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SHORT FORM ORDER

Motion Sequence #6-7

SUPREME COURT-STATE OF NEW YORK

Present:

HON. THOMAS A. ADAMS

Justice.

TRIAL/IAS, PART 11
NASSAU COUNTY

KEITH GAYLE, WILNER AUDOIN, BAILLE MYRLANDE,
GARY AUGUSTIN, WILNER CADET, IVROSAIRE
DORMIL, JEAN SERGE , DORMIL and GUERDA
NERSON,

Plaintiffs,

-against-

INDEX NO. 22249/96
MOTION DATE 7/27/00

SCOTT A. BRASNER, JOHNNIE MULDROW & BRENT BUS
SERVICE INC.,

Defendants.

The following papers read on this motion:

- Notice of Motion 1
- Cross-Motion 2
- Affirmation in Opposition 3
- Replying Affidavits 4

The Court sua sponte hereby amends its October 30, 2000 order to read as follows:

This motion by defendant, Brasner, for summary judgment, dismissing the complaint, is granted. Cross-motion by Johnnie Muldrow and Brent Bus Service Inc. for summary judgment is granted.

The motion is based upon the contention that none of the plaintiffs, all of whom were passengers in a bus owned by defendant, Brent Bus Service, Inc., and operated by defendant, Muldrow, when it was involved, on July 24, 1994, in a collision with a vehicle owned and operated by the movant, sustained a "(s)erious injury", as defined in **INSURANCE LAW §5102(d)** .

The movant having presented admissible medical evidence in support of his position, it became incumbent upon plaintiffs to present adequate admissible medical evidence to raise triable issues of fact sufficient to withstand the instant motion. (See **GROSSMAN v WRIGHT**, 268 AD2d 79.)

The affidavit of the physician, a specialist in the practice of physical medicine and rehabilitation, under whose supervision and direction each of the plaintiffs was examined and

treated, to which are attached reports, summarizing the nature of the examinations and treatments as to each plaintiff and his final diagnoses, contains the following statement: "Each of these individuals presented with objective medical evidence which required extensive treatment and significant limitation of all their physical activities. The activities they were limited in included work, recreation and other physical activities for a period no less than 120 days following the accident." He closes the affidavit, sworn to on July 18, 2000, with the following further statement: "Based upon our examinations, the treatment rendered along with the results of the diagnostic studies as well as the objective physical examination findings shows that each of these individuals suffered an injury which rendered them partially disabled and in need of extensive treatment and rehabilitation as a direct result of this motor vehicle accident for a period well in excess of 90 days following the accident." Under the circumstances, it would appear that sufficient admissible evidence might have been presented on behalf of plaintiffs as to their compliance with the 90/180 day prescription of the statute so as to warrant the submission of the "(s)erious injury" question to the trier(s) of the facts. Nevertheless, the opposition to the instant motion has fallen short in one respect, namely, that plaintiffs' physician has failed to explain the five year gap between his last examination and treatment of the plaintiffs in 1995 and the date of his aforesaid affidavit. (See **PHILPOTTS v PETROVIC**, 160 AD2d 856; **CALCAGNO v NEW YORK CITY TRANSIT AUTHORITY**, 266 AD2d 421.) Under the circumstances, plaintiffs have not succeeded in demonstrating the existence of a triable issue of fact that would warrant denial of this motion.

DATED 11-1-00


J.S.C.

ENTERED
NOV 08 2000
KAREN V. MURPHY
COUNTY CLERK OF NASSAU COUNTY