

**Shore v Y. Darek Taxi Inc.**

2014 NY Slip Op 32639(U)

September 16, 2014

Supreme Court, Bronx County

Docket Number: 302132/10

Judge: Howard H. Sherman

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NEW YORK SUPREME COURT - COUNTY OF BRONX

**PART 04**

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SCARLET SHORE and COURTNEY ANDREA FOX,

Plaintiffs,

Index No. 302132/10

-against-

**DECISION/ORDER**

Y. DAREK TAXI INC., MD F. AHMED, ANTOINE  
CHARLES and MOUSTAFA A. HUSSEIN,

Howard H. Sherman  
J.S.C.

Defendants.  
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**Facts and Procedural Background**

Plaintiff seeks damages for injuries allegedly sustained on November 25, 2008 in a motor vehicle accident that occurred at the intersection of E. 39<sup>th</sup> Street and Park Avenue, New York County, New York.

This action was commenced in March 2010, and issue was joined with the service in the same month of the answer of defendants Antoine Charles ("Charles"), and Moustafa Hussein ("Hussein"). As pertinent here, the answer interposed an affirmative defense of Insurance Law, §5104(a).

The Note of Issue was filed on February 26, 2013 and as such, the motion and cross-motion are timely made.

Verified Bill of Particulars

Plaintiff alleges that the following injuries were caused, aggravated, accelerated, exacerbated and/or precipitated by the motor vehicle accident: **cervical spine** disc bulges at C5-6 level and sprain and strain, and brachial

radiculopathy; **thoracic** spine sprain/rib cage contusion. [Verified Bill of Particulars ¶ 11].

Plaintiff alleges periods of confinement to bed and to home from 11/25/09 to approximately 12/1/09.<sup>1</sup> She interposes no claim for lost wages [Id. ¶ 13 - 14].

All injuries are alleged to be permanent and to qualify as serious injuries as defined as : 1) a permanent loss of use of a body organ, member, function or system; 2) a significant limitations of use of a body function or system; 3) a permanent consequential limitation of use of a body organ and/or member, and 4) a medically determined injury or impairment which prevented plaintiff from performing all of the material acts which constitute her usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident [Id. ¶ 20].

### **Motions**

1) Defendants Charles and Hussein move for an award of summary judgment dismissing the complaint on the grounds that plaintiff did not sustain a serious injury in the underlying motor vehicle accident. In support they submit copies of the pleadings, and the verified bill of particulars, as well as a copy of the transcript of plaintiff's August 24, 2011 examination before trial, and the affirmed reports of the independent medical evaluations.

2) The corporate defendant and Ahmed cross-move for summary judgment on the same grounds adopting and incorporating the facts, legal arguments and

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<sup>1</sup> The Bill of Particulars erroneously alleges the date as 12/1/08.

exhibits set forth in defendants' motion.

**Independent Medical Evaluations**

Defendants submit the report of a November 7, 2011 independent orthopedic evaluation conducted by Lisa Nason, M.D. For purposes of the evaluation, Dr. Nason reviewed no contemporaneous medical records.

Plaintiff presented for examination with complaints of pain in the cervical and thoracic spine, as well as in the right knee and hip.<sup>2</sup>

On examination of the **cervical** spine, Dr. Nason found full ranges of motion in every plane as quantified and compared to normal readings,<sup>3</sup> with no evidence of either tenderness or muscle spasm along the upper trapezius, supraspinatus, and infraspinatus muscles. Foraminal compression, Spurling, and Soto- Hall tests were all negative, and no evidence of muscle atrophy was observed.

The **thoracic** spine revealed no pain, tenderness or spasm, and range of motion testing was full in all planes as quantified and compared to normal readings. Lasguere's and straight leg raising were negative, and Dr. Nason found no evidence of tenderness to palpation, or pain, upon examination of the chest and ribs.

Upon these clinical findings, Dr. Nason concluded her evaluation with a finding that plaintiff had no evidence of orthopedic residuals or permanency resulting from the alleged injuries.

On the same day, plaintiff was examined by Jean-Robert Dearouleaux, M.D.,

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<sup>2</sup> It is noted that no injuries are alleged to have been sustained to either the right knee or hip.

<sup>3</sup> The testing was conducted with use of a goniometer referencing AMA guidelines for normal readings.

a board certified neurologist.

She presented with complaints of cervical and thoracic spine pain. Upon an examination including findings of full ranges of motion of the neck and the thoracic spine as quantified and compared to normal readings <sup>4</sup>, as well as negative findings on Soto-Hall, Spurling's, cervical distraction, compression, Lasguere's, and bilateral straight leg raise (normal at 90°), Dr. Dearouleaux concluded that plaintiff's alleged injuries had resolved without residuals and no further neurological treatment was indicated.

### **Deposition**

As pertinent here, plaintiff testified that after the impacts of the collision, she was experiencing pain in the right side of her body and was taken by ambulance from the accident scene to NYU Medical Center where x-rays of her ribs and neck were taken [SHORE EBT: 31 - 32]. She left the emergency room three hours after arriving, however, she could not recall whether she was given any instructions upon discharge, or whether she was dispensed any assistive devices [Id 33]. She remained in bed for four days after the accident [Id 60].

The following week she consulted with an orthopedic surgeon due to pain in the right ribs and the right side of her neck [Id 36]. After his examination, the orthopedist advised that she "should probably look into physical therapy," however she could not recall whether he prepared such a prescription [Id 37].

Plaintiff went for physical therapy, on five to ten occasions in 2008 at an

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<sup>4</sup> A goniometer was used to measure ranges of motion and quantified normal readings based upon AMA guidelines.

unnamed facility near her office, but she could not remember when, nor whether there was a physical examination preceding the therapy [ld 37 - 40].

She commenced a course of physical therapy two to three times a week for "months" at the Center for Rehabilitation at HSS although she could not recall whether it was still in 2008 [ld 43 - 46]. Plaintiff also had acupuncture at a different facility on less than ten occasions [ld 47; 55 - 56], and an MRI was conducted during that period, but she was unable to remember how long after the accident the diagnostic studies were performed [ld 48 - 50].<sup>5</sup> She consulted another orthopedist during this period "more than once" but less than five times [ld 52 - 54].

At the time of the deposition, plaintiff was not being treated for the accident-related injuries, however she was performing stretching exercises recommended by the physical therapist, and going to Pilates [ld 57]. Her last therapy session was in 2010 [ld 57], and at that time she was in less pain than at the time of the accident [ld 58]. She testified that she always experiences a little pain in her neck and her back due to the injuries sustained in the accident [ld 59]. There are no activities that she could no longer do as a result of the injuries, however she has difficulty in carrying anything heavy around her neck or in bending her neck all the way back [ld 60 - 62]. Finally, plaintiff testified that she missed three weeks from work as a result of the accident [ld 63].

### **Discussion and Conclusion**

It is clear that this record does not support a finding of a material issue of fact

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<sup>5</sup> None are part of the record here.

that plaintiff suffered a permanent loss of use of her cervical and/or thoracic spine (see, Oberly v Bangs Ambulance, 96 NY2d 295, 299, 751 NE2d 457, 727 NYS2d 378 [2001]).

With respect to the remaining categories asserted, upon review of the findings by objective testing upon orthopedic and neurologic examination revealing a complete resolution of the spinal and rib injuries asserted, including findings of full ranges of motion in all planes of the cervical and thoracic spine, as quantified and compared to normal readings, and the lack of evidence of spasm in the affected areas as well as negative results in all objective testing, it is the finding of this court that defendants have met their initial burden to prove as a matter of law that plaintiff did not sustain a serious injury in the "significant limitation" and "permanent consequential" categories asserted.

Defendants have also shouldered their initial burden with respect to the 90/180 claim by virtue of plaintiff's testimony concerning the minimal confinement necessitated by the accident as well as her ability to return to work within weeks of the incident.

Upon this showing, it is incumbent upon the plaintiff to come forward "with an objective medical basis supporting the conclusion that he sustained a serious injury (see, Toure v Avis Rent A Car Sys., 98 NY2d 345, 350-351, 774 NE2d 1197, 746 NYS2d 865 [2002])." Baez v Rahmatiali, 6 NY3d 868, 869; 850 NE2d 19 [2006].

In opposition plaintiff comes forward with copies of hospital records that are inadmissible as tendered [Exhibit A]; a report of a 12/01/08 examination by David J. Fleiss, M.D. certified by that physician [Exhibit B]; a 12/05/08 report of Joet R.

Mittleman, D.C. of a chiropractic consultation certified by the examining chiropractor <sup>6</sup> [Exhibit C]; copies of reports of a 12/18/08 initial and two follow-up examinations conducted by Douglas A. Schwartz, D.O., which are unsigned and accompanied by a certification of a "Luis Collado" without any attestation as to that individual's authority to make such a certification on behalf of the physician's medical group, and as such, the copies of the reports are inadmissible. Finally, plaintiff tenders an affirmed report of Dr. Schwartz's re-evaluation of plaintiff conducted 08/19/13.

Upon consideration of the admissible medical records here to which all favorable inferences must be afforded, it is the finding of this court that plaintiff has raised an at least arguable issue of fact that she sustained an accident-related injury of the thoracic spine sufficient to qualify as serious in the "permanent consequential" and/or "significant limitation" categories asserted.

Specifically, a material issue of fact is raised as to whether nearly five years post-accident plaintiff has restrictions in the range of motion of her thoracic spine attributable to the incident.

To the extent the recent evaluation was limited in scope to this affected area, plaintiff comes forward with no medical evidence to raise an issue of fact as to a "permanent consequential" injury of the cervical spine, however if the trier of fact determines that plaintiff sustained a serious injury of the thoracic spine, it may award damages for all injuries causally related to the accident, even those that do

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<sup>6</sup> The copy of the report is accompanied by that of an initial physical therapy evaluation and subsequent notes not tendered in admissible form as neither certified by the medical facility nor sworn to by the therapist.

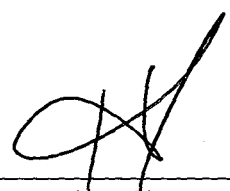
not meet the threshold (see, Linton v Nawaz, 14 NY3d 821, 926 NE2d 593 [2010]). Issues of credibility devolving from the experts' conflicting clinical assessments of the recent ranges of motion of plaintiff's thoracic spine, are matters more properly resolved by the triers of fact.

Finally, plaintiff comes forward with no proof to raise an issue of fact with respect to the 90/180 serious injury claim.

Accordingly, the motion and cross-motion are granted solely to the extent of awarding summary judgment dismissing plaintiff's claims of serious injury in the "permanent loss of use" and the "90/180" categories, and are otherwise denied.

This constitutes the decision and order of this court.

Dated: September 16, 2014  
Bronx, New York



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Howard H. Sherman  
J.S.C.