

<b>Barr v Salem Truck Leasing Inc.</b>
2022 NY Slip Op 32069(U)
June 30, 2022
Supreme Court, Kings County
Docket Number: Index No. 511582/2019
Judge: Debra Silber
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : PART 9**

**X**

**JINNER BARR,**

**Plaintiff,**

**DECISION/ORDER**

**-against-**

**Index No. 511582/2019**

**SALEM TRUCK LEASING INC., S. BERTRAM, INC.  
and GABRIEL RUIZ,**

**Motion Seq. No. 1**

**Date Submitted: 3/17/2022**

**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, Affirmations, Affidavits, and Exhibits Annexed.....	<u>13-22</u>
Affirmations in Opposition and Exhibits Annexed.....	<u>26-38, 40-42</u>
Reply Affirmation.....	<u>43-44</u>

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

This is a personal injury action arising from an automobile accident that occurred on February 22, 2019, at or near the intersection of Bushwick Avenue and Gates Avenue in Brooklyn, New York. At the time of the accident, the plaintiff was driving her vehicle, traveling on Bushwick Avenue, intending to make a right turn onto Gates Avenue. The defendant was also traveling on Bushwick Avenue, also intending to make a right turn onto Gates Avenue, when the vehicles came into contact with each other. Plaintiff did not request an ambulance and was not treated at a hospital emergency room.

In her bill of particulars, the plaintiff claims that as a result of the accident, she injured her right shoulder, right knee, neck and back. Plaintiff underwent arthroscopic surgery for the injuries to her right shoulder on May 21, 2019. At the time of the

accident, the plaintiff was 64 years old. At her deposition, she testified that she only missed “a couple of days” from work as a school bus driver [Doc 20].

The defendants move for summary judgment dismissing the complaint. They contend that the plaintiff did not sustain a “serious injury” as defined by Insurance Law § 5102(d).

In support of the motion, the defendants submit an attorney’s affirmation, copies of the pleadings, the plaintiff’s bill of particulars, the plaintiff’s deposition transcript, an affirmation from Dr. Arnold Berman, an orthopedic surgeon, who examined the plaintiff on behalf of the defendants, and an affirmation from Dr. Scott Coyne, a radiologist, who reviewed the MRIs of the plaintiff’s right shoulder, right knee, cervical spine, and lumbosacral spine.

Dr. Berman examined the plaintiff on August 27, 2020, approximately eighteen months after the accident, and tested the range of motion in the plaintiff’s cervical and lumbar spine, right and left knees and left shoulder, and reported completely normal results. However, he also tested the range of motion in the plaintiff’s right shoulder, and his findings are not normal. He notes that plaintiff’s forward flexion was 160 degrees when normal is 180 degrees, and plaintiff’s abduction was 160 degrees when normal is 180 degrees. Dr. Berman reported that all other ranges of motion in the plaintiff’s right shoulder were normal. In his report, he lists the documents and medical records that he reviewed and, in some instances, he incorporates portions of the results of those tests into his report. He notes that the plaintiff had surgery to her right shoulder. He states that the MRI of her right knee shows multiple tears, as well as a subchondral fracture. He notes that the MRI of the plaintiff’s right shoulder shows multiple tears and that the

MRIs of the plaintiff's cervical and lumbar spine show multiple herniated and bulging discs.

Dr. Berman's report fails to address many of the plaintiff's claimed injuries. Regarding the plaintiff's right shoulder, he opines that the plaintiff sustained a "[r]ight shoulder strain/sprain, contusion by history resolved with no residuals, pre-existing complete tear on MRI 03/14/19 of the rotator cuff. There was a retraction of rotator cuff 3 months after the accident. This indicates it is a pre-existing injury." He opines that the rotator cuff tear was pre-existing, although the MRI was taken after the accident. He fails to mention or opine on the tears to the supra and infraspinatus tendons, the partial tear of the sub scapularis tendon, the SLAP tear, the tear to the inferior labrum, or the arthroscopic surgery that the plaintiff had to her shoulder.

Regarding the plaintiff's right knee, Dr. Berman opined that plaintiff sustained a "[r]ight knee strain/sprain, contusion resolved with no residuals. There are MRI findings of chondromalacia and osteochondral defect and cystic type revised tears and ligament tears that indicate pre-existing disease. This low speed single motor vehicle accident could not have caused these MRI findings." The court notes, however, that Dr. Berman only had the police accident report and did not review any deposition testimony about how the accident occurred. As such, his conclusions regarding the speed of the vehicles and how the impact occurred are nothing more than speculation. Moreover, although he addresses the fracture, the chondromalacia, the ligament tears, the tear of the posterior horn of the medial meniscus, and the popliteal cyst, he fails to address the "complete tear of the anterior horn and body of the lateral meniscus" or the "thin linear tear of the inferior articular surface of the posterior horn of the lateral meniscus."

Regarding the plaintiff's claimed injuries to her cervical, thoracic, and lumbar spine, Dr. Berman opines that the plaintiff sustained "[c]ervical, thoracic and lumbar spine strain/sprain resolved with no residuals and no aggravation to pre-existing to the MRI findings of multilevel disc bulging from C2 to C7 and from L2 to S1. This could not have been caused by a single low speed motor vehicle accident. There were no objective findings and no radiculopathy on exam and no clinical correlation between the MRI findings and the normal exam." Again, as there's no indication that Dr. Berman reviewed anything other than the police accident report, he has no knowledge of how the accident occurred and his opinion that the injuries that the plaintiff is claiming to her cervical and lumbar spine could not have been caused by the subject accident is purely conjecture.

Finally, the court notes that Dr. Berman fails to address or explain the deficits that he noted in the plaintiff's range of motion in her right shoulder, despite his claim at the end of his report that the plaintiff's injuries are "now resolved with no clinical residuals" and that "[t]here were no objective findings on examination."

The defendants' radiologist, Dr. Coyne, did not examine the plaintiff. He reviewed the plaintiff's MRI films and concluded that "[t]he cervical spine and lumbosacral spine MRI examinations demonstrate degenerative disc and facet joint changes, which are focally advanced at specific levels," and opines that "[t]he degree of degeneration is typically encountered in patients of this age." With regard to the right shoulder, Dr. Coyne opines that "[t]he right shoulder MRI demonstrates degenerative changes of the glenohumeral joint, glenoid cartilaginous labrum, acromioclavicular joint with subacromial impingement, and very old, chronic full thickness tears with complete absence of the distal segments of the supraspinatus and infraspinatus muscles and

residual atrophy of the remaining musculature. Superior migration of the humeral head with extensive surface irregularity of the humeral head is also present, resulting from the long-standing absence of the supraspinatus and infraspinatus tendons. There is subscapularis and biceps tendinosis.” He also states that “[t]here is no evidence of acute rotator cuff or other muscle/tendon tear.”

Regarding the MRI of the plaintiff’s right knee, Dr. Coyne opines that “[t]he right knee demonstrates advanced tricompartmental degenerative osteoarthritic changes, severe degenerative change of the medial and lateral menisci, with nearly complete absence of the lateral meniscus, degenerative change of the anterior cruciate ligament and lateral collateral ligamentous complex, and small chronic effusion and large Baker’s cyst.” Although he opines that “[t]here is no evidence of traumatic tear or other acute medial or lateral meniscus pathology,” that “[t]he medial and lateral collateral ligamentous complexes and patellar retinacula are intact,” and that [t]here is no evidence of acute cruciate ligament tear or other trauma”, Dr. Coyne fails to address the plaintiff’s claim of a subchondral fracture in the right knee. The court also notes that Dr. Coyne’s findings contradict the findings from the plaintiff’s radiologist, which Dr. Berman recites and incorporates into his report.

With regard to the 90/180-day category of injury, as previously indicated, the plaintiff’s bill of particulars and her deposition testimony are clear that she missed only a few days from her job at a school bus driver. The defendants have made a *prima facie* case with regard to the 90/180 category of injury.

However, the court finds that defendants have not 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 Eyley*, 79 NY2d 955, 956-957 [1992]). While plaintiff’s testimony that

she missed only a few days from work after the accident makes a prima facie showing on the 90/180-day category of injury (see *Dacosta v Gibbs*, 139 AD3d 487, 488 [1st Dept 2016] [“Plaintiff’s testimony indicating that she missed less than 90 days of work in the 180 days immediately following the accident and otherwise worked “light duty” is fatal to her 90/180–day claim”]; *Strenk v Rodas*, 111 AD3d 920 [2d Dept 2013] [plaintiff returned to work on a partial basis during the relevant period of time]; *Hamilton v Rouse*, 46 AD3d 514, 516 [2d Dept 2007] [“The plaintiff testified at trial that he missed only one month of work, that he then returned to work on a part-time basis, and that, after another month, he had resumed working on a full-time basis”]), defendants have not made a prima facie case with regard to the other applicable categories of injury.

The court finds that the IME report of Dr. Berman, which finds significant limitations in plaintiff’s range of motion in her right shoulder, but opines that the injury is “resolved with no residuals”, as well as his opinions that the injuries that the plaintiff claims were caused by the accident to her cervical and lumbar spine and right knee could not have been caused by the subject accident, are conclusory in nature and are insufficient to establish that the plaintiff did not sustain a serious injury as defined in Insurance Law § 5102(d).

When a defendant has failed to make a prima facie case with regard to all of the plaintiff’s claimed injuries and all of the applicable categories of injury, the motion must be denied, and it is unnecessary to consider the papers submitted by plaintiff in opposition (see *Yampolskiy v Baron*, 150 AD3d 795 [2d Dept 2017]; *Valerio v Terrific Yellow Taxi Corp.*, 149 AD3d 1140 [2d Dept 2017]; *Koutsoumbis v Paciocco*, 149 AD3d 1055 [2d Dept 2017]; *Aharonoff-Arakanchi v Maselli*, 149 AD3d 890 [2d Dept 2017]; *Lara v Nelson*, 148 AD3d 1128 [2d Dept 2017]; *Sanon v Johnson*, 148 AD3d 949 [2d

Dept 2017]; *Weisberg v James*, 146 AD3d 920 [2d Dept 2017]; *Marte v Gregory*, 146 AD3d 874 [2d Dept 2017]; *Goeringer v Turrisi*, 146 AD3d 754 [2d Dept 2017]; *Che Hong Kim v Kossoff*, 90 AD3d 969 [2d Dept 2011]).

Even if defendants had met their prima facie burden for summary judgment, plaintiff would have been found to have overcome the motion, as there are triable issues of fact raised by his submissions in opposition to the motion. Specifically, there are issues of fact raised by plaintiff's doctor's affirmations, which create a "battle of the experts" sufficient to overcome the motion. For example, Dr. Pearl [Doc 35] provides range of motion testing data for a date two weeks after the accident, which indicates her range of motion in her right knee and right shoulder were severely limited. He opines "it is determined to a reasonable degree of medical certainty that the patient sustained the above diagnosed right knee and right shoulder injuries as a result of the motor vehicle accident of 2/22/2019. . . . The patient's right knee injury and symptomatology are consistent with a severe frontal impact of her vehicle, causing her body and right knee to abruptly and forcefully be thrust forward and into the dashboard, exerting blunt trauma and stress on the right knee. Moreover, the patient had not injured her right knee prior to the accident of 2/22/2019, and she did not have right knee pain prior to the accident. If the tears and fracture pre-existed the accident, she would have experienced pain symptoms and restrictions in the right knee prior to the accident, but the patient had not had pain in the right knee and was asymptomatic prior to the accident. It is, therefore, determined to a reasonable degree of medical certainty that the above-diagnosed tears and fracture with fluid accumulation of the right knee are directly causally related to the accident of 2/22/2019. . . . Similarly, the patient, who was asymptomatic in the right shoulder and had no prior history of right shoulder injury,

began experiencing right shoulder pain. MRIs soon after the accident revealed the above-diagnosed tears. The MRI report did not note that the tears were in a degenerative condition. The patient's right shoulder injury and symptomatology are consistent with a severe frontal impact of her vehicle, causing her body and right knee to abruptly and forcefully be thrust forward and backward while holding the steering wheel, and injuring her right shoulder joint. Moreover, the patient had not injured her right shoulder prior to the accident of 2/22/2019, and she did not have right shoulder pain prior to the accident. If the tears pre-existed the accident, she would have experienced pain symptoms and restrictions in the right shoulder prior to the accident, but the patient had not had pain in the right shoulder and was asymptomatic prior to the accident. It is, therefore, determined to a reasonable degree of medical certainty that the above-diagnosed tears with joint and bursal effusion of the right shoulder are directly causally related to the accident of 2/22/2019."

Accordingly, it is

**ORDERED** that the defendants' motion is denied.

This constitutes the decision and order of the court.

Dated: June 30, 2022

ENTER :



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Hon. Debra Silber, J.S.C.