

Gaccione v Krebs

2007 NY Slip Op 34561(U)

August 20, 2007

Supreme Court, Nassau County

Docket Number: 20854/05

Judge: John M. Galasso

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Order Appealed From dated August 20, 2007
(pages 3-6)

SUPREME COURT - STATE OF NEW YORK - COUNTY OF NASSAU
PRESENT: HONORABLE JOHN M. GALASSO, J.S.C.

.....
GARY GACCIONE

Plaintiff,

Index No. 20854/05
Seq. No. 001
Part 41

-against-

PENNY S. KREBS and
WILLIAM E. KREBS

7/19/2007

Defendants.

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Upon the foregoing papers, defendants' motion for an order pursuant to CPLR § 3212 granting summary judgment in their favor and dismissing the summons and complaint of plaintiff upon the grounds that, as a matter of law, plaintiff has not suffered a serious injury as defined by Insurance Law § 5102(d) is granted.

This case involves a motor vehicle accident that occurred on October 18, 2004, resulting in plaintiff's claim of serious injury as defined under Insurance Law § 5102(d).

Movants have sustained their initial burden of submitting evidentiary proof in admissible form to warrant the objective findings that plaintiff has not suffered a serious injury, including the affirmed reports of Doctors C.M. Sharma and Stanley Ross, who concluded that there were no positive objective physical findings that plaintiff sustained any substantial or permanent injuries or disability as a result of the subject accident (*see Kearse v NYCTA*, 16 AD3d 45; *Grossman v Wright*, 268 AD2d 79; *Guzman v Paul Michael Management*, 266 AD2d 508). Movants include plaintiff's physical therapy records to demonstrate plaintiff's remarkable improvement in range of motion in the months following the accident.

The Court also finds that defendants demonstrated a *prima facie* entitlement to judgment under the 90/180 day threshold category b, the inclusion of plaintiff's deposition testimony as well as the report of Dr. Harvey Lefkowitz, a radiologist, who concluded the cervical spine revealed degenerative disease, non-traumatic in nature (*Robinson v Polasky*, 32 AD3d 1214; *Lopez v Caprio-Ceballo*, 20 AD3d 336), and that "there is no evidence of signal density to suggest acute post-traumatic change."

Plaintiff must now come forward with some admissible evidence demonstrating a serious injury within the meaning of the No-Fault Law (*Gaddy v Eyley*, 79 NY2d 995). This he has failed to do.

In support of his opposition plaintiff submits the affirmed reports of Dr. Ben Benatar, who first treated plaintiff 3 months after the accident, Dr. Richard Radna, who examined plaintiff on February 13, 2006 and Dr. Sanford West, who examined plaintiff on March 14, 2006. Dr. Benatar conducted plaintiff's most recent examination on May 23, 2007.

There are no records or affirmation from plaintiff's initial treating physician, Dr. Jeffrey Elfenbein, who recommended physical therapy and eventually referred plaintiff to Dr. Benatar. According to Dr. Benatar, plaintiff also saw another orthopedist, Dr. Zimmerman, before his consultation; however, there are no records of that visit submitted in opposition.¹

Assuming arguendo that Dr. Benatar's first examination is considered to be contemporaneous with the accident (see Thompson v Abbasi, 15 AD3d 95; Lanza v Carlick, 279 AD2d 613; Passarelle v Burger, 278 AD2d 294), he reported a severe restricted range of motion. He also took cervical and lumbar x-rays of plaintiff that same day.

The cervical x-ray showed loss of lordosis, loss of disc height at C5-6 and osteophytes (boney outgrowths) which Dr. Radna refers to as degenerative changes. The lumbar x-ray also showed loss of lordosis, multiple osteophytes and multi-level disc degeneration.

¹Evidently, Dr. Radna reviewed a copy of Dr. Zimmerman's "missing" report.

Dr. Benatar makes no mention of his own x-ray findings and instead bases his conclusions on the unaffirmed MRI reports which revealed, inter alia, disc herniations at C4-5, L3-4 and L4-5 and a bulge at L2-3 with thecal sac effacement.² The MRI reports offer no explanation for causation.

Dr. Benatar's initial impression of post-traumatic myofascitis, muscle inflammation, with radiculopathy essentially has remained unchanged, although he now adds the herniations and bulge mentioned in the MRI reports.

His conclusions, therefore must be considered speculative since he never addresses the disc degeneration found by his own x-rays and by defendant's radiologist who reviewed the actual films (Khan v Finchler, 33AD3d966; Kaplan v Vanderhans, 26AD3d468; compare Wadford v Gruz, 35AD3d258).

Furthermore, his conclusions are based upon unaffirmed reports where he did not review the actual films (Cohen v A One Products, 34AD3d517; Vishnevsky v Glassberg, 29AD3d680).

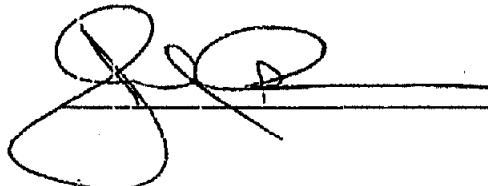
As far as the affirmations of Drs. Radna and West are concerned, although both were aware of the x-ray findings, neither discusses the pre-existing degenerative changes and their relationship to plaintiff's then current condition and both refer to the unaffirmed MRI reports.

Therefore, there is no objective basis for concluding that plaintiffs physical limitations and continuing pain are attributable to the subject accident (Jiminez v Rojas, 26AD3d563).

²Plaintiff's bill of particulars lists these alleged injuries as well as radiculopathy, derangement, spasms, restricted range of motion and radiating pain with no claim of aggravation of an underlying degenerative condition.

Since there has been no evidence submitted regarding a medically determined disabling injury under the 90/180- day threshold category, plaintiff's deposition is insufficient to raise an issue of fact regarding a serious injury (*Glielmi v Banner*, 254 AD2d 255), and his attorney's affirmation is without medically probative value (*Sloan v Schoen*, 251 AD2d 319), the complaint is dismissed.

Dated: August 20, 2007



J.S.C.