

Davila v Davis

2007 NY Slip Op 33384(U)

October 15, 2007

Supreme Court, Nassau County

Docket Number: 9901-05/

Judge: Ute W. Lally

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SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK

mg

Present:

HON. UTE WOLFF LALLY,

Justice

TRIAL/IAS, PART 8
NASSAU COUNTY

ANDERSON DAVILA,

Plaintiff(s),

MOTION DATE: 8/3/07
INDEX NO.: 19901/05
SEQ. NO. 1
CAL. NO. 2007H2399
X X X

-against-

BETH J. DAVIS and ANDREW B. DAVIS,

Defendant(s)

- The following papers read on this motion for summary judgment:
- Notice of Motion/ Order to Show Cause..... 1-5
 - Answering Affidavits..... 6-10
 - Replying Affidavits..... 11,12
 - Briefs:

Upon the foregoing papers, it is ordered that this motion by defendants for an order pursuant to CPLR 3212 granting summary judgement in their favor dismissing plaintiff's complaint on the ground that plaintiff's alleged injuries do not meet the "serious injury" threshold as defined in Insurance Law § 5104(a) and required by Insurance Law § 5102 (d) is granted.

This is an action to recover money damages for personal injuries allegedly sustained in a motor vehicle accident that occurred on May 7, 2005, at approximately 4.00 p.m. at the intersection of Sunrise Highway and North Village Avenue, Rockville Centre, New York. Plaintiff claims to have sustained serious injuries as the result of defendants' negligence.

In order for a court to grant summary judgement, "it must be clearly appear that no material triable issue of fact is presented" (Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395, 404). In

the present matter defendant establishes "a prima facie showing by documentary evidence [that] the complaint may be dismissed" (Sillman, supra). However, the plaintiff may "show such facts as may be deemed ... sufficient to raise an issue with respect of [defendant's] documentary evidence" (Sillman, supra).

In support of their motion, defendants supplied two affirmed medical reports by C. M. Sharma, M.D. and Isaac Cohen, M.D.

Dr. Sharma, a board certified neurologist, conducted a neurological examination of the plaintiff on November 9, 2006. In his affirmed to report, Dr. Sharma first gives a brief history of the occurrences and a description of the medical records of the plaintiff he reviewed. He then gives the results of the neurological examination of the plaintiff. According to his records he performed several tests, each showing no noticeable problems. According to Dr. Sharma, plaintiff has inter alia normal gait/coordination and skull/spine. A description of how the tests were performed is given.

Dr. Cohen, a diplomate of the board of orthopedic surgeons, conducted a medical evaluation of the plaintiff on November 13, 2006. In his report, Dr. Cohen initially expounds a brief history of the occurrences and a description of the medical records he reviewed. Thereafter he delineates the results of the physical evaluation. With regard to the cervical and thoracolumbar spine, the lower and upper extremities, Dr. Cohen observed normal range of motion (hereinafter "ROM") and no particularities. Moreover the gait is described as normal. He gives a description of the measurement and states the normal ROM.

From the records Dr. Cohen reviewed, two of them magnetic resonance imaging (hereinafter "MRI"), examinations of the plaintiff's cervical spine and lumbosacral spine area, and he states that the MRI of the cervical spine demonstrates disc osteophyte complex, which is a condition "clearly pre-existent in nature and not accident-related." The MRI of the lumbosacral spine only shows some bulging, a non traumatic condition and no evidence of acute herniated disc present. Dr Cohen states that he found no signs of disability and opines plaintiff is able to perform his regular activities, including holding gainful employment.

A defendant's expert must specify the objective tests upon which their medical conclusions are based, and when rendering an opinion with respect to the plaintiff's ROM, the expert must compare any finding to those ROM considered normal to the particular body part (Browdame v. Candura, 25 AD3d 747; Sequeira v. W & E Auto Repair, Inc., 17 AD3d 578; Qu v. Doshna, 12 AD3d 578).

Applying the aforesaid criteria, the Court finds that said reports and the conclusions herein contained to be legally sufficient. Both, Dr. Sharma and Dr. Cohen specify the objective tests on which the conclusions were predicated.

Therefore, this Court finds that the defendants have established their Prima Facie entitlement that plaintiff has not sustained a serious injury. Thus, the burden now shifts to the plaintiff to overcome defendants' motion by demonstrating that he sustained a serious injury within the meaning of the "No-Fault Insurance Law" (Gaddy v. Eyler, 79 NY2d 955, 957).

In opposition to the defendants' findings, plaintiff submitted affidavits and medical reports of Fokion Avergionos, D.C. and Alonzo M. Borja, D.C.

Dr. Averginos, a chiropractor, examined Mr. Davilla twice, on May 12, 2005 and Aug 2, 2005. During the period between May 12, 2005 and October 26, 2005 he treated the plaintiff for the injuries allegedly sustained in the motor vehicle accident which occurred on May 7, 2005. He did not see Mr. Davilla after his last treatment on October 26, 2005.

The defendants moved for summary judgment on March 2, 2007. More than one year had elapsed between the last medical report on August 2, 2005 and the motion. Plaintiff's last treatment on October 26, 2005 occurred more than one year before the motion. In Tudisco v. James the Appellate Division states: "Neither the report of the injured plaintiff's chiropractor nor the report of her neurologist was sufficient to sustain her burden, since both reports were based upon examinations conducted over one year before the defendant move for summary judgement" (Tudisco v. James, 28

AD3d 536). Moreover, Dr. Averginos relied upon two unsworn MRI-reports by Dr. Jill Wruble, D.O. Unsworn medical reports may not be considered in opposition to a summary judgment motion (Grasso v. Angerami, 79 NY2d 813; Hagan v. Thompson, 234 AD2d 420) and sworn reports based upon same, likewise, may not be considered by the court (Wagman v. Bradshaw, 292 AD2d 84).

Therefore the medical reports of Dr. Averginos can not be considered by this Court as they are not based upon a recent examination and rely upon unsworn MRI-reports.

Dr. Borja, a board certified chiropractor, examined the plaintiff twice, the report has the date of the last examination on May 17, 2007. In his report, Dr Borja states that the plaintiff sustained serious injuries which will be most likely of a permanent nature. According to his report, one criteria for his findings is plaintiff's ROM. Since he did not describe the tests performed in deriving those measurements, the findings cannot be considered (Browdame v. Candura, supra). Moreover, he refers to the unsworn MRI reports which cannot be considered either (Grasso v. Angerami, supra; Wagman v. Bradshaw, supra). Finally, he draws his conclusions from omnibus studies and subjective complaints by the plaintiff. Both cannot be considered as objective proof, which is essential to proof that the plaintiff has sustained serious injuries and to defeat defendants' motion for summary judgement (See Merisca v. Alford, 243 AD2d 613).

Therefore, defendants' motion for summary judgement is granted, as plaintiff failed to demonstrate that he has sustained "serious injuries" within the meaning of the "No-Fault Insurance Law."

Dated: OCT 15 2007

ENTERED

OCT 18 2007

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**

[Handwritten Signature]

J.S.C.