

Layne-Barker v Kagan
2020 NY Slip Op 33463(U)
October 20, 2020
Supreme Court, Kings County
Docket Number: 518427/2018
Judge: Debra Silber
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

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CARLON LAYNE-BARKER,

Plaintiff,

DECISION / ORDER

-against-

Index No. 518427/2018

Motion Seq. No. 2

MILA KAGAN and MARCEL KAGANOVSKAYA,

Date Submitted: 10/20/20

Cal No. 26

Defendants.

_____x

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendants' motion for summary judgment.

Papers	NYSCEF Doc.
Notice of Motion, Affirmation and Exhibits Annexed.....	<u>26-37</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>41-48, 52-55</u>
Reply Affirmation.....	<u>49, 56</u>

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

This is a personal injury action arising out of a motor vehicle accident which took place on March 3, 2017 in Brooklyn, NY. At the time of the accident, plaintiff was fifty-two years old. She sought medical treatment the same day. Plaintiff alleges that as a result of the accident she sustained injuries to her right knee and chest (thoracic spine). Defendants move for summary judgment dismissing the complaint and contend that plaintiff did not sustain a "serious injury" as defined by Insurance Law § 5102(d).

Defendants submit the pleadings, plaintiff's EBT transcript and affirmed reports from an orthopedist, Jeffrey Passick, M.D., a neurologist, Dr. Jean-Robert Desrouleaux and a radiologist, Dr. Melissa Sapan-Cohen.

Dr. Passick examined plaintiff on October 2, 2019 and tested her range of motion and reports that plaintiff had normal range of motion in her cervical spine, which is not a part of plaintiff's body that she claimed to have injured, but the range of motion in her thoracic spine and in her right knee were not normal. Her left knee was normal (150/150) but her right knee was 130/150. The thoracic spine does not move as much as the lumbar and cervical spine, but plaintiff was restricted by 5 degrees in all five planes measured. For example, where 30 degrees of rotation is normal, Dr. Passick reports that plaintiff could reach 25 degrees. He diagnoses plaintiff with "thoracic spine strain and right knee contusion, status post arthroscopy." He states that "after review of the claimant's file, taking a history, and performing a physical examination, and if the history reported is correct, it appears that the above diagnosed injuries are causally related to the accident. . . . I find no orthopedic disability based on the physical examination at this time."

Dr. Jean-Robert Desrouleaux examined plaintiff on November 7, 2019 and tested the range of motion in her spine. He reports a normal exam and concludes that "Based on the physical examination at this time, there is no objective evidence of a disability from a neurological standpoint."

Dr. Sapan-Cohen reviewed the MRIs of plaintiff's right knee and thoracic spine. She reports that there are three herniations and many bulges in the plaintiff's thoracic spine. This part of the spine does not flex or bend. Thus, to explain the herniations, she states "multiple disc herniations do not occur at the same exact point in time from a single acute traumatic related injury. In the setting of acute trauma, the disc space

which absorbs the maximum amount of force will suffer the disc herniation should one happen to occur. The presence of multilevel disc herniations is more compatible with the inherited predisposition to disc degeneration and pathology. . . In my opinion, [the] disc herniations at T5-6, T6-7 and T7-8 . . . are associated with underlying degenerative changes indicating they are chronic in nature. . . .There are no findings to indicate acute traumatic related injury on the submitted examination.” With regard to the MRI of plaintiff’s right knee, taken in June, 2017, Dr. Sapan-Cohen concludes that the films do not indicate an acute injury, and “In my opinion, there is tricompartmental osteoarthritis which is most severe within the lateral compartment of the joint space. Associated tearing of the lateral meniscus is likely degenerative in nature and is not associated with any additional findings to confirm an acute traumatic related injury.”

With regard to the 90/180-day category of injury, defendants contend that by eliminating the accident as the cause of the conditions alleged, defendants have eliminated all categories of injury in the statute. Further, they maintain that plaintiff cannot establish that she was medically prevented from performing substantially all of her usual and customary activities for the requisite period, as plaintiff testified at her EBT (Page 25) that she missed about fifteen days from work as a community liaison for the New York City Department of Design and Construction in the six months after the accident, and missed about four months of work after the arthroscopic knee surgery, which took place a year after the accident.

Conclusions of Law

Defendants have failed to make a prima facie showing that plaintiff did not sustain a permanent consequential limitation of use of a body organ or member, or a

significant limitation of use of a body function or system, as a result of the subject accident. As defendants have failed to make a prima facie case with regard to all of plaintiff's injuries and all of the applicable categories of injury, it is unnecessary to consider the papers submitted by the plaintiff in opposition (see *Yampolskiy v Baron*, 150 AD3d 795 [2d Dept 2017]; *Valerio v Terrific Yellow Taxi Corp.*, 149 AD3d 1140 [2d Dept 2017]; *Koutsoumbis v Paciocco*, 149 AD3d 1055 [2d Dept 2017]; *Aharonoff-Arakanchi v Maselli*, 149 AD3d 890 [2d Dept 2017]; *Lara v Nelson*, 148 AD3d 1128 [2d Dept 2017]; *Sanon v Johnson*, 148 AD3d 949 [2d Dept 2017]; *Weisberg v James*, 146 AD3d 920 [2d Dept 2017]; *Marte v Gregory*, 146 AD3d 874 [2d Dept 2017]; *Goeringer v Turrisi*, 146 AD3d 754 [2d Dept 2017]; *Che Hong Kim v Kossoff*, 90 AD3d 969 [2d Dept 2011]).

In any event, had defendants made a prima facie case for dismissal, plaintiff's doctor, Nunzio Saulle, M.D., provides an affirmed report (E-File Doc 55) which is sufficient to overcome the motion and raise an issue of fact as to whether plaintiff sustained a serious injury as a result of the accident (see *Young Chan Kim v Hook*, 142 AD3d 551, 552 [2d Dept 2016]).

Accordingly, it is

ORDERED that the motion is denied.

This constitutes the decision and order of the court.

Dated: October 20, 2020

ENTER :



Hon. Debra Silber, J.S.C.