At a term of the IAS Part of the Supreme Court of the State of New York, held in and for the County of Orange, at 285 Main Street, New York 10924 on the 23rd day of November, 2020.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, on all parties.

LENA SHOCKLEY,

PLAINTIFF,

-AGAINST-

MARIE DE LO GONZALEZ-CASTILLION, SEVEN CEAR, JUSTIN FOOTMAN and DONNA HAWKINS,

DEFENDANTS.

DECISION & ORDER

INDEX #EF007545/2018
Motion date: 9/14/20
Motion Seq.# 1 & 2

VAZQUEZ-DOLES, J.S.C.

The following papers numbered 1 - 11 were read on the threshold motion by defendants, JUSTIN FOOTMAN and DONNA HAWKINS, to dismiss the complaint (Mot. Seq. #1) and the motion by defendants, MARIE DE LO GONZALEZ-CASTILLION and STEVEN CEAR (Mot.Seq. #2) for summary judgment dismissing the complaint on the grounds of liability and that plaintiff has not suffered a serious injury:

Mot. Seq. #1

Notice of Motion, DiMaggio Affirmation, Exhibits A-F. 1-3
Del Duco Affirmation in Opposition, Exhibits 1- 6. 4-5
Reply Affirmation. 6

Mot. Seq. #2

Notice of Motion, Coleman Affirmation, Exhibits A-G. 7-9
DiMaggio Affirmation in Opposition. 10
Reply Affirmation. 11

This is an action wherein the plaintiff seeks damages for alleged personal injuries arising from a three (3) car accident that occurred on December 10, 2016 on Summerville Way in

Chester, New York. Plaintiff alleges she sustained serious injuries. Specifically, she claims disc bulges of the cervical and lumbar spine, left shoulder posterior superior labral tear and right wrist injury. Plaintiff was the driver of a Ford SUV traveling North on Route 94. GONZALES (vehicle 1) was operating a Honda four-door sedan and FOOTMAN (vehicle 2) was operating a Chrylser SUV. The police report indicates GONZALEZ (vehicle 1) was traveling North on Route 94 when she lost control due to icy conditions causing her to crash into the curb damaging the front passenger tire. FOOTMAN (Vehicle 2), unable to avoid colliding with GONZALEZ (vehicle 1) due to icy conditions, hit the rear of vehicle 1 and went up onto the curbing. Plaintiff stated that she was slowing to a stop when FOOTMAN (vehicle 2) collided with the front passenger side of her vehicle while reversing off the curbing. FOOTMAN (vehicle 2) stated that his tires would not grip the road so he could not have reversed into plaintiff's vehicle. He was stopped and was hit in the rear by plaintiff. FOOTMAN (vehicle 2) did sustain damage to the rear passenger side and plaintiff's vehicle sustained damage to the front passenger side door, bumper and fender area. As there were no third party witnesses to provide information in determining the cause of the collision between FOOTMAN (vehicle 2) and plaintiff (vehicle 3) outside the apparent ice conditions, either instance reported is possible.

GONZALEZ and CEAR move for summary judgment contending that they are free from negligence. Defendants assert they are entitled to summary judgment on liability based on the evidence in the record demonstrating that they had no involvement in the plaintiff's accident. In their opposition, FOOTMAN and HAWKINS argue not every rear-end collision is the exclusive fault of the rear driver. There can be more than one proximate cause of an accident (*see Cox v. Nunez*, 23 A.D.3d 427 [2d Dept 2005]), and a defendant moving for summary judgment in a

negligence action has the burden of establishing, prima facie, that he or she was not at fault in the happening of the subject accident (*see Suris v Citiwide Auto Leasing, Inc.*, 145 A.D.3d 817 [2d Dept 2016]). Here, GONZALEZ, during her deposition, admitted that she lost control of her vehicle and slid on the ice until she hit another vehicle and hit the curb. GONZALEZ further admitted that the majority of her car was still blocking the moving lane of traffic when she came to a stop. GONZALEZ and CEAR failed to establish, prima facie, that no negligence on the part of GONZALEZ contributed to the accident and therefore, the branch of their motion for summary judgment on the ground of liability is denied (*see Martinez v Allen*, 163 AD3d 951 [2d Dept 2018]).

The initial burden on a motion for summary judgment rests with the movant (*see Hanna v Alverado*, 16 AD3d 624, 624 [2d Dept. 2005]; cf. *Elfiky v Harris*, 301 AD2d 624, 624 [2003]). Plaintiff claims "serious injury" under the permanent consequential and significant limitation categories, as well as the 90/180 day threshold rules. Plaintiff concedes that a permanent loss of use of a body organ, member, function or system cannot be demonstrated. With respect to the 90/180 category, plaintiff's own deposition testimony establishes that she did not sustain a medically determined injury or impairment of a non-permanent nature which prevented her from performing substantially all of the material acts which constituted 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, as she returned to work without any restrictions two weeks following the accident (*Anderson v Foley*, 162 AD3d 965 [2d Dept 2018]).

Where the evidence demonstrates plaintiff had pre-existing conditions and/or that there were no objective limitations or disability, defendant has made their *prima facie* showing that

there was no serious injury. Here, defendants assert their expert found that there was no orthopedic disability, and none of the injuries were causally related to the accident. Plaintiff testified that she injured her knee, hands and neck in a 2007 trip and fall. She further testified that she injured her neck, back, arm and leg in a January 2, 2007 MVA, and injured her neck, hip and mid-back in a November 5, 2010 MVA. Plaintiff further testified that she re-injured her neck in another MVA in September 2018 and that her numbness and tingling in her right wrist began after the subsequent accident.

As the proponent of the summary judgment motion, defendant has the threshold burden to establish, by competent medical evidence that plaintiff did not suffer a serious injury casually related to the subject accident (*see Toure v Avis Rent a Car Sys.*I, 98 NY2d 345, 352 [2002]; *Peterson v Cellery*, 93 AD3d 911, 912 [3d Dept. 2012]. To that end, defendant submitted plaintiff's deposition testimony and the affirmed report of examining orthopedist, Robert C. Hendler. Dr. Hendler conducted a medical evaluation of the plaintiff on December 9, 2019. Prior to the evaluation, Dr. Hendler reviewed various documents including plaintiff's medical records and diagnostic studies. Dr. Hendler noted that immediately following the accident, plaintiff refused any medical treatment. Plaintiff presented to the emergency room at Orange Regional Medical Center on December 13, 2016. Plaintiff complained of pain in her neck and lower back. A CAT scan was performed of her cervical spine and x-rays of her lumbar spine showing no evidence of any fractures or dislocations with mild degenerative change. Plaintiff was then seen by Dr. Datta for pain management on February 23, 2017. Plaintiff complained of pain in her neck, left shoulder, left knee, ankles and wrists. There are no further records from Dr. Datta. Three months later, plaintiff began treating at Dolson Avenue Medical where she received

chiropractic care and physical therapy. Plaintiff's testimony clearly shows prior and post injuries to her neck, back and hands and her medical records indicate that plaintiff did not receive any treatment for her left shoulder until ten months following the subject accident.

Upon physical examination, Dr. Hendler determined plaintiff's range of motion of her lumbar spine, cervical spine, shoulders and wrists to be within normal limits and all tests were negative. Regarding her left shoulder, Dr. Hendler notes that plaintiff did not recall any mechanism of injury from the subject accident. Further, based upon plaintiff's clinical history and review of the submitted medical file, Dr. Hendler opines that the rotator cuff tear and degenerative change in the left shoulder are pre-existing conditions and were not caused by the subject accident.

In that defendants have established that the plaintiff suffers from pre-existing conditions, the "plaintiff must provide objective medical evidence distinguishing [the identified] preexisting condition from the injuries claimed to have been caused by the instant accident" (*She v Ives*, 137 AD3d 1404 [3d Dept 2016]) [internal quotation marks, brackets and citations omitted]; *see Dudley v Imbesi*, 121 AD3d 1461, 1462 [3d Dept 2014]).

Plaintiff's submissions include the evaluation report of Dr. Datta dated February 23, 2017 and the evaluation report of Dr. Charles W. Episalla, an orthopedic, who provided no opinion, objective medical evidence or any factual explanation distinguishing plaintiff's pre-existing condition of neck or low back pain. (*see Thomas v. Ku,* 112 A.D.3d 1200, 1201 [3d Dept 2013]; *Falkner v. Hand*, 61 A.D.3d 1153, 1155 [3d Dept 2009]). Dr. Episalla's report, only takes note of one prior injury where plaintiff injured her left knee and left wrist. Dr. Episalla did not review any previous medical records and was informed by plaintiff that she has had no prior history of

injuries with regard to the areas involved in this accident. Plaintiff further stated that she has been out of work since the accident, which conflicts with her prior testimony of returning to work after two weeks. Dr. Episalla failed to refute the findings of the defendant's orthopedist that the plaintiff's injuries were pre-existing and not caused by the subject accident (*see Levine v. Deposits Only, Inc.*, 58 A.D.3d 697 [2d Dept 2009]; *Saint–Hilaire v. PV Holding Corp.*, 56 A.D.3d 541 [2d Dept 2008]). This failure renders speculative the findings of Dr. Episalla, upon whose report the plaintiff principally relied in opposing the defendant's motion, that the plaintiff's injuries were caused by the subject accident (*see Norton v. Roder*, 65 A.D.3d 1317 [2d Dept 2009]; *Luciano v. Luchsinger*, 46 A.D.3d 634 [2d Dept 2007]; *Giraldo v. Mandanici*, 24 A.D.3d 419 [2d Dept 2005]).

Under ordinary circumstances a plaintiff's medical proof should be contemporaneous with the accident (*Cooper v. Dunn*, E.D.N.Y., 2001 WL 138864; *e.g., Pierre v. Nanton*, 279 A.D.2d 621 [2d Dept 2001]; *cf. Schaefer v. Pierce*, 205 A.D.2d 521 [2d Dept 1994]), and it is without question that any medical opinion based upon incomplete or false information is without probative value (*see generally, Kallicharan v. Sooknanan*, 282 A.D.2d 573 [2d Dept 2001]). Here, Dr. Episalla's findings are based upon an examination three and one-half years after the subject accident and is based upon incomplete medical information. He specifically indicates that the opinions given are based on history obtained from the patient and medicals available for review and reserves the right to change his opinions if additional medicals or history becomes available. Plaintiff has failed to raise a triable issue of fact.

Based upon the foregoing, it is hereby

ORDERED that the branch of the motion by defendants, GONZALEZ and CEAR, (Mot.

Seq.#2) to dismiss the complaint of the grounds of liability is denied; and it is further

ORDERED that the defendants' motions (Mot. Seqs. #1 & 2) to dismiss the complaint on the grounds of no serious injury under the permanent consequential and significant limitation categories as well as the 90/180 day threshold rules are granted; and it is further

ORDERED that the complaint is dismissed in its entirety.

This shall constitute the Decision and Order of the Court.

Dated: November 23rd , 2020
Goshen, New York

ENTER:

HON. MARIA S. VAZQUEZ-DOLES, J.S.C.

To: Counsel of Record Via NYSCEF