

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. GEOFFREY J. O'CONNELL

Justice

TRIAL/IAS, PART 6
NASSAU COUNTY

KIMBERLY McCALPINE and PATRICIA FERRO,

Plaintiff(s),

INDEX No. 9392/00

-against-

TRIAL MOTION DATE: 12/3/04

IADER SAENZ and LUZ M. ROMERO,

Defendant(s).

This matter having come on for trial and a jury having been selected, Defendants move for an order dismissing the complaint for reasons of payment, release and collateral estoppel. (See, CPLR 3211(a)(5)).

Upon the parties appearance for trial of this motor vehicle personal injury action brought by Plaintiff Kimberly McCalpine, Defendant conceded liability. It is undisputed that the verified bill of particulars in this action with respect to the injuries claimed is identical to the injuries specified in another bill of particulars verified by Plaintiff Kimberly McCalpine in an action arising out of an automobile accident which predated this accident by seven weeks. Separate suits against different defendants were brought by the same Plaintiff's attorney and both defendants were insured by the Allstate Insurance Company. The same physician treated Plaintiff for the injuries claimed to have been sustained in the two accidents and that physician saw Plaintiff for the first time some ten months after the second accident. The first action was settled and a general release was given.

On these conceded facts, the Court finds that any testimony by the proposed medical witness, the physician who treated Plaintiff for both accidents and who did not see her until ten months after the second accident, which purported to attribute the identically described injuries as attributable to the second accident

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and not the first would be incredible as a matter of law. No explanation has been offered for the failure to move for consolidation of the two actions. Under all of these circumstances the oral motion is granted.

This constitutes the order and decision of the Court.

Dated: Dec 6, 2004

Geoffrey J. O'Connell
HON. GEOFFREY J. O'CONNELL, J.S.C.

ENTERED

DEC 08 2004

**MASSAU COUNTY
CLERK'S OFFICE**