

Pulido v Rodriguez

2007 NY Slip Op 33628(U)

November 5, 2007

Supreme Court, Nassau County

Docket Number: 6225-05/

Judge: Ute W. Lally

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SCAN

SHORT FORM ORDER

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SUPREME COURT - STATE OF NEW YORK

Present:

HON. UTE WOLFF LALLY,

Justice

TRIAL/IAS, PART 8
NASSAU COUNTY

JOSE QUERUBIN PARRA PULIDO,

Plaintiff(s),

MOTION DATE: 8/27/07
INDEX NO.: 16225/05
SEQ. NO. 1
CAL. NO. 2007H1521
X X X

-against-

HENRY GOMEZ RODRIGUEZ,

Defendant (s)

The following papers read on this motion for summary judgment:

- Notice of Motion/ Order to Show Cause..... 1-8
- Answering Affidavits..... 9-12
- Replying Affidavits..... 13,14
- Briefs:

Upon the foregoing papers, it is ordered that this motion by defendant for an order pursuant to CPLR 3212 granting summary judgement in his 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 February 4, 2004, at approximately 5.00 p.m. on Shelter Rock Road near I. U. Willets Road, North Hills, New York. Plaintiff claims to have sustained serious injuries as the result of defendant's negligence.

In support of his motion the defendant supplied affirmed

medical reports by Michael J. Katz, M.D., Edward M. Weiland, M.D. and Steven L. Mendelsohn, M.D.

Dr. Katz, a fellow of the American Academy of Orthopedic Surgeons and a diplomate of the American Board of Forensic Medicine, conducted an orthopedic examination of the plaintiff on March 19, 2007. In his affirmed report, Dr. Katz initially expounds a brief history of the occurrence and medical treatment allegedly arising therefrom. Thereafter, he delineates the results of the physical evaluation of plaintiff. With regard to the cervical and lumbosacral spine, the left wrist and the left forearm, the left hand and the right and left knee, Dr. Katz observed full range of motion (hereinafter "ROM") and no particularities. In his affirmed report, he gives a description of the measurements and states the normal ROM. In addition, he performed several tests such as the Adson's for the cervical spine and Babinski's and Patrick's for the lumbosacral spine. Again, all tests demonstrated no particularities and a description of how they were performed is given. He states a list of records he reviewed. Finally, Dr. Katz states that he found no signs or symptoms of permanence referable to the musculoskeletal system and disability and opines that plaintiff is able to perform his regular activities, including holding gainful employment.

Dr. Weiland, a board certified neurologist, conducted a neurological examination of the plaintiff on March 22, 2007. In his affirmed report, Dr. Weiland first gives a brief history of the occurrence, medical treatment allegedly arising therefrom and a description of the medical records he reviewed. He then states the results of the neurological examination of the plaintiff. According to his records, he performed several tests, each showing no noticeable problems. Dr. Weiland finds that the plaintiff has, inter alia, intact cognitive functions and reflexes. A description of how the tests were performed is given. Furthermore, Dr. Weiland measured plaintiff's ROM in particular body parts, such as the cervical and lumbar spine, compared these findings to the average ROM and found full ROM for the plaintiff.

Finally, defendant submitted three medical reports of Dr. Mendelsohn, a board certified radiologist, who on Jan 2, 2007 conducted radiological reviews with respect to a CT scan of plaintiffs lumbar spine and a CT scan and MRI of plaintiff's cervical spine, each conducted on March 3, 2004. Upon review of the documents, Dr. Mendelsohn noted no accident related particularities, that could indicate that plaintiff has sustained serious injuries.

Within the context of a defendant's burden, a defendant's expert must specify the objective tests upon which his 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; Sequira 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. Dr. Katz and Dr. Weiland specify the objective tests on which the conclusions were predicated. Dr. Mendelsohn gives a detailed description of his review of plaintiff's CT scan and MRI.

Therefore, this court finds that the defendant has established his Prima Facie proof that plaintiff has not sustained serious injuries. Thus, the burden now shifts to the plaintiff to overcome defendant's motion by demonstrating that he sustained serious injuries within the meaning of the "No-Fault Insurance Law" (Gaddy v Eyler, 79 NY2d 955, 957).

In opposition to the defendant's motion and physicians' findings, plaintiff submitted two medical reports of Dr. Itzhak C. Haimovic, M.D., one of Joseph Garolis, D.C. and one of Douglas A. Schwartz, D.O.

Of these medical reports, the first report of Dr. Haimovic, dated April 28, 2004 is not affirmed and the one of Joseph Garolis, D.C. dated February 22, 2006, is not an affidavit, thus, they are unsworn. Unsworn medical reports may not be considered in

opposition to a summary judgement motion (Grasso v. Angerami, 79 NY2d 813; Hagan v. Thompson, 234 AD2d 420). Therefore, these medical reports cannot be considered by this court.

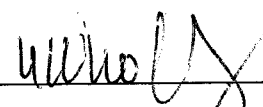
The second report of Dr. Haimovic is dated September 30, 2005. Dr. Haimovic did not see the plaintiff thereafter. More than one year elapsed between this medical report and the defendant's motion for summary judgement on June 21, 2007. In Tudisco v. James (28 AD3d 536) the Appellate Division, Second Department 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 moved for summary judgement." In addition, Dr. Haimovic relied upon an unsworn MRI-report by Dr. Richard N. Silvergleid. As previously stated, unsworn medical reports may not be considered in opposition to a summary judgment motion (Grasso v. Angerami, supra; Hagan v. Thompson, supra) and sworn reports based upon same, likewise, may not be considered by the court (Wagman v. Bradshaw, 292 AD2d 84). Therefore, the second medical report of Dr. Haimovic cannot be considered, as it is not based upon a recent examination and relies upon an unsworn MRI report.

Douglas A. Schwartz, board certified in physical medicine and rehabilitation, examined the plaintiff on July 17, 2007. Dr. Schwartz attests to plaintiff having lost 22 % to 60 % ROM, depending on the examined body part. He compares these findings to the average ROM. On the other hand, Dr. Haimovic as well relied upon an unsworn MRI-report by Dr. Richard N. Silvergleid that is non admissible (Grasso v. Angerami, supra; Hagan v. Thompson, supra) and sworn reports based upon same, likewise, may not be considered by the court (Wagman v. Bradshaw, supra). Moreover, the last documented treatment of plaintiff occurred on or around February 7, 2006. Plaintiff has not been examined or treated thereafter until July 17, 2007. Plaintiff alleges treating himself constantly at home upon advice of his healthcare providers. However, there is no objective proof documented that plaintiff performed said exercises or that further medical treatment would not have been necessary. Therefore he fails to demonstrate an

explanation for the gap in treatment of 17 months between February 7, 2006 and July 17, 2007. The absence of an explanation for the gap in the plaintiff's treatment is fatal to the plaintiff's claim (Pomella v Perez, 4 NY3d 566; Nemchyonok v Peng Liu Ying, 2 AD3d 421; Delpilar v Browne, 282 AD2d 647). In Caracci v Miller (34 AD3d 515), a period of sixteen months was seen as sufficient for a gap in treatment.

Therefore, defendant's 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: NOV 05 2007



J.S.C.

ENTERED

NOV 09 2007

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**