

**Rivera v American United Transp. Inc.**

2013 NY Slip Op 33803(U)

July 1, 2013

Supreme Court, Bronx County

Docket Number: 308666/10

Judge: Mitchell J. Danziger

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: PART IA-2

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WILFREDO RIVERA,

Plaintiff,

DECISION and ORDER  
Index No. 308666/10

-against-

Present: Hon. Mitchell Danziger  
AJSC

AMERICAN UNITED TRANSPORTATION INC.,  
and RAFAEL SORIANO-ROSARIO LUIS,

Defendants.

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Recitation, as required by CPLR §2219(a), of the papers considered in reviewing the underlying motion for summary judgment:

Notice of Motion and annexed Exhibits and Affirmations.....	1
Memo of Law.....	2
Affirmation in Opposition .....	3
Reply Affirmation.....	4

Plaintiff Wilfredo Rivera commenced this action alleging that he sustained serious injuries as a result of an automobile accident caused by the defendants' negligence on June 6, 2010. Plaintiff claims that the defendants' taxi struck the plaintiff's bicycle.

Defendants move for summary judgment pursuant to CPLR 3212 on the ground that the plaintiff did not sustain serious injuries within the meaning of Insurance Law 5102(d).

The defendants offer as proof of the absence of serious injury to plaintiff, Wilfredo Rivera the medical affirmation of Dr. Lisa Nason, an orthopedist. Dr. Nason conducted an orthopedic examination of the plaintiff on January 23, 2012. Dr. Nason's report lists the plaintiff's claimed injuries as including the following: "The claimant alleges that he injured his neck, lower back,

bilateral knees and left ankle..." The doctor's report states as follows: "He sustained a left knee fracture." Range of motion testing of the cervical and lumbar spine, bilateral knees and left foot/ankle revealed normal ranges. The doctor's report states that "there is no evidence of residuals or permanency."

In support of the motion the defendants also submit a medical affirmation from Dr. Jean-Robert Desrouleaux, neurologist. Dr. Desrouleaux performed a neurological examination of the plaintiff on January 23, 2012. The doctor's report contains the following history: "He sustained a laceration to the bridge of the nose and received 6 sutures as well as lacerations to the forehead and bilateral knees. The claimant was transported by ambulance and treated at St Barnabas Hospital and discharged. He sustained a left knee fracture." Range of motion testing of plaintiff's cervical and lumbosacral spine revealed normal ranges of motion. Dr. Desrouleaux's report concluded that the plaintiff's injuries to his cervical and lumbar spines were resolved.

The moving papers contains an MRI report on plaintiff's left knee taken on June 29, 2010 which indicates as follows: "Bony contusion/microfracture of the anteromedial and anterolateral femoral condyle..."

In support of the motion the defendants submit an affirmed report by Dr. A. Robert Tantleff, a radiologist. Dr. Tantleff reviewed the MRI of plaintiff's left knee and concluded as follows: "There is no evidence of osseous fracture or dislocation." Dr. Tantleff also reviewed the MRI of plaintiff's lumbar spine dated June 29, 2010 and concluded as follows: "Based on the images as submitted, age related and age consistent degenerative changes of the lumbar spine most pronounced at L3-4. The findings denoted are of no definitive clinical significance and have no correlation to the current date of incident."

In opposition, plaintiff submits an Affirmation from treating physician Dr. Nagaveni Rao. Dr. Rao's report states as follows: "Based upon the objective examination and my review of the MRI report, my diagnostic impression was as follows: MRI confirmed indication of a meniscal tear and fracture..." Further, "On June 29, 2010, an MRI of the lumbar spine was performed. I have reviewed these MRI films which revealed a disc bulge...at L3-4." The doctor's initial examination of the plaintiff took place on June 28, 2010 which revealed restricted ranges of motion in plaintiff's lumbar spine. Further, a follow-up examination of plaintiff's lumbar spine on August 22, 2012 showed continued restrictions. Dr. Rao's impression was that the plaintiff sustained a "fracture and partial permanent restriction of motion of the left knee and partial permanent restriction of the lumbar spine." Further, the aforesaid injuries are causally related to the accident in question.

In opposition, plaintiff submits an affirmed report by Dr. Satish Chandra which states as follows: "I read the following MRI of the plaintiff, Wilfredo Rivera's left knee dated June 29, 2010." The doctor's impression was as follows: "Bony contusion/microfracture of the anteromedial femoral condyle..." Further, Dr. Chandra's report stated as follows: "I have reviewed the affirmed report of defendants' radiologist, A. Robert Tantleff, M.D., dated August 24, 2011 and I disagree with the findings set forth therein."

#### DISCUSSION

The proponent of a motion for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." (*JMD Holding Corp v Congress Financial Corporation*, 4 NY 3d 373 [2005], quoting *Alvarez v Prospect Hospital*, 68 NY 2d 320

[1986]; *Lesane v Tejada*, 15 AD 3d 358 [2<sup>nd</sup> Dept 2005].) In the present action, the burden rests on the defendants to establish, by the submission of evidentiary proof in admissible form, that the plaintiff did not suffer a serious injury as a result of the accident. The burden thereafter shifts to the plaintiff to demonstrate the existence of a triable issue of fact. (*Seminara v Grossman*, 253 AD 2d 420 [2d Dept 1998].)

The Court of Appeals emphasized in *Pommells v Perez* that litigation can be commenced against a car owner or driver for damages caused by an accident only in the event of serious injury. (*Pommells v Perez*, 4 NY 3d 566 [2005]; Insurance Law §5104[a].) Insurance Law § 5102(d) defines serious injury as:

a personal injury which results in.....permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a nonpermanent 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 90 days during the 180 days immediately following the occurrence of the injury or impairment.

A claim of serious injury can be substantiated by an expert's designation of a numeric percentage of a plaintiff's loss of range of motion. (*Toure v Avis Rent A Car Systems, Inc.*, 98 NY 2d 345 [2002].) In the case of *Lopez v Senatore* (65 NY 2d 1017 [1985]), the Court held that where a treating physician, in an affidavit supported by exhibits, set forth the injuries and course of

treatment, identified a limitation of movement of the neck of only 10 degrees to the right or left, and on that predicate expressed the opinion that there was a significant limitation of use of a described body function or system, such evidence was sufficient for the denial of summary judgment.

A bulging or herniated disc may constitute serious injury if objective evidence exists as to the extent of the alleged physical limitation resulting from the disc injury and its duration. (*Espinal v Galicia*, 290 AD 2d 528 [2<sup>nd</sup> Dept 2002].)

Dr. Rao's report stated as follows: "MRI confirmed indication of a meniscal tear and fracture." Dr. Rao's report concluded that the aforesaid injuries "were traumatic in nature and causally related to the June 6, 2010, accident." The aforesaid tear and/or fracture raises triable issues of fact (*See, Yuen v. Arka Memory Cab Corp.*, 80 AD 3d 481 (1<sup>st</sup> Dept., 2011); *Peluso v. Janice Taxi Co., Inc.*, 77 AD 3d 491 (1<sup>st</sup> Dept., 2010).

The medical reports are in conflict with respect to serious injury. The defendants' examining physician and radiologist, concluded that the plaintiff's injuries are not causally related to the accident and/or degenerative in nature. In contrast, the plaintiff's treating physician found permanent injures as stated above. (*See, Duran v. Kabir*, 93 AD 3d 566 (1<sup>st</sup> Dept., 2012).

Dr. Rao's report indicates that the doctor recommended "to follow physical therapy three (3) times per week for the neck, lumbar spine, left knee, and left ankle..." Further, "Mr. Rivera continued to treat with my office at that frequency for approximately three (3) months following his accident, during which time he was substantially incapacitated from his normal routine and customary activities."

In *Pommels v. Perez* (4 NY 3d 566, *supra*), the Court of Appeals required a plaintiff who stops medical treatment to "offer some reasonable explanation for having done so." This Court finds

that the plaintiff herein has provided a reasonable explanation for his treatment gap. (See *Brown v Achy*, 9 AD 3d 30 [1<sup>st</sup> Dept 2004]; *Turner-Brewster v Arce*, 17 AD 3d 189 [1<sup>st</sup> Dept 2005].)

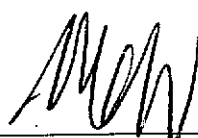
Viewing the objective medical evidence in a light most favorable to the plaintiff, this Court finds that the aforesaid meniscal tear and fracture which the defendants dispute as well as plaintiff's limitations of motion of his lumbar spine both in the months following plaintiff's accident and thereafter describe a serious injury and raise a triable issue of fact. (*Toure v Avis Rent A Car Systems, Inc.*, 98 NY 2d 345, *supra*; *Brown v Achy*, 9 AD 3d 30 [1<sup>st</sup> Dept 2004]; *Vitale v Lev Express Cab Corp*, 273 AD2d 225 [2<sup>nd</sup> Dept 2000]; *DiLeo v Blumberg*, 250 AD 2d 364 [1<sup>st</sup> Dept 1998].)

For the foregoing reasons, the motion by the defendants for summary judgment on threshold is denied.

This constitutes the Decision and Order of this Court.

Dated: ~~June 26~~, 2013  
July 1

So ordered,

  
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Mitchell Danziger, AJSC