

Kechian v Oslacky

2020 NY Slip Op 34829(U)

May 7, 2020

Supreme Court, Orange County

Docket Number: Index No. EF004524-2018

Judge: Sandra B. Sciortino

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This opinion is uncorrected and not selected for official publication.

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, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

X
STEPHANIE M. KECHIAN,

Plaintiff,

-against-

JOYCE A. OSLACKY,

Defendant.

DECISION AND ORDER

INDEX NO.: EF004524 -2018

Motion Date: 02/03/2020

Sequence No.: 1

X

SCIORTINO, J.

The Court has considered the papers e-filed in connection with the motion by defendant, Joyce A. Oslacky for an order, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint on the grounds that plaintiff, Stephanie M. Kechian, did not sustain a serious injury as defined in Insurance Law §5102(d).

Background and Procedural History

This is an action for personal injuries allegedly sustained by plaintiff in a rear-end motor vehicle accident that occurred on May 19, 2015, at approximately 9:08 p.m. on the entrance ramp of the Garden State Parkway Northbound onto I-87/287 in the Village of Chestnut Ridge, New York. Plaintiff was operating a motor vehicle which was struck in the rear by a vehicle owned and operated by the defendant. As a result of the accident, plaintiff alleges that she sustained serious injuries as defined in Insurance Law §5102(d).

More specifically, in her Bill of Particulars, plaintiff alleges that, as a result of the accident, she sustained the following injuries:

- Closed head injury
- Traumatic Brain Injury

- Concussion
- Post concussion syndrome and disorder
- Neurocognitive disorder
- Impairment ability to read and visually scan
- Vision changes
- Short term memory loss
- Poor concentration
- Slowed speech and loss of fluency
- Musculoskeletal trauma to her neck, back, chest, upper shoulders, left arm, upper back, lower back and left hip, and persistent back chest neck and abdominal pain (*hereinafter collectively referred to as plaintiff's musculoskeletal injuries*)
- Anxiety disorder
- Post-Traumatic Stress disorder (PTSD)

Plaintiff alleges injuries that resulted in a permanent, consequential limitation of use of a body organ, member, function or system; a significant limitation of use of a body function or system; and a medically-determined injury or impairment of a non-permanent nature that prevented plaintiff from performing substantially all of the material acts which constitute her usual and customary daily activities for not less than 90 of the 180 days immediately following the accident.

Discussion

The Court of Appeals has held that where, as here, a plaintiff seeks to satisfy the statutory serious injury threshold under the permanent consequential limitation of use or the significant limitation of use categories, he or she must proffer objective medical evidence “involv[ing] a comparative determination of the degree or qualitative nature of [the] injury based on the normal function, purpose and use of the body part” (*Dufel v Green*, 84 NY2d 795, 798 [1995]). The required “comparative determination” may be established by either “an expert's designation of a numeric percentage of a plaintiff's loss of range of motion” or “[a]n expert's qualitative assessment of a plaintiff's condition ..., provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system” (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350 [2002]). “[S]ubjective complaints alone are not sufficient” to meet the threshold (*id.*). Defendant bears the

initial burden of establishing a *prima facie* case that plaintiff did not sustain a serious injury (*see id.*).

A. Plaintiff's Musculoskeletal Injuries

In support of her motion for summary judgment addressed to plaintiff's claimed musculoskeletal injuries, defendant submitted the report of Dr. Marc Appel, an orthopedic surgeon, who conducted an independent medical examination of plaintiff on behalf of the defense. Defendant also submitted a report by Dr. David Panasci, a radiologist, who reviewed the diagnostic imaging studies conducted of plaintiff.

Dr. Appel noted by way of history that plaintiff was out of work for one month following the accident in question, a fact confirmed by plaintiff's deposition testimony. On examination, Dr. Appel found that plaintiff had a normal range of motion of her cervical spine, shoulders, elbows, wrists, hands, and fingers. Dr. Appel further noted that plaintiff had a normal range of motion of her lower back, hips, knees, ankles and feet. Based upon the history he obtained from plaintiff, the medical records reviewed and his examination, he opined with reasonable medical certainty that plaintiff sustained soft tissue injuries to her neck and shoulder which have resolved, and soft tissue injury to her back which has resolved as the only complaint made was of pain, which was not supported by objective clinical evidence.

Dr. Panacci opined with reasonable medical certainty that the May 21, 2015 x-ray of plaintiff's left shoulder and the August 31, 2016 MRI of plaintiff's lumbar spine were both normal and did not demonstrate any evidence of an injury causally related to this accident.

The affirmed reports of Dr. Appel and of Dr. Panacci are sufficient to establish defendant's *prima facie* entitlement to summary judgment with respect to plaintiff's claimed musculoskeletal injuries. Having done so, the burden shifted to plaintiff to present proof in

admissible form to rebut this prima facie showing. Therefore, it is incumbent upon plaintiff to come forward with admissible proof sufficient to raise a triable issue of fact.

In opposition, plaintiff submitted the report of Dr. Debra Ann Pollack, a neurologist, who performed an independent medical examination of plaintiff on October 26, 2016. Dr. Pollack recorded a history that, following this accident, plaintiff missed one month of work, and was then laid off in June 2016. Dr. Pollack noted plaintiff complained of short-term memory loss, low back pain, and reported that her “vision is not the greatest.” However, the entirety of plaintiff’s musculoskeletal examination was normal. Dr. Pollack opined that plaintiff was able to do all of her regular activities, and that she had a temporary moderate impairment. As Dr. Pollack found no objective evidence of any musculoskeletal injury, plaintiff failed to rebut defendants’ showing of entitlement to summary judgment for these claimed injuries.

Similarly, plaintiff’s proof was also insufficient to raise a triable issue as to whether she was prevented from performing substantially all of her usual activities for at least 90 of the first 180 days following the subject accident. Plaintiff’s deposition testimony and information given to her doctors was that she missed only two weeks to one month of work as a result of the accident. She further submitted no competent medical evidence that the injuries allegedly sustained by her in this accident rendered her incapable of performing substantially all of her usual and customary daily activities for not less than 90 days of the first 180 days subsequent to the subject accident (*see Hernandez v Almanzar*, 32 AD3d 360 [1st Dept 2006]).

As such, defendant’s motion for summary judgment is granted as it pertains to plaintiff’s claimed musculoskeletal injuries.

B. Plaintiff’s Neurological Injuries

In support of her motion for summary judgment addressed to plaintiff’s claimed neurological injuries, defendant submitted the affirmed report of Dr. Richard DeBenedetto, a

clinical psychologist and neuropsychologist. Dr. DeBenedetto conducted a neuropsychological examination of plaintiff on September 18, 2019 on behalf of the defense. He performed a mental status examination and neurobehavioral examination, which included the performance of several objective examinations and assessments. He also reviewed plaintiff's medical records.

Dr. DeBenedetto noted by way of history and complaints by plaintiff that since the accident of May 19, 2015, plaintiff claimed she suffered from post-accident driving phobia, short-term memory loss and slowed thinking, although she has not received any neuropsychological treatment. Plaintiff reported that the short-term memory problems she had following the accident had improved and she had mild problems with word retrieval and verbal fluidity. She reported mild anxiety with driving which did not interfere with her ability to drive. She complained that she had occasional mild headaches.

Dr. DeBenedetto found that plaintiff's thinking was logical, coherent and goal directed, and her ideational productivity and tempo were within normal limits. In addition, he found that plaintiff's intelligence, reasoning and judgment were within normal limits. He opined that there was no evidence on mental status examination or self-report of symptoms of PTSD. All objective diagnostic testing done by Dr. DeBenedetto was reported by him as being in the average to low average range. Plaintiff's neurobehavioral status examination was within normal limits, and her mental status assessment was also within normal limits.

However, Dr. DeBenedetto did find areas of weakness around speed of information processing, which resulted in variable performance on tasks dependent on cognitive flexibility and efficient mental processing. He opined, however, that these deficits did not significantly detract from plaintiff's overall neurocognitive profile, ability level and did not represent any meaningful disability. He opined that these deficits may be attributed to anxiety or that they may be normal for plaintiff. He concluded that plaintiff's examination revealed no evidence of a

traumatic brain injury (TBI). The court finds that defendant's proof meets her *prime facie* burden that the plaintiff did not sustain a serious injury with respect to her claimed neurological injuries. Therefore, it is incumbent upon plaintiff to come forward with admissible proof sufficient to raise a triable issue of fact.

In opposition to defendant's motion, plaintiff submits uncertified and unattested to excerpts of records of plaintiff's treating physician, Dr. Adrienne Salomon. However, as these records are not certified or otherwise attested to as to their accuracy, they are not in admissible form and may not be considered by this Court as part and parcel of plaintiff's opposition.

Varveris v Franco, 71 AD3d 1128, 1129 [2d Dept 2010]; *Little v Locoh*, 71 AD3d 837 [2d Dept 2010]).

Plaintiff also submitted the affidavit of Dr. Karen Dahlman, a clinical neuropsychologist, together with Dr. Dahlman's affirmed report of an independent medical evaluation conducted for no fault on December 7, 2015, December 15, 2015 and December 22, 2015; in addition to an addendum to that report dated December 20, 2019, in which Dr. Dahlman reviewed Dr. DeBenedetto's report.

Dr. Dahlman noted that she had reviewed the data obtained by defendant's examining neuropsychologist, Dr. DeBenedetto, and opined that his data showed the same deficits as she found in 2015, which she attributed to a mild neurocognitive disorder due to traumatic brain injury from this accident. Those claimed deficits are:

- Attentional deficits (Borderline to Below Average range scores across instruments)
- Patchy memory deficits (with Low Average delayed verbal memory, Low Average delayed visual memory, and Low Average auditory working memory)
- Slow information processing (RIAS-2 Processing Speed Index in the Low Average range)
- Patchy executive deficits (Below Average set-shifting, Borderline response inhibition).

Dr. Dahlman opines that the neurological deficits found by her in 2015, and by Dr. Benedetto in 2019, are injuries that were caused by the 2015 motor vehicle accident; that these injuries resulted in a significant limitation of plaintiff's brain and neurological systems; and that the continued presence of these deficits, four years later, are a permanent consequential limitation of use of plaintiff's brain and neurological system.

Dr. Dahlman also notes that Dr. Benedetto's opinion that "there is no evidence on mental status examination or self-report of Posttraumatic Stress Disorder" is without basis as Dr. Benedetto did not administer any instrument to measure the presence or extent of PTSD symptoms, such as the Detailed Assessment of Posttraumatic Stress.

Based upon the foregoing, the Court finds that plaintiff has raised a triable issue of material fact as to whether she has suffered a permanent consequential limitation of use of a body organ or member and/or significant limitation of use of a body function or system with respect to her claimed neurological injuries.

However, as noted above, plaintiff's proof was also insufficient to raise a triable issue as to whether she was prevented from performing substantially all of her usual activities for at least 90 of the first 180 days following the subject accident. As such, that portion of defendant's motion is granted with respect to plaintiff's neurological injuries.

Conclusion

Based upon the foregoing, it is hereby

ORDERED that defendant's motion for summary judgment is granted with respect to plaintiff's claim that she sustained a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than

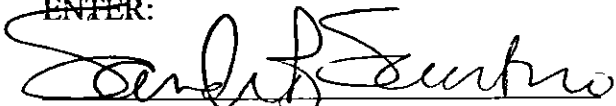
ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment; and it is further

ORDERED that defendant's motion for summary judgment is granted with respect to plaintiff's claim that she sustained a permanent consequential limitation of use of a body organ or member or significant limitation of use of a body function or system as it relates to plaintiff's alleged musculoskeletal injuries, and it is further

ORDERED that defendant's motion for summary judgment is denied with respect to plaintiff's claim that she sustained a permanent consequential limitation of use of a body organ or member or significant limitation of use of a body function or system as it relates to plaintiff's alleged neurological injuries.

Virtual settlement conference shall be held on June 15, 2020 at 11:00 a.m.

Dated: May 7, 2020
Goshen, New York

ENTER:

HON. SANDRA B. SCIORTINO, J.S.C.

TO: All parties via NYSCEF