

Amador v Villanueva
2016 NY Slip Op 30245(U)
January 13, 2016
Supreme Court, Bronx County
Docket Number: 303374/13
Judge: Elizabeth A. Taylor
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

U

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, I.A.S. PART 2
AMANDO AMADOR, SR., JANELLE AMADOR &
ARMANDO AMADOR, JR.,

Plaintiffs,

Index No.303374/13

-against-

DECISION/ORDER

Present:
HON. ELIZABETH A. TAYLOR

MIGUEL VILLANUEVA, GERINALDO MOORE,
ROLAND TORRES & JOHN DOE#1, said name
being fictitious and unknown to plaintiffs, and the true
name of said person is unknown to plaintiffs,
Defendants.

The following papers numbered 1 to ___ read on this motion, _____

No	On Calendar of	PAPERS NUMBERED
	Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed-----	1-2
	Answering Affidavit and Exhibits-----	3-4
	Replying Affidavit and Exhibits-----	5-6
	Affidavit-----	
	Pleadings -- Exhibit-----	
	Stipulation -- Referee's Report --Minutes-----	
	Filed papers-----	

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Motion pursuant to CPLR 3212, for an order granting summary judgment
dismissing the complaint, on the ground that plaintiffs have not suffered serious injuries,
is denied.

Plaintiffs commenced this personal injury action alleging that they sustained
injuries in a motor vehicle accident on April 29, 2011. Plaintiffs' allege that they
suffered a serious injury as defined by Insurance Law 5102(d). Specifically, plaintiff
Armando Amador, Sr. alleges, among others, injuries to his right shoulder, cervical
spine, lumbar spine, and right knee. Plaintiff Janelle Amador claims, among others,
injuries to her left knee, cervical spine, lumbar spine, and thoracic spine. Additionally,

plaintiff Armando Amador, Sr. (A.J.) alleges, among others, injuries to his left knee, right knee and lumbar spine. Defendants move for summary judgment dismissing the complaint on the ground that plaintiffs did not suffer serious injuries within the meaning of the No-Fault Law.

In the bill of particulars, plaintiffs plead "serious injury" in the following categories:

- 1) "permanent consequential limitation of use of a body organ or member;" and
- 2) "significant limitation of use of a body function or system."

To prevail on a motion for summary judgment, defendants have the initial burden of presenting competent evidence establishing that plaintiff has not suffered a serious injury (*see Spencer v Golden Eagle, Inc.*, 82 AD3d 589 [1st Dept 2011]). Such evidence includes affirmations of medical experts who examined the plaintiff and have concluded that no objective medical findings support plaintiff's claim (*Id.*).

In support, defendants submit the affirmed reports of 1) Lisa Nason, M.D.; 2) Michael Carciente, M.D.; and 3) David Fisher, M.D. On April 8, 2015, Dr. Nason conducted an orthopaedic examination of Mr. Amador., including range of motion testing of his right shoulder, cervical spine, lumbar spine, and right knee. Dr. Nason concluded that any soft tissue injuries were resolved and that no further orthopaedic treatment was necessary. On May 19, 2015, Dr. Carciente conducted a neurological examination of Mr. Amador including testing of his cervical, lumbar and thoracic spine and found no neurological injury. Additionally, Dr. Fisher, a radiologist, reviewed the x-ray of Mr. Amador's thoracic spine, and the MRI films of his right shoulder and right

knee. Dr. Fisher concluded that the films revealed no traumatic or casually related injury.

On April 20, 2015, Dr. Nason conducted an orthopedic examination of Ms. Amador, including range of motion testing of her left knee, cervical spine, lumbar spine, and thoracic spine. Dr. Nason concluded that any soft tissue injuries were resolved and that there was no disability. On April 22, 2015, Dr. Carciente conducted a neurological examination of Ms. Amador including testing of her cervical, lumbar and thoracic spine and found no neurological injury. Additionally, Dr. Fisher reviewed the MRI films of Ms. Amador's right shoulder and left knee. Dr. Fisher concluded that Ms. Amador did not suffer a traumatic or casually related injury.

On April 20, 2015, Dr. Nason conducted an orthopedic examination of A.J., including range of motion testing of his left knee, right knee and lumbar spine. Dr. Nason concluded A.J. has normal range of motion and that there was no disability. On April 22, 2015, Dr. Carciente conducted a neurological examination of A.J. including testing of the cervical, lumbar and thoracic spine and found no neurological injury.

Based upon the foregoing, this court finds that defendant has met its prima facie burden of demonstrating that plaintiffs have not suffered a permanent consequential limitation of use of a body organ or member or a significant limitation of use of a body function or system.

To create an issue of fact, plaintiff must establish a serious injury arising from a "permanent consequential limitation of use of a body organ, member, function or

system” or “significant limitation of use of a body function or system.” To establish that an injury is permanent or consequential, plaintiff must set forth medical proof containing objective, quantitative evidence with respect to diminished range of motion or a qualitative assessment comparing plaintiff’s present limitation to the normal function, purpose and use of the affected body organ, member, or system (*Perl v Meher*, 18 NY3d 208 [2011]; *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 353 [2002]).

In the instant matter, plaintiff submits the affirmed report of Daniel Wilen, M.D. Dr. Wilen affirms that he first examined Mr. Amador within the week after the accident and concluded that he suffered injuries to his lumbar spine, cervical spine, and right shoulder. On September 26, 2015, approximately four years after the accident, Dr. Wilen examined Mr. Amador and performed range of motion testing on his lumbar spine, cervical spine, and right shoulder. Dr. Wilen found limited range of motion and concluded that the injuries were permanent as they had not been resolved through physical therapy. Dr. Wilen further affirmed that the injuries were casually related to the accident.

Additionally, Dr. Wilen affirms that he first examined Ms. Amador within the week after the accident and concluded that she suffered injuries to her lumbar spine, cervical spine, and left knee. Approximately four years after the accident, on September 26, 2015, Dr. Wilen examined Ms. Amador and performed range of motion testing on her lumbar spine, cervical spine, and left knee. Dr. Wilen found limited range of motion and concluded that the injuries were permanent as they had not been resolved through

physical therapy. Dr. Wilen further affirmed that the injuries are casually related to the accident.


Further, Dr. Wilen affirms that he examined A.J. within a week after the accident and concluded that he suffered injuries to his left knee and right knee. On September 26, 2015, approximately four years after the accident, Dr. Wilen examined A.J. and performed range of motion testing on his left knee and right knee. Dr. Wilen found limited range of motion and concluded that the injuries were casually related to the accident.

Based upon the affirmation of plaintiffs' expert, this court finds that plaintiffs raise an issue of fact as to whether they suffered a permanent consequential limitation or a significant limitation of use of a body function or system serious injury (see *Grant v United Pavers Co. Inc.*, 91 Ad3d 499 [1st Dept 2012]).

Accordingly, defendants' motion for summary judgement is denied.

The foregoing shall constitute the decision and order of this court.

Dated: JAN 13 2016



Elizabeth A. Taylor A.J.S.C.