

Rios v Perez

2014 NY Slip Op 32636(U)

September 12, 2014

Supreme Court, Bronx County

Docket Number: 301838/11

Judge: Howard H. Sherman

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

-----x
Carmen J. Rios and Richard J. Acevedo

Plaintiff,

-against-

**Jose Tomas Perez , Evelyn Reyes ,
Kelvy F. Cabrera and F-C Auto Corp.,**

Defendants
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Index No.: 301838/11

DECISION/ORDER

Howard H. Sherman
J.S.C.

Facts and Procedural Background

Plaintiffs seek damages for injuries allegedly sustained on July 6, 2009 in a motor vehicle accident that occurred at or near the intersection of Grand Concourse and E. Burnside Avenue, Bronx, New York.

To date, no Note of Issue has been filed.

Plaintiff **Carmen J. Rios** ("Rios") alleges that as a result of the motor vehicle accident she sustained *inter alia*, the following serious injuries as a result of the accident: tear of the posterior horn of the medial meniscus and traumatic internal derangement of the **left knee**, requiring surgical repair ; straightening of the normal **cervical** curve; subligamentous posterior **herniation at L3-4 and L5 radiculopathy** [Verified Bill of Particulars ¶ 11].

It is further alleged that Rios was confined to bed/home for approximately one month following the accident , and for two months after the 10/08/09 arthroscopic surgery,

and "intermittently" to date¹ [Id. 13].

Plaintiff **Richard J. Acevedo** ("Acevedo") alleges that as a result of the motor vehicle accident he sustained *inter alia*, the following serious injuries as a result of the accident: **cervical spine** - disc herniations with spondylitic change at C5-C6 and C6-C7 levels; **lumbar spine**- disc herniations at L4-L5 level and L4 radiculopathy ; **right knee**- tear of the posterior horn of the medial meniscus requiring surgical repair [Verified Bill of Particulars ¶ 11].

It is further alleged that Acevedo was confined to bed/home for approximately one month following the accident , and for six weeks after the 11/18/09 arthroscopic surgery, and "intermittently "to date [Id. 13].

The injuries sustained by both plaintiffs are alleged to be permanent and to qualify as serious injuries as defined as : 1) a permanent consequential limitation of use of a body organ or member ; and/or 2) a significant limitation of use of a body function or system, and/or 3) a medically determined injury or impairment which prevented plaintiffs from performing all of the material acts which constitute their usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident [Id. ¶ 20].

Motions

1) Defendants Kelvy Cabrera ("Cabrera") and F-C Auto Corp. ("F-C Auto") move for summary judgment dismissing the complaint based on the failure of plaintiffs to establish a serious injury within the meaning of Insurance Law § 5102(d).

¹ The b/p is dated 12/14/11.

In support defendants come forward with affirmed reports of independent medical evaluations conducted by Alan M. Crystal, M.D., a board- certified orthopedist, and Audrey Eisenstadt, M.D., a board- certified radiologist, as well as copies of contemporaneous medical reports , including an initial examination by Pierre Jean Jacques Renelique, M.D., conducted the day after the accident, and the operative report of 10/08/09. The motion is also supported by copies of the transcripts of plaintiffs' 03/14/12 examinations before trial.

2) Defendants Jose Perez ("Perez") and Evelyn Reyes ("Reyes") move for the same relief adopting and incorporating the facts, legal arguments and exhibits of the co-defendants' motion.

In **opposition** , plaintiffs come forward with affirmations of the respective treating physicians and board-certified orthopedic surgeons, Randall V. Ehrlich, M.D., and Thomas Scilaris, M.D.

Rios

Independent Medical Evaluations

1) Audrey Eisenstadt conducted a **radiological** review of the contemporaneous diagnostic films of plaintiff's left knee, and lumbar and cervical spine. In addition, a report of the review of a 08/28/09 left shoulder MRI is also submitted. As no injury of the left shoulder is alleged, that report is not here discussed.

With respect to the 07/06 /09 films of the **left knee** she opined that the study revealed early degenerative joint disease at the femoropatellar joint space greater than six months in origin, and no evidence of post-traumatic osseous , ligamentous , tendinous or meniscal changes or of any joint effusion to suggest any recent trauma or current inflammation causally

related to the motor vehicle accident. The menisci were found to be normal in morphology, with no parameniscal abnormality observed.

The study of the **lumbar** spine was found to be normal, with no changes seen involving the osseous ,ligamentous or intervertebral disc structures, or any post-traumatic abnormalities.

The **cervical** spine study was found to reveal straightening, a nonspecific finding, frequently related to patient position and comfort for the examination . There were no recent or post-traumatic changes involving the osseous , ligamentous or intervertebral disc structures observed.

2) Dr. Alan Crystal rendered an **orthopedic** evaluation of plaintiff after a physical examination conducted on June 14, 2012.

For purposes of the evaluation , Dr. Crystal reviewed *inter alia*, the contemporaneous MRI reports, as well as Dr. Eisenstadt's report of her review of same; a report of an 9/23/09 examination and the operative report of Dr. Ehrlich.

Plaintiff presented with complaints of back and neck pain and of pain in her left knee that was "worse" since her surgery. She was observed to be using a cane.

After conducting a series of objective tests , including range of motion testing ; muscle and motor strength; observation for spasm upon palpation; SLR; ligament stability testing of the left knee, including varus and valgus and anterior and posterior cruciate, and Lachman's and Drawer tests , 'Dr. Crystal concluded that with respect to the spinal injuries alleged, plaintiff had no objective findings of a symptomatic herniated disc at a lumbar or cervical level causing nerve root involvement, noting that plaintiff's radiologist had made no

findings of disc pathology on review of the MRI studies. Due to the lack of objective neurological findings and the absence of nerve root involvement in the contemporaneous films, Dr. Crystal opined that "there was no basis to causally relate the alleged injuries of record of the cervical and lumbar spine to the accident of 07/06/09."

Concerning the left knee, the full range of motion of which was equivalent to that of the right knee, and which revealed no abnormality upon the above-noted testing, Dr. Crystal concluded that there was no basis to causally relate the alleged injuries of record to the accident because no such injury was documented; the radiologist and surgeon omitted the fact that the MRI showed degenerative arthritis; the operative report does not describe a tear of the posterior horn of the medial meniscus; the accident did not have the biomechanics to tear a meniscus, and complex tears of a meniscus are "degenerative" tears.

Dr. Crystal concluded that plaintiff was fully functional to perform all normal and usual daily activities, including work, without restriction.

Contemporaneous Medical Records

Dr. Renelique conducted an initial examination of plaintiff on July 7, 2009, and diagnosed post-concussion syndrome; acute cervical and lumbosacral strain/sprain; acute traumatic lumbosacral and cervical radiculitis and contusion sprain/strain of the left knee. The treating physician recommended a course of physical therapy treatment, and "told that after his (sic) injuries no heavy work should be performed until improvements are visible/verified." In addition, Rios was "cautioned to avoid excessive bending, lefting (sic), sitting and standing in a stationary position for prolong periods of time"

The MRI study of the **left knee** dated 08/28/09 identified a tear of the posterior horn of the medial meniscus. That of the **cervical** spine of 09/05/09 revealed neither bulges nor herniations, while the study of the **lumbosacral** spine of the same date revealed no significant abnormalities.

The operative report dated 10/08/09 includes the following findings upon arthroscopic examination of the left knee : a midbody white zone complex lateral meniscal tear; chondrosis of the posterior-lateral tibial plateau, grade 2; advanced chondral defect of the medial patellar facet, and multiple chondrial loose bodies. A partial medial and lateral meniscectomy was performed.

Examination Before Trial

As pertinent here, Rios testified that she was a front-seated passenger in Perez's SUV on the way to City Island when the front right side of the vehicle was impacted, and her left knee hit the dashboard and her head the back of the headrest [RIOS EBT: 12-26]. An ambulance arrived at the scene, and she was given an ice pack for her knee [Id. 29-30]. She did not go into the ambulance, and was driven home by Perez [Id. 30].

The next day she went to a healthcare facility in her neighborhood, presenting with complaints that the left knee was black and blue and swollen and she was experiencing pain in the knee, and back, and neck [Id. 32-33]. She went for treatment at the facility every other day for a couple of months, until her surgery [Id. 34-36]. The treatment included acupuncture, heating pads, and massage and electrical stimulation [36]. She was provided

with a knee and back brace , both of which she continues to use [38-39].

Rios testified that since the accident the only time she leaves her home is when she goes to the doctor [65], and she cannot do chores , such as laundry and grocery shopping , nor can she go up and down the stairs², and she is "always in bed." [66:25], however, due to a family emergency she traveled to India in November 2010 [90].

Also as pertinent here, plaintiff testified that she was involved in a prior motor vehicle accident in which she sustained injuries to her lower back for which she received treatment, and after commencing a law suit, a settlement. She was unable to state when the prior accident occurred "in the 21st century." [61-64; 85-86]. Plaintiff also fell on two occasions after her surgery, the latter incident precipitated by her knee coming "out of place ." [55].

DISCUSSION AND CONCLUSION

Upon review of the findings by objective testing upon recent examination, including findings of the absence of spasm in the affected areas, and negative SLR, as well as symmetric motor testing in all major muscle groups of the upper and lower extremities , and full range of motion of the left knee , and the absence of any positive findings upon testing for its structural integrity , as well as the findings of the lack of post-traumatic changes evidenced in the contemporaneous diagnostic studies of the affected areas it is the finding of this court that defendants have met their initial burden to prove as a matter of law that plaintiff did not sustain either a permanent limitation of use of a body organ or member , and/or a significant

² Plaintiff lives in a five-story walk-up [82].

limitation of use of a body function or system as a result of the underlying motor vehicle accident.

In addition, in light of the findings of the absence of trauma-related abnormality in the contemporaneous films, and the evidence of pre-existing degenerative disease, raising issues of the etiology of the injuries alleged, and the recommendation of the treating physician upon initial exam being limited to an instruction to avoid "heavy" work and "excessive" bending/lifting or "prolonged" sitting, and standing, it is the further finding of this court that defendants have demonstrated as a matter of law that plaintiff did not sustain a serious injury in the 90/180 category asserted.

Upon this showing, it is incumbent upon the plaintiff to come forward "with an objective medical basis supporting the conclusion that she sustained a serious injury (see Toure v Avis Rent A Car Sys., 98 NY2d 345, 350-351, 774 NE2d 1197, 746 NYS2d 865 [2002])." Baez v. Rahamatali, 6 N.Y.3d 868, 869; 850 N.E.2d 19 [2006]. Plaintiff has done so by raising issues of fact as to both the etiology of the injury to her left knee as well as the persistence of post-surgical limitations.

Plaintiff comes forward with the affirmation of Randall V. Ehrlich, M.D., who conducted an initial orthopedic examination of plaintiff on September 23, 2009, and performed arthroscopic surgery on plaintiff's left knee two weeks later. Dr. Ehrlich opines to a reasonable degree of medical certainty that the lateral meniscus tear diagnosed on the first examination, and confirmed upon arthroscopic examination, was the result of the

07/06/09

motor vehicle accident. Dr. Ehrlich conducted two post-surgery examinations, finding on each date restrictions in the range of motion (90/140 degrees).

Dr. Ehrlich also conducted an examination on October 2, 2013, and found range of motion measurements to reveal active range of motion to 110 ° (normal to 140 °).

Due to the "presence of arthroscopically documented chondral change " Dr. Ehrlich concluded that plaintiff would more "likely than not require future treatment for the left knee injuries she

sustained in her July 6, 2009 motor vehicle accident." In addition, Dr. Ehrlich affirms that he reviewed the findings of defendants' experts as to the etiology of plaintiff's injuries and disputes them "based upon [his] treatment , examination and direct observation during surgery and [his] own review of applicable records and MRI reports [] " , and that he assessed that plaintiff had achieved maximum benefits from the surgery and from therapy as of the November 2009 visit, and and in so doing, he sufficiently addresses those issues of causality raised by defendants' experts.

However, the affirmation and narrative reports fail to raise an issue of fact with respect to the 90/180 claim as the treating physician did not incorporate any contemporaneous recommendation sufficient to raise an issue of fact of a medically-determined injury requiring her confinement to home for more than 90 days after the accident .

Acevedo

Independent Medical Evaluations

1) Audrey Eisenstadt conducted a **radiological** review of the contemporaneous diagnostic films of plaintiff's right and left knee,³ and lumbar and cervical spine.

With respect to the 10/03 /09 MRI study of the **right knee** she opined that the study revealed mucoid grade II intrasubstance degenerative signal change in the posterior horn of the medial meniscus , evidence of a degenerative process without traumatic basis or causal relationship to the accident. Dr. Eisenstadt opined that any acute or traumatic meniscal injury would be associated with osseous, ligamentous, and tendinous abnormalities not observed in the films. She concluded that the study revealed no permanent or post-traumatic changes causally related to the accident.

The 08/22/09 study of the **lumbar** spine was found to reveal degenerative changes in the lower lumbar spine and a loss of height and signal intensity at L4-5 . Dr. Eisenstadt concluded that the bulging , and small L4-5 herniation were degenerative in origin. No annular tears suggestive of an acute disc rupture were observed.

The 07/16/09 **cervical** spine study was found to reveal degenerative disc disease at the C5-6 level, with osteophyte formation also observed at that level. Desiccation was seen throughout the cervical spine. The straightening observed was found to be nonspecific and the C5-6 bulging found to be degenerative in origin.

³ No injury to the left knee is asserted .

2) Dr. Alan Crystal rendered an **orthopedic** evaluation of plaintiff after a physical examination conducted on May 24, 2012.

For purposes of the evaluation, Dr. Crystal reviewed *inter alia*, the contemporaneous MRI reports, as well as Dr. Eisenstadt's report of her review of same; a report of a 07/07/09 medical and acupuncture examination; reports of follow-up visits for the period September - November 2009; the 11/18/09 operative report of Dr. Scilaris, and his report of the examination of 11/09/09.

Plaintiff presented with complaints of back and neck pain and claims that despite the surgery, his right knee is "still not 100%."

The **cervical** spine was found to have full ranges of motion in all planes and no spasm was observed on palpation. Motor strength of the upper extremities was found to be 5/5.

On examination of the **lumbar** spine, Dr. Crystal found full ranges of motion in all planes with the exception of forward lumbar flexion and there were negative findings on lying supine and Lasegue's SLR testing. There was neither spasm nor tenderness observed on palpation.

Both knees were found to have full ranges of motion as quantified and compared to normal readings, and no effusion, nor tenderness was observed. The right knee surgical scar was well healed, and upon varus/valgus testing for ligament stability, no abnormality was found. There were negative findings, as well, on Lachman's, Drawer and posterior

cruciate ligament testing of the knee.

Concluding that plaintiff was fully functional to perform all normal and usual daily activities, Dr. Crystal found no objective findings with respect to the cervical and lumbar spine, and no impairment in these areas.

With respect to the right knee injury asserted, Dr. Crystal disputes the biomechanics of the injury as alleged, opining that an injury to the left knee was more likely, and notes that the report of the initial examination contains a description of plaintiff limping on that knee and a referral for a left knee MRI, and the medical records include the report of a negative finding on a left knee CT scan. He also opines that plaintiff's body did not move in such a way to cause a meniscal tear.

Dr. Crystal also notes that the operative report contains findings of arthritis (chondromalacia) of the patella, and the MRI report lacks any evidence of bone edema, providing evidence that the arthritic areas were not causally related to the accident.

He concludes that there is no basis to causally relate the alleged injuries of record to the accident.

Contemporaneous Medical Records

Dr. Renelique conducted an initial examination of plaintiff on July 7, 2009, and diagnosed post-concussion syndrome; acute cervical and lumbosacral strain/sprain; acute traumatic lumbosacral and cervical radiculitis and contusion sprain/strain of the left knee. The treating physician prescribed physical therapy treatment and told that no heavy work

should be performed until there was improvement.

There was a follow-up visit on 10/21/09 , with plaintiff presenting with complaints of neck, back and left knee pain, and the treating physician diagnosed cervical and lumbar sprain/strain.

The MRI study of the **right knee** dated 10/03 /09 identified a tear of the posterior horn of the medial meniscus. That of the **cervical** spine of 07/16/09 revealed anterior and posterior disc herniations with adjacent spondylitic change at the C5-6 and C6-7 levels, as well as a reversal of the normal cervical curve, while that of the 08/22/09 lumbar spine revealed a central posterior protruded disc herniation at L4-5.

The operative report dated 11/18/09 includes the following findings upon arthroscopic examination of the right knee : posterior horn medial meniscal tear; traumatic chondral defect medial femoral condyle ; lateral tibial plateaus chondromalacia; chondromalacia patella and inferior pole of the patella synovitis.

Examination Before Trial

As pertinent here, Acevedo testified that she was a back -seat passenger in Perez's SUV when it was hit on the right side and his body went from side to side, and whole right side hit the door , and his head , the top of the vehicle [ACEVEDO EBT: 14-23;74]. An ambulance arrived at the scene , but plaintiff didn't go to the hospital because he did ot have medical insurance [Id. 28].

The next day, he presented to a medical clinic with complaints of pain in his neck,

back, right knee and "whole right side." [Id. 30]. He commenced treatment there four days a week for three months , and continued going with less frequency through the beginning of 2010 [Id. 30-32]. He stopped treating because "[i]t was not really bothering [him] that much."

[Id. 33:4-5].

For about a month after the accident, and for a month and one-half after the surgery, he was confined to home [Id. 51]. He sought medical assistance from St. Barnabas and Metropolitan hospitals for his neck and back pain during the course of 2011 and he continues to use a knee brace every day , and a neck brace "only when it hurts." [Id. 37:19].

DISCUSSION AND CONCLUSION

Upon review of the findings by objective testing upon recent examination, including findings of the absence of spasm in the affected areas, and full range of motion , and the absence of any positive findings upon testing for the structural integrity of the right knee as well as the findings of defendants' radiologist of the lack of post-traumatic changes evidenced in the contemporaneous diagnostic studies of the affected areas , and with respect to the right knee injury alleged, the lack of medical evidence of any complaints or treatment concerning that area in Dr. Renelique's initial and follow-up reports, it is the finding of this court that defendants have met their initial burden to prove as a matter of law that plaintiff did not sustain either a permanent limitation of use of a body organ or member , and/or a significant limitation of use of a body function or system as a result of the underlying motor

vehicle accident.

In addition, in light of the findings of the absence of trauma-related abnormality in the contemporaneous films, and the evidence of pre-existing degenerative disease, raising issues of the etiology of the injuries alleged, and the recommendation of the treating physician upon initial exam being limited to an instruction to avoid "heavy" work and the testimony of plaintiff as to the periods of post-accident and post-surgical confinement, it is the further finding of this court that defendants have demonstrated as a matter of law that plaintiff did not sustain a serious injury in the 90/180 category asserted.

Upon this showing, it is incumbent upon the plaintiff to come forward "with an objective medical basis supporting the conclusion that she sustained a serious injury (see Toure v Avis Rent A Car Sys., 98 NY2d 345, 350-351, 774 NE2d 1197, 746 NYS2d 865 [2002])." Baez v. Rahamatali, 6 N.Y.3d 868, 869 ; 850 N.E.2d 19 [2006] . Plaintiff has done so .

Plaintiff comes forward with the affirmation of Thomas Scilaris, M.D., who conducted an initial orthopedic examination of plaintiff on November 9, 2009, and performed arthroscopic surgery on plaintiff's right knee nine days later. Dr. Scilaris opines to a reasonable degree of medical certainty that the tear of the posterior horn of the medial meniscus of the right knee, evidenced in an October 3, 2009 MRI , and diagnosed by him on the first examination , and confirmed upon arthroscopic examination , was the result of the 07/06/09 motor vehicle accident. Dr. Scilaris conducted two post-surgery examinations, finding on each date restrictions in the range of motion of the knee .

Dr. Scilaris also conducted an examination on September 6, 2013, and found range of motion measurements to reveal active range of motion to 120 ° (normal to 140 °), and tenderness along the inferior pole of the patella along the medial aspect with patella compression. There was also mild anteromedial and lateral tenderness observed. Dr. Scilaris

concluded that Acevedo had sustained post right knee arthroscopy with residual chondromalacia, and recommended that he commence a formal physical therapy focused on knee strength and range of motion optimization.

Due to the longevity of the symptoms , he also concluded that plaintiff "will be left with a permanent partial disability due to limitation of motion and loss of use and function of his right knee." In addition , he addressed the issue of plaintiff's degenerative disease raised by plaintiffs' experts and stated that he disagreed with this assessment of etiology "based upon my treatment, examination, and direct observation during surgery and . . . review of the applicable records and MRI reports. "

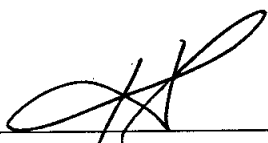
However, the affirmation and narrative reports fail to raise an issue of fact with respect to the 90/180 claim as the treating physician did not incorporate any contemporaneous recommendation sufficient to raise an issue of fact of a medically-determined injury requiring plaintiff's confinement to home for more than 90 days after the accident .

Accordingly, it is ORDERED that the motions be and hereby are granted solely to the

extent of awarding summary judgment dismissing the 90/180 claims asserted by each plaintiff.

This constitutes the decision and order of this court.

Dated : September 12, 2014


Howard H. Sherman