

**Ruiz v Jarrett**

2013 NY Slip Op 33789(U)

July 9, 2013

Supreme Court, Bronx County

Docket Number: 305559/2008

Judge: Lucindo Suarez

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: I.A.S. PART 19

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VICTOR M. RUIZ and LUIS A. REYES,

Plaintiffs,

DECISION AND ORDER

Index No. 305559/2008

- against -

LLOYD F. JARRETT,

Defendant.

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PRESENT: Hon. Lucindo Suarez

Upon defendant's notice of motion dated May 3, 2013 and the affirmation, affirmed reports and exhibits submitted in support thereof; plaintiff's affirmation in opposition dated June 26, 2013 and the affirmation annexed thereto; the stipulation of the parties dated July 3, 2013; defendant's reply affirmation dated July 3, 2013; and due deliberation; the court finds:

The court *sua sponte* recalls and vacates its decision dated July 3, 2013 and substitutes the following decision therefor to reflect that, prior to the decision having been rendered, the parties had agreed that defendant Lloyd F. Jarrett may submit opposition up to July 10, 2013. The motion was submitted on July 2, 2013, and the parties' stipulation was dated July 3, 2013.

Plaintiff Luis A. Reyes commenced this action to recover damages for personal injuries sustained in a motor vehicle accident that occurred on July 26, 2006. Defendant now moves pursuant to CPLR 3212 for summary judgment on the ground that plaintiff did not sustain a "serious injury," as the phrase is defined in Insurance Law § 5102.<sup>1</sup> Plaintiff alleges he sustained injuries to his left knee requiring surgical intervention, a bulging disc at L4-L5 and a herniated disc at L5-S1. Plaintiff claims he suffered a permanent consequential limitation of use of a body organ or member; a significant

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<sup>1</sup> Defendant informs the court that the action by plaintiff Victor M. Ruiz has settled.

limitation of use of a body function or system; and a medically 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 ("90/180").

In support of the motion, defendant proffers the affirmed reports of orthopedic surgeon Martin Barschi, M.D., neurologist Daniel J. Feuer, M.D. and radiologist Lewis Rothman, M.D. along with plaintiff's medical records. Dr. Barschi evaluated plaintiff on September 15, 2010 and reported observing normal ranges of motion of the cervical and lumbosacral spine and left knee. Additional objective tests administered yielded negative results. He opined that plaintiff's soft tissue injuries had resolved. Dr. Feuer performed a normal neurological examination of plaintiff on December 2, 2010, finding normal ranges of motion of the cervical and lumbar spine and negative results on all tests administered. Dr. Rothman interpreted the MRI taken of plaintiff's left knee on December 17, 2010 and observed a small cystic structure at the posterior roof of the medial meniscus but no evidence of a ligamentous tear, meniscal tear, or posttraumatic abnormality. Plaintiff treated with Medalliance Medical Health Services after the accident. In an examination performed January 17, 2007, orthopedic surgeon Randall Ehrlich, M.D. found a full range of motion of the left knee and negative results from all additional tests. He reported "Impression: Currently resolved knee injuries." A report of the left knee MRI performed September 19, 2006 indicated small joint effusion but no evidence of a tear of the medial or lateral menisci. A report of the left knee MRI performed December 17, 2010 read that there were "[n]o conclusive features of meniscal tear," among other findings.

Plaintiff testified that he stopped attending therapy in January 2007 and did not seek any further treatment until 2010 or 2011 when he began experiencing pain in the left knee. He then treated with Dr. Ehrlich, who performed knee surgery in 2011.

Defendant has demonstrated that plaintiff did not sustain a serious injury within the meaning of the Insurance Law. Defendant's experts reported observing full ranges of motion in all affected areas. *See Levinson v. Mollah*, 105 A.D.3d 644, 963 N.Y.S.2d 653 (1st Dep't 2013); *Haniff v. Khan*, 101 A.D.3d 643, 958 N.Y.S.2d 89 (1st Dep't 2012). Dismissal of the 90/180 claim is also warranted since plaintiff alleged in his bill of particulars that he was disabled for less than the statutory period. *See Abreu v. NYLL Mgt. Ltd.*, 2013 NY Slip Op 4445 (App. Div. 1st Dep't June 13, 2013); *Haniff v. Khan, supra*.

Plaintiff in opposition submits an affirmation and records from Dr. Ehrlich. Dr. Ehrlich began treating plaintiff in November 2006 and noted observing a limited range of motion of the left knee. He suspected that plaintiff sustained chondral damage and a patellofemoral contusion causally related to the accident and administered a corticosteroid injection. He diagnosed plaintiff's left knee injury as resolved in January 2007, although he suspected that plaintiff would require future treatment for a possible chondral injury. He examined plaintiff again on June 29, 2011 and observed an antalgic gait and a diminished range of motion of the knee. He suspected plaintiff suffered a symptomatic chondral injury which would not be readily apparent on a routine MRI study and recommended arthroscopic surgery. Dr. Ehrlich's post-operative report confirmed findings of an anterior horn flap tear of the medial meniscus; a posterior horn complex tear of the lateral meniscus; a Grade 2 chondral injury of the trochlea; a Grade 4 chondral injury of the inferior medial and lateral patellar facets; multiple small chondral loose bodies; anterior interval contracture; and tricompartmental reactive villous hypertrophic synovitis. Plaintiff exhibited range of motion limitations in an examination five weeks after surgery and again in a more recent examination performed June 5, 2013. Dr. Ehrlich opined that plaintiff's left knee injury was permanent and causally related to the motor vehicle accident in 2006. Viewing the evidence in a light most favorable to plaintiff, *see Cruz v. Rivera*, 94 A.D.3d 576, 942 N.Y.S.2d 91 (1st Dep't 2012), the submissions are sufficient to raise a triable issue of fact that plaintiff sustained a

serious injury to his left knee. *See Abreu v. NYLL Mgt. Ltd., supra; Venegas v. Parmjit Singh*, 103 A.D.3d 562, 962 N.Y.S.2d 67 (1st Dep't 2013). Although plaintiff presented no medical evidence of a serious injury to his spine, he is entitled to recover damages for all injuries causally related to the accident. *See Lugo v. Adom Rental Transp., Inc.*, 102 A.D.3d 444, 958 N.Y.S.2d 99 (1st Dep't 2013). Plaintiff submits no evidence addressing his 90/180 claim.

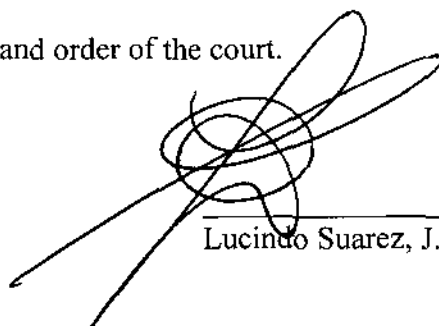
Accordingly, it is

ORDERED, that defendant's motion seeking summary judgment dismissing the complaint of plaintiff Luis A. Reyes is granted to the extent of dismissing his serious injury claim in the category of "a medically 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": and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of defendant Lloyd A. Jarrett dismissing the serious injury claim of plaintiff Luis A. Reyes in the category of "a medically 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."

This constitutes the decision and order of the court.

Dated: July 9, 2013



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Lucindo Suarez, J.S.C.