

Goldstein v Duffy

2021 NY Slip Op 33405(U)

September 2, 2021

Supreme Court, Orange County

Docket Number: Index No. EF009294-2018

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
GAIL GOLDSTEIN,

Plaintiff,

-against-

SEAN DUFFY,

Defendants.
-----X

DECISION AND ORDER

INDEX NO.: EF009294-2018

Motion Date: 6/25/2021

Sequence Nos. 1

The following papers numbered 1 to 17 were considered in connection with the defendant's motion for summary judgment on the grounds that plaintiff did not suffer a serious personal injury in accordance with Insurance Law §5102:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Affirmation (Clark)/ Exhibits A - G	1 - 9
Affirmation in Opposition(Campbell)/ Exhibits A - F	10 - 16
Reply Affirmation	17

Background and Procedural History

This personal injury action arises out of a motor vehicle accident that took place on April 14, 2017 in Nassau County, New York. Plaintiff commenced this action by filing a Summons and Complaint on September 6, 2018. Issue was joined by Verified Answer filed on November 16, 2018. Plaintiff alleges she sustained serious injuries as defined in Insurance Law §5102(d). Plaintiff subsequently served a Bill of Particulars claiming the following injuries/conditions to establish a

serious injury: multiple bulging discs; cerebral concussion with post concussion syndrome; left shoulder separation; major depressive disorder; anxiety; and depression.

The Examination before Trial of plaintiff Gail Goldstein was held on April 7, 2020. Note of Issue was filed on January 7, 2021.

Plaintiff Gail Goldstein's Deposition (Exhibit D)

On April 14, 2017, at approximately 5:00 p.m., plaintiff was a passenger in a vehicle owned by her. Her daughter was operating the vehicle at the time of the accident. Despite a green light, plaintiff's daughter remained stopped at an intersection to allow a police car with its emergency lights and sirens activated to proceed through the intersection. While plaintiff remembered her daughter saying "oh no," she had no recollection of any contact between vehicles. She remembers a police officer standing next to her vehicle asking if she needed medical attention. Plaintiff declined medical attention, and told the officer she wanted to go home. Her vehicle was towed from the scene of the accident with the plaintiff and her daughter in the truck cab. They rented a car and traveled home.

Claiming memory problems since the accident, plaintiff did not provide a thorough history of her treatment. The day after the accident she experienced back pain and dizziness; her daughter drove her to Crystal Run Urgent Care. She was examined, given medication, and told to follow up with her primary care physician. She first discussed her symptoms with Dr. Doti, then she sought treatment with Dr. Taylor, a chiropractor, approximately once a week for pain in her head, neck, back, and left shoulder. Approximately one month after the accident she sought treatment with Dr. Belasco, complaining of dizziness, cognitive issues, light sensitivity and headaches. She was treated with medication and saw Dr. Belasco until the summer of 2019. She then treated with Dr. Sheflin,

a psychiatrist, twice. She was prescribed anti-depressant medication. She then treated with Dr. Rockman, who also prescribed anti-depressant medication. Dr. Belasco referred her to Dr. Copans, who referred her to Deborah Strock, a therapist. She subsequently sought treatment with Dr. Byne for blurred vision and headaches who treated her with eye conversion therapy.

At some point, plaintiff sought treatment with Dr. Gottesman and Dr. Soloman for injuries sustained to her left shoulder and neck. An MRI was taken and she received an injection in her left shoulder for pain. She was then referred her to Access Physical Therapy; she attended therapy once a week for a period of time but stopped because she was “tired of being a patient.”

Plaintiff states she suffered from depression after the death of her husband in 2009 and this accident exacerbated the previous psychiatric symptoms. She testified that, prior to the accident, “[she] had depression and anxiety, but it was managed well.” Plaintiff had suffered from, and intermittently sought treatment for, depression and anxiety since the 1990s. She has been treated with numerous types of anti-depressant medications. At the time of the accident, she was in therapy but not actively taking medication for anxiety or depression.

In 2018, the plaintiff experienced episodes of blurry vision for “a few months.” She began experiencing the same symptoms again about two months prior to the deposition.

Prior to the accident, plaintiff gardened “for hours” every day. After the accident she gardens approximately once a week. She attributes the decrease in gardening to her depression; she can no longer “seem to find joy in anything.” Plaintiff also has difficulty reading and cooking without a recipe, and it now takes her approximately twice as long to cook. While she previously used her treadmill five days per week, she has since stopped using the treadmill due to balance issues and depression. Plaintiff also attributes her fiancé leaving her in 2019 to the underlying accident and its

psychological impact.

Motion for Summary Judgment

Defendant argues that plaintiff has not suffered a serious injury within the meaning of the Insurance Law. In her Bill of Particulars plaintiff alleges the following categories of injuries under the Insurance Law with respect to all injuries: (1) permanent loss of use; (2) permanent consequential limitation; (3) significant limitation of use; and (4) 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.

In support of the motion, defendant submits the narrative report of Dr. John Ioia, board certified orthopedic surgeon (Exhibit F). Dr. Ioia examined the plaintiff on July 16, 2020. Plaintiff complained of discomfort in her neck, left shoulder and back. Dr. Ioia performed range of motion testing. Range of motion testing of the cervical spine showed flexion 0-60/0-50, extension 0-40/0-60, lateral rotation to left 0-60/0-80 and right 0-75/0-80. Dr. Ioia noted the medical records reviewed demonstrate some degenerative changes to her cervical spine, but "there is nothing related to this accident." Dr. Ioia concludes that "[T]here are no objective findings to indicate any ongoing needs or problems."

Range of motion testing of the back showed forward flexion was 0-60/0-60, dorsal extension was 0-20/0-25. At the time of examination, plaintiff was recovering from a fracture of the right toe, which made examination difficult. Chronic degenerative changes of the back were noted. Dr. Ioia noted that plaintiff may have had some sprain of the spine, "[plaintiff's] workup has been quite benign with no evidence of objective problems that require treatment... There is no evidence of any

ongoing objective problems.”

Right shoulder range of motion was normal: 0-165/0-180 forward flexion and lateral abduction; 0-90/0-90 external rotation. Left shoulder range of motion was: 0-165/0-180 forward flexion and lateral abduction; external rotation 0-65/0-90. Internal rotation was the same on both sides. Dr. Ioia noted mild loss of mobility in the left shoulder compared with the unaffected right shoulder.

Dr. Ioia’s impressions included mild whiplash or cervicalgia; mild lumbago; contusion or bruising to the left shoulder with mild loss of mobility. Dr. Ioia concludes, “[B]ased solely on her orthopedic issues, I feel that she can return to all of her activities of daily living.”

Defendant submits the neurological medical evaluation report of Dr. Loren Rosenthal, board certified in Medical Management (Exhibit E). Dr. Rosenthal examined the plaintiff on July 23, 2020. Plaintiff complained of headaches, visual problems, neck and lower back pain. Dr. Rosenthal performed range of motion testing of the cervical and lumbar spine was performed; all revealed full range of motion. Cerebellar testing revealed no evidence of dysemetria, dystaxia, or truncal ataxia.

Dr. Rosenthal’s diagnoses included degenerative disc disease of the lumbosacral spine (pre-existing); degenerative disc disease of the cervical spine (pre-existing); broad based posterior disc herniations encroaching upon the cord and bilateral exiting nerve roots at C5-C6; and post-concussion syndrome (resolved). Dr. Rosenthal notes that “[plaintiff’s] inability to function at times, as stated, is related to her pre-existing depression and chronic anxiety... I do find, however, that at C5-C6 she has a herniated disc compressing on the nerve roots at C-6. Her neurological examination was unremarkable. I believe she is able to return to activities of daily living and work.”

Defendant submits the neuropsychological examination report of Dr. Richard DeBenedetto,

doctor of psychology. (Exhibit G). Dr. DeBenedetto performed a neuropsychological examination by teleconference on August 4, 2020. Dr. DeBenedetto opines that plaintiff's performance and embedded measures of response-bias and effort overall are within acceptable limits for a valid neuropsychological profile. Her reported symptoms regarding memory deficits and affective distress are not found in the population of individuals with diagnosed traumatic brain injury or serious psychiatric disorders. Plaintiff's only significant deficit was with respect to semantic recall, which fell "far below her ability in this area on prior testing. On her initial evaluation her performance in this area was solidly within average to above average ability limits." Dr. DeBenedetto concludes that her deficit for semantic recall/learning does not represent her true ability in this area and may be due to some secondary factor, including psychiatric disorder, symptom magnification, marked anxiety-distractibility, or other motivational factors.

Plaintiff's performance on neurocognitive testing and presentation on mental status examination were within normal limits. Plaintiff's psychological profile on Psychometric Testing self-report reflected symptoms of severe depression and anxiety. Dr. DeBenedetto notes this finding is inconsistent with her presentation on mental status examination and with her description of her level of daily functioning. He notes, "[T]he persistence of a severe anxious depressive disorder some three years after her accident and in the absence of significant physical injury and/or high levels of persistent pain and physical limitations is inconsistent with clinical expectations in similar cases." Dr. DeBenedetto concludes that there is no objective evidence to support a claim of neurocognitive impairment of psychological disability. From a neuropsychological perspective, plaintiff can and is effectively meeting usual demands of daily living.

Defendant argues that summary judgment must be granted, as none of plaintiff's claimed

injuries rise to the level of a “serious injury” as defined by the Insurance Law.

Opposition

In opposition, plaintiff argues defendant failed to make a *prima facie* showing of entitlement to summary judgment. The fact that defendant’s experts opined that plaintiff’s symptoms were related to a pre-existing condition is insufficient as they fail to address any aggravation of the condition which had been asymptomatic prior to the accident. Further, a pre-existing condition does not foreclose a finding that the injuries were causally related to the accident.

Dr. DeBenedetto’s report is not properly certified pursuant to CPLR 2106, since he is a psychologist, not a physician. As Dr. DeBenedetto’s report is inadmissible, defendant has failed to submit any evidence regarding plaintiff’s neuropsychiatric claims and traumatic brain injury claim. Even if DeBenedetto’s report were considered, his conclusions based on the testing he performed are speculative as he does not explicitly state that plaintiff’s depression and anxiety were not caused or exacerbated by the accident. Dr. DeBenedetto’s report makes no reference to plaintiff’s 90/180 claim.

With respect to Dr. Rosenthal’s report, there is no opinion offered as to whether plaintiff’s noted C5-C6 disc herniation was caused by the accident, nor did he testify as to the length, duration, or impact that the post-concussion syndrome may have had. Dr. Rosenthal’s report makes no reference to plaintiff’s 90/180 claim.

With respect to plaintiff’s orthopedic injuries, defendant has failed to establish that plaintiff did not sustain a “serious injury” as defined by the Insurance Law. Dr. Ioia’s report, upon which defendant relies, acknowledges plaintiff’s disc herniation with nerve root impingement and summarily concludes that the injury is unrelated to the accident. Again, Dr. Ioia did not address her

90/180 claims.

In opposition to the motion, plaintiff offers the narrative report of Dr. Nicholas Belasco, board certified in Family Medicine and Osteopathic Medicine. Dr. Belasco's report, dated July 12, 2020, is affirmed in compliance with Civil Practice Law & Rules §2106. Dr. Belasco first treated the plaintiff on May 17, 2017; an initial evaluation was performed. Plaintiff complained of headache, dizziness, sleep problems, difficulty concentrating, light sensitivity, neck pain, fatigue, nausea, and eye problems. Plaintiff was diagnosed with concussion without loss of consciousness and intractable acute posttraumatic headaches, musculoskeletal disorder with occipital neuralgia, and posttraumatic amnesia.

Dr. Belasco opines that plaintiff's "functional abilities have been compromised by cognitive problems, as well as continued psychological issues and persistent headache and sleep issues; all of which never fully recovered." Dr. Belasco concludes that plaintiff suffered a complex neuro-musculoskeletal injury and "is suffering from a degree of disability of neurocognitive nature as well as, and most especially, a severely disruptive and poorly controlled psychological disability." He opines that the plaintiff's injury is permanent, with guarded prognosis, and is causally related to the underlying accident.

Plaintiff submits the report of Dr. Robert Dyne, licensed optometrist and board certified in rehabilitative visual therapy, dated August 12, 2020. Dr. Dyne examined plaintiff initially on August 13, 2018. Plaintiff complained of irritation around her eyes, including pain and pressure. She was diagnosed with post traumatic concussion characterized by convergence insufficiency and photophobia. Dr. Dyne treated plaintiff with Optometric Visual Therapy for twenty two sessions. Dr. Dyne opines that "with a combination of Optometric Visual Therapy, prism glasses and appropriate

refractive correction, [plaintiff] has been able to reduce the effects of the accident... [Plaintiff] will have permanently reduced ability to perform visually.”

Plaintiff also submits the psychological examination report of Dr. Victoria Londin, Ph.D. Dr. Londin examined the plaintiff on June 26, 2019. Dr. Londin’s findings were; post-concussion syndrome (persistent and chronic) and post-traumatic stress disorder (chronic). Dr. Londin opines that these psychological symptoms are causally-related to the accident of record, and the plaintiff “is not fully capable of meeting all of the usual demands of daily living as well as all of the demands and responsibilities of employment.”

Reply

In reply, defendant provides a properly certified version of Dr. DeBenedetto’s report. Defendant argues plaintiff’s opposition is based on plaintiff’s subjective complaints, feelings and belief. Plaintiff has failed to raise a triable issue of fact.

Discussion

As the proponent of the summary judgment motion, defendant bears the initial burden of establishing a *prima facie* case that plaintiff did not sustain a serious injury (*see Toure v Avis Rent a Car Sys.*, 98 NY2d 345, 352 [2002]; *Peterson v Cellery*, 93 AD3d 911, 912 [3d Dept. 2012]). Once defendant has met this burden, plaintiff must then submit objective and admissible proof of the nature and degree of the alleged injury in order to meet the threshold of the statutory standard (*Heege v. Falisi*, 2013 NY Slip Op. 31475[U] [Suffolk Co. 2013]). Conflicting expert opinions generally raise triable issues of fact precluding summary judgment (*Wilcoxon v. Palladino*, 122 AD3d 727, 728 [2d Dept 2014]; *Garcia v. Long Island MTA*, 2 AD3d 675 [2d Dept 2003])

It is well-established that proof under the significant limitation of use category requires

“comparative determination of the degree or qualitative nature of the injury based on the normal function, purpose and use of the body part and must be supported by objective medical evidence.” (*Toure*, 98 NY 2d at 350-351) “[A]ny assessment of the significance of a bodily limitation necessarily requires consideration not only of the extent or degree of limitation, but of its duration as well” (*Estrella v. GEICO Ins. Co.*, 102 AD3d 730 [2d Dept 2013]). However, a “significant limitation” need not be permanent in order to constitute a serious injury (*Toure*, 98 NY 2d at 351). A lack of recent examination is a relevant factor when considering a limitation (*Vasquez v. Almanzar*, 107 AD3d 538, 539 [1st Dept 2013]). “The failure of a defendant’s medical expert to address the findings contained in MRI reports reviewed as part of his or her examination is academic in the face of that expert’s finding of a full range of motion and a lack of disabilities causally related to the motor vehicle accident” (*Kearse v. New York City Tr. Auth.*, 16 AD3d 45, 50 [2d Dept 2005]).

A “permanent consequential limitation” requires a greater degree of proof than a “significant limitation,” as only the former requires proof of permanency (*Vasquez v. Almanzar*, 107 AD3d at 539). To qualify as a serious injury, a “permanent loss of use” must be total (*Oberly v. Bangs Ambulance Inc.*, 96 NY2d 295, 298 [2001]). A diagnosis of a bulging or herniated disc, by itself, does not constitute a serious injury (*Manzano v. O’Neil*, 285 AD2d 966 [4th Dept 2001]).

Shoulder, Cervical spine and Lumbar spine

The Court has examined the range of motion reports of defendant’s expert orthopedist and neurologist, Dr. Ioia and Dr. Rosenthal, which compare their findings, in each instance, to what is normal (*Walker v. Public Adm’r of Suffolk County*, 60 AD3d 757 [2d Dept 2009]). Both reports sufficiently establish that the actual ranges of motion fall within the normal range. By reliance on these affirmed reports, in which both Dr. Ioia and Dr. Rosenthal find the injuries sustained in the

accident have resolved, defendant initially met its *prima facie* burden of showing that the plaintiff did not sustain serious injuries with respect to the shoulder, cervical and lumbar spine, as a result of the accident (*See, Toure*, 98 N.Y.2d 345; *Gaddy v. Eyles*. 79 NY 2d 955 [1992]).

In light of defendant's showing, the burden shifted to plaintiff to demonstrate, by admissible evidence, that plaintiff's injuries meet the threshold of Insurance Law §5012(d). In opposition, plaintiff has failed to provide medical evidence as to plaintiff's orthopedic injuries regarding the extent or degree of physical limitation or an expert's qualitative assessment of plaintiff's shoulder, cervical spine or lumbar spine injuries (*Toure*, 98 NY2d 345 [2002]). Instead, plaintiff's opposition only points to deficiencies in defendant's submission. Furthermore, "the mere existence of a bulging or herniated disc is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitation resulting from the disc injury and its duration" (*Meely v. 4 G's Truck Renting Co., Inc.*, 16 AD3d 26, 30 [2d Dept 2005]). Therefore, plaintiff has failed to raise a triable issue of fact regarding the permanence and significance of plaintiff's shoulder, cervical spine and lumbar spine injuries (*Toure*, 98 NY 2d 345).

Cerebral Injuries

"A causally-related emotional injury, alone or in combination with a physical injury, can constitute a serious injury" (*Taranto v. McCaffrey*, 40 AD3d 626 [2d Dept 2007]). With respect to plaintiff's claimed neurocognitive and psychological injuries, defendant met its *prima facie* burden of establishing that plaintiff did not sustain a serious injury. After performing neuropsychological testing, Dr. DeBenedetto found that there is no objective evidence to support a claim of neurocognitive impairment or psychological disability, and plaintiff can and is effectively meeting usual demands of daily living.

In opposition, plaintiff's psychologist, Dr. Londin, fails to raise a triable issue of fact as to plaintiff's psychological injuries (*Toure*, 98 NY2d 350). Despite review of medical records, which detail plaintiff's psychiatric history, Dr. Londin indicates that "there is no reported significant medical, psychiatric, or neurocognitive history prior to the accident... There is no reported history of mental illness."

Dr. Londin concludes that plaintiff's psychological symptoms are causally-related to the accident of record and that the plaintiff "is not fully capable of meeting all of the usual demands of daily living as well as all of the demands and responsibilities of employment." Dr. London opines that her findings of post-concussion syndrome and post-traumatic stress disorder are supported by objective medical evidence. No indication is provided in the report as to what objective evidence she relies upon. Dr. Londin's report is conclusory, speculative, and legally insufficient to raise a triable issue of fact (*Vaughan v. Baez*, 305 AD2d [1st Dept 2003]). Plaintiff having failed to provide sufficient credible medical evidence attributing plaintiff's claimed psychological injuries to the medically determined injuries sustained in the accident, defendant's motion to dismiss is granted with respect to these injuries.

With respect to plaintiff's neurocognitive injuries, Dr. Belasco opines that plaintiff suffered a complex neuro-musculoskeletal injury and "is suffering from a degree of disability of neurocognitive nature as well as, and most especially, a severely disruptive and poorly controlled psychological disability." Dr. Belasco further opines that plaintiff's "functional abilities have been compromised by cognitive problems, as well as continued psychological issues and persistent headache and sleep issues; all of which never fully recovered." He concludes that the plaintiff's injury is permanent, with guarded prognosis, and is causally related to the underlying accident.

In light of the parties' conflicting expert reports, there are triable issues of fact as to causation of plaintiff's claimed neurocognitive injuries and whether these injuries constitute a "serious injury" under the Insurance Law. Therefore, summary judgment as to these injuries must be denied (*Garcia v. Long Island MTA*, 2 AD3d 675 [2d Dept 2003]).

90/180 claim

With respect to plaintiff's 90/180 claims, the Second Department has held that the report of an independent examination of plaintiff, conducted over a year after the accident, must relate its findings to the 90/180 claim (*Volpetti v. Yoon Kap*, 28 AD3d 750 [2d Dept 2006]). A report which fails to do so falls short of satisfying the burden of proof necessary to establish the absence of a serious injury (*Scinto v. Hoyte*, 57 AD3d 646 [2d Dept 2008]). However, the Second Department has also held that a plaintiff's deposition testimony may be used as a basis of determining whether the alleged injuries prevented plaintiff from performing "substantially all" of the material acts constituting her customary daily activities during at least 90 out of the first 180 days following the accident (*Sanchez v. Williamsburg Volunteer of Hatzolah, Inc.* 48 AD3d 664, 665 [2d Dept 2008]). In an effort to reconcile this discrepancy, courts have held that, where a plaintiff presents evidence supporting a 90/180 claim, the defendant must come forth with a doctor's report ruling out the claim (*Walcott v. Ocean Taxi Inc.*, NY Slip Op 50158[U] [Sup Ct Kings Cty 2009]). "However, where a plaintiff's testimony indicates that he or she was not incapacitated for the requisite period, than the defendants need not submit a medical opinion in order to meet their burden." (*id.*)

In the case at bar, plaintiff's deposition testimony demonstrates that her alleged injuries are insufficient to constitute a serious injury under the 90/180 category. Plaintiff testified that, after the accident she gardens less frequently; takes longer to cook, and does not use the treadmill anymore.

While plaintiff testified that she experienced cognitive problems after the accident, plaintiff's own testimony regarding her ability perform daily activities demonstrate the absence of a triable issue of fact as to this category. Therefore, defendant has demonstrated that the alleged injuries did not prevent her from performing "substantially all" of the material acts constituting their customary daily activities during at least 90 out of the first 180 days following the accident (*Sanchez*, 48 AD3d at 665).

Conclusion

On the basis of the foregoing, it is

ORDERED that defendant's application for summary judgment on the ground that plaintiff did not suffer a "serious injury" is granted as to plaintiff's cervical spine; lumbar spine; shoulder; and psychological injuries; and it is further

ORDERED that defendant's application for summary judgment on the ground that plaintiff did not suffer a "serious injury" is denied with respect to plaintiff's claimed neurocognitive injuries.

The parties shall appear for a virtual conference on October 7, 2021 at 10:15 a.m. A Microsoft Teams link will be provided prior to the conference.

This decision shall constitute the order of the Court.

Dated: September 2, 2021
Goshen, New York

ENTER:

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

To: *Counsel of Record via NYSCEF*