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David v Mallilo & Grossman
2010 NY Slip Op 52179(U)
Decided on December 16, 2010
Appellate Term, First Department
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Decided on December 16, 2010

*APPELLATE TERM OF THE SUPREME COURT, FIRST DEPARTMENT*PRESENT: McKeon, P.J., Schoenfeld, Shulman, JJ
570740/07.**Rosalie David and Steven David, Plaintiffs-Respondents- Cross-Appellants,****against****Mallilo & Grossman, Antony Mallilo and Francesco Pomara, Jr., Defendants-
Appellants- Cross-Respondents, -and- Peter Gallanter, Defendant.**

Defendants Mallilo & Grossman, Antony Mallilo and Francesco Pomara, Jr., as limited by their briefs, appeal from those portions of an order of the Civil Court of the City of New York, New York County (Joan M. Kenney, J.), dated August 17, 2009, after a nonjury trial, which awarded damages in the principal sum of \$250,000 to plaintiff Rosalie David and damages in the principal sum of \$25,000 to plaintiff Steven David. Plaintiffs cross-appeal from that portion of the aforesaid order which limited the damage awards to the above noted amounts.

Per Curiam.

Order (Joan M. Kenney, J.), dated August 17, 2009, to the extent appealed and cross-appealed from, affirmed, without costs.

In this legal malpractice action, partial summary judgment was awarded to plaintiffs on the underlying issue of negligence, and the case was tried to determine whether, but for defendants' negligence, plaintiffs would have prevailed at trial of the underlying personal injury action (*see David v Mallilo & Grossman*, 19 Misc 3d 142[A], 2008 Slip Op 51039[U] [2008]). The trial evidence, fairly interpreted, supports Civil Court's determination that plaintiff Rosalie David sustained a "serious injury" in the subject motor vehicle accident (*see Insurance Law* ♦ 5102[d]). The trial evidence permitted the court to conclude that, because of a rotator cuff injury sustained in the accident, plaintiff Rosalie David was unable to perform substantially all daily activities for 90 out of the 180 days immediately following the accident. Notably, plaintiff Rosalie David and her husband, plaintiff Steven David, testified that, for several months after the accident, Rosalie was restricted in bathing, dressing and household activities, and unable to [*2]drive, type, write on the blackboard or lift boxes of books at the school where she worked. Plaintiff Rosalie David's surgeon connected the torn rotator cuff to the accident and confirmed her restrictions following the accident and surgery.

We find that the award to plaintiff Rosalie David for pain and suffering, and the award to Steven David for loss of services and consortium, did not deviate materially from reasonable compensation (*see generally DeSimone v Royal GM, Inc.*, 49 AD3d 490 [2008], *lv dismissed in part, denied in part* 11 NY3d 862 [2008]; *Caban v City of NY*, 46 AD3d 319 [2007]; *Leonard v Irwin*, 280 AD2d 935 [2001]; *Hafner v County of Onondaga*, 278 AD2d 799 [2000]; *cf. Lipton v NYC Transit Auth.*, 11 AD3d 201 [2004], *lv denied* 5 NY3d 707 [2005]).^[FN1]

We have considered defendants' remaining contentions and find them to be lacking in substantial merit.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Decision Date: December 16, 2010

Footnotes

Footnote 1: In evaluating the appropriateness of the damage awards, we have construed the awards as adjusted by Civil Court to account for the General Obligations Law § 15-108 offset to which the parties agree defendants were entitled.

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