

Kahn v Yanity

2019 NY Slip Op 35195(U)

July 25, 2019

Supreme Court, Queens County

Docket Number: Index No. 703633/18

Judge: Richard G. Latin

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable RICHARD G. LATIN
Justice

IA PART 40

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SHARON KAHN,

Plaintiff(s),

-against-

PATRICIA YANITY AND PATRICK D. YANITY,

Defendant(s).

-----X

Index No.: 703633/18
Motion Date: 6/20/19
Motion Cal. No.:18
Motion Seq. No.: 4

FILED
AUG 12 2019
COUNTY CLERK
QUEENS COUNTY

The following numbered papers read on this motion by plaintiff for summary judgment pursuant to CPLR § 3212 and Insurance Law § 5102(d).

PAPERS	NUMBERED
Notice of Motion-Affidavits-Exhibits.....	1 - 4
Answering-Affidavits-Exhibits-Memorandum of Law.....	5 - 8
Replying.....	9 - 10

Upon the foregoing cited papers, it is ordered that plaintiff's motion, pursuant to CPLR 3212, is determined as follows:

Plaintiff commenced the instant action to recover for injuries she allegedly sustained as a result of a motor vehicle accident on April 19, 2017. Plaintiff now moves for summary judgment on the basis that she did suffer a "serious injury," as defined in Insurance Law § 5102(d).

The proponent of a summary judgment motion has the burden of submitting evidence in admissible form demonstrating the absence of any triable issues of fact and establishing entitlement to judgment as a matter of law (*see Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]; *see also Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Only when the movant satisfies its prima facie burden will the burden shift to the opponent "to lay bare his or her proof and demonstrate the existence of triable issues of fact" (*Alvarez*, 68 NY2d at 324; *see also Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Chance v Felder*, 33 AD3d 645, 645-646 [2d Dept 2006]).

In support of the motion the plaintiff submits, inter alia, her deposition testimony and the affirmed medical reports of John G. Fahrback, M.D., defendants'

neurosurgeon and Aric Hausknecht, M.D., plaintiff's neurologist/pain management specialist.

Plaintiff testified that she is a Queens resident who was 25 years old at the time of the deposition and had recently passed the Bar Examination. At the time of the accident, she was nearly complete with her second year at Buffalo Law School and was on her way to school when her vehicle was struck in the rear. Upon being struck, her body swung backward and her head, neck, and shoulders made contact with the head rest behind her.

For about 10 days following the accident she experienced soreness in that general area and on April 29, 2017 she tried to turn while sitting on the couch and felt like she pinched a nerve in her neck. She averred that she felt a shooting pain that went all the way down into her hand and, thereafter, slid off the couch and crawled to her bathroom to get Advil. The plaintiff stated that she then waited for friends who had the key to her apartment to come over. She laid mainly on the floor but as her pain continued in waves she was able to periodically sit upright. She also vomited and her vision became blurry, but she was able to eventually stand up before her friends arrived. Thereafter, one of the friends drove her to a third friend's house, and while sitting at a table and noshing on chips she began to feel the room spin and her entire left side, from the top of her head down to her foot, went numb and tingled. Thinking the injury was just a pinched nerve, she laid down on a couch to rest and eventually moved to a bed upstairs to try and sleep while her friends went out. She googled how long tingling from a pinched nerve should last and became concerned after she passed the normal four hour mark. She then tried to walk down the stairs to share her concerns with her friends when she lost control of the left side of her body and fell. One of her friends then took her to the hospital, just after midnight, on April 30, 2017.

Once she arrived at Mercy Hospital she waited for a bit in triage. She then told them that she thought she had pinched a nerve and they soon began to have her do tests where she would close her eyes and stick her hands and legs out in front of her. The hospital staff recognized that her left side was drooping and they said to each other and to plaintiff that these were signs of a stroke and were going to perform an MRI. After the MRI was performed, it was confirmed that she had a stroke. Thereafter, the doctors performed a cerebral angiogram and informed plaintiff that she had a cerebral dissection. She alleged that the doctors told her that the dissection was caused by a traumatic injury to her neck and asked her if she was in a car accident. She stated that after answering the doctors in the affirmative, she was told her that it was common with this type of dissection to occur within a short time period after an accident. Plaintiff then claimed that she stayed at Mercy Hospital for seven days and had a lot of trouble walking and still had blurry vision. While at the hospital, either the occupational therapist or physical therapist got her to start practicing walking around the hospital.

After being hospitalized, plaintiff did not return to school to finish the semester. Later in the summer when she was feeling better she was allowed to take her finals remotely from Queens. She ultimately took them in July and August before she went back to Buffalo and also had an internship with an intellectual property attorney which she began in mid July. When plaintiff was discharged from the hospital and given various

medications to take she alleged that she was also instructed not to drive, not to be on her own, not to shower on her own, and just to stick to bed rest as much as possible. She further stated that she was on Coumadin until August of 2017 and had to have her blood tested by her primary care physician nearly every day or every other day throughout the entirety of the summer. Following just after her discharge and continuing to after this deposition, plaintiff averred that she has also been regularly seeing a neurologist. Additionally, she stated that when she went back to law school for the Fall of 2017, various accommodations were made for her.

She also claimed that to this day she still suffers from anxiety when traveling in a car and experiences both neck pain and tingling and numbness on the left side of her body. She averred that she was told by her neurologist, Dr. Katz, that the effects of the stroke that have lasted past a year will likely continue. Plaintiff stated that she does not feel like she has a lot of control over the left side of her body and does not have the same balance that she used to before. She further alleged that she has not had any physical therapy as she has not been deemed a proper candidate due to her condition. She maintained that Dr. Katz specifically told her that it would not help her because of the stroke she sustained.

Additionally, plaintiff stated that in August of 2018, following the Bar Examination, that she went on a 28 day trip to Europe. After being cleared by Dr. Katz that she could travel, plaintiff and her friends had to modify their trip from one of exploration to one of walking as plaintiff is not allowed to wear a backpack or carry or push anything heavy. She was also not permitted to bungee jump or cliff jump or do anything that would risk another dissection and was limited to just walking tours. When asked what other activities plaintiff used to perform before the accident that she can no longer perform at all, she alleged that she cannot participate in any contact sport, cannot go on any rides at an amusement park, cannot swim, and cannot get her hair done. She added that she cannot sky dive, do any of that kind of stuff, and cannot put anything heavy on her back. Prior to her injury she had played recreational volleyball weekly, played in the inter-law school softball game at the University of Virginia, was a strong swimmer, and was planning on cliff jumping and bungee jumping on her post-Bar trip. As to activities she used to engage in that she can still do but cannot do as well she claimed that description applies to almost everything. She cannot drive as long as she used to. she cannot get her hair washed, she cannot exercise the same way at the gym, cannot do all the same yoga poses, cannot do anything where she stretches her neck, she cannot do any activities the same that require her to balance, she cannot walk stairs without holding a railing, and she does not have the same control or strength in her left hand as she does her right. She alleged that these restrictions and limitations have also impacted her social life as she intentionally passes up on certain physical or athletic group activities that she normally would have joined her friends for.

Plaintiff had her "Independent Medical Examination" with Dr. Fahrback on March 12, 2019. Dr. Fahrback found that plaintiff was an accurate historian whose statements were consistent with the medical records. He concluded that she did not exaggerate or amplify her symptoms. He further opined that the history provided, as well as her subjective complaints and objective findings, matched up well with the imaging findings. Additionally, he found that plaintiff suffered from a vertebrobasilar dissection that was causally related to the motor vehicle accident and that the injury was not the result of a pre-existing injury. He noted that the plaintiff continues to exhibit persistent symptoms of post-thalamic pain syndrome,

consisting of paresthesias and dysesthetic pain syndrome of the left side, leading to discoordination of the left upper and lower extremity. He opined that these symptoms and objective findings were consistent with the radiographic findings of a right posterior thalamic infarct. Moreover, he found that plaintiff also exhibited a mild disability as a result of the left hemibody parasthesias and discoordination and that the thalamic infarct is permanent. He stated that at this juncture, it is unlikely that plaintiff's condition will change for better or worse. He also verified that the limitations concerning certain physical activities like vigorous exercise, participation in sports, and other activities requiring fine coordination skills are consistent with her injuries.

Dr. Hausknecht examined plaintiff most recently on May 16, 2019. He also found that plaintiff was a reliable historian who exhibited no prior history of head or neck injuries or risk factors for cerebrovascular disease. Furthermore, he causally related, within a reasonable degree of medical certainty, plaintiff's flexion-extension injury with the subject motor vehicle accident. He found that plaintiff has been symptomatic for over two years now, and while she has made some partial recovery, she remains symptomatic and is doubtful there will be any future recovery. As such, he opined that her condition is permanent in nature. He stated that her MRI reveals objective evidence of cerebral damage that is irreversible in nature and the cause of her sensorimotor symptom. As a result, he concluded that plaintiff sustained a permanent consequential limitation of function of her neurological system.

Therefore, this 25 year old plaintiff who suffered a stroke as a result of the subject motor vehicle accident and now has enduring left-side weakness, numbness, tingling, pain, discoordination, and restriction from vigorous exercise, sports, and anything involving fine coordination skills, due to the irreparable limitations to her neurological system, has met her prima facie burden with respect to the claim that she suffered a permanent consequential limitation of use of neurological system as a result of the subject accident (*see Hoxha v McEachern*, 42 AD3d 433 [2d Dept 2007; *cf. Gaddy v Eyler*, 79 NY2d 955 [1992]; *cf Hayes v Johnston*, 17 AD3d 853, 854 [3d Dept 2005][stroke fails to constitute serious injury where doctors do not opine that stroke caused permanent or significant impairment to system and concede that stroke symptoms did not persist]). It is, thus, incumbent on the defendants to raise a triable issue of fact as to plaintiff's permanent neurological condition, which they fail to do with the submission of the affirmed medical report of Edward A. Toriello, M.D., an orthopedic surgeon.

Accordingly, plaintiff's motion for summary judgment on this issue of "serious injury" is granted.

Plaintiff shall serve a copy of this order, together with notice of entry, on the defendants within 30 days of the date of entry of this order.

This constitutes the decision and order of the Court.

Dated: July 25, 2019


RICHARD G. LATIN, J.S.C.

