

Hadley v Keren

2007 NY Slip Op 31674(U)

June 13, 2007

Supreme Court, Richmond County

Docket Number: 0100890/2005

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND PART DCM 3**

**Index No.: 100890/2005
Motion No.: 2, 3, 4 & 5**

DANTE HADLEY and DAWN HADLEY,

Plaintiffs

against

DECISION & ORDER

HON. JOSEPH J. MALTESE

**ORIF A. KEREN, GENNADY DIEFVSKY,
MARIE CHRISTINA WARREN, UNITED SERVICES
AUTOMOBILE ASSOCIATION and JOSE M. MIRANDA,**

Defendants

The following items were considered in the review of these motions for summary judgment

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1, 2, 3, 4
Answering Affidavits	5, 6
Replying Papers	7, 8, 9
Exhibits	Attached to Papers
Memorandum of Law	

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

In motion number 2 the defendants, Marie Christina Warren and United Services Automobile Association, seek summary judgment on the grounds that the plaintiffs have not sustained a “serious injury” as defined in Insurance Law §5102(d).¹ In motion number 3 the defendant, Jose Miranda, moves for summary judgment based upon the serious injury threshold as well. In motion number

¹ A serious injury must be a personal injury, "[W]hich 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 constitutes such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment" (Insurance Law §5102 [d]).

4 the defendant, Gennady Diefvsky, seeks summary judgment based upon the serious injury threshold as well as liability against the plaintiff and all of the co-defendants. In motion number 5 the defendant, Ofir A. Keren, moves for summary judgment based upon the serious injury threshold. The plaintiff opposes all of these motions.

The serious injury threshold set forth in Insurance Law §5104(a) can only be established under these categories. (*Coon v. Brown*, 192 AD2d 908 [3rd Dept 1993]; *Daviero v. Johnson*, 88 AD2d 732 [3rd Dept 1982].) Thus, the mere fact that one has been injured, even seriously, does not establish that a “serious injury” has been sustained. (*Jones v. Sharpe*, 98 AD2d 859 [3rd Dept 1989], *aff’d* 63 NY2d 645 [1984].) Rather, a plaintiff must show that he or she sustained a personal injury, i.e., bodily injury, sickness or disease (11 NYCRR §65-2.1[e]), that results in one of the nine serious injury threshold categories. (*See, Van Norstrand v. Regina*, 212 AD2d 883 [3rd Dept 1995].)

It is important to keep in mind the policies underlying the enactment of the No-Fault Law and the law’s structure when litigating no-fault related issues. Courts have consistently held that the No-Fault Law must be interpreted to fulfill the policies the legislature had in mind. (*See, Oberly v. Bangs Ambulance*, 96 NY2d 295 [1991]; *Scheer v. Koubek*, 70 NY2d 678 [1987]; *Maida v. State Farm*, 66 AD2d 852 [2d Dept 1978].) It is for the court to decide in the first instance whether a plaintiff has made a *prima facie* showing of “serious injury” (*see, e.g., Licari v. Elliott*, 57 NY2d 230, 237).

A defendant can establish that the plaintiff’s injuries are not serious within the meaning of Insurance Law §5102(d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff’s claim. Where defendant’s motion for summary judgment properly raises an issue as to whether a serious injury has been sustained, it is incumbent upon the plaintiff to produce evidentiary proof in admissible form in support of his or her allegations (*see, Kordana v. Pomellito*, 121 AD2d 783, appeal dismissed, 68 NY2d 848). The burden, in other words, shifts to plaintiff to come forward

with sufficient evidence to demonstrate the existence of an issue of fact as to whether he or she suffered a serious injury (*see, Gaddy v. Eyley*, 79 NY2d 955; *Grossman v. Wright* 268 AD2d 79 [2nd Dept 2000]). The plaintiff in such a situation must present objective evidence of the injury. The mere parroting of language tailored to meet statutory requirements is insufficient (*id*). Additionally, a plaintiff's subjective claim of pain and limitation of motion must be sustained by verified objective medical findings which are based on a recent examination of the plaintiff.

In this action both plaintiffs were examined by, and all of the defendants rely upon, the independent medical examination performed by Dr. Robert Israel, a board certified orthopaedist. With respect to Dawn Hadley, Dr. Israel found that as compared to normal values (all of which were stated in great detail in Dr. Israel's affirmed report) the plaintiff's cervical, thoracic, and lumbar spine revealed absolutely no limitations as to range of motion. Furthermore, Dr. Israel noted that there was no loss of range of motion with respect to Ms. Hadley's left shoulder. His diagnosis was a resolved lumbar cervical and thoracic spine sprain, resolved left shoulder sprain with no disabilities sustained as a result of the accident.

Dr. Israel also examined the plaintiff, Dante Hadley. Dr. Israel found that as compared to normal values, Dante Hadley's lumbar spine revealed no limitations as to range of motion as compared to normal. Nor was there any sustained injury to the plaintiff's left leg. His diagnosis with respect to Dante Hadley was a resolved lumbar spine sprain and resolved left leg sprain with no disabilities sustained as a result of the accident.

Both plaintiffs were also examined, at the request of the defendants, by Dr. Michael Carciente, a board certified neurologist. His affirmed reports state that the plaintiffs both completed a normal neurological examination. He found no objective findings or evidence of ongoing neurological injury or disability in both plaintiffs.

In order to successfully oppose a motion for summary judgment on the issue of whether an injury is serious within the meaning of Insurance Law §5102 (d), the plaintiff's expert must submit quantitative objective findings in addition to an opinion as to the significance of the injury. (*Grossman v. Wright* 268 AD2d 79 [2d Dept 2000].)

In opposition, the plaintiff relies upon the medical records of Dr. Rame E. Hanna, one of the physicians at Benson Medical, P.C., the medical facility where the plaintiffs were treated. The plaintiffs, prior to relying upon these records served an “intention to offer business medical records at trial” upon all of the defendants. Furthermore, the plaintiffs attach the affirmation of Dr. Hanna that states the records are, *inter alia*, representative of a complete and accurate version of the medical records of Dante and Dawn Hadley, that they were made in the regular course of business and that “the records were accurate when made and I would swear to that effect if called to testify at the time of trial.”

The plaintiffs argue that the records are in admissible form for the time of trial pursuant to CPLR § 4532-a and therefore may be commented upon by other health care professionals. These medical records are the only medical evidence presented to oppose the defendant’s doctors findings that both plaintiffs did not suffer a serious injury.

New York CPLR § 4532-a, entitled “Admissibility of graphic, numerical, symbolic or pictorial representations of medical or diagnostic tests” states in its entirety:

“A graphic, numerical, symbolic or pictorial representation of the results of a medical or diagnostic procedure or test is admissible in evidence provided:

(1) the name of the injured party, the date when the information constituting the graphic, numerical, symbolic or pictorial representation was taken, and such additional identifying information as is customarily inscribed by the medical practitioner or medical facility is inserted on such graphic, numerical, symbolic or pictorial representation; and

(2) (a) the representation has been previously received or examined by the party or parties against whom it is being offered; or

(b)(I) at least ten days before the date of trial of the action, the party intending to offer such graphic, numerical, symbolic or pictorial representation as a proposed exhibit serves upon the party or parties against whom said proposed exhibit is to be offered, a notice of intention to offer such proposed exhibit in evidence during the trial and that the same is available for inspection; and

(ii) the notice aforesaid is accompanied by an affidavit or affirmation of such physician identifying such graphic, numerical, symbolic or pictorial representation and attesting to the identifying information inscribed thereon, attesting that the identifying information inscribed thereon is the same as is customarily inscribed by the medical practitioner or facility, and further attesting that, if called as a witness in the action, he or she would so testify.

Nothing contained in this rule, however, shall prohibit the admissibility of a graphic, numerical, symbolic or pictorial representation in evidence where otherwise admissible.”

This section provides a means of authenticating any "graphic, numerical, symbolic or pictorial representation of the results of a medical or diagnostic procedure or test" without the need for foundation testimony (*Aguirre v. Long Island Rail Road Co.* 286 A.D.2d 658 [2d 2001]). Thus, a hearsay exception and self-authentication procedure is created for the identifying information on the image. (*Id.*) This rule does nothing more than provide a short cut to authentication of the pictorial medical test. As the original practice commentary of this rule stated, this provision does not ameliorate the need for expert testimony. “Expert testimony will almost always be necessary to interpret and explain the image to the fact-finder.” Moreover, “it will be futile to admit the X-ray into evidence without accompanying expert testimony, just as it would be nonsensical to admit a hieroglyphic document without explanation.”² On the other hand, testimony by the physician under whose supervision the image was taken is not necessary. Once the image has been authenticated, any qualified expert should be permitted to interpret it.

²See, 2007 Practice Commentary, written by Vincent Alexander, and citing to “Dean (now Judge) Joseph M. McLaughlin,” the author of the original practice commentary to this section.

In examining the evidence presented by the plaintiff, all the affirmation of Dr. Hanna does is authenticate the medical records of the plaintiff. They do not explain the medicine to the court, which is not competent to interpret the meanings of the medical records. In essence, the plaintiff has simply authenticated a hieroglyphic volume of the plaintiffs' medical records without an explanation as to their meanings. Therefore, the plaintiffs do not present evidence sufficient to defeat the defendants' entitlement to summary judgment based upon the serious injury threshold set forth in the Insurance Law.

Assuming arguendo, that the plaintiffs' medical records attached were proper evidentiary material to rebut the defendants doctor's findings that the plaintiffs did not suffer a serious injury, summary judgment would still be granted in favor of the defendants. Dr. Hanna's records, specifically the "Comprehensive Narrative Report" dated December 4, 2006 for both plaintiffs, does not compare his findings for the plaintiffs alleged loss of range of motion to the normal range of motion. It is well settled that the failure to "compare to normal" is fatal in a plaintiff's attempt to create a triable issue of fact (*Kennedy v. Brown* 23 AD3d 625 [2d Dep t2005]).

Furthermore, all of the medical evidence presented, taken at truth, fail to adequately cover a twenty month gap in treatment, which by itself warrants summary judgment in favor of the defendants based upon the serious injury threshold (*Pommels v. Perez*, 4 NY3d 566 [2005]). Moreover, the Appellate Division, Second Department, has mandated dismissal of a plaintiffs' action where there was an unexplained gap in treatment as short as sixteen months. (*Moore v. Sarwar* 29 AD3d 752 [2d Dept 2006]; *Batista v. Olivo* 17 A.D.3d 494 [2d Dept 2005].)

A motion for summary judgment must be denied if there are "facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. "Moreover, the parties competing contentions must be viewed in a light most favorable to the party opposing the motion" (*Marine Midland Bank, N.A., v. Dino, et al.*, 168 AD2d 610 [2nd Dept 1990]). Summary judgment should not be granted where there is any doubt as to the existence of a triable

issue or where the existence of an issue is arguable (*American Home Assurance Co., v. Amerford International Corp.*, 200 AD2d 472 [1st Dept 1994]).

Here, the defendants make a *prima facie* showing that the plaintiffs did not sustain a serious injury within the meaning of Insurance Law § 5102(d) (*Toure v Avis Rent A Car Sys.*, 98 N.Y.2d 345 [2002]). The defendants submitted the affirmations of an orthopedist and a neurologist who examined both plaintiffs, both of whom concluded that the plaintiffs were not disabled, impaired, or restricted in any manner as a result of the accident. The plaintiffs' opposition papers were insufficient to raise a triable issue of fact. Moreover, the plaintiffs' medical records, if competent evidence properly before the court, did not explain medically a twenty month gap in treatment, and dismissal is warranted by the Court of Appeals decision in *Pommels v. Perez*.

Accordingly, it is hereby:

ORDERED, that the defendants' motions for summary judgment based upon the plaintiffs' failure to sustain a serious injury as defined by Insurance Law § 5102 are granted in their entirety and this action is dismissed; and it is further

ORDERED, that the court did not address the issue of liability as sought by defendant Diefvsky in motion number 4.

ENTER,

DATED: June 13, 2007

Joseph J. Maltese
Justice of the Supreme Court