

**Velasquez v Travez Transp. Inc.**

2020 NY Slip Op 35705(U)

February 18, 2020

Supreme Court, Queens County

Docket Number: Index No. 706598/18

Judge: Rudolph E. Greco, Jr.

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable RUDOLPH E. GRECO, JR.  
Justice

IA PART 32

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ADRIANA VELASQUEZ,

Index No.: 706598/18  
Motion Date: 1/30/20  
Motion Cal. No.: 53  
Motion Seq. No.: 1

Plaintiff,  
-against-

TRAVEZ TRANSPORTATION INC. AHMED  
NAWAZ, and GUILLERMO VANDERHUCK,

FILED  
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QUEENS COUNTY

Defendants.  
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The following numbered papers read on this motion by defendants, Travez Transportation Inc. and Ahmed Nawaz, and cross-motion by co-defendant, Guillermo Vanderhuck, for summary judgment.

PAPERS	NUMBERED
Notice of Motion-Affidavits-Exhibits.....	1 - 4
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Upon the foregoing papers, it is ordered that this motion by defendants, Travez Transportation Inc. and Ahmed Nawaz (TT-Defendants), and the cross-motion by co-defendant, Guillermo Vanderhuck, (collectively: Defendants) for summary judgment, pursuant to CPLR 3212, are determined as follows:

Plaintiff, Adriana Velasquez, commenced the instant action to recover for injuries she allegedly sustained in a motor vehicle accident that occurred on September 19, 2017, on 80<sup>th</sup> Street at its intersection with 24<sup>th</sup> Avenue, Queens, New York. TT-Defendants now move for summary judgment on the ground that Plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d). Co-defendant Vanderhuck cross-moves for summary judgment on the same ground.

The proponent of a summary judgment motion has the initial burden of establishing entitlement to judgment as a matter of law, submitting evidence in admissible form demonstrating the absence of any triable issues of fact (*see Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]; *see also Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Only when the movant satisfies its prima facie burden will the burden shift to the opponent "to lay bare his or her proof and demonstrate the existence of triable issues of fact" (*Alvarez*, 68 NY2d at 324; *see also Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Chance v Felder*, 33 AD3d 645, 645-46 [2d Dept 2006]). Thus, where the movant fails to meet this initial burden, summary judgment must be denied regardless of the sufficiency of the opposing papers (*see Foss v Netherlands Ins. Co.*, 22 NY3d 728, 734 [2014]).

In support of the motion, TT-Defendants submit, inter alia, the Verified Bill of Particulars, the transcript of Plaintiff's EBT, affirmations of radiologist Scott A. Springer,

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DO, DABR, an affirmation of Darren Fitzpatrick, MD, a Board-Certified Radiologist, an affirmation of Steven A. Renzoni, MD, a Board-Certified Orthopedic Surgeon, and an affirmation of Rikki Lane, MD, a Board-Certified Emergency Medicine. In support of the cross-motion, co-defendant Vanderhuck submits everything TT-Defendants submit, in addition to an affirmation of David Zelefsky, MD and an affirmation of Samuel Krivit, PA.

In the Verified Bill of Particulars, Plaintiff alleges several of the categories of "serious injury" listed in the statutory definition under Insurance Law § 5102 (d). Specifically, Plaintiff alleges she suffered the following: (1) dismemberment; (2) significant disfigurement; (3) a fracture; (4) permanent loss of use of a body organ, member, function or system; (5) permanent consequential limitation of use of a body organ or member; (6) significant limitation of use of body function or system; and (7) a medical 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 (90-out-of-180-day rule). Plaintiff claims, inter alia, that she sustained injuries to her cervical spine, lumbar spine, and left shoulder as a result to the subject accident, and not a result of the slip-and-fall accident that occurred over 20 years ago or a prior motor vehicle accident that occurred in 2011.

Defendants' evidentiary submissions demonstrate that Plaintiff did not suffer a dismemberment, significant disfigurement (*see Mnateukanova v Elliot*, 174 AD3d 798, 799 [2d Dept 2019]), a fracture, permanent loss of use of a body organ, member, function or system (*see Oberly v Bangs Ambulance Inc.*, 96 NY2d 295, 299 [2001]) or an injury under the 90-out-of-180-day rule (*see Gaddy v Eyer*, 79 NY2d 955, 958 [1992]). In opposition, Plaintiff submits, inter alia, an affirmation of Stephanie M. Bayner, MD, coupled with the MRI reports produced after Plaintiff's 2011 motor vehicle accident and the instant accident. Plaintiff's evidence substantiates Defendants' claim that she did not suffer said injuries, thus she failed to raise a triable issue of fact (*id.*).

Furthermore, Defendants' evidentiary submissions demonstrate that Plaintiff claimed the same cervical spine and lumbar spine injuries in her 2011 accident lawsuit (*see Yoon Taek Im v Park*, 69 AD3d 926, 927 [2d Dept 2010]; *Penalosa v Chavez*, 48 AD3d 654, 655 [2d Dept 2008]; *McKenzie v Redl*, 47 AD3d 775, 776-77 [2d Dept 2008]; *Vidor v Davila*, 37 AD3d 826, 826-27 [2d Dept 2007]; *Ingram v Doe*, 296 AD2d 530, 531 [2d Dept 2002]; *Vitale v Carson*, 258 AD2d 647 [2d Dept 1999]). Plaintiff denied injuring her cervical spine in her prior 2011 accident, however, the evidence shows that is not true. Plaintiff's own expert, Krivit, PA, opined that, as a result to Plaintiff's 2011 accident, she suffered an 80% loss of range in motion (flexion) and 83% loss of range in motion (extension) in her cervical spine. Krivit further opined that, as a result to Plaintiff's 2011 accident, she suffered an 67% loss of range in motion (flexion) and 100% loss of range in motion (extension) in her lumbar spine. Moreover, after the 2011 accident and before the instant accident, Plaintiff's doctor, Zelefsky, found full range of motion in her right shoulder. Nevertheless, three months after finding full range of motion in Plaintiff's right shoulder, her other expert found limited range of motion in her right shoulder.

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Plaintiff's opposing papers fail to raise a triable issue of fact and fail to provide any objective evidence to support her claim that any preexisting injuries were exacerbated by and causally related to the subject accident (*id.*). In fact, her expert's report shows that, less than a month after the subject accident, she had better range of motion in her cervical spine and lumbar spine in comparison to reports from her 2011 accident. Additionally, Dr. Bayner relied on the MRI reports regarding the 2011 accident, which explicitly show that Plaintiff suffered from a cervical spine and lumbar spine injuries (*id.*). Since Plaintiff failed to raise a triable issue of fact all causes of action relating to a cervical spine and lumbar spine injuries must be dismissed (*id.*).

As to Plaintiff's alleged left shoulder injury, Defendants' evidentiary submissions, including Plaintiff's own testimony, demonstrate that any limitation in range of motion is limited and not causally related to the subject accident (*see Pucci v Trabulsky*, 161 AD3d 1117, 1118-19 [2d Dept 2018]). In opposition, Plaintiff failed to raise a triable issue of fact (*id.*). Plaintiff's expert and Defendants' experts had similar findings regarding the MRI of Plaintiff's left shoulder. Nevertheless, Defendants' experts concluded that such findings were degenerative in nature. Dr. Fitzpatrick further compared his findings against what a traumatic injury to the shoulder would reveal. Plaintiff's expert did not address said comparison. Dr. Bayner's affirmation shows that the alleged injury to Plaintiff's left shoulder was healing, but then worsened overtime without explanation. Therefore, Plaintiff's causes of action for permanent consequential limitation of use of a body organ or member and significant limitation of use of body function or system must also be dismissed (*id.*; *see O'Shea v Johnson*, 49 AD3d 614, 615 [2d Dept 2008]).

Moreover, the Court finds that Plaintiff's testimony suggests that her left shoulder was not injured in the subject accident (*see Carthen v Sherman*, 169 AD3d 416, 417-18 [1st Dept 2019]). Given the circumstances, where Plaintiff's assertions have been repeatedly proven false, the Court finds that Plaintiff's testimony is demonstrably false and should be rejected as incredible as a matter of law (*id.*). Plaintiff is a prime example of why the No-Fault Law was established (*see Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 350 [2002]).

Accordingly, this motion by defendants, Travez Transportation Inc. and Ahmed Nawaz, and this cross-motion by co-defendant, Guillermo Vanderhuck, for summary judgment are granted; and it is further

**ORDERED** that Plaintiff's complaint and any and/or all counterclaims and crossclaims are dismissed; and it is further

**ORDERED** that defendants, Travez Transportation Inc. and Ahmed Nawaz, shall serve a copy of this order with notice of entry upon Plaintiff and co-defendant, Guillermo Vanderhuck, within thirty (30) days of the date of entry.

This constitutes the decision and order of this Court.

Dated: February 18, 2020

RUDOLPH E. GRECO, JR., J.S.C.

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