objecting testing that they performed in arriving to their diagnosis and as such, the defendant has failed to met her burden of establishing that the plaintiffs do not have a cause of action Accordingly, based upon the foregoing and the circumstances presented herein, the defendant's motion is in all respects denied.

This shall constitute the decision and order of the Court.

So ordered.

Dated: Riverhead, New York
April 4, 2007



J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION ____ DO NOT SCAN