

Amador v Rodriguez

2015 NY Slip Op 30983(U)

May 20, 2015

Supreme Court, Bronx County

Docket Number: 301979/13

Judge: Wilma Guzman

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

Index No. **301979/13**
Motion Calendar No. 2
Motion Date: 3/2/15

JANELLE AMADOR and NATHANIA ORTIZ
Plaintiff,

-against-

DECISION/ ORDER

Present:
Hon. Wilma Guzman
Justice Supreme Court

ELIZABETH RODRIGUEZ and ANDRES RAMIREZ, JR.
Defendants.

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>
Defendants 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 moves this Court for an Order dismissing plaintiffs Amador and Ortiz' 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 on August 2, 2012 as the result of motor vehicle accident.

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 Amador

Dr. Audrey Eisenstadt reviewed the plaintiff's September 27, 2012 cervical spine MRI and opined that plaintiff presented with pre-existing degenerative disc changes.

Dr. John H. Buckner examined the plaintiff on September 16, 2013. Upon review of the plaintiff's medical records, Dr. Performed range of motion testing. Dr. Buckner fails to indicate the normal ranges of motion as a guideline for the testing and records that plaintiff presented 40 degrees in tilting and 30 degrees in extension. However, Dr. Buckner fails to indicate what the normal range of motion for the cervical spine should be. Similarly, Dr. Buckner indicates range of motion in the lumbar spine flexion and abduction at 135 degrees and external rotation of 80 degrees, bilaterally. Dr. Buckner opined that the plaintiff's injuries had resolved in the cervical spine and shoulder, which he does not causally relate to the subject accident. Dr. Buckner indicates that there was not one causally related objective finding described in any medical report. Dr. Buckner opined that plaintiff's treatment has been excessive. Dr. Buckner opined that plaintiff may perform all activities of daily living.

Dr. Gabriel L. Dassa examined the plaintiff on September 19, 2014 and found range of motion limitations as compared to the norm in the left shoulder. Dr. Dassa also reviewed the plaintiff's medical records pertaining to 2007, 2008 and 2011 and September 2012 and noted there

was no documentation of injuries to the left shoulder for which she had surgery on October 22, 2012 by Dr. Richard Pearl. Dr. Dassa opined that the plaintiff's injuries were permanent.

Plaintiff Ortiz also submits medical records detailing treatment from August 6, 2012 through September 19, 2013, which includes the reports of Dr. Clyde Weissbart and the operative report of Dr. Pearl, both of which was relied upon and reviewed by the defendant's doctors.

Plaintiff has submitted competent medical proof to address defendant's arguments of degeneration. Young Kyu Kim v. Gomez, 105 A.D3d 415 (1st Dept. 2013). Plaintiff has submitted sufficient proof to raise a triable issue of fact as to whether she sustained a permanent injury under Ins. Law 5104.

Plaintiff Ortiz

Dr. Audrey Eisenstadt reviewed the plaintiff's September 27, 2012 right knee MRI and opined that plaintiff presented with pre-existing degenerative disease and showed no evidence of recent trauma or active inflammation. The September 28, 2012 left shoulder MRI showed degenerative joint disease and the August 21, 2012 lumbar spine MRI which showed no post-traumatic abnormalities.

Dr. John H. Buckner examined the plaintiff on August 26, 2013. Upon review of the plaintiff's medical records, Dr. Buckner performed range of motion testing. Dr. Buckner fails to indicate the normal ranges of motion as a guideline for the testing and records that plaintiff presented 80 degrees, 45 degrees and 60 degrees in tilting and 30 degrees in extension. However, Dr. Buckner fails to indicate what the normal range of motion for the cervical spine should be. Similarly, Dr. Buckner indicates range of motion in the both shoulders at 165 degrees and 90 degrees and 40 degrees in the lumbar spine flexion. At this point, this Court notes that Dr. Buckner's report as it applies to plaintiff Ortiz is unsigned and not sworn to (there appears to be some pages missing). As such, this Court does not consider the report of Dr. Buckner as it applies to this plaintiff. Thompson v. Abassi, 15 A.D3d 95 (1st Dept. 2005).

Notwithstanding, plaintiff Ortiz has provided sufficient proof to raise a triable issue of fact. Dr. Randall V. Erlich affirms that he performed an initial orthopedic examination on the plaintiff on October 22, 2012. Using a goniometer, he noted range of motion limitations as compared

to the norm in the right knee and reviewed the MRI films of the right knee and noted a tear of the posterior horn of the medial meniscus and chondral injury of the patella. On October 25, 2012 he performed right knee arthroscopic surgery which revealed a complex tear of the mid body posterior horn. Dr. Erlich affirms that he saw no signs of pre-existing condition and causally related the plaintiff's condition to the August 2, 2012. He reexamined the plaintiff on March 19, 2014 and noted range of motion limitations as compared to the norms in the right knee. Dr. Erlich affirms that the plaintiff re-enrolled in formal supervised physical therapy. Dr. Erlich opined that plaintiff had a permanent consequential limitation directly caused by the motor-vehicle accident.

Plaintiff Ortiz also submits chiropractic clinical examination forms detailing treatment from August 7, 2012 through August 26, 2013, which includes the reports of Dr. Clyde Weissbart and Dr. Pearl, both of which was relied upon and reviewed by the defendant's doctors.

Plaintiff has submitted competent medical proof to address defendants arguments of degeneration. Young Kyu Kim v. Gomez, 105 A.D3d 415 (1st Dept. 2013). Plaintiff has submitted sufficient proof to raise a triable issue of fact as to whether she sustained a permanent injury under Ins. Law 5104.

This Court notes that the reply papers of defendant Rodriguez which were untimely served and submitted are not considered herein.

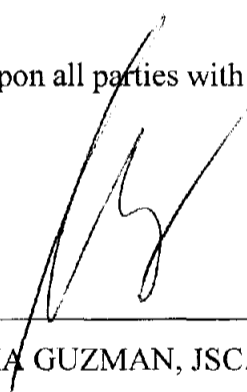
Accordingly, it is

ORDERED that defendants motion for summary judgment under Ins. Law 5104 is denied as to both defendants 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.

DATE 5/20/15


HON. WILMA GUZMAN, JSC.