

Rivera v Fernandez & Ulloa

2013 NY Slip Op 33818(U)

June 14, 2013

Supreme Court, Bronx County

Docket Number: 0308178/2010

Judge: Wilma Guzman

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This opinion is uncorrected and not selected for official publication.

PART 07

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

Case Disposed
Settle Order
Schedule Appearance

-----X
RIVERA, RICHARD

Index No. **0308178/2010**

-against-

Hon. **WILMA GUZMAN**

FERNANDEZ & ULLOA
-----X

Justice.

The following papers numbered 1 to _____ Read on this motion, **SUMMARY JUDGMENT DEFENDANT**
Noticed on **August 22 2012** and duly submitted as No. _____ on the Motion Calendar of _____

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this Motion is decided in accordance with the attached decision and order -

Motion is Respectfully Referred to:

Justice: _____

Dated: _____

Dated: **JUN 14 2013**

JUN 21 2013

Hon. _____

WILMA GUZMAN, J.S.C.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX**

Index No. 308178/10
Motion Calendar No. 5
Motion Date: 6/15/13

RICHARD RIVERA and JULIO MORAN

Plaintiff,

-against-

**FERNANDEZ & ULLOA AUTO GROUP, and
T. VALERRO-CABRERA**

Defendants.

DECISION/ ORDER

Present:

Hon. Wilma Guzman
Justice Supreme Court

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

<u>Papers</u>	<u>Numbered</u>
Notice of Motion, Affirmation in Support, and Exhibits Thereto.....	1
Affirmation in Opposition	2
Reply Affirmation	3

Upon the foregoing papers and after due deliberation, and following oral argument, the Decision/Order on this motion is as follows:

Defendants move for an Order granting summary judgment dismissing plaintiffs complaint on the grounds that each plaintiff fails to meet the burden of a sustainable serious injury under Ins. Law sections 5102(d) and 5104(a). Plaintiffs submitted written opposition.

Plaintiffs commenced this cause of action seeking damages for injuries allegedly sustained while operating his motor vehicle on June 26, 2010.

At the outset, this Court finds, contrary to plaintiff's argument that the motion for summary judgment is timely as it was served within 120 days of the filing of the note of issue. C.P.L.R. 3212, Brill v. City of New York, 2. N.Y.2d 648 (2004).

In support of the motion for summary judgment, a defendant may rely either on the sworn statements of the defendant's examining physician or the unsworn reports of the plaintiff's examining physician. Pagano v. Kingsbury, 182 A.D.2d 268, 587 N.Y.S.2d 692 (2nd Dept. 1992) Also, an affirmed physician's report, being in admissible form and showing that a plaintiff was not suffering from any disability or consequential injury from the accident would be sufficient to satisfy a defendant's burden of proof and shift to the plaintiff the burden of establishing the existence of a triable issue of fact. See Gaddy v. Eyler, 79 N.Y.2d 955, 582 N.Y.S.2d 990 (1992), where defendant

established a prima facie case that plaintiff's injuries were not serious through the affidavit of a physician who examined plaintiff and concluded that plaintiff had a normal examination. When the movant has made such a showing, the burden shifts and it then becomes incumbent upon the plaintiff to produce prima facie evidence in admissible form to support the claim of serious injury. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986). To raise a triable issue of fact as to whether a herniated disc constitutes a serious injury, a plaintiff is required to 'provide objective evidence of the extent or degree of the alleged physical limitations resulting from the [injury] and their duration' (Noble v. Ackerman, 252 A.d.2d 392, 394). In lieu thereof, "[a]n expert's qualitative assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system (see Dufel, 85 N.Y.2d at 798." (Toure v. Avis Rent A Car Systems, Inc., 98 N.Y.2d 345, 350).

Plaintiff Rivera

Dr. David Fisher's report of plaintiff Rivera's July 26, 2010 left knee MRI indicates that it was a normal study with no evidence of meniscal or ligament injury and of recent traumatic or causally related injury to the left knee

Dr. John Mitamura's August 14, 2010 examination of plaintiff Rivera indicates that the left knee MRI showed degenerative signal posterior horn, medial meniscus without definitive MRI evidence for tear and trace of intraarticular fluid.

Dr. Buckner examined plaintiff Rivera on October 17, 2011 and opined that plaintiff's complaint of knee injury was chronic and the result of recent injury, this opinion was consistent with the MRI's. Dr. Buckner also reviewed the findings of Dr. Mitamura's surgery on September 3, 2010 and opined that the findings were not likely to be the result of injury as described. Furthermore, Dr. Buckner opined that plaintiff's examination revealed no abnormalities to the cervical spine and found range of motion to be normal.

Defendants have submitted sufficient proof to meet the prima facie burden for summary judgment. Plaintiff Rivera must now submit sufficient proof to raise a triable issue of fact.

In opposition, the plaintiff Rivera submits the report of Dr. Mitamura who first examined the plaintiff Rivera on September 1, 2010. His initial impression after examination was that plaintiff had internal derangement of the left knee. He recommended plaintiff continue with physical therapy and discussed other options in light of possibility of failure to improve with conservative treatment. Plaintiff opted for surgical intervention which he underwent on September 3, 2010.

Plaintiff was last seen by Dr. Mitamura on September 29, 2012 and was found to have full extension with 125 degrees range of motion out of a normal 120-125 range of motion. Dr. Mitamura opined that plaintiff's injury was causally related to the subject accident and he has not fully recovered. There was atrophy of the quadriceps musculature with the medial joint line tenderness consistent with damage which did not heal to the medial meniscus. Dr. Mitamura further opined that due to the articular cartilage damage within the knee his risk for needing joint replacement is quite significant. His injuries were permanent.

Plaintiff Moran

Dr. Fisher's report of plaintiff Moran's July 6, 2010 MRI indicates there was diffuse degenerative changes, most pronounce at C5-6 and C6-7. The findings reflected chronic preexisting injury and there was no radiographic evidence of recent or causally related injury to the cervical spine.

Dr. Buckner examined plaintiff Moran on October 11, 2011 and using a goniometer, found that plaintiff Moran's range of motion in the cervical spine was normal as compared to the normal ranges. He opined that there was not causally related pathology. Dr. Buckner noted that plaintiff had lower back injuries from 2006 which were reflected in emergency room records as the result of falling in a hole or being injured while playing basketball. He has no permanency and is not disabled. He is able to perform all activities of daily living and his usual customary work without restrictions, noting that plaintiff Moran returned to work within two weeks of the claimed injury.

Defendants have submitted sufficient proof to meet the prima facie burden for summary judgment. Plaintiff Moran must now submit sufficient proof to raise a triable issue of fact.

Dr. Riaz first examined the plaintiff Moran on June 28, 2010 and noted range of motion limitations in the cervical spine as compared to the norms. The June 6, 2006 MRI showed a slight straightening of the cervical lordosis, right paracentrally herniated disc causing mild spinal stenosis at C5-C6 and at C6-C7 a left paracentral disc protrusion causing slight spinal stenosis and slight narrowing of the left neural foramen. On August 3, 2012, plaintiff Moran also had range of motion limitations as compared to the norm in his cervical spine. Dr. Riaz opined that plaintiff's traumatically induced injury resulted in the a weakening of the supportive soft tissue structures. Dr. Riaz noted the injuries were supported by the MRI and that plaintiff may have difficulty performing many daily activities His injuries are permanent and directly related to the subject accident.

Plaintiff Rivera has failed to raise a triable issue of fact. Dr. Mitamura fails to causally relate the left knee injury to the subject accident. In his report which was submitted by plaintiff, Dr. Mitamura indicates that the injuries are secondary to the subject accident. Nor does Dr. Mitamura address defendants doctors opinions that plaintiff Rivera's left knee injuries were preexisting and degenerative. Bravo v. Martinez, 105 A.D.3d 458 (1st Dept. 2013); Pines v. Lopez, 88 A.D.3d 545 (1st Dept. 2010).

Plaintiff Moran has submitted sufficient proof to raise a triable issue of fact as to whether they sustained an serious injury of a significant limitation of use of a body organ, member, function or system or a permanent consequential limitation of use of a body function or system. Dr. Riaz's opinion that plaintiff's injuries were causally related to the trauma of the accident raises an issue of fact at odds with Dr. Buckner's assessment of the 2006 injuries and the subject accident. Contra Bravo v. Martinez, supra. See generally, Sylla v. Brickyard Inc., 2013 WL 1235463(1st Dept. 2013), under the Insurance Law 51.

However, each plaintiff fails to submit sufficient medical proof that they were unable to perform their usual and customary activities for 90 out of the first 180 days following the accident. Uddin v. Cooper, 32 A.D.3d 270 (1st Dept.2006).

Accordingly, it is

ORDERED that defendants motion for summary judgment dismissing the plaintiff Rivera's complaint is granted in it's entirety. It is further

ORDERED that defendants motion for summary judgment dismissing plaintiff Moran's complaint for failure to sustain a serious injury is hereby granted to the extent that plaintiff Moran has failed to raise a triable issue of fact as to whether he was incapable of performing all of her usual and customary activities for 90 out of 180 days following the accident. All other portions of defendants motion for summary judgment are hereby denied. It is further

ORDERED that defendants serve a copy of this order upon all parties with notice of entry, within thirty(30) days of this order.

This constitutes the decision of the Court.

JUN 14 2013

DATE

HON. WILMA GUZMAN, JSC.