

Davis v Rivers

2010 NY Slip Op 32601(U)

September 15, 2010

Sup Ct, Nassau County

Docket Number: 19190/08

Judge: Roy S. Mahon

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SCAW

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON
Justice

STEPHANIA DAVIS,

TRIAL/IAS PART 7

Plaintiff(s),

INDEX NO. 19190/08

- against -

**MOTION SEQUENCE
NO. 1 & 2**

TARA L. RIVERS and ADRIAN DEBATTISTA,

**MOTION SUBMISSION
DATE: July 12, 2010**

Defendant(s).

The following papers read on this motion:

Notice of Motion	XX
Affirmation in Opposition	X
Reply Affirmation	XXX

Upon the foregoing papers, the motion by the defendant Adrian Debattista for an Order granting the defendant Adrian DeBattista summary judgment pursuant to CPLR 3212 dismissing the complaint on the basis that the plaintiff, Stephania Davis did not sustain a "serious injury" under §5102(d) of the Insurance Law or in the alternative on the basis that he was not liable for the subject accident and the motion by the defendant Tara L. Rivers for an Order pursuant to CPLR §3212 and New York Insurance Law Art. 51 granting summary judgment to the defendant, Tara L. Rivers, dismissing the Verified Complaint of the plaintiff, Stephania Davis, on the ground that the injuries claimed do not satisfy the "serious injury" threshold requirement of §5102(d) of the Insurance Law and thus her complaint for non-economic loss is barred by §5104(a) of the Insurance Law and dismissible as a matter of law, are both determined as hereinafter provided:

This personal injury action arises out of a motor vehicle accident that occurred on February 28, 2008 at approximately 4:00 pm on Lincoln Avenue at or near its intersection with North Village Avenue, Rockville Centre, Nassau County, New York.

The plaintiff in the plaintiff's Verified Bill of Particulars sets forth:

"8a-c. As a result of the crash herein, plaintiff, Stefania Davis, sustained the following serious personal injuries, all of which he has been informed are of a permanent, protracted and lasting nature.

Posterior disc bulge at C4-C5 with ventral C.S.F. impression and ventral cord abutment;
 Posterior disc bulge at C4-C6 with ventral C.S.F. impression and ventral cord abutment;
 Posterior disc bulge at C6-C7 with ventral C.S.F. impression;
 Posterior disc bulge at L3-L4;
 Posterior disc bulge at L4-L5;
 Posterior disc bulge at L5-L6;
 Left C5-C6 cervical radiculopathy;
 Left L4-L5 lumbar radiculopathy;
 Joint effusion of the left knee;
 Internal derangement of the left knee;
 Lumbar trigger point injection;
 Cervical sprain/strain;
 Lumbar sprain/strain;
 Left knee sprain/strain'
 Myofascitis; and
 Traumatically induced arthritis.

8. Plaintiff, Stefania Davis, was confined to bed for approximately three (2) months following the crash herein and intermittently thereafter except for visits to her treating physicians.

9. Plaintiff, Stefania Davis, was confined to house for approximately four (4) months following the crash herein and intermittently thereafter except for visits to her treating physicians."

In support of the requested relief the respective defendants, amongst other things, submit an affirmed letter report dated November 18, 2009 of S. Farkas, MD an orthopedist of an orthopedic examination of the plaintiff conducted on November 18, 2009; an unsworn report of Stand-Up MRI of Lynbrook, PC dated March 13, 2008 by John Himelfarb, MD, of an MRI scan of the plaintiff's left knee; the plaintiff's Emergency Department records from Mercy Medical Center for February 28, 2008 and three affirmed letter reports all dated December 29, 2009 of Sheldon P. Feit, MD, a radiologist of reviews of a March 11, 2008 MRI of the plaintiff's left knee; a March 25, 2008 MRI of the plaintiff's lumbosacral spine and a March 25, 2008 MRI of the plaintiff's cervical spine.

The rule in motions for summary judgment has been succinctly re-stated by the Appellate Division, Second Dept., in **Stewart Title Insurance Company, Inc. v. Equitable Land Services, Inc.**, 207 AD2d 880, 616 NYS2d 650, 651 (Second Dept., 1994):

"It is well established that a party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642; *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*State Bank of Albany v. McAuliffe*, 97 A.D.2d 607, 467 N.Y.S.2d 944), but once a prima facie showing has been made, the

burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572; *Zuckerman v. City of New York*, *supra*, 49 N.Y.2d at 562, 427 N.Y.S.2d 595, 404 N.E.2d 718)."

It is noted that the question of whether the plaintiff has made a prima facie showing of a serious injury should be decided by the Court in the first instance as a matter of law (see *Licaro v. Elliot*, 57 NY2d 230, 455 NYS2d 570, 441 NE2d 1088; *Palmer v. Amaker*, 141 AD2d 622, 529 NYS2d 536, Second Dept., 1988; *Tipping-Cestari v. Kilhenny*, 174 AD2d 663, 571 NS2d 525, Second Dept., 1991).

In making such a determination, summary judgment is an appropriate vehicle for determining whether a plaintiff can establish prima facie a serious injury within the meaning of Insurance Law Section 5102(d) (see, *Zoldas v. Louise Cab Corp.*, 108 AD2d 378, 381, 489 NYS2d 468, First Dept., 1985; *Wright v. Melendez*, 140 AD2d 337, 528 NYS2d 84, Second Dept., 1988).

Serious injury is defined, in Section 5102(d) of the Insurance Law, wherein it is stated as follows:

"(d) 'Serious injury' means a personal injury which 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 constitute 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."

PHYSICAL EXAMINATION: The claimant is a 27-year-old female who stands 5'4" tall and weighs 140 lbs.

The claimant was asked to inform me as to any pain or tenderness during the examination.

Skin: The skin was examined with no lesions, masses, or warmth noted.

Examination of the lumbar spine: Revealed no spasm or crepitus to palpation during static positioning or active range of motion. The claimant can forward flex to approximately 45 degrees (90 degrees or more of forward flexion normal). Lateral bending was 0 degrees to the right and 30 degrees to the left (30 degrees lateral bending normal). Rotation to the left and right is to 45 degrees (45 degrees of rotation to the left and right normal). The claimant complains of pain to palpation, but not range of motion. She ambulates without a limp. The claimant can toe and heel walk without difficulty. Deep tendon reflexes were normal at both the Achilles tendon and patellar tendon regions. Severe "give-way" strength is noted about the ankles and knees bilaterally. Straight leg raising was negative. The claimant sits and bends fully forward while seated on the examining room table to pull her pant leg up with

no indication of discomfort.

Examination of the cervical spine: Examination revealed this individual to present with 30 degrees of rotation to the right and 0 degrees to the left (70 to 80 degrees rotation left and right is normal) she moves her eyes when asked to flex and extend her neck (30 to 50 degrees of flexion and extension is normal). The claimant complains of pain to palpation. There was no spasm or crepitus to palpation during static positioning or active range of motion. Deep tendon reflexes are 2+. Severe "give-way" strength is noted to the left biceps, triceps, deltoid and wrist extensors. 5+ motor strength is noted on the right except for severe "give-way" strength of the right deltoid. Tinel's sign was negative at the elbow and wrists bilaterally.

Tattoos are noted upon the back and neck.

Left knee examination: Both knees were examined. There was no effusion nor bogginess noted. The claimant complains of pain anteriorly and laterally. There is 14½ inches of circumferential measurement. The knees are stable. A negative Apley's , McMurray's and Drawer Signs were noted bilaterally. Quad and patella tendons are intact bilaterally. There is no retropatellar crepitus. Bilateral range of motion of the knee was from full extension (0 extension normal) to 80 degrees of flexion (normal range of motion 0 to 130 - 135 degrees flexion).

All measurements were performed using a goniometer.

Normal range of motion measurements have been obtained from Physical Examination of the Spine and Extremities by Dr. Hoppenfeld, The American Medical Association Guidelines to the Evaluation of Permanent Impairment, and Campbell's Operative Orthopedics.

Range of motion as documented in this report, indicates the normal range of motion as obtained from the above sources. One must understand, however, that each individual may have a variance from this normal range of motion and this in and or itself may have absolutely no clinical importance. Decreased range of motion can be under the control of the claimant, can be due to body habitus such as obesity, may be due to arthritis, or other causes and still be considered normal for this particular individual.

Sensory Examination: Equal sensation was noted about the lower extremities. She states feeling more about the right than left upper extremity.

DIAGNOSES: The claimant presents with diagnoses of:

1. Resolved cervical sprain.
2. Resolved lumbar sprain.
3. Resolved sprain of the left knee.

The diagnoses, as documented, are based upon the claimant's description of the accident and the physical examination, taking into account the subjective

complaints and objective findings.

TREATMENT: There is no need for orthopedic treatment or physical therapy. The claimant requires no household help, durable medical goods, further diagnostic testing or medical transportation at this time. The claimant does not require surgery.

DISABILITY: I find no orthopedic disability based on the physical examination at this time. The claimant may carry out the daily activities of living, without restriction. She is employable without restrictions.

This individual presented with extreme exaggeration of symptoms and a very theatrical presentation. She ambulates without a limp, yet she attempts to show severe "give-way" strength of the ankles and knees bilaterally. This is also contradicted by the fact that she is able to walk on her toes and heels. This individual's show of 45 degrees of forward flexion of the lumbar spine is contradicted by the fact that she sits and bends fully forward to pull her pant leg up and down with no indication of discomfort. This is equivalent to flexing to at least 100 to 110 degrees. Her show of decreased range of motion of the cervical spine with the use of her eyes only has no clinical correlation to any objective findings. This individual presents with absolutely no true objective findings and I believe she has recovered from any reported injury.

There is no clinical correlation to any reported positive MRI findings."

The respective reports of Dr. Feit state:

"MRI OF THE CERVICAL SPINE:

An MRI of the cervical spine was submitted. Multiple T1 and T2 weighted sagittal and T2 weighted axial images were obtained using a conventional and fast spin-echo pulse sequence.

There are no abnormal areas of T2 brightening. Desiccatory changes are identified at all the visualized cervical discs. Evaluation of the sagittal images demonstrates ventral epidural defects at the C3-C4, C4-C5 and C5-C6 levels. These correspond to mild disc bulges which encroach on the subarachnoid space and slightly indent on the cervical cord. No focal herniation is seen.

No signal abnormalities are identified within the cervical cord. The craniocervical junction is intact. There is no evidence of spondylolisthesis. No paraspinal soft tissue mass lesions are identified.

IMPRESSION:

1. Mild disc bulges at the C3-C4, C4-C5 and C5-C6 levels.
2. No evidence of focal herniation."

"MRI OF THE LEFT KNEE:

An MRI of the cervical spine was submitted. Multiple T1 and T2 weighted sagittal and T1 weighted coronal images were obtained using a conventional and fast spin-echo pulse sequence. A coronal inversion recovery sequence and a partial flip angle axial sequence was also obtained.

Evaluation of the fibromeniscal cartilage fails to demonstrate evidence of any meniscal tears. The anterior and posterior cruciate ligaments are intact. The visualized portions of the quadriceps tendon and patellar tendon are unremarkable. The medial and lateral collateral ligaments as well as the iliotibial band are intact. The medial and lateral patellar retinacula are intact. There is a small joint effusion. No soft tissue masses are identified. No significant marrow space pathology is seen.

IMPRESSION:

1. Small joint effusion.
2. No evidence of meniscal tear, ligamentous injury or fracture.
3. Essentially normal study.

CONCLUSION:

Review of the left knee MRI demonstrates no discernible abnormalities. Therefore, there are no abnormalities causally related to the injury of 02/28/2008."

MRI OF THE LUMBOSACRAL SPINE:

An MRI of the lumbosacral spine was submitted. Multiple T1 and T2 weighted sagittal and axial images were obtained using a conventional and fast spin-echo pulse sequence.

There are no abnormal areas of T2 brightening. All the visualized lumbar intervertebral discs appear to be essentially well hydrated and intact. There is no evidence of any disc bulges or focal herniations. There is no central canal or exit foraminal stenosis. The facet joints appear intact. The conus medullaris is intact. There is no evidence of spondylolisthesis. No paraspinal soft tissue mass lesions are identified.

IMPRESSION: Normal study.

CONCLUSION:

Review of the lumbosacral spine MRI demonstrates no discernible abnormalities. Therefore, there are no abnormalities causally related to the injury of 02/28/2008."

The unsworn report of the plaintiff's treating radiologist Dr. Himelfarb are properly considered in relation to the respective defendants' applications (see, **Pagano v Kingsbury**, 182 AD2d 268, 587 NYS2d 692 (Second Dept., 1992). Dr. Himelfarb's report provides:

"INTERPRETATION: There is a small joint effusion. No popliteal cyst is observed.

There is a tiny benign appearing subcortical cyst in the tibial plateau by the lateral tibial spine.

The bony structures are otherwise normal in morphology and signal intensity without evidence of occult fracture, bone contusion or avascular necrosis.

The articular cartilages appear preserved.

The cruciate and collateral ligaments appear intact as due the extensor tendons of the knee.

The menisci appear intact without suspicious signal changes for a tear.

IMPRESSION: SMALL JOINT EFFUSION.
TINY BENIGN APPEARING SUBCORTICAL CYST IN
THE TIBIAL
PLATEAU BY THE LATERAL TIBIAL SPINE
MENISCI AND LIGAMENTS INTACT"

The Court finds that the defendants have submitted evidence in admissible form to make a "prima facie showing of entitlement to judgment as a matter of law" (**Winegrad v. New York University Medical Center, 64 NY2d 851, 853; Pagano v. Kingsbury, supra at 694**) and is sufficient to establish that the plaintiff did not sustain a serious injury. Accordingly, the burden has shifted to the plaintiff to establish such an injury and a triable issue of fact (**see Gaddy v. Eyer, 79 NY2d 955, 582 NYS2d 990, 591 NE2d 1176; Jean-Meku v. Berbec, 215 AD2d 440, 626 NYS2d 274, Second Dept., 1995; Horan v. Mirando, 221 AD2d 506, 633 NYS2d 402, Second Dept., 1995**).

In opposition to the defendants' requested relief as to the issue of whether the plaintiff suffered a serious injury pursuant to §5102 of the Insurance Law, the plaintiff submits an affirmed letter report dated May 6, 2010 of Samuel H. Kelman, DO, FAAPMR, the plaintiff's treating physician and an affidavit of the plaintiff as to the absence of health insurance.

A review of the correspondence of Dr. Kelman and in particular its reference to said physician's treatment of the plaintiff on March 4, 2008; March 28, 2008; June 9, 2008; August 11, 2008; May 27, 2009; September 16, 2009 and April 16, 2010, the tests performed at the respective examinations and the results of same create an issue of fact as to whether the plaintiff suffered a serious injury pursuant to §5102 of the Insurance Law. As such, to the extent that the respective defendants seek an Order pursuant to CPLR §3212 that the plaintiff did not suffer such an injury, the defendant Adrian Debattista's application for such relief and the defendant Tara L. Rivers' motion for such an Order, are both respectively denied.

As to that branch of the defendant Adrian Debattista's motion which seeks judgment on the grounds that said defendant is not liable for the happening of the accident in issue, a review of the deposition transcripts of the plaintiff creates an issue of fact as to the color of the light at the intersection in issue (see

deposition transcript of Stephania Davis at pgs 17-19). As such, the defendant Adrian Debattista's motion for summary judgment as to the issue of liability, is denied.

SO ORDERED.

DATED: 9/15/2010

..... Roy S. Mahon
J.S.C.

ENTERED

SEP 20 2010

NASSAU COUNTY
COUNTY CLERK'S OFFICE