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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - NASSAU COUNTY

Present:

HON. ANTHONY L. PARGA

Justice

PART 10

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**PROVIDENCE WASHINGTON INSURANCE
COMPANY on its own behalf and as insurer
and as subrogee of SCOTT SHELOFSKY,
and TONI-ANN SHELOFSKY,**

**INDEX NO. 5186/04
[ACTION NO. 1]**

Plaintiff,

-against-

BINA E. MUNOZ and REBECCA E. MUNOZ,

Defendants.

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REBECCA MUNOZ,

Plaintiff,

-against-

**SCOTT E. SHELOFSKY and TONI-ANN
SHELOFSKY,**

**INDEX NO. 8901/06
X X X
[ACTION NO. 2]**

**MOTION DATE: 7/30/09
SEQUENCE NO. 001**

Defendants.

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**DISTRICT COURT OF NASSAU COUNTY
FIRST DISTRICT : CIVIL PART 1**

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**PROVIDENCE WASHINGTON INSURANCE
COMPANY on its own behalf and as insurer
and as subrogee of SCOTT SHELOFSKY,
and TONI-ANN SHELOFSKY,**

**INDEX NO. 29850/03
[ACTION NO. 3]**

Plaintiff,

-against-

BINA E. MUNOZ and REBECCA E. MUNOZ,

Defendants.

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Upon the foregoing papers, it is ordered that the motion by defendants in Action No. 2 for an order granting them summary judgment pursuant to CPLR 3212 is granted.

The following facts are taken from pleadings and submitted papers and do not constitute findings of fact by this Court.

Action No. 2 is an action to recover damages for the personal injuries sustained by the plaintiff as a result of a motor vehicle accident which occurred at the intersection of Port Washington Boulevard and Main Street, Port Washington, N.Y. on June 8, 2003. Plaintiff was the operator of a car owned by non-party Bina Munoz. The other car was owned by defendant Toni-Ann Shelofsky and operated by defendant Scott Shelofsky.

In support of this motion, defendants Scott Shelofsky and Toni-Ann Shelofsky submit the sworn report of orthopedist, Leon Sultan, who reviewed Rebecca Munoz' medical records and after an examination on January 22, 2008 concluded that with: "regard to this woman's cervical spine, thoracolumbar spine and right knee reveals that she is orthopedically stable and neurologically intact. Today's examination does not confirm any ongoing causally related orthopedic or neurological impairment in

regard to the occurrence of 6/8/03." Dr. Sultan described the objective tests ("forward flexion", "trunk tilting", etc.) with the normal range.

Defendants' neurologist, Dr. Edward Weiland, reviewed Rebecca Munoz' medical records, examined her on January 22, 2008, administering objective tests and concluded that: "I can find no evidence of a lateralizing neurologic deficit at the present time. . . . There is no finding of any neurologic permanency or residual based upon the physical examination findings noted today."

In opposition, plaintiff Rebecca Munoz submits the affirmation of treating physician, Jeffrey Perry, who examined her on June 11, July 9 and August 13, 2003 and concluded that: "Ms. Munoz had a marked antalgic gait favoring her right lower extremity, numerous areas of lacerations and ecchymosis including in the right rib cage, right knee region and the right tibial shaft. Her cervical and lumbar excursion were quite limited. Based upon Ms. Munoz's description of events and the physical examination of June 11, 2003, there was a direct causal relationship between her motor vehicle accident and my findings." Dr. Perry's affirmation does not indicate what objective tests were performed to determine the degree and extent of the limitation of use or function and its permanency (*Grasso v. Angerami*, 79 NY2d 813 (1991); *Friedman v. U-Haul Truck Rental*, 216 AD2d 266 (2nd Dept. 1995); *Pagano v. Kingsbury*, 182 AD2d 268 (2nd Dept. 1992)).

Plaintiff, Rebecca Munoz's physiatrist, Joseph Gregorace, reviewed the medical records, examined her on November 13, 2003, June 11, July 9 and August 13, 2003 and administered an objective test (goniometer) and diagnosed plaintiff with right knee pain and cervical and lumbar rotation limits. After physical therapy Rebecca Munoz was examined again by Dr. Gregorace on June 22, 2009 and he concludes: "As

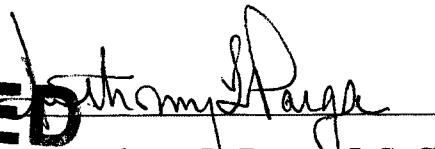
of June 22, 2009 my diagnosis of Ms. Munoz is as follows: cervical spine myofasciitis with bulging discs at C3/4, C4/5, C5/6 and C6/7; myofasciitis bilateral upper trepezius muscles; lumbar spine myofaciitis with bulging discs at L4/5 and L5/S1; right knee chondromalacia patella, chronic; . . . prognosis for her full and complete recovery is poor. She continues to be symptomatic with correlative objective clinical findings more that 6 years post injury. Ms. Munoz's lumbar and cervical spinal injuries and range of motion restrictions are significant and permanent."

There is no explanation by plaintiff Rebecca Munoz for the gap in any treatment between January 2004 and June 2009. As recently reaffirmed by the Court of Appeals, in the context of soft-tissue injuries, involving complaints of pain which are difficult to observe or quantify, what constitutes a "serious injury" is vexing. The Court of Appeals concluded, however, that even where there is objective medical proof of injury, where additional contributory factors interrupt the chain of causation between the accident and claimed injury, such as a gap in treatment, an intervening medical problem or pre-existing condition, summary dismissal of a complaint may be appropriate (*Pommells v. Perez, et al.* 4 NY3d 566 (2005)).

The mere existence of a herniated disc does not constitute serious injury (*St. Pierre v. Ferrier*, 28 AD3d 641 (2nd Dept., 2006)). The testimony and admissible medical evidence indicate that plaintiff suffered soft tissue injuries but not to the extent described as serious injury pursuant to Insurance Law 5102(d).

Dated: September 24, 2009.

ENTERED


Anthony L. Parga, J. S. C.

SEP 28 2009

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**