

**Richard v Jerez**

2013 NY Slip Op 33736(U)

December 9, 2013

Sup Ct, Bronx County

Docket Number: 301485/09

Judge: Ben R. Barbato

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This opinion is uncorrected and not selected for official publication.

PART 21/SJT

Case Disposed	<input type="checkbox"/>
Settle Order	<input type="checkbox"/>
Schedule Appearance	<input type="checkbox"/>

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

Richard, Fedet,

Index No. 301485/09

Ramen D. Jerez, <sup>-against</sup> Vazouyamanan Dou Koure, **Hon. Ben R. Barbato**  
Mine Trans Corp. and Wilner Valcourt, **A.J.S.C.**

The following papers numbered 1 to 9 Read on this motion, Summary Judgment As.  
Noticed on 09/17/12 & 10/10/12 and duly submitted on the Motion Calendar.

	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		

<sup>and cross-motion are</sup>  
Upon the foregoing papers this motion is decided in accordance with the attached Decision and Order.

Motion is Respectfully Referred to:  
Justice: \_\_\_\_\_  
Dated: \_\_\_\_\_

DEC 15 2013

DEC 12 2013

Dated: 12/09/2013

Hon. Ben R. Barbato  
**BEN R. BARBATO, A.J.S.C.**

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

**Present:** Honorable Ben R. Barbato

\_\_\_\_\_  
FEDNEL RICHARD,

Plaintiff,

-against-

**DECISION/ORDER**

Index No.: 301485/09

RAMON D. JEREZ, VAZOYMANAN DOUKOURE,  
MINE TRANS CORP. and WILNERT VALCOURT,

Defendants.

\_\_\_\_\_  
The following papers numbered 1 to 9 read on this motion and cross motion for summary judgment noticed on September 17, 2012 and October 10, 2012 respectively and duly transferred on October 11, 2013.

<u>Papers Submitted</u>	<u>Numbered</u>
Notice of Motion, Affirmation & Exhibits	1, 2, 3
Notice of Cross-Motion, Affirmation & Exhibits	4, 5, 6
Affirmation in Opposition & Exhibits	7, 8
Reply Affirmation	9

Upon the foregoing papers, and after reassignment of this matter from Justice Alison Y. Tuitt on October 11, 2013, Defendant, Wilnert Valcourt, seeks an Order granting summary judgment and dismissing Plaintiff's Complaint on the issue of liability and for failure to satisfy the serious injury threshold under Insurance Law §5102(d). By cross-motion, Defendants, Vazoymanan Doukoure and Mine Trans Corp., seek an Order granting summary judgment and dismissing Plaintiff's Complaint for failure to satisfy the serious injury threshold under Insurance Law §5102(d) and an Order denying Defendant Valcourt's summary judgment motion on the issue of liability.

This is an action to recover for personal injuries allegedly sustained as a result of a motor vehicle accident which occurred on June 9, 2007, on Macombs Dam Bridge, in the County of

Bronx, City and State of New York.

On March 10, 2011, the Plaintiff appeared for a physical examination conducted by Defendants' appointed physician Dr. Michael J. Katz, an Orthopedic surgeon. Upon examination and review of Plaintiff's medical records, Dr. Katz determined that Plaintiff suffered cervical and lumbosacral spine strain, left knee contusion and left ankle contusion, all of which had resolved at the time of the examination. Dr. Katz opines that Plaintiff shows no signs or symptoms of permanence relative to the musculoskeletal system or related to the motor vehicle accident of June 9, 2007. Dr. Katz further finds that Plaintiff is not currently disabled and that he is capable of full time full duty work as a sanitation worker without restrictions. Dr. Katz opines that Plaintiff is capable of his activities of daily living and all pre-loss activities.

Defendants also submit Plaintiff's upper extremity and lower extremity somatosensory studies which revealed normal findings.

The Court has read Plaintiff's submissions, the affirmed reports of Dr. Joyce Goldenberg and Dr. Nicky Bathia, as well as Dr. Ronald Wagner's affirmed MRI reports.

Any reports, Affirmation or medical records not submitted in admissible form were not considered for the purpose of this Decision and Order. See: *Barry v. Arias*, 94 A.D.3d 499 (1<sup>st</sup> Dept. 2012).

Under the "no fault" law, in order to maintain an action for personal injury, a plaintiff must establish that a "serious injury" has been sustained. *Licari v. Elliot*, 57 N.Y.2d 230 (1982). The proponent of a motion for summary judgment must tender sufficient evidence to the absence of any material issue of fact and the right to judgment as a matter of law. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 (1986); *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 (1985). In the present action, the burden rests on defendant to establish, by submission of

evidentiary proof in admissible form, that plaintiff has not suffered a "serious injury." *Lowe v. Bennett*, 122 A.D.2d 728 (1<sup>st</sup> Dept. 1986) *aff'd* 69 N.Y.2d 701 (1986). Where a defendant's motion is sufficient to raise the issue of whether a "serious injury" has been sustained, the burden then shifts and it is incumbent upon the plaintiff to produce *prima facie* evidence in admissible form to support the claim of serious injury. *Licari, supra*; *Lopez v. Senatore*, 65 N.Y.2d 1017 (1985). Further, it is the presentation of objective proof of the nature and degree of a Plaintiff's injury which is required to satisfy the statutory threshold for "serious injury". Therefore, disc bulges and herniated disc alone do not automatically fulfil the requirements of Insurance Law §5102(d). See: *Cortez v. Manhattan Bible Church*, 14 A.D.3d 466 (1<sup>st</sup> Dept. 2004). Plaintiff must still establish evidence of the extent of his purported physical limitations and its duration. *Arjona v. Calcano*, 7 A.D.3d 279 (1<sup>st</sup> Dept. 2004).

In the instant case Plaintiff has demonstrated by admissible evidence an objective and quantitative evaluation that he has suffered significant limitations to the normal function, purpose and use of a body organ, member, function or system sufficient to raise a material issue of fact for determination by a jury. Further, he has demonstrated by admissible evidence the extent and duration of his physical limitations sufficient to allow this action to be presented to a trier of facts. The role of the court is to determine whether bona fide issues of fact exist, and not to resolve issues of credibility. *Knepka v. Tallman*, 278 A.D.2d 811 (4<sup>th</sup> Dept. 2000). The moving party must tender evidence sufficient to establish as a matter of law that there exist no triable issues of fact to present to a jury. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 (1986). Based upon the exhibits and deposition testimony submitted, the Court finds that Defendants have not met that burden. However, based upon the medical evidence and testimony submitted, Plaintiff has not established that he has been unable to perform substantially all of his normal activities for

90 days within the first 180 days immediately following the accident and as such is precluded from raising the 90/180 day threshold provision of the Insurance Law.

Upon a reading of the Examinations Before Trial and in consideration of the arguments of the parties, summary judgment on the issue of liability shall be denied.

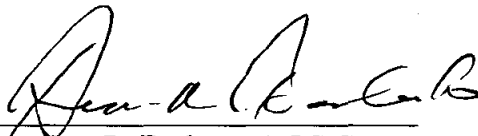
Therefore it is

**ORDERED**, that Defendant, Wilnert Valcourt's motion for an Order granting summary judgment and dismissing Plaintiff's Complaint on the issue of liability is **denied** and Defendant Wilnert Valcourt's summary judgment motion on the issue of serious injury is **granted** to the extent that Plaintiff is precluded from raising the 90/180 day threshold provision of the Insurance Law; and it is further

**ORDERED**, that Defendants Vazoymanan Doukoure and Mine Trans Corp.'s cross-motion for an Order granting summary judgment dismissing Plaintiff's Complaint for failure to satisfy the serious injury threshold pursuant to Insurance Law §5102(d) is **granted** to the extent that Plaintiff is precluded from raising the 90/180 day threshold provision of the Insurance Law.

Dated: December 9, 2013

DEC 12 2013

  
\_\_\_\_\_  
Hon. Ben R. Barbato, A.J.S.C.