

**Chavez v Jofaz Transp. Inc.**

2018 NY Slip Op 30096(U)

January 18, 2018

Supreme Court, New York County

Docket Number: 451303/2014

Judge: Paul A. Goetz

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. PAUL A. GOETZ
J.S.C.

PRESENT: \_\_\_\_\_
Justice

PART 22

CHAVEZ, MELANIE

INDEX NO. 451303/2014

MOTION DATE \_\_\_\_\_

JOFAZ

MOTION SEQ. NO. 002

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause -- Affidavits -- Exhibits + 122 No(s) 1 + 2

Answering Affidavits -- Exhibits \_\_\_\_\_ No(s) 3

Replying Affidavits \_\_\_\_\_ No(s) 4

Upon the foregoing papers, it is ordered that this motion is

Defendants Jofaz Transportation, Inc. and Jean Louis's motion on for summary judgment pursuant to CPLR 3212 on the grounds that the injuries allegedly sustained by Plaintiffs Melanie C. and Maria Vera as a result of the September 6, 2012, motor vehicle accident fail to establish serious injury thresholds as defined by Insurance Law 5102 (d) and Co-Defendants Howard, Ruth and Mindy Miller's cross motion for summary judgment on the same grounds are decided as follow:

Plaintiffs' bill of particulars alleges Melanie C. sustained neck and back tenderness and suffers from posttraumatic stress disorder as a result of the accident. Plaintiffs' supplemental bill of particulars alleges Ms. Vera sustained injuries to her cervical and lumbar spine, right shoulder, right hand and wrist; and that she suffers from adjustment disorder mixed with anxiety and depression as a result of the accident.

Plaintiffs aver that their injuries meet the following Insurance Law 5102 (d) criteria: fracture; a permanent loss of use; a permanent consequential limitation; a significant limitation of use, and 90/180-day.

Melanie C.

Regarding Melanie's claim of a psychological impairment, Defendants argue that Melanie only had one psychological consultation and there is no evidence that Melanie received any follow-up psychological treatment or counseling after that initial October 15, 2012, evaluation. In opposition, Plaintiffs rely on the October 15, 2012, psychological evaluation.

Dated: [A] causally-related emotional injury, alone or in combination with a physical injury, can \_\_\_\_\_, J.S.C.

JAN 18 2018

CASE DISPOSED

NON-FINAL DISPOSITION

1. CHECK ONE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER

3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER

DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ  
J.S. Justice

PART 22

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

-v-

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_  
Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ [No(s)] \_\_\_\_\_  
Answering Affidavits — Exhibits \_\_\_\_\_ [No(s)] \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_ [No(s)] \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

constitute a serious injury within the meaning of Insurance Law 5102 [d]" (*Kranis v Biederbeck*, 83 AD3d 903 [2<sup>nd</sup> Dept]; *lv denied* 17 NY3d 709 [2011] [internal quotation marks omitted]) and a showing of Post Traumatic Stress Disorder "nearly two years after the accident" is grounds for finding that a defendant has failed to "make a prima facie showing that plaintiff's alleged causally-related psychological injury did not amount to a serious injury" (*Brandt-Miller v McArdle*, 21 AD3d 1152, 1153 [3d Dept 2005]). Here, there is no admissible evidence of Melanie's psychological condition or that she received any treatment or counseling after the initial evaluation in October, 2012. Plaintiffs do present an affirmation from Dr. Ajendra Sohal who states that he followed Melanie's care with Dr. Rombom and that "[i]t was reported that within the first six months after this accident Melanie had constant nightmares, would not stay in her own bed and suffered an extreme anxiety depression and fear of buses." However, Dr. Sohal's statement as to what was reported to him is "hearsay and therefore may not be relied upon to raise an issue of fact" (*Lee v Rodriguez*, 150 AD3d 481, 482 [1<sup>st</sup> Dept 2017]).

In *Pommells v Perez*, (4 NY3d 566, 574 - 75 [2005]) the Court of Appeals held that a defendants' motion for summary dismissal was properly granted where the defendants raised cessation of treatment and the plaintiff offered no explanation in response as to why he failed to pursue treatment for his injuries. Therefore, there being no evidence presented by Plaintiffs in response to Defendants cessation of treatment argument, that portion Defendants' motion and Co-Defendant's cross motion seeking dismissal of Melanie's post traumatic stress disorder claim must be granted.

Concerning Melanie's claim of serious injury to her neck and back, Defendants met their prima facie burden of establishing that Melanie did not sustain a serious injury to those body parts through the affirmation of their orthopedic surgeon, Dr. Zimmerman dated January 7, 2015, who upon examination

Dated: \_\_\_\_\_, J.S.C.

(297)

MOTION CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. PAUL A. GOETZ  
J.S.C.

PRESENT: \_\_\_\_\_  
Justice

PART 22

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

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Answering Affidavits — Exhibits \_\_\_\_\_ [No(s)] \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_ [No(s)] \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

found normal ranges of motion and negative/normal objective tests for Melanie's cervical and lumbar spine and concluded that Melanie's orthopedic examination was normal and that there is no evidence of injuries those body parts (*Fernandez v Hernandez*, 151 AD3d 581 [1<sup>st</sup> Dept 2017] [holding "[d]efendants made a prima facie showing that plaintiff did not suffer significant or permanent limitations to her lumbar spine or knees as a result of the accident" through orthopedic surgeon's report "who found normal ranges of motion, negative objective test results, and resolved sprains, strains and contusions . . ."] *Cattouse v Smith*, 146 AD3d 670 [1<sup>st</sup> Dept 2017]).

In opposition, Plaintiffs present, inter alia Dr. Sohal's affirmation who states he first saw Melanie on September 27, 2012, when he advised Ms. Vera that he does not treat patients as young as Melanie. Nevertheless, Dr. Sohal states that he "advised Ms. Vera that her daughter should refrain from performing any strenuous activities including gym classes and any heavy lifting during the six months immediately following [the] accident." Dr. Sohal examined Melanie on January 11, 2017, and "found evidence of tenderness and spasm with tenderness in the neck and back . . . [and] paraspinous muscle spasms and tenderness in the cervical and lumbar spine." Plaintiffs also submit uncertified hospital records for Melanie, however, since these records are not in admissible form they are of no probative value (CPLR 2306). In any event, again there being no evidence presented by Plaintiffs that Melanie received treatment for her alleged injuries to her cervical and lumbar spine after her initial emergency room visit, that portion of Defendants' motion and Co-Defendants' cross motion seeking dismissal of Melanie's claims of serious injuries to those body parts must be granted. (*Pommells*, 4 NY3d at 574-75).

Defendants failed to meet their prima facie burden as to Melanie's 90/180-day claim. In support of their argument that Melanie's 90/180-day claim should be dismissed, Defendants submit two pieces of

Dated: \_\_\_\_\_ (397) \_\_\_\_\_, J.S.C.

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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ  
J.S.C.  
Justice

PART 22

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

-v-

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Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

evidence that are of no probative value. First, Defendants submit Melanie's deposition transcript taken in October 2014 when she was seven years old. Because the Court did not make a determination of the infant's Plaintiff's competency to testify, her deposition is deemed unsworn and may not be used affirmatively as direct evidence (*Carrasquillo v City of New York*, 22 Misc 3d 171 [SC Kings Co 2008]). Defendants next submit a New York City Public School Historical Profile Report purportedly documenting Melanie's attendance for 2012. However, this school record is not certified and there is no affidavit laying a foundation for its submission as evidence and therefore, it is of no probative value (CPLR 4540 [a]; *Dowtin v Cohen*, 99-CV-323, 2005 US Dist LEXIS 4731 [USDC EDNY.2005]). Consequently, that portion of Defendants' motion and Co-Defendants' cross motion seeking dismissal of Melanie's 90/180-day claim must be denied.

Ms. Vera

Defendants met their prima facie burden of establishing that Ms. Vera's injuries to her cervical and lumbar spine were not caused by the September 6, 2012, accident by submitting her deposition testimony that she injured those body parts in an accident in August, 2012 (*Silverman v MTA Bus Co.*, 101 AD3d 515 [1<sup>st</sup> Dept 2012]; *Brewster v FTM Servo, Corp.*, 44 AD3d 351 [1<sup>st</sup> Dept 2007]). In opposition, Plaintiffs submit, inter alia, the affirmation and affirmed medical records of Ms. Vera's treating physician, Dr. Ajendra Sohal. Dr. Sohal's initial report dated September 27, 2012, indicates under "Past Medical History: Another motor vehicle accident." In his January 17, 2017, affirmation Dr. Sohal states "Ms. Vera presented a history of motor vehicle accident occurring on September 6, 2012 [the date of the accident at issue in this case]." Neither of the affirmed reports of Ms. Vera's two other treating doctors, Dr. Kevin E. Wright (orthopedic surgeon) and Dr. Laxmidhar Diwan (sports medicine,

Dated: \_\_\_\_\_, J.S.C.

(4197)

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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ  
J.S.C.  
*Justice*

22  
PART \_\_\_\_\_

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

-v-

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Answering Affidavits — Exhibits \_\_\_\_\_ No(s). \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_ No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

orthopedic surgeon) mention Ms. Vera's August, 2012 accident. Dr. Sohal fails to adequately address causation because he does not state whether Ms. Vera recovered from the August, 2012 accident and was asymptomatic before the September 6, 2012 accident (*Accord Silverman*, 101 AD3d at 516). Therefore, that portion of Defendants' motion and Co-Defendants' cross motion seeking dismissal of Ms. Vera's claims of serious injury to her cervical and lumbar spine must be granted.

Defendants also met their prima facie burden that Ms. Vera did not sustain a serious injury to her right shoulder and right hand/wrist through the affirmation of their orthopedic surgeon, Dr. Alan J. Zimmerman dated February 11, 2015, who upon examination found normal ranges of motion and negative objective tests for those body parts (*Fernandez*, 151 AD3d at 581; *Cattouse*, 146 AD3d at 670). In opposition Plaintiffs submit, inter alia, Dr. Sohal's affirmation dated January 17, 2017, wherein he states that Ms. Vera has a 50% reduction in one movement and a 16.6% reduction in two other right shoulder movements. Dr. Sohal further states that he has reviewed the MRI report of Ms. Vera's right shoulder and the reports of Dr. Diwan and Dr. Wright and he concludes that the September 6, 2012, accident was the cause of the right shoulder partial tear of Ms. Vera's distal supraspinatus tendon, joint space narrowing and joint effusion. Dr. Sohal's findings of limitation in ranges of motion and other objective indications of injury to Ms. Vera's right shoulder and his opinion that the September 6, 2012 accident caused Ms. Vera's injury to her right shoulder is sufficient to raise a triable issue of fact as to whether the September 6, 2012, accident caused a serious injury to her right shoulder (*Encarnacion v Castillo*, 146 AD3d 600 [1<sup>st</sup> Dept 2017]; *DaCosta v Gibbs*, 139 Ad3d 487 [1<sup>st</sup> Dept 2016]). Therefore, that portion of Defendants' motion and Co-Defendants' cross motion seeking dismissal of Ms. Vera's claim of serious injury to her right shoulder must be denied.

Dated: \_\_\_\_\_ (597) \_\_\_\_\_, J.S.C.

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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ  
J.S.C.  
*Justice*

PART 22

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

-v-

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Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

Concerning Ms. Vera's claim of a psychological impairment, again there is no evidence of her psychological condition or that she received any treatment or counseling after her initial evaluation in October, 2012. Therefore, because there is no evidence presented by Plaintiffs in response to Defendants' cessation of treatment argument, that portion of Defendants' motion and Co-Defendants' cross motion seeking dismissal of Ms. Vera's claim that she suffers from adjustment disorder mixed with anxiety and depression as a result of the accident must be granted (*Pommells*, 4 NY3d at 574 - 75).

Finally, Defendants make a prima facie showing on Ms. Vera's 90/180-day claim by relying on her deposition testimony that after the September 6, 2012, accident she would have her friends help her with household chores (*Cf Russell v Mitchell*, 59 AD3d 355 [1st Dept 2009]). Plaintiff's affidavit stating that Dr. Sohail instructed her not to perform any household chores for six months, does not create an issue of fact (*McCree v Sam Trans. Corp.*, 82 AD3d 601 [1st Dept 2011]). Therefore, that portion of Defendants' motion and Co-Defendants' cross motion seeking dismissal of Ms. Vera's 90/180-day claim must be granted.

Plaintiffs opposition did not argue that Ms. Vera's injuries fall within the fracture and permanent loss of use categories of Insurance Law 5102 (d). Therefore, Ms. Vera's claims under those categories are deemed abandoned and she may proceed under the permanent consequential limitation and significant limitation of use categories for her alleged injuries to her right shoulder.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: \_\_\_\_\_ (697) \_\_\_\_\_, J.S.C.

1. CHECK ONE:  CASE DISPOSED  NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
3. CHECK IF APPROPRIATE:  SETTLE ORDER  SUBMIT ORDER
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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ  
J.S.C.  
*Justice*

PART 22

Index Number : 451303/2014  
CHAVEZ, MELANIE  
vs.  
JOFAZ TRANSPORTATION, INC.  
SEQUENCE NUMBER : 002  
SUMMARY JUDGMENT



INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

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Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

Accordingly, based on the foregoing it is hereby

**ORDERED** that Defendants' motion and Co-Defendants' cross motion seeking summary judgment on and dismissal of Melanie's claims of serious injury to her neck and back and her claim of post traumatic stress disorder are GRANTED and those claims are DISMISSED; and it is further

**ORDERED** that Defendants' motion and Co-Defendants' cross motion seeking summary judgment on and dismissal of Melanie's 90/180-day claim are DENIED; and it is further

**ORDERED** that Defendants' motion and Co-Defendants' cross motion seeking summary judgment on and dismissal of Ms. Vera's claims of serious injury to her cervical and lumbar spine, right hand/wrist, and her claims of adjustment disorder and 90/180-day are GRANTED and those claims are DISMISSED; and it is further

**ORDERED** that Defendants' motion and Co-Defendants' cross motion seeking summary judgment on and dismissal of Ms. Vera's claim of serious injury to her right shoulder are DENIED and Ms. Vera may proceed with her claim of serious injury to her right shoulder under the permanent consequential limitation and significant limitation of use categories; and it is further

**ORDERED** that the parties are directed to appear for a settlement conference in Part 22 at 80 Centre Street, Room 136 on February 27, at 9:30 AM.

This constitutes the Decision and Order of the Court.

Dated: 1/18/18

(797)

[Signature], J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

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