

**Saintsurin v Kimpel**

2007 NY Slip Op 33761(U)

November 14, 2007

Supreme Court, Nassau County

Docket Number: 5235-06/

Judge: Karen Veronica Murphy

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK  
TRIAL TERM, PART 25 NASSAU COUNTY**

**PRESENT:**

**Honorable Karen V. Murphy**  
**Justice of the Supreme Court**

\_\_\_\_\_ x

**MARIE M. SAINTSURIN,**

**Index No. 5235/06**

**Plaintiff,**

**-against-**

**Motion Dated: 6/14/07**

**Motion Submitted: 8/10/07**

**Motion Sequence: 002**

**JEANNE E. KIMPEL,**

**Defendant.**

\_\_\_\_\_ x

The following papers read on this motion:

- Notice of Motion/Order to Show Cause.....X
- Answering Papers.....X
- Reply.....X
- Briefs: Plaintiff's/Petitioner's.....
- Defendant's/Respondent's.....

Defendant moves this Court for an Order, pursuant to CPLR §3212, granting summary judgment in her favor. Plaintiff opposes the requested relief.

The instant action arises out of an automobile accident that occurred on May 23, 2003, wherein it is alleged that Defendant struck the right rear passenger side of the vehicle Plaintiff was operating. As a result of the impact, Plaintiff is alleged to have suffered neck, back and shoulder pain and disability. According to her deposition testimony on April 20, 2005, Plaintiff was confined to home and bed for one month following the accident and therefore was unable to work during this time. Immediately following the accident, Plaintiff complained of neck pain and a headache, which lasted a couple of days, to the police officers who arrived at the scene. She did not lose consciousness, bleed or receive any bruises or contusions as a result of the impact. She did not seek immediate medical treatment for her injuries, did not go to a hospital or seek any kind of emergency treatment. Plaintiff was able to drive her vehicle home following the accident.

Plaintiff first sought medical treatment four days after the accident. The treatment

was in the form of physical therapy. She attended physical therapy approximately three to four times per week for approximately three months. Plaintiff discontinued therapy because she relocated. She also received acupuncture for her injuries. At the time of her deposition, Plaintiff testified that she no longer felt pain related to the injuries she received as a result of the accident. However, she continued to have difficulty lifting objects weighing over a couple of pounds.

Prior to the time of her deposition, Plaintiff was a full time student at Nassau Community College. She discontinued her studies due to medical conditions unrelated to the accident. At the time of the deposition Plaintiff worked approximately 25 hours per week as a school bus aide. Plaintiff also worked at an assisted living facility aiding patients, but it is unclear from her deposition whether this work was in 2003 or 2005. She left this employment for reasons unrelated to the instant accident. Subsequent to the accident, in 2005, Plaintiff was also employed full time at the South Shore Mall in Bay Shore, as a security guard. The position required her to work eight hours a day, walking around a store to watch shoppers.

It is well recognized that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact. (*Andre v. Pomeroy*, 35 N.Y.2d 361, 320 N.E.2d 853, 362 N.Y.S.2d 131 [1974]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact. (*Nassau Diagnostic Imaging & Radiation Oncology Assoc. v. Winthrop-University Hosp.*, 197 A.D.2d 563, 602 N.Y.S.2d 650 [2d Dept., 1993]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein the Plaintiff. (*Makaj v. Metropolitan Transp. Auth.*, 18 A.D.3d 625, 796 N.Y.S.2d 621 [2d Dept., 2005]).

The Defendant must in the first instance establish her *prima facie* entitlement as a matter of law by demonstrating that the Plaintiff did not sustain a serious injury within the meaning of Insurance Law Section 5102(d) as a result of this accident. (*Felix v. New York City Tr. Auth.*, 32 A.D.3d 527, 819 N.Y.S.2d 835 [2d Dept., 2006]). This Court is satisfied that she has done so.

The Insurance Law defines serious injury to mean, in relevant part, a personal injury that results in "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 customary daily activities for not

less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment." Insurance Law Section 5102(d).

According to the sworn report of defense expert orthopedic surgeon, Dr. Michael Katz, he examined Plaintiff on November 7, 2005. At this examination, Plaintiff complained that she could not lift or stand or sit for more than 30 minutes. Following his examination, which included objective testing of her condition, and a review of records, Dr. Katz was of the opinion that Plaintiff suffered a cervical strain resolved and lumbosacral strain resolved. He opined that she showed no signs or symptoms of permanence or a casually related basis relative to the instant accident, was not disabled, was capable of gainful employment as a bus matron and was capable of all her activities of daily living.

Dr. Erik J. Entin, Defendant's neurological expert, opined, following his examination on June 7, 2005, that Plaintiff showed no evidence of neurological deficit or disability referable to the subject accident. He further found her gait, strength and muscle tone to be normal. He found no Romberg sign, no abnormal involuntary movement, no muscle atrophy and no Hoffman reflexes. The coordination examination revealed normal finger-to-nose, heel-to-shin, rapid alternating movements and tandem walking. He found Plaintiff's deep tendon reflexes to be symmetrical throughout.

Dr. Melissa Sapan Cohn, Defendant's radiological expert examined the cervical and lumbosacral spine MRIs taken of Plaintiff on October 23, 2003. She found the Plaintiff had degenerative changes of the lumbosacral spine, but no evidence of trauma-related injury.

Having established *prima facie* evidence that Plaintiff did not suffer a serious injury, the burden now shifts to Plaintiff to demonstrate the existence of a triable issue of fact. (See, *Kaplan v. Hamilton Med. Assoc.*, 262 A.D.2d 609, 692 N.Y.S.2d 674 [2d Dept., 1999]). Plaintiff has failed to meet her burden. The copy of a faxed report allegedly prepared by Dr. Irving M. Etkind, dated August 9, 2007, is illegible in significant part. It will therefore not be considered by this Court. The additional reports by Dr. Etkind are not in the proper form and will also not be considered by this Court. Defendant's motion for summary judgment is granted and the complaint is dismissed.

The foregoing constitutes the Order of this Court.

Dated: November 14, 2007  
Mineola, NY

**ENTERED**

NOV 20 2007

NASSAU COUNTY  
COUNTY CLERK'S OFFICE

*Teresa J. Murphy*

J.S.C.  
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