

Oshy v Giannikas

2012 NY Slip Op 31631(U)

June 14, 2012

Supreme Court, Queens County

Docket Number: 1618/2010

Judge: Robert J. McDonald

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

- - - - - x

NANCY OSHY, an infant under the age of 14 years, by her Mother and Natural Guardian, SHERIN ZEID, and SHERIN ZEID, Individually,

Plaintiffs,

- against -

Index No.: 1618/2010
Motion Date: 05/31/12
Motion No.: 34
Motion Seq.: 1

GEORGE GIANNIKAS,

Defendant.

- - - - - x

GEORGE GIANNIKAS,

Third-Party Plaintiff,

-against-

SAM OSHY,

Third-Party Defendant.

-----x

The following papers numbered 1 to 13 were read on this motion by defendant, GEORGE GIANNIKAS, for an order pursuant to CPLR 3212, granting defendant summary judgment and dismissing the complaint of infant plaintiff NANCY OSHY on the ground that said plaintiff did not sustain a serious injury within the meaning of Insurance Law §§ 5102 and 5104:

Papers
Numbered

Notice of Motion-Affidavits-Exhibits.....1 - 6
Affirmation in Opposition-Affidavits-Exhibits.....7 - 11
Reply Affirmation.....12 - 13

This is a personal injury action in which the infant plaintiff, NANCY OSHY, seeks to recover damages for injuries she sustained as a result of a motor vehicle accident that occurred on January 22, 2007, at or near the intersection of 21st Street and 31st Drive, Astoria, Queens County, New York.

At the time of the accident, plaintiff Sherin Zeid, and her daughter, infant plaintiff Nancy Oshy, were passengers in the vehicle operated by Sam Oshy. Nancy and Sherin were seated in the rear seat. Plaintiffs' vehicle collided with the vehicle owned and operated by George Giannikas. Plaintiffs commenced the within action on January 21, 2010. Issue was joined by service of a verified answer dated March 2, 2010. The third-party action was commenced in April 2010.

In her verified Bill of Particulars, Nancy Oshy who was five years of age at the time of the accident, states that as a result of the accident she sustained, inter alia, "strain and sprain of lumbar spine, lumbar muscular spasm; and lumbar restriction of range of motion."

The infant plaintiff contends that she sustained a serious injury as defined in Insurance Law § 5102(d) in that she sustained a permanent loss of use of a body organ, member function or system; a permanent consequential limitation or use of a body organ or member; a significant limitation of use of a body function or system; and a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff from performing substantially all of the material acts which constitute her 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.

Defendant now moves for an order pursuant to CPLR 3212(b), granting summary judgment dismissing the complaint of plaintiff Nancy Oshy on the ground that plaintiff did not suffer a serious injury as defined by Insurance Law § 5102.

In support of the motion, defendant submits an affirmation from counsel, Marcella Gerbasi Crewe, Esq.; a copy of the pleadings; plaintiff's verified bill of particulars; the affirmed medical report of board certified orthopedic surgeon, Dr. Leon Sultan; and a copy of the transcript of the examination before trial of plaintiff, Sherin Zeid, and infant plaintiff Nancy Oshy.

Dr. Leon Sultan, an orthopedic surgeon, retained by the defendant, examined Nancy Oshy on November 12, 2011. At the time of the examination she was nine years old. Plaintiff reported

that she has no complaints in regard to the accident of January 22, 2007 except for occasional "bothering of her neck posteriorly." She told Dr. Sultan that she presently attends regular gym activities. Dr. Sultan performed quantified and comparative range of motion tests. He found that the plaintiff had no limitations of range of motion in the cervical spine and thoracolumbar spine. The doctor states that: "today's orthopedic examination in regard to this child's cervical spine and thoracolumbar spine reveals her to be orthopedically stable and neurologically intact. Today's examination does not confirm any ongoing causally related orthopedic or neurological impairment in regard to the occurrence of January 22, 2007. No permanency is noted and no further testing or treatment is indicated."

In her examination before trial, taken on April 18, 2011, Nancy Oshy, age nine, testified that she is a 4th grade student in public school. She stated that she does not remember if she missed school as a result of the accident. She stated that on the day of the accident she was sitting in a car seat in the rear passenger seat. She remembered that a car hit her father's car and that her back and neck began to hurt about three or four days after the accident. She stated that the pain lasted four months and then began to subside. She did state that at the present time she was still having neck pain approximately three times a week and back pain approximately twice per week.

Nancy's mother, Sherin Zeid, testified at her own examination before trial on April 18, 2011. She testified that three days after the accident she and Nancy went to the emergency room at Elmhurst Hospital as they were both in pain. They were discharged the same day and approximately two weeks later they began treating with chiropractor, Dr. Charles Krieger. She stated that Nancy treated with Dr Krieger in May or June 2007 and hasn't seen any other doctors for injuries related to the accident since that time. She stated that Nancy only missed one day from school due to the accident.

Defendant's counsel contends that the medical report of Dr. Sultan as well as the transcript of the mother's examination before trial in which she states that Nancy only missed one day from school are sufficient to establish, prima facie, that the infant plaintiff has not sustained a permanent consequential limitation or use of a body organ or member; a significant limitation of use of a body function or system; or a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff from performing substantially all of the material acts which constitute her 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.

In opposition, plaintiff's attorney, James M. Sheridan, Jr., Esq., submits his own affirmation as well as the affidavit of chiropractor Dr. Charles A. Krieger, the unsigned affirmation of Dr. Irving Liebman, a board certified orthopedist, and the affidavit of plaintiff dated April 18, 2012.

Dr. Krieger states that he initially examined Nancy Oshy on February 7, 2007, two weeks after the accident. He states that at that time he conducted cervical and lumbar range of motion testing and found substantial limitation in her range of motion in all planes of the cervical spine. He diagnosed the plaintiff with a sprain and strain of the lumbar spine with resulting significant restriction of motion and muscle spasm which were causally related to the motor vehicle accident of January 22, 2007. He states that after undergoing several months of chiropractic, orthopedic and physical therapy treatments he determined that plaintiff's condition was permanent and that upon discharge she had attained maximum medical benefit from conservative treatment.

Dr. Krieger re-examined the plaintiff on March 12, 2012, at which time he performed quantified and comparative range of motion tests with the use of a goniometer. He found substantial limitations of range of motion in all planes of the cervical spine and lumbar spine. He states that plaintiff is still suffering from the injuries she sustained in 2007. His final diagnosis is post traumatic sprain and strain of the lumbar spine and cervical spine and resulting permanent traumatic limitations of motion. He concludes that these findings indicate that she is suffering from a dysfunction of both the cervical and lumbar plexus' causally related to the automobile accident and that as a result of said injuries she has a permanent, medically significant partial disability that will require her to receive ongoing treatment in the future.

The affirmation of Dr. Liebman who examined the plaintiff on one occasion is not competent nor admissible for purposes of the within motion as the copy submitted with the affirmation in opposition is not signed.

In her affidavit, plaintiff Nancy Oshy states that after the accident her parents took her to Elmhurst Hospital where

she complained of injuries to her neck and back. She states that the injuries became progressively worse after the accident. As a result of the pain she sought treatment from Dr. Krieger where she received physical therapy for several months. She discontinued active treatment when she reached maximum medical improvement and when her no-fault insurance benefits were denied. She states that since the accident she can no longer participate in gym class and play sports to the same extent as before the accident. She states that she continues to have constant pain and stiffness in her neck and back.

On a motion for summary judgment, where the issue is whether the plaintiff has sustained a serious injury under the no-fault law, it is defendant's initial obligation to demonstrate that the plaintiff has not sustained a "serious injury" by submitting affidavits or affirmations of its medical experts who have examined the litigant and have found no objective medical findings which support the plaintiff's claim (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]). Where defendants' motion for summary judgment properly raises an issue as to whether a serious injury has been sustained, it is incumbent upon the plaintiff to produce evidentiary proof in admissible form in support of his or her allegations. The burden, in other words, shifts to the plaintiff to come forward with sufficient evidence to demonstrate the existence of an issue of fact as to whether he or she suffered a serious injury (see Gaddy v. Eyler, 79 NY2d 955 [1992]; Zuckerman v. City of New York, 49 NY2d 557[1980]; Grossman v. Wright, 268 AD2d 79 [2d Dept 2000]).

Here, the proof submitted by the defendant, including the affirmed medical report of Dr. Sultan and the mother's examination before trial in which she stated that the infant plaintiff only missed one day of school following the accident, were sufficient to meet their prima facie burden by demonstrating that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]).

However, this Court finds that the plaintiff raised triable issues of fact by submitting the affirmed medical report of Dr. Krieger attesting to the fact that after a qualitative examination the plaintiff had substantiated injuries contemporaneous to the accident and had significant limitations in range of motion at a recent examination, and concluding that the plaintiff's limitations were significant

and permanent and resulted from trauma causally related to the accident (see Perl v Meher, 18 NY3d 208 [2011]; Ortiz v Zorbas, 62 AD3d 770 [2d Dept. 2009]; Azor v Torado, 59 AD3d 367 [2d Dept. 2009]). Although Dr. Krieger refers to results obtained by Dr. Liebman, Dr. Krieger found, on the basis of his own physical examinations of the plaintiff, made contemporaneously with the subject accident and at the time of his most recent examination of the plaintiff, that the plaintiff had a quantified decreased range of motion in her cervical and lumbar spine compared to the norm (see Gussack v McCoy, 72 AD3d 644 [2d Dept. 2010]). As such, the plaintiff raised a triable issue of fact as to whether she sustained a serious injury under the permanent consequential and/or the significant limitation of use categories of Insurance Law § 5102(d) as a result of the subject accident (see Khavosov v Castillo, 81 AD3d 903 [2d Dept. 2011]; Mahmood v Vicks, 81 AD3d 606 [2d Dept. 2011]; Compass v GAE Transp., Inc., 79 AD3d 1091 [2d Dept. 2010]; Evans v Pitt, 77 AD3d 611 [2d Dept. 2010]; Tai Ho Kang v Young Sun Cho, 74 AD3d 1328 743 [2d Dept. 2010]).

In addition, Dr. Krieger adequately explained the gap in the plaintiff's treatment by stating that her no fault benefits were terminated and in addition, the plaintiff reached the point of maximum medical improvement (see Abdelaziz v Fazel, 78 AD3d 1086 [2d Dept. 2010]; Tai Ho Kang v Young Sun Cho, 74 AD3d 1328 [2d Dept. 2010]; Gaviria v Alvarado, 65 AD3d 567 [2d Dept. 2009]; Bonilla v Tortori, 62 AD3d 637 [2d Dept. 2009]).

Accordingly, for the reasons set forth above, it is hereby

ORDERED, that the defendant's motion for an order granting summary judgment dismissing the complaint of Nancy Oshy is denied.

Dated: June 14, 2012
Long Island City, N.Y.

ROBERT J. MCDONALD, J.S.C.