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SHORT FORM ORDER

INDEX No. 08-13670
CAL. No. 10-00466MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 9-16-10
ADJ. DATE 10-21-10
Mot. Seq. # 001 - MG; CASEDISP

TERESA GRANADA and VERONICA SOLANO, Plaintiffs, - against - ADA G. JACKSON and BARRETT JACKSON, Defendants.	THE BONGIORNO LAW FIRM, P.L.L.C. Attorney for Plaintiffs 250 Mineola Boulevard Mineola, New York 11501 ROBERT P. TUSA, ESQ. Attorney for Defendants 898 Veterans Memorial Highway, Suite 320 Hauppauge, New York 11788

Upon the following papers numbered 1 to 20 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13 ; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 14 - 20 ; Replying Affidavits and supporting papers __; Other __; it is,

ORDERED that the motion by the defendants Ada G. Jackson and Barrett Jackson for an Order, pursuant to CPLR 3212, dismissing the complaint is granted.

The instant action seeks to recover damages for personal injuries arising from a motor vehicle accident that occurred on Terry Road at its intersection with Townline Road in the Town of Islip on June 14, 2005. The accident occurred when a vehicle owned by the defendant Barrett Jackson and operated by the defendant Ada G. Jackson collided with a vehicle being operated by the plaintiff Teresa Granada in which the plaintiff Veronica Solano was a passenger. The complaint alleges that the plaintiffs sustained serious injuries as a result of the defendant's negligence in causing the accident. Specifically, the bill of particulars alleges that plaintiff Teresa Granada sustained, among other things, disc bulge at C5-6 level compressing the anterior cord; posterior disc bulge at the C6-7 level; straightening of the normal curve; significantly decreased range of motion in the lumbar spine; post traumatic facet joint syndrome; myofasciitis; paraspinal muscle spasms; decreased lumbar lordosis; significantly decreased range of motion in the right shoulder; positive impingement sign and positive supraspinatous test in the right shoulder; and right carpal tunnel syndrome. It alleges that, as a result of the accident, plaintiff Granada was confined to bed and home intermittently through the present date, but was not incapacitated from employment as a result of the accident. The bill of particulars alleges that plaintiff Solano sustained the following injuries to the cervical spine: straightening of the normal curve; significantly decreased range of motion; pain radiating into the upper extremities; numbness and tingling in the arms; decreased sensation at left C5-C6 dermatome to pinprick and light touch; pain, discomfort, tenderness and spasms; paraspinal tenderness; and headaches. It alleges that she received no treatment at a hospital, was confined to bed and home intermittently through

the present date and was not incapacitated from employment as a result of the accident. With respect to both plaintiffs, the bills of particulars allege that they each sustained a serious injury within the meaning of the Insurance Law in that they sustained a permanent consequential limitation, a significant disfigurement, a permanent loss of use, a significant limitation of use of a body function and nonpermanent injuries that have substantially altered their daily activities for 90 out of the first 180 days immediately following the occurrence.

The defendants now move for an Order, pursuant to CPLR 3212, dismissing the complaint on the grounds that the plaintiffs' injuries do not meet the serious injury threshold requirement under Insurance Law Section § 5102. In support of this branch of their motion, the defendants submitted, among other things, the affirmations of Robert Israel, M.D., a copy of the Southside Hospital Emergency Department medical record, and deposition testimony of plaintiffs Granada and Solano.

A "serious injury" is defined as a personal injury which "results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitutes such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment" (Insurance Law § 5102 [d]). The Court of Appeals has held that the issue of whether a claimed injury falls within the statutory definition of a "serious injury" is a question of law for the courts in the first instance, which may properly be decided on a motion for summary judgment (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Charley v Goss***, 54 AD3d 569, 863 NYS2d 205 [1st Dept 2008]).

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp,*** 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ Med Ctr***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). In a motor vehicle case, a defendant moving for summary judgment on the issue of whether the plaintiff sustained a serious injury has the initial burden of presenting competent evidence establishing that the injuries do not meet the threshold (*see* ***Pagano v Kingsbury***, 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see* ***Alvarez v Prospect Hosp***, *supra*; ***Winegrad v New York Univ Med Ctr***, *supra*). Once this showing has been made, however, the burden shifts to the plaintiff to produce evidentiary proof in admissible form sufficient to overcome the defendant's submissions by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law (*see* ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Grossman v Wright***, 268 AD2d 79, 707 NYS2d 233 [2d Dept 2000]; ***Pagano v Kingsbury***, *supra*; *see also* ***Alvarez v Prospect Hosp***, *supra*; ***Zuckerman v City of New York***, *supra*).

The defendants have demonstrated their *prima facie* entitlement to summary judgment dismissing the plaintiff Granada's complaint and the plaintiffs have failed to come forward with admissible evidence demonstrating that a triable issue of fact exists. Dr. Israel's affirmed report was sufficient to establish that

plaintiff Granada did not sustain a serious injury as a result of the subject accident. Dr. Israel performed an independent orthopedic examination on plaintiff Granada on September 9, 2009. He stated that the examination of the cervical spine revealed a normal lordosis and that cervical compression testing, the Spurling and the Valsalva were negative. Dr. Israel states that, upon examination, range of motion testing of the cervical spine reveals flexion to 45 degrees (45 degrees being normal), extension to 60 degrees (60 degrees being normal), right and left rotation to 80 degrees (80 degrees being normal), and right and left lateral flexion to 45 degrees (45 degrees being normal). He graded muscle strength 5/5 in the biceps, triceps, wrist flexors and extensors bilaterally and stated deep tendon brachioradialis, biceps and triceps reflexes were symmetrical. He found that grasping power was firm in both hands, that there was normal proprioception with no sensory deficit on light touch and pin prick, and that there was no radiating pain or paresthesias. His examination of the thoracic spine revealed no redness, swelling, increased warmth or tenderness. Both shoulder blades were symmetrical. There was no tenderness to palpation over the trapezius proximal to the superior angle of the scapula, along the medial border and down to the inferior angle or over the spinous processes from T1 through T12.

Dr. Israel stated that the examination of the lordotic curve was normal and that there were no spasms or tenderness present over the paraspinal musculature on palpation. Sitting Lasegue's testing was bilaterally negative to 80 degrees (80 degrees being normal). Straight leg raising was bilaterally negative to 75 degrees (75 degrees being normal) in both the seated and supine positions. Range of motion of the lumbar spine revealed forward flexion to 90 degrees (90 degrees being normal), extension to 30 degrees (30 degrees being normal), right lateral flexion to 45 degrees (45 degrees being normal) and left lateral flexion to 45 degrees (45 degrees being normal). His examination showed bilateral patella and Achilles' deep tendon reflexes to be symmetric. Muscle strength of both lower extremities was graded at 5/5. There was no atrophy present in the muscles of both lower extremities nor was there radiation of pain, numbness or tingling. Upon his examination of the bilateral shoulders, Dr. Israel stated that there was no deltoid atrophy and no tenderness on palpation of the acromioclavicular joint or over the greater tuberosity. Range of motion of the shoulders revealed anterior flexion to 170 degrees (170 degrees being normal), abduction to 180 degrees (180 degrees being normal), adduction to 45 degrees (45 degrees being normal), external rotation to 45 degrees (45 degrees being normal), internal rotation to 45 degrees (45 degrees being normal) and posterior extension to 45 degrees (45 degrees being normal). There was no instability present and the drop arm, Yergason's, apprehension, Speed and O'Brien tests were all negative. The impingement sign was negative. There was no elevation, protraction or retraction of the scapula and there was no winging of the scapula. There was no atrophy present. Dr. Israel stated that the remainder of Granada's physical exam was negative. Dr. Israel concluded plaintiff Granada has no disability as a result of the accident and that she had resolved sprains of the cervical spine, the thoracic spine, the lumbar spine and bilateral shoulders.

Plaintiff Granada's deposition testimony indicated that plaintiff Granada went to the emergency room some time after her accident complaining of neck pain and was released without being admitted to the hospital. She was then treated at a clinic in Bay Shore for a period of approximately one and a half years, three times per week when she started treatments and only once a week at the time treatment ended. Ms. Granada indicated that she worked as a babysitter and house cleaner five days per week at the time of the accident. She indicated that she missed two weeks from work, then returned to cleaning/babysitting three days per week, until she stopped in 2006 and went to work for the Salvadorian consulate as a paralegal. In 2008, she began working five days per week at Health First doing prequalifications for Medicaid. She has

traveled by airplane to Texas and Florida since the date of the accident. Finally, plaintiff Granada testified that she injured her neck in the accident and that at the time of the deposition her neck and head ached. She made no claim or reference to pain in her shoulders or lumbar region of her back.

It is well-established that in threshold serious injury cases, restrictions in range of motion typically are numerically quantified, compared to the norms, and based upon identified objective tests, and that these requirements are applied to defendants seeking summary judgment, as well as to plaintiffs opposing summary judgment (***Perl v Meher***, 74 AD3d 930, 902 NYS2d 632 [2d Dept 2010]). It is noted that Dr. Israel recorded numerically quantified ranges of motions for this plaintiff and compared each of them to the norm. Although plaintiff Granada reported to Dr. Israel in September 2009 that she continues with pain in her neck, upper back, lower back and both shoulders, all worse than at the time of the accident, there was no subjective evidence of restricted motion or pain during his examination nor did she mention the pain in her upper back, lower back or shoulders during her August 2009 deposition.

In a similar vein, the evidence submitted by the defendants was sufficient to establish their *prima facie* entitlement to summary judgment dismissing the complaint as asserted by plaintiff Veronica Solano. In support of this branch of their motion, the defendants submitted, *inter alia*, the affirmation of Dr. Israel and the deposition testimony of plaintiff Solano. Dr. Israel's affirmed report was sufficient to establish that plaintiff Solano did not sustain a serious injury as a result of the subject accident. Dr. Israel performed an independent orthopedic examination on plaintiff Solano on October 9, 2009. Dr. Israel states that, upon examination of her cervical spine, plaintiff Solano had normal lordosis, and no tenderness to palpation in the paraspinal region or of the trapezius muscle. Cervical compression testing, Spurling and Valsalva were negative. Range of motion of the cervical spine revealed flexion to 45 degrees (45 degrees being normal), extension to 60 (60 degrees being normal), right rotation to 80 degrees (80 degrees being normal), left rotation to 80 degrees (80 degrees being normal), right lateral flexion to 45 degrees (45 degrees being normal), and left lateral flexion to 45 degrees (45 degrees being normal). Muscle strength was graded 5/5 in the biceps, triceps, wrist flexors and extensors bilaterally. Deep tendon brachioradialis, biceps and triceps reflexes were symmetrical. Grasping power was firm in both hands. There was normal proprioception with no sensory deficit on light touch and pin prick and there was no radiation of pain or paresthesias. Upon examination of the lumbar spine, Dr. Israel found the lordotic curve to be normal. There were no spasms or tenderness present over the paraspinal musculature on palpation. Sitting Lasegue's testing was bilaterally negative to 80 degrees (80 degrees being normal). Straight leg raising was bilaterally negative to 75 degrees (75 degrees being normal). Range of motion of the lumbar spined revealed forward flexion to 60 degrees (60 degrees being normal), extension to 30 degrees (30 degrees being normal), right leg flexion to 45 degrees (45 degrees being normal) and left lateral flexion to 45 degrees (45 degrees being normal). His examination showed bilateral patella and Achilles' deep tendon reflexes to be symmetric. Proprioception was normal with no sensory deficit on light touch and pin prick. Muscle strength of both lower extremities was graded at 5/5. There was no atrophy present in the muscles or both lower extremities and there was no radiation pain, numbness or tingling. Dr. Israel stated that sprains of the cervical and lumbar spine were resolved and that the plaintiff Solano has no disability as a result of the accident.

The plaintiff Solano indicated to Dr. Israel that although she continues with pain in her neck and lower back, it is better than at the time of the accident. At her deposition on August 10, 2009, plaintiff Solano testified that she did not seek medical attention until approximately four days after the accident

when she went to a clinic in Bay Shore with plaintiff Granada for therapy. She attended the clinic for therapy for approximately one and one half years and, like plaintiff Granada, she went about three times a week in the beginning and then decreased to once a week until it ended. Plaintiff Solano testified that she lost no time from work as a result of the accident. She indicated that she was not in pain on the date of the deposition and that she was able to do laundry and travel to Houston after the accident.

Dr. Israel's affirmed report establishes that plaintiff Solano did not sustain a serious injury as a result of the subject accident. Dr. Israel examined the plaintiff Solano on October 9, 2009, and concluded that plaintiff Solano had sustained sprains of the cervical and lumbar spine, which were now resolved. Dr. Israel provided range of motion testing and other objective medical evidence to support the conclusion that plaintiff Solano did not sustain significant and/or permanent limitations to her cervical or lumbar spine, as she expressly alleges in her bill of particulars (*see* ***Menezes v Khan***, 67 AD3d 654, 889 NYS2d 54 [2d Dept 2009]; ***Joseph v Hampton***, 48 AD3d 638,852, NYS2d 335 [2d Dept 2008])

Plaintiffs' opposition papers were insufficient to raise a triable issue of fact. The most recent medical report submitted by the plaintiff Granada was dated September 9, 2005, and the most recent medical report submitted by the plaintiff Solano was dated August 2, 2005. The reports do not state that any of the injuries are permanent or that the patient was totally or partially disabled. The plaintiffs, having failed to set forth any objective medical findings from recent examinations, have failed to raise a triable issue of fact as to whether either sustained a serious injury under the permanent loss of use, the permanent consequential limitation of use, and/or the significant limitations of use categories of the Insurance Law § 5102 (*see* ***Jean v Labin-Natochenny***, 77 AD3d 623, 909 NYS2d 103 [2d Dept 2010]; ***Clarke v Delacruz***, 73 AD3d 965, 900 NYS2d 669 [2d Dept 2010]; ***Kauderer v Penta***, 261 Ad2d 365, 689 NYS2d 190 [2d Dept 1999]; ***Thomas v Roach***, 246 AD2d 591, 667 NYS2d 296 [2d Dept 1998]). Neither plaintiff has supplied any evidence of a significant disfigurement, a permanent loss of use of a body function or any substantial alteration of her daily activities for 90 out of 180 days immediately following the accident. Accordingly, the defendants' motion for summary judgment dismissing the complaint is granted.

Dated: February 14, 2011

Hon. Joseph Farneti
Acting Justice Supreme Court

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION