

**Pickering v Basar**

2020 NY Slip Op 32649(U)

August 12, 2020

Supreme Court, Kings County

Docket Number: 519164/2016

Judge: Debra Silber

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : PART 9**

\_\_\_\_\_ **x**

**SHANTELL PICKERING,**

**Plaintiff,**

**DECISION / ORDER**

**-against-**

**Index No. 519164/2016**

**Motion Seq. No. 2**

**Date Submitted: 7/15/20**

**MOHAMMAD A. BASAR, V.A. CRUZ-ZAPATA  
and MTE TRANSPORTATION CORP.,**

**Defendants.**

\_\_\_\_\_ **x**

*Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendants' motion for summary judgment.*

<b>Papers</b>	<b>NYSCEF Doc.</b>
Notice of Motion, Affirmation and Exhibits Annexed.....	<u>42-50</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>53-58</u>
Reply Affirmation.....	<u>60</u>

**Upon the foregoing cited papers, the Decision/Order on this application is  
as follows:**

This is a personal injury action arising out of a motor vehicle accident which took place on December 17, 2014. Plaintiff was a rear seat passenger in a taxi driven by defendant Cruz-Zapata and owned by defendant MTE Transportation when the taxi rear-ended a vehicle driven by defendant Basar. Defendant Basar obtained summary judgment dismissing the complaint as against him in a prior motion on the grounds that he was not negligent. Plaintiff was removed from the scene in an ambulance and brought to the emergency room at Interfaith Hospital. She was treated and released and began a course of physical therapy. On August 15, 2015, she had arthroscopic surgery to her right knee. In her Bill of Particulars, plaintiff, who was 27 at the time of

the accident, alleges that as a result of the accident, she sustained injuries to her right knee, neck and lumbar spine.

Defendants contend that plaintiff did not sustain a “serious injury” as defined by Insurance Law § 5102(d). Defendants submit the pleadings, plaintiff’s EBT transcript, an affirmed IME report from Jeffrey Guttman, M.D., who examined plaintiff on September 18, 2019, an affirmed report from Ronald Paynter, M.D., who is board certified in emergency medicine, and an affirmed report from A. Robert Tantleff M.D., a radiologist, who reviewed the MRIs of plaintiff’s right knee and of her cervical and lumbar spine.

Dr. Guttman, an orthopedist, examined plaintiff and reports normal ranges of motion in plaintiff’s cervical and lumbar spine, with otherwise negative test results, and an abnormal finding, 130 degrees when normal is 150 degrees, in the plaintiff’s right knee extension, which he attributes to the arthroscopic surgery. Dr. Guttman diagnoses plaintiff with resolved sprain/strain in her cervical and lumbar spine. He states that her right knee has “resolved.” He opines that plaintiff has “no evidence of residuals or permanency. She may continue with her activities of daily living with no restrictions. She does not need orthopedic treatment or physical therapy.”

Defendants’ radiologist reviewed the pre-surgery MRIs of plaintiff’s right knee and her cervical and lumbar spine. With regard to the knee, he states that plaintiff’s knee (before the surgery) demonstrates “lateral displacement and tilting of the patella secondary to the patient’s [obesity] . . . there is chondromalacia patella . . . There are red marrow proliferative changes, a secondary finding of longstanding obesity . . . The [films] are otherwise normal.” Dr. Tantleff concludes “there is no evidence of post-

traumatic abnormality. The regional ligaments, tendons and menisci are intact without traumatic tears or rupture. There is no evidence of acute or recent injury.” His findings with regard to her spine are that all of the abnormal findings are degenerative and caused or exacerbated by plaintiff’s obesity and were not caused by any traumatically induced injury.

Dr. Paynter, who reviewed plaintiff’s emergency room records, found no indication of a serious injury as a result of the motor vehicle accident and notes that “had plaintiff suffered the injuries claimed in the bill of particulars” as a result of the accident, there would have been clinical findings in the emergency room records to support her claim, but there are none. He concludes that the emergency room records are therefore “inconsistent with the injuries alleged in the plaintiff’s bill of particulars and show that the claimed injuries do not have an acute traumatic origin and so could not be causally related to the 12/17/14 accident.”

Movants have made a prima facie showing of their entitlement to summary judgment (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyer*, 79 NY2d 955, 956-957 [1992]). Defendants provide an affirmed IME report from Dr. Jeffrey Guttman, who examined plaintiff, an affirmed report from a radiologist, who reviewed the plaintiff’s MRIs, and an affirmed report from Dr. Ronald A. Paynter, a doctor who is board certified in emergency medicine, who reviewed plaintiff’s emergency room records. These reports, together with plaintiff’s EBT and bill of particulars, make a prime facie showing that plaintiff did not sustain a serious injury from the subject accident.

With regard to the category of injury “a medically determined injury or impairment

which prevented the party from performing substantially all of the material acts which constituted his or her customary daily activities for not less than 90 days during the 180 days immediately following the accident,” while Dr. Paynter’s opinion, which is more or less the same in every motion he provides an affirmation for, strains credulity, the plaintiff’s EBT and bill of particulars support defendants’ motion. Specifically, plaintiff testified at her EBT that she missed one month from work after the accident [Page 35 Line 16], but lost more time from work after the knee surgery. As the knee surgery was performed more than six months after the accident, that lost time does not qualify for the 90/180 day category of injury, even if it was “medically determined.” In her bill of particulars, her claim for lost time from work delineated in her answer to question 14 is that she lost time from work after the knee surgery, “8/20/15 - 3/16 due to surgery.”

Plaintiff opposes the motion. Her counsel provides an overly-long forty-four page affirmation. First, he alleges the plaintiff’s EBT is inadmissible as she did not sign it. This is incorrect, as it was held more than a year ago and the plaintiff filed her Note of Issue before this motion was made, although it was rejected by the clerk. The CPLR provides that “If the witness fails to sign and return the deposition within sixty days, it may be used as fully as though signed” (NY CLS CPLR R 3116). Counsel cannot argue that it was not available for her review and correction. Next, he avers that defendants have failed to make a prima facie case. Then, he argues that if the court finds that defendants have made a prima facie case, that plaintiff has overcome it and raised triable issues of fact.

However, there is only one exhibit provided by plaintiff that is in admissible form, and it is an affirmation from a physician, Sunil Butani, M.D., of Action Sports Medicine,

who examined plaintiff on January 9, 2020, five years after the accident, for the first time. He is thus an expert, not a treating doctor. Therefore, his description of the medical records he reviewed is inadmissible hearsay. Opinion testimony submitted in a motion for summary judgment must be supported by the record, and such record must be in admissible form (see *Uddin v Cooper*, 32 AD3d 270, 272 [1st Dept 2006] ["Inasmuch as he relied on unsworn medical reports from such period, they were hearsay and thus not probative of the issue."]; *Vishnevsky v Glassberg*, 29 AD3d 680, 681 [2d Dept 2006] ["The plaintiffs also relied upon the affirmations of Dr. St. Hill, who impermissibly relied upon the unsworn reports of another doctor. Therefore, the plaintiffs may not rely on Dr. St. Hill's affirmation to defeat the motion for summary judgment."]). He describes his exam, but for his range of motion findings, he does not say what reference book he used for his "normals." He puts his results into one list so it cannot be determined which body part he is referring to. He concludes that her gait is normal, but her range of motion in her neck and right knee is restricted and both of these body parts are painful. He states that she has a permanent partial disability with regard to her right knee and neck, and "if the patient's history is correct, her continued pain is caused by the accident of 12/17/14."

This is insufficient. The plaintiff has failed to raise a triable issue of fact as to whether her alleged injuries were caused by the subject accident, as she has not provided any medical records in admissible form which were created either contemporaneously with the accident, or even within the first year after it. Therefore, with regard to the categories of injury "a permanent consequential limitation of use" and "a significant limitation of use," plaintiff has not overcome the motion. "[A]

contemporaneous doctor's report is important to proof of causation" (*Perl v Meher*, 18 NY3d 208, 217-218, 960 NE2d 424, 936 NYS2d 655 [2011]; *Griffiths v Munoz*, 98 AD3d 997, 999 [2d Dept 2012]). "The absence of a contemporaneous medical report invites speculation as to causation." (Id.).

The plaintiff also fails to raise a triable issue of fact as to whether she sustained a serious injury under the 90/180-day category of Insurance Law § 5102 (d), as her one admissible medical report states (Page 3, "Work History") that she missed two months of work as a result of the accident. (see *McIntosh v O'Brien*, 69 AD3d at 587). As stated above, she testified at her EBT that she missed one month of work after the accident, and her bill of particulars which states that her claim for lost wages is for after the surgery, which was more than six months after the accident.

Accordingly, it is

**ORDERED** that the motion is granted and the complaint is dismissed.

This constitutes the decision and order of the court.

Dated: August 12, 2020

ENTER:



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Hon. Debra Silber, J.S.C.