

Morales v Hernandez
2007 NY Slip Op 32658(U)
August 7, 2007
Supreme Court, Queens County
Docket Number: 0018350/2005
Judge: David Elliot
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT IA Part 14
Justice

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JOSE MORALES, et al.		Number <u>18350</u> 2005
-against-		Motion
		Date <u>June 19,</u> 2007
TEOFILO HERNANDEZ, et al.		Motions
		Cal. Number <u>21</u>
	X	Motion Seq. No. <u>1</u>

The following papers numbered 1 to 36 read on this motion by Cheng Tong Tang, cross motion by Teofilo Hernandez and Xiomaria Collado and cross motion by Jose Aca to dismiss the complaint on the grounds that neither plaintiff sustained a "serious injury" in the subject accident.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	1-4
Notices of Cross Motions - Affidavits-Exhibits ...	5-8, 9-12
Answering Affidavits - Exhibits	13-32
Reply Affidavits	33-34, 35-36

Upon the foregoing papers it is ordered that the motion and cross motions are granted.

Plaintiffs in this negligence action seek damages for personal injuries sustained in an automobile accident on July 1, 2004, on Van Dam Street in the vicinity of the Queens Midtown Expressway, in Queens County. In the verified bill of particulars, plaintiff Jose Morales alleges injuries which include: posterior disc bulges at L3-4 and L4-5. Plaintiff Oswaldo Chavez alleges that he sustained posterior disc bulge at C3-4, posterior disc herniation at L5-S1 and other soft tissue injuries. Plaintiffs oppose the motion and cross motions.

In order to maintain an action for personal injury under the "no-fault" statute, plaintiffs must establish that they each sustained a "serious injury" (Licari v Elliot, 57 NY2d 230 [1982]). As the proponents of the respective motion and cross motions for

summary judgment, however, the defendants have the initial burden of demonstrating, by admissible evidence, that the plaintiffs did not sustain a serious injury pursuant to Insurance Law, § 5102[d] (Alvarez v Prospect Hospital, 68 NY2d 320 [1986]; Winegrad v New York Univ. Medical Center, 64 NY2d 851 [1985]). In support of the motion and cross motions, defendants submitted the affirmed medical reports of Doctors Ravi Tikoo, Carl Austin Weiss and Natalio Damien.

Jose Morales

Morales was examined by Dr. Tikoo, a neurologist, on February 7, 2007. Morales' chief complaints were limited to bilateral wrist and bilateral knee pain. Dr. Tikoo diagnosed Morales with a history of soft tissue injuries of the bilateral wrists and knees and concluded that there was no significant clinical evidence of neuropathy, radiculopathy or disc herniation. Dr. Tikoo affirms that maximum medical improvement had been reached for this plaintiff, that there was no permanent injury and that Morales is able to work in his normal capacity.

Dr. Weiss performed an orthopedic examination of Morales on February 8, 2007. Plaintiff made complaints of occasional back and bilateral knee pain. Upon examination, Dr. Weiss found no tenderness in the cervical or mid-lumbar spine, and range of motion was within normal limits in the head, neck and waist regions, as well as in both knees and shoulders. Dr. Weiss also found full range of motion of both shoulders and no atrophy of the shoulder girdle musculature. Dr. Weiss, therefore, concludes that Morales suffered vague sprain injuries and has completely recovered; there is no disability or permanency.

Finally, Dr. Damien reviewed Morales' magnetic resonance imaging (MRI) film taken of his cervical spine on August 11, 2004 and noted the results as follows:

"[t]he examination reveals the cervical discs to be intact. There is no evidence of a disc bulge, disc herniation or nerve root impingement at any level. There is no evidence of neural foramina narrowing or cord compression at any cervical level. The cervical vertebral bodies are in proper alignment and of normal height with no evidence of fracture or dislocation."

Oswaldo Chavez

After examining Chavez on February 7, 2007, Dr. Tikoo affirms that Chavez has a "history of lumbosacral strain and soft tissue injuries to the right shoulder and right knee," and that "despite

[Chavez'] subjective complaints, there are no objective findings to substantiate [the] complaints."

Dr. Weiss examined Chavez on February 8, 2007. Plaintiff made complaints of occasional back and right shoulder pain and a "clicking" in his right knee. Upon physical examination, Dr. Weiss found no tenderness in the cervical or mid-lumbar spine and range of motion was within normal limits in the head, neck and waist regions as well as in both shoulders. There were no abnormalities found in the knees or ankles. Dr. Weiss concluded that Chavez suffered a minor back sprain which has resolved and there is no permanency, disability or need for further treatment.

The MRI taken of plaintiff's cervical spine on August 11, 2004 was reviewed by Dr. Damien on January 18, 2006. Dr. Damien found no evidence of disc bulge, disc herniation or nerve root impingement at any level. The cervical vertebral bodies were in proper alignment and of normal height without any evidence of fracture or dislocation. A review of the MRI taken of Chavez' lumbar spine revealed that the lumbar vertebral bodies were in proper alignment and of normal height with no evidence of fracture or dislocation. Similarly, a review of the MRI of this plaintiff's right shoulder taken on August 25, 2004, revealed that the supraspinatus tendon was intact with no evidence of injury or tear. The rotator cuff muscles and tendons were also intact with no evidence of rupture or tear, and the bony structures were intact with no acute fracture or dislocation present.

The affirmed medical reports of the physicians who examined the plaintiffs on behalf of the defendants are sufficient to establish a prima facie case that the plaintiffs did not sustain a serious injury as a result of the accident at issue. The burden, therefore, shifts to the plaintiffs to raise a triable issue of fact that they sustained a serious injury (see Gaddy v Eyler, 79 NY2d 955 [1992]).

No medical evidence was submitted in opposition to the branches of the motion and cross motions which seek to dismiss Morales' claim of serious injury. Therefore, summary judgment is granted in favor of the movant and cross movants dismissing Morales' causes of action, on the merits and as otherwise unopposed.

The submissions which pertain to Chavez, to wit, an attorney's affirmation, Chavez' affidavit of merit and several sworn and unsworn medical reports and records are insufficient to raise a triable issue of fact. The bare affirmation of Chavez' attorney, who demonstrated no personal knowledge of this plaintiff's injuries, is without evidentiary value and, thus, fails to overcome

the defendants' showing (see Zuckerman v City of New York, 49 NY2d 557 [1980]; Carpluk v Friedman, 269 AD2d 349 [2000]; Sloan v Schoen, 251 AD2d 319 [1998]). The unsworn medical reports are inadmissible (see Pagano v Kingsbury, 182 AD2d 268 [1992]; McLoyrd v Pennypacker, 178 AD2d 227 [1991]); and the sworn reports do not establish that the said injuries are causally-related to the subject accident (Collins v Stone, 8 AD3d 321 [2006]; Cacaccio v Martin, 235 AD2d 384 [1997]). Moreover, the affirmed report by Dr. Tak indicates that the report is based, in part, upon findings in plaintiff's unsworn MRI, however, there is no indication that Dr. Tak actually reviewed the MRI films. Dr. Tak's report is thus properly disregarded as unsupported by competent, admissible evidence (see Collins v Jost, 281 AD2d 175 [2001]; Goldin v Lee, 275 AD2d 341 [2000]). Interestingly, Dr. Tak notes that Chavez "likely sustained permanent loss of ranges of motion" and that Chavez' restrictions are "likely causally-related to the [subject] accident." Furthermore, Dr. Tak's report essentially indicates that Chavez suffered from a herniated disc and bulging discs. Such injuries do not alone constitute a serious injury; rather, the plaintiff is still required to provide objective evidence of the extent or degree of physical limitations resulting from such injuries and their duration (see Descovich v Blieka, 279 AD2d 499 [2001]; Guzman v Michael Mgt., 266 AD2d 508 [1999]; Noble v Ackerman, 252 AD2d 392 [1998]). Finally, plaintiff's self-serving affidavit concerning his inability to perform his daily activities after the accident, without more, is insufficient to establish that he sustained a medically-determined injury or impairment of a nonpermanent nature which prevented him from performing substantially all of the material acts which constituted his usual and customary daily activities for a period of not less than 90 days during the 180-day period immediately following the accident (see Yagliyan v Gun Shik Yang, 241 AD2d 518 [1997]; Cullum v Washington, 227 AD2d 370 [1996]; Atamian v Mintz, 216 AD2d 430 [1995]). Accordingly, the branches of the motion and cross motions which seek dismissal of the causes of action alleged by Chavez, is granted.

Conclusion

The motion and cross motion to dismiss the complaint on the grounds that neither plaintiff sustained a serious injury in the subject accident, are granted.

Dated: August 7, 2007

J.S.C.