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

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KIMIESHA MCCAULE,

Plaintiff,

-against-

THE NEW YORK CITY BOARD OF EDUCATION, THE CITY OF NEW YORK, JOFAZ TRANSPORTATION, INC., PRESNEL CAMILUS, MAC TRAILER LEASING, INC., and "JOHN DOE,"

Defendants.

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DECISION / ORDER

Index No. 523452/2019
Motion Seq. No. 4, 5
Date Submitted: 11/17/22

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendant MAC Trailer Leasing, Inc.'s motion and the remaining defendants' motion for summary judgment.

Papers	**NYSCEF Doc.**
Notices of Motion, Affirmations and Exhibits Annexed.....	64-78; 79-87
Affirmation in Opposition and Exhibits Annexed.....	89-96; 97-104
Reply Affirmation.....	113

Upon the foregoing cited papers, the Decision/Order on these motions is as follows:

This is a personal injury action which arises from a motor vehicle accident which took place on May 21, 2019, when the plaintiff was a passenger on a school bus (hereinafter the "school bus defendants") which was driving on Flatbush Avenue in Brooklyn, NY, when it was hit by a truck owned by defendant MAC Trailer Leasing, Inc. (hereinafter "MAC") and driven by defendant John Doe. Plaintiff was accompanying her son's class on a trip, which is why she was on the school bus. Plaintiff was taken by ambulance from the scene to the emergency room at Methodist Hospital, then went to a doctor a few days later. At the time of the accident, plaintiff was approximately twenty-nine years of age. In her Bill of Particulars, [Doc 69] plaintiff claims that as a result of the accident, she sustained injuries to her cervical, thoracic and lumbar spine and to both shoulders and both knees. In addition, she claims that

to "the extent defendants claim that any injuries sustained by the plaintiff were caused by pre-existing conditions, the Plaintiff alleges that any so claimed pre-existing conditions were latent, inactive and dormant and were exacerbated and activated by the acts and omissions of the defendants giving rise to the accident and injuries as set forth herein."

Defendants MAC and John Doe contend in their motion (Seq. #4) and the school bus defendants contend in their motion (Seq. #5) that they are entitled to summary judgment dismissing the complaint as plaintiff did not sustain a serious injury as a result of the accident, as defined by Insurance Law § 5102(d). Defendants MAC and John Doe support their motion with an attorney's affirmation, the pleadings, plaintiff's bill of particulars, plaintiff's 50-h hearing transcript and her deposition transcript, and an affirmed IME report from an orthopedist. The school bus defendants do not submit any additional evidence, simply filing copies of the papers filed in Motion Seq. #4, so their motion is what is known as a "me too" motion.

Dr. Andrew Bazos, an orthopedist, examined plaintiff on May 6, 2021, on behalf of the defendants. This was two years after the accident. Dr. Bazos' affirmed report is entirely inadequate and troubling. First, he summarizes the medical records he reviewed, then he states that he used a goniometer and the "normals" listed in the AMA Guidelines 6th Edition to measure plaintiff's range of motion.

The entire description of the doctor's cervical exam is as follows: "Cervical spine exam showed completely normal flexion of 45 degrees and extension of 45 degrees. There was normal left and right rotation of 70 degrees respectively. There was no paraspinal tenderness or spasm noted. There was no midline bony tenderness or trapezial tenderness noted. The cervical spine demonstrated a normal lordotic curve." There is no description of rotation or lateral bending testing. The numbers he lists as "normal" are not, in fact, the correct numbers for cervical range of motion. Generally, experts use the AMA Guidelines,

5th Edition. The 6th Edition, which the court does not have, is unlikely to be so significantly different than the 5th. The doctor described his exam of the plaintiff's lumbar spine: "The thoracolumbar spine demonstrated normal flexion to 90 degrees. Extension was also normal at 30 degrees. There was no paraspinal tenderness or spasm noted and the lumbar spine demonstrated normal alignment. Likewise, there was no midline bony tenderness. The claimant was able to heel and toe walk without difficulty. A mini squat was also performed without difficulty. Straight leg raise was negative on both sides at 90 degrees." There is no mention of left or right lateral flexion. He did not test the range of motion of plaintiff's thoracic spine.

In describing his testing of the plaintiff's shoulders, Dr. Bazos' description is "[b]oth shoulders demonstrated normal forward elevation of 180 degrees and abduction of 180 degrees. Internal rotation was normal bilaterally at 50 degrees and external rotation was normal bilaterally at 45 degrees. There was no apprehension or impingement noted in either shoulder. There was no discrete acromioclavicular tenderness or biceps groove tenderness and O'Brien's test was negative bilaterally." The problem with this description is that the doctor does not indicate the values for the normal range of motion. The "normal" for internal rotation should be 80 degrees, although the New York State Worker's Compensation Guidelines for Determining Impairment (2017) say normal is 70 degrees, and for external rotation it should be 90 degrees, not 45.

Dr. Bazos did not test the range of motion in plaintiff's knees. For some reason, he tested her elbows, wrists and hands. He concludes his report by stating "The claimant sustained nothing more than minor, self-limited, soft tissue sprain/strain injuries to the cervical spine and lumbar spine. In fact, any other proposed injury the claimant may have sustained is based solely on her subjective complaints and history alone due to the lack of

any accident-related objective findings. These injuries resolved completely within just a few weeks with conservative management, thereby returning the claimant to her pre-accident status of musculoskeletal health and without the need for any additional medical treatment. The claimant is left with no disability or limitations in performing her normal daily activities."

Document 72 appears to be prints of films of some sort, which are entirely illegible. Document 73 in defendants' motion are an assortment of plaintiff's medical records. They are 195 pages of records and include the emergency room records, intake forms, physical therapy records, chiropractic records, acupuncture records, an MRI report [lumbar at page 15, reports a herniation at L4-5], records from New York Spine Specialist regarding epidural steroid injections she received, prescriptions, no-fault records, billing records and correspondence. Many pages are duplicated multiple times. The probative value of these records is not clear to the court. Document 74, also 195 pages, appears to be another copy of Document 73.

Document 75, consisting of 197 pages, also described by movants as "medical records," is more of the same. In this virtual pile of documents, there is an IME report from an acupuncturist, Marina Merson, dated 2/17/20, who states that plaintiff complained of neck and low back pain with radiation to the left leg. In the heading "Casual [sic] Relationship" Ms. Merson states "Based on the history given and the medical data supplied, it is my opinion that the claimant's injuries are causally related to the accident of 05/21/2019." The report is affirmed, but Ms. Merson is not a physician entitled to affirm, and then it is sort of notarized, but there is no jurat. There is a report from Brooklyn Premier Orthopedic Center for Musculoskeletal Disorders [Page 109] dated 7/9/20 which states that plaintiff informed this facility that her "pain is aching, sharp, shooting, throbbing, burning, tight and constant. Worse with bending, prolonged ambulating, sitting and increased mobility. . . . she rates her

pain 10/10." The range of motion testing done that day reports "Forward flexion was 50 (normal 60°). Extension was 15 (normal 25°). Lateral bend to the left 25 (normal 25°). Lateral bend to the right 15 (normal 25°)." Plaintiff was prescribed Flexeril and pain cream. She was prescribed a back brace.

Document 76 is Dr. Bazos' report. Document 77 appears to be the ambulance report. To be clear, defendants have submitted approximately 600 pages of plaintiff's medical records to support their claim that plaintiff did not sustain a serious injury from the accident.

Movants' counsel summarizes plaintiff's claims [Doc 65 ¶7] as follows: "Plaintiff McCaule served Bills of Particulars on May 13, 2020, May 27, 2020, and March 10, 2021 which are collectively annexed hereto as Exhibit D. Plaintiff McCaule alleges a strain/sprain to her cervical spine, lumbar spine, thoracic spine, right shoulder, and bilateral knees with claimed unspecified restrictions in range of motion. She also alleges a disc herniation at L4-5, an unspecified lumbar spine annular tear, an unspecified lumbar spine central dural sac deformation, cervical spine pain, and unspecified spasms in her thoracic spine. Finally, plaintiff alleges interlaminar lumbar epidural steroid injections on December 18 2020 and January 27, 2021."

Movants' counsel concludes that the motion must be granted, as "Dr. Bazos affirmed, under penalty of perjury, that there were no objective findings to confirm any of plaintiff McCaule's subjective complaints, and that she had no disability, limitation, or permanency from an orthopedic standpoint. (See Exhibit "I," page 8 of report)." Counsel concludes that "In tendering evidence that plaintiff McCaule has not satisfied New York's serious injury threshold, MAC has met its initial burden establishing its prima facie entitlement to summary judgment thereby shifting the burden to plaintiff McCaule to produce evidentiary proof in admissible form sufficient to establish issue of fact which would require a trial of this action."

Movants' counsel is not correct. First, if a defendant's expert concedes that the alleged injuries were caused by the accident, the burden of proof does not shift to the plaintiff (see *Novembre v Punnoose*, 211 AD3d 961 [2d Dept 2022]). Here, Ms. Merson states "Based on the history given and the medical data supplied, it is my opinion that the claimant's injuries are causally related to the accident of 05/21/2019."

Second, the court finds that the defendants have failed to make a prima facie case for summary judgment. Without even analyzing the evidence relating to the 90/180 day category of injury, Dr. Bazos' affirmation is insufficient to make a prima facie case with regard to the "permanent consequential limitation of use of a body organ or member" and the "significant limitation of use of a body function or system" categories of injury in Insurance Law §5102(d).

When a defendant has failed to make a prima facie case with regard to all of plaintiff's 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]).

Accordingly, it is **ORDERED** that the motions are both denied.

This constitutes the decision and order of the court.

Dated: March 13, 2023

ENTER:

Hon. Debra Silber, J.S.C.