

Davis v Hibbert

2011 NY Slip Op 30666(U)

February 22, 2011

Sup Ct, Nassau County

Docket Number: 012882/09

Judge: F. Dana Winslow

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**SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK**

**Present:
HON. F. DANA WINSLOW,**

**Justice
TRIAL/IAS, PART 4
NASSAU COUNTY**

LLOYD DAVIS,

Plaintiff,

-against-

**INDEX NO.: 012882/09
MOTION SEQ. NO.: 001**

**CAROL HIBBERT and HECTOR J.
HIBBERT,**

MOTION DATE: 11/5/10

Defendants.

The following papers read on this motion (numbered 1-3):

Notice of Motion.....1
Affirmation in Opposition.....2
Memorandum of Law.....2a
Reply Affirmation.....3

The motion by defendants CAROL HIBBERT and HECTOR J. HIBBERT for summary judgment pursuant to **CPLR §3212** is determined as follows.

Plaintiff LLOYD DAVIS, age 45, alleges that on January 17, 2008, at approximately 5:05 p.m., he was the operator of a vehicle that came into contact with a motor vehicle operated by defendant HECTOR J. HIBBERT and owned by defendant CAROL HIBBERT. The accident occurred at James LI. Burrell Avenue at or near its intersection with Harvard Street, Village of Hempstead. Defendants now move for an order dismissing plaintiff's complaint pursuant to **CPLR §3212** on grounds that plaintiff failed to sustain a "serious injury" within the meaning of **Insurance Law §5102(d)**. The motion is determined as follows.

Insurance Law §5102(d) provides that a "serious injury means a personal injury which results in (1) death; (2) dismemberment; (3) significant disfigurement; (4) a fracture; (5) loss of a fetus; (6) permanent loss of use of a body organ, member, function or system; (7) permanent consequential limitation of use of a body organ or member; (8) significant limitation of use of a body function or system; or (9) 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" (numbered by the Court). The Court's consideration in this action is confined to whether plaintiff's injuries constitute a permanent consequential limitation of use of a body organ or member (7), significant limitation of use of a body function or system (8), or a medically determined injury which prevented plaintiff from performing all of the material acts constituting his usual and customary daily activities for ninety days of the first one hundred eighty days following the accident (9).

In support of their motion for summary judgment, defendants submit (1) an affirmed report of examination, dated May 7, 2010, of orthopedist Michael J. Katz, MD, covering an examination of that date; (2) reports of radiologist Melissa Sapan Cohn, MD, dated August 16, 2010 covering a review of an x-ray of plaintiff's right shoulder conducted on January 19, 2008 and a review of cervical spine MRIs conducted on March 18, 2008 and May 2, 2008; and (3) an unaffirmed report of examination, dated August 19, 2008, of plaintiff's physicians, Jennifer Halstead-Kenny, MD and Sunil Butani, MD.

Using a goniometer, Dr. Katz reported that physical examination of plaintiff's cervical and thoracolumbosacral spines, and right shoulder, revealed normal range of motion results, comparing the results to norms. With respect to the cervical and thoracolumbosacral spines Dr. Katz's other reported findings include no spasms, normal motor strength, intact sensation, normal reflexes and negative straight leg raising test. With respect to plaintiff's right shoulder, Dr. Katz's other reported findings include no swelling, erythema or induration and no impingement at 90 degrees (normal). Dr. Katz diagnosed "cervical radiculopathy - resolved; right shoulder contusion - resolved." Dr. Katz noted that plaintiff informed him that he missed only one day of work because of the accident. Dr. Katz concluded that plaintiff has regained full range of motion and power, is capable of full time employment as a handyman and is capable of all pre loss activities. Dr. Katz noted that the MRI report of plaintiff's cervical spine reveals pre-existing degenerative changes.

Dr. Cohn reviewed an x-ray of plaintiff's right shoulder performed on January 19, 2008, two days post accident. Dr. Cohn opined that the findings on the x-ray were consistent with 'calcific bursitis' which is an inflammatory condition not resulting from an acute traumatic injury. In addition Dr. Cohn reviewed an MRI of plaintiff's cervical spine, performed on March 18, 2008 and opined that the reported disc bulges and desiccation reflect "mild multilevel degenerative changes." Dr. Cohn also determined that said MRI revealed a lesion within the clivus which is "not a sequel of trauma but needs to be further evaluated." Dr. Cohn's review of the May 2, 2008 cervical spine MRI revealed "no evidence of enhancement of the clival lesion" which has "no relationship to a traumatic injury and likely

represents a benign lesion.” Dr. Cohn also found “stable multilevel degenerative changes.”

In addition, defendants submit the deposition testimony of plaintiff conducted on April 2, 2010. Plaintiff testified that he missed two days of work as a result of the accident [Defendants’ Exh. E p. 7], that he stopped treating because Dr. Butani told him that there was not anything else that could be done for him [Defendants’ Exh. E p. 39] and that he has no future appointments [Defendants’ Exh. E p. 41]. Plaintiff testified that there is no activity that he could do at work or home prior to the accident that he cannot engage in now but that he has difficulty reaching and fully turning his head [Defendants’ Exh. E pp. 40-41].

The Court finds that the reports of defendants’ physicians are sufficiently detailed in the recitation of the various clinical tests performed and measurements taken during the examination to satisfy the Court that an “objective basis” exists for their opinions. Accordingly, the Court finds that defendants have made a *prima facie* showing, that plaintiff LLOYD DAVIS did not sustain a serious injury within the meaning of **Insurance Law §5102(d)**. With that said, the burden shifts to plaintiff to come forward with some evidence of a “serious injury” sufficient to raise a triable issue of fact. **Gaddy v. Eyler**, 79 NY2d 955, 957.

In opposition, plaintiff submits (1) an affirmation of Sunil Butani, MD, dated October 29, 2010 together with attached unaffirmed (i) report of needle EMG, dated November 4, 2008, of the upper extremities and cervical paraspinals indicating a right C5-C6 radiculopathy; (ii) reports of examination dated January 18, 2008, February 2, 2008, February 19, 2008, March 11, 2008, March 25, 2008, April 29, 2008, May 27, 2008, June 24, 2008, July 22, 2008, August 19, 2008, October 15, 2008 and January 16, 2009; (2) affirmation of Nizarali Visram, MD, sworn to on October 27, 2010, covering an examination conducted on October 15, 2010; (3) affirmation of radiologist Harold Tice, MD attesting to the accuracy of attached MRI reports of plaintiff’s cervical spine and right shoulder conducted on March 18, 2008; and (4) affidavit of plaintiff, sworn to on October 29, 2010.

In his affirmation, Dr. Butani states that plaintiff came under his care and the care of Dr. Halstead-Kenny on January 19, 2008. On that date, Dr. Butani affirms that plaintiff “was tender to palpation across the cervical paraspinals with limited range of motion of the cervical spine, weakness in the right supraspinatus muscle”, and “pain on range of motion of the right shoulder with positive impingement signs and severe pain and weakness on supraspinatus testing.” Dr. Butani provided limited range of motion results from his February 19, April 29 and June 24 examinations. Dr. Butani stated that on February 18, 2009, plaintiff was discharged “as he had reached a plateau regarding the improvement of his right shoulder and neck pain” and that “further treatment would have been palliative in nature.” Dr. Butani concluded that the accident was a direct cause of plaintiff’s right

shoulder and neck injuries and that plaintiff sustained a significant limitation of the use of his right shoulder. Dr. Butani also set forth results of the MRI scans performed by Harold Tice, MD, and the EMG and nerve conduction studies of plaintiff's cervical spine performed by Dr. Butani. The Court will consider Dr. Butani's unaffirmed examination reports attached to his affirmation as Dr. Butani purportedly incorporates those reports in his affirmation.

Dr. Visram's affirmation, reports results of his examination of plaintiff conducted on October 15, 2010. Dr. Visram provided range of motion of plaintiff's cervical spine and right shoulder comparing the results to normal. Dr. Visram diagnosed "post traumatic right shoulder supraspinatus impingement syndrome with persistence of pain/adhesive capsulitis and post traumatic cervical spine herniation at C5/6 and disc bulges at C4/5 and C7/T1 with myofascial pain." Dr. Visram concluded that plaintiff's injuries were sustained as a result of the accident and that plaintiff suffered from a permanent consequential and significant limitation of use of his right shoulder and neck. Dr. Tice affirms as to the accuracy of MRI reports covering MRIs conducted by him of plaintiff's cervical spine and right shoulder on March 18, 2008. The cervical spine MRI report includes findings of a C5/6 disc herniation, a disc bulge at C7/T1 and C4/5 and a non specific clivus lesion. The right shoulder MRI report concludes that there were findings consistent with impingement syndrome.

It is the determination of this Court that plaintiff has failed to submit *objective* medical evidence (of either a quantitative or qualitative nature) sufficient to raise a triable issue as to whether or not plaintiff sustained a "serious injury" within the meaning of **Insurance Law §5102(d)**. Dr. Butani reports that at plaintiff's initial visit, he exhibited 'limited' range of motion of his cervical spine and right shoulder without identifying the objective tests used in evaluating plaintiff's range of motion or numerically quantifying such restrictions and comparing any such results to normal. *See Mancini v. Lali Ny, Inc.*, 77 AD3d 797; *Jean v. Labin-Natochenny*, 77 AD3d 623; *Resek v. Morreale*, 74 AD3d 1043; *Perl v. Meher*, 74 AD3d 930; *Robinson-Lewis v. Grisafi*, 74 AD3d 774; *Villante v. Miterko*, 73 AD3d 757; *Ortiz v. Ianina Taxi Services, Inc.*, 73 AD3d 721; *Simanovskiy v. Barbaro*, 72 AD3d 930; *Keith v. Duval*, 71 AD3d 1093; *Knopf v. Sinetar*, 69 AD3d 809; *Johnson v. Tanquille*, 70 AD3d 645. Dr. Butani also failed to provide a qualitative assessment of the regions of plaintiff's body claimed to be injured. *See Toure v. Avis Rent A Car Sys.*, 98 NY2d 345, 350; *Jean v. Labin-Natochenny*, *supra*; *Robinson-Lewis v. Grisafi*, *supra*; *Knopf v. Sinetar*, *supra*. As such, Dr. Butani's reports do not constitute objective medical evidence contemporaneous with the accident. *See Husbands v. Levine*, 79 AD3d 1098; *Torchon v. Oyezole*, 78 AD3d 929; *Posa v. Guerrero*, 77 AD3d 898; *Srebnick v. Quinn*, 75 AD3d 637; *Delarosa v. McLedo*, 74 AD3d 1012; *Vilomar v. Castillo*, 73 AD3d 758; *Milosevic v. Mouladi*, 72 AD3d 1036; *Little v. Loch*, 71 AD3d 837; *Bleszcz v. Hiscock*, 69 AD3d 890; *Bleszcz v. Hiscock*, 69 AD3d 890; *Yunatov v. Stein*, 69 AD3d 569.

The Court notes that in his affirmation, Dr. Butani also refers to an examination of January 19, 2008 but fails to provide quantitative or qualitative range of motion results. Dr. Butani's reports of his April 29, 2008 and June 24, 2008 examinations provides limited range of motion results for plaintiff's right shoulder but no results for plaintiff's cervical spine. In his affirmation, Dr. Butani fails to refer to the statements in his examination reports of April 29, 2008, June 24, 2008, July 22, 2008, August 19, 2008 and January 16, 2009 that plaintiff's cervical range of motion was normal. With respect to plaintiff's right shoulder, Dr. Butani failed to refer in his affirmation to his annexed examination reports of July 22, 2008 and August 19, 2008, seven and eight months after the accident, stating that plaintiff had full range of motion of his right shoulder with no motor weakness or sensory deficits and negative impingement signs.

In addition, plaintiff failed to present evidence to refute the findings of defendant's radiologist, Dr. Sapan Cohn (1) that the radiographs of plaintiff's right shoulder revealed calcific bursitis which is a chronic not traumatic condition and "represents inflammation of the bursa" usually resulting from repetitive motion; and (2) that the two MRIs of plaintiff's cervical spine revealed multilevel disc bulging and disc desiccation which represent degenerative changes. "Plaintiff had the burden to come forward with evidence addressing defendant's claimed lack of causation." **Pommells v. Perez**, 4 NY3d 566, 580. This renders speculative Dr. Visram's conclusion that all injuries were sustained as a result of the accident. *See Nieves v. Michael*, 73 AD3d 716; *Iovino v. Scholl*, 69 AD3d 799; *Reefer v. Adom Rental Transport, Inc.*, 68 AD3d 1086; *Mensah v. Badu*, 68 AD3d 945; *Shmerkovich v. Sitar Corp.*, 61 AD3d 843; *Levine v. Deposits Only, Inc.*, 58 AD3d 697.

Moreover, the Court finds that the affirmation of radiologist Dr. Tice and the attached MRI reports covering plaintiff's cervical spine and left shoulder, fail to express an opinion as to causation of plaintiff's alleged injuries. *See Knox v. Lennihan*, 65 AD3d 615; *Ferber v. Madorran*, 60 AD3d 725; *Garcia v. Lopez*, 59 AD3d 593; *Luizzi-Schwenk v. Singh*, 58 AD3d 811; *Sapienza v. Ruggiero*, 57 AD3d 643; *Sorto v. Morales*, 55 AD3d 718; *Penaloza v. Chavez*, 48 AD3d 654; *Collins v. Stone*, 8 AD3d 321. The Court notes, that the existence of a radiologically confirmed disc injury alone will not suffice to defeat summary judgment. *See Pommells v. Perez*, 4 NY3d 566 at 574; *Pierson v. Edwards*, 2010 WL 3910185; *Catalano v. Kopmann*, *supra*; *Vilomar v. Castillo*, *supra*; *Bleszcz v. Hiscock*, *supra*; *Knopf v. Sinetar*, *supra*; *Chanda v. Varughese*, 67 AD3d 947; *Ciancio v. Nolan*, 65 AD3d 1273; *Yun v. Barber*, 63 AD3d 1140; *Caraballo v. Kim*, 63 AD3d 976; *Jules v. Calderon*, 62 AD3d 958; *Ferber v. Madorran*, 60 AD3d 725. Dr. Butani and Dr. Tice also fail to address the EMG finding on November 4, 2008 of a right radiculopathy which is significant in light of Dr. Butani's findings that plaintiff had normal range of motion in his cervical spine on April 29, 2008. Further, it is unclear whether Dr. Visram reviewed actual MRI films. *See Umanzor v. Pineda*, 39 AD3d 539; *Friedman v. U-Haul Truck Rental*,

216 AD2d 266.

Dr. Visram's opinion that plaintiff sustained a permanent consequential and significant limitation of use of his right shoulder and cervical spine is belied by plaintiff's own deposition testimony on April 2, 2010 that there is nothing he is unable to do at work or home that he was able to do before the accident [Defendants' Exh. E p. 40]. The Court also notes plaintiff's contradictory claims in his affidavit sworn to on October 29, 2010. In said affidavit, plaintiff states "as a result of the injuries I sustained I have right shoulder weakness and pain and have difficulty performing my duties at my job as a handyman as well as everyday activities." Plaintiff also states "I have restriction of motion in my neck and right shoulder that limits my activities in everyday life."

There is also insufficient evidence that plaintiff's alleged injuries are permanent §5102(d)(7)). Dr. Visram's assertion that plaintiff's injury is permanent is conclusory as he fails to offer any evidence of permanency. "Mere repetition of the word 'permanent' in the affidavit of a treating physician is insufficient to establish 'serious injury' and [summary judgment] should be granted for defendant where plaintiff's evidence is limited to conclusory assertions tailored to meet statutory requirements." **Lopez v. Senatore**, 65 NY2d 1017, 1019. *See also* **Lincoln v. Johnson**, 225 AD2d 593; **Orr v. Miner**, 220 AD2d 567. Any statements of permanency of plaintiff's injuries are belied by his deposition testimony that he missed only two days of work and that he is not limited in his work or everyday activities. *See* **Relaford v. Valentine**, 17 AD3d 339.

Further, the Court finds plaintiff's affidavit is self serving and insufficient to raise an issue of fact. *See* **Riley III v. Randazzo**, 77 AD3d 647; **Villante v. Miterko**, *supra*; **Lozusko v. Miller**, 72 AD3d 908; **Stevens v. Sampson**, 72 AD3d 793; **Keith v. Duval**, *supra*; **Singh v. City of New York**, 71 AD3d 1121; **Larson v. Delgado**, 71 AD3d 739; **Acosta v. Alexandre**, 70 AD3d 735. Plaintiff's complaints of subjective pain do not by themselves satisfy the "serious injury" requirement of the no-fault law. *See* **Scheer v. Koubek**, 70 NY2d 678; **Sham v. B & P Chimney Cleaning and Repair Co., Inc.**, 71 AD3d 978; **Ambos v. New York City Transit Authority**, 71 AD3d 801; **Acosta v. Alexandre**, *supra*; **Dantini v. Cuffie**, 59 AD3d 490; **Ranzie v. Abdul-Massih**, 28 AD3d 447.

Plaintiff has failed to submit competent medical evidence that the injuries that he sustained rendered him unable to perform all of his usual and customary daily activities for ninety days of the first one hundred eighty days following the accident. Plaintiff testified at his deposition that he missed only two days of work as a maintenance man and that his duties at his job did not change as a result of the accident [Defendants' Exh. E p. 7]. As noted above, plaintiff also testified that there was nothing he was unable to do at work or at home after the accident that he could perform before the accident [Defendants' Exh. E p. 40].

Further, plaintiff testified that in June or July of 2009, he went on a vacation to Las Vegas for four days [Defendants' Exh. E p. 46]. See **Posa v. Guerrero**, 77 AD3d 898; **Riley III v. Randazzo**, *supra*; **Baena v. Almonte**, 74 AD3d 1262; **Vasquez v. John Doe #1**, *supra*; **Casimir v. Bailey**, 70 AD3d 994; **Pacheco v. Connors**, 69 AD3d 818; **Duke v. Saurelis**, 41 AD3d 770; **Sainte-Aime v. Ho**, 274 AD2d 569.

Based on the foregoing, it is

ORDERED, that the motion by defendants CAROL HIBBERT and HECTOR J. HIBBERT for summary judgment dismissing the complaint of plaintiff LLOYD DAVIS pursuant to CPLR §3212, on the grounds that plaintiff failed to sustain a "serious injury" within the meaning of Insurance Law §5102(d) is granted.

This constitutes the Order of the Court.

Dated: February 22, 2011

[Handwritten Signature]
J.S.C.

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