

Kent v Holbok
2021 NY Slip Op 33300(U)
May 5, 2021
Supreme Court, Erie County
Docket Number: Index No. 817122/2018
Judge: Diane Y. Devlin
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At a Special Term of the Supreme Court held in and for the County of Erie, State of New York, located at Part 32, Buffalo, NY, on the 15TH day of April 2021.

PRESENT: HON. DIANE Y. DEVLIN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : : COUNTY OF ERIE

JESSICA KENT

Plaintiff

-vs-

JENNA HOLBOK, VEHICLE ASSET LEASING TRUST,
MATTHEW R. THOMAN, AND TWIN CITY AMBULANCE
CORP.

Defendants

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DECISION AND
ORDER

It is hereby ORDERED that Defendants' motion is GRANTED in part and DENIED in part and Plaintiff's cross motion is DENIED.

The Court has read and considered the following papers on these motions:

Notice of Motion--Affirmations--Exhibits Document Numbers 28-41, 61

Notice of Cross Motion--Affirmations, Affidavit--Exhibits Document Numbers 43-56

Opposing Affirmations, Document Numbers 57-59

Replying Affirmations, Document Numbers 60

This action sounds in negligence stemming from a motor vehicle accident that occurred on January 9, 2018 on Hopkins Road. Plaintiff testified that she was on the way to a job interview when Defendant Holbok swerved her car to the other lane to avoid a rear-end accident

which caused the Defendant Twin City Ambulance vehicle to react and come into contact with Plaintiff's vehicle.

As a result of the motor vehicle accident, Plaintiff alleges that she sustained a concussion, post-traumatic headaches, cervical bulges, anxiety, and loss of memory among other injuries. She claims that she sustained a threshold injury under the permanent loss of use, permanent consequential, significant limitation, and 90/180 categories. Discovery has been conducted and Defendants file a motion for summary judgment on the theory that Plaintiff did not sustain a threshold injury pursuant to Insurance Law 5102(d); Plaintiff files a cross motion claiming that she sustained a threshold injury pursuant to the 90/180 and significant limitation categories.

Defendants submit an IME report from neuropsychologist Dr. Santa Maria that includes the results of the battery of tests that Plaintiff completed. Dr. Santa Maria opines that the Plaintiff does not have post-traumatic stress disorder and any depressive symptoms are not related to the motor vehicle accident. Defendants also rely on an orthopedic IME where Dr. Molinari found normal cervical range of motion and opined that Plaintiff did not sustain a traumatic spinal injury.

Plaintiff's neurologist Dr. McVige opines that Plaintiff struggled with daily headaches, and her headache profile revealed headaches three to four times a week. The headaches occur on the right side of her head and radiate to her neck.

In Alcombrack v. Swarts, 49 AD3d 1170 (4th Dept. 2008) the Court held that "headaches [are] not physical limitations that can be observed." Courts have held that headaches do not necessarily constitute a serious injury. Downie v. McDonough, 117 AD3d 1401 (4th Dept. 2014).

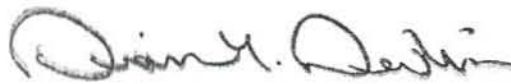
Plaintiff also relies on an affidavit of John Bialecki, D.C. He measured the cervical ranges of motions and referred to his records where the ranges of motion were documented. He

measured right lateral flexion at 31 degrees with 45 as normal and lumbar extension of 12 degrees with 25 as normal at the initial examination on January 23, 2018. The other cervical and lumbar ranges of motion were only reduced slightly. By the June 21, 2018 examination, cervical ranges of motion were nearly full in all planes. Similar to the case at bar, the chiropractor in the Downie case found nearly normal cervical ranges of motion or a reduction of 10-11% which the court found to be insignificant or inconsequential. Id.

The Plaintiff was not working at the time of the accident but was seeking employment. She testified that she could not swim, garden, launder clothes, and vacuum. She could take baths but not showers. In her affirmation, Dr. McVige indicated that Plaintiff was disabled from January 9, 2018 to April 26, 2018. However, a review of her medical records indicates that at the initial visit on 1/22/18 Plaintiff had full range of cervical motion; at the 2/8/18 visit the notes indicate that Plaintiff did go to some job interviews but had to leave due to persistent symptom; her memory was intact; she had difficulty driving but was not restricted from driving; the notes from the 3/1/18 visit indicate that Plaintiff should avoid headache triggers; and notes from the 3/15/18 visit indicate that "activities high risk for head injury should be avoided" yet she was also counseled on the "importance of moderate physical activity." Notes from the 4/19/18 visit indicate that Plaintiff was "still hesitant about applying for jobs given that she is nervous if she will be able to handle the interviews or the job duties." In Felton v Kelly, 44 AD3d 1217 (3d Dept. 2007), dismissal of the 90/180 claim was denied where a plaintiff had headaches that kept him out of work for seven months and to participate in some household work and personal hobbies.

The Court GRANTS Defendants' motion and dismisses the permanent loss of use, permanent consequential limitation, and significant limitation claims. The Court DENIES

dismissal as to the 90/180 claim. The Court DENIES Plaintiff's cross motion.



DIANE Y. DEVLIN, J.S.C.

GRANTED: May 5th 2021