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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - NASSAU COUNTY

Present:

HON. ANTHONY L. PARGA

Justice

-----X PART 9  
AMILCAR VASQUEZ and FRANCISCO VASQUEZ,

Plaintiff,

INDEX NO. 12894/08

MOTION DATE: 4/16/10

SEQUENCE NO: 01, 02

-against-

HAROLD HARBER and AMY J. HAIMM,

Defendants.

-----X  
Notice of Motion, Affirmation, & Exhibits.....   1    
Affirmation in Opposition & Exhibits.....   2    
Notice of Motion, Affirmation & Exhibits.....   3  

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Upon the foregoing papers, it is ordered that the motion by the defendants for an order granting summary judgment dismissing the Complaint on the ground that the plaintiffs did not sustain a serious injury ( Insurance Law §5102(d)) is granted.

Motion by plaintiff Amilcar Vasquez for an order dismissing defendants' counterclaim on liability is denied as moot.

This is an action to recover damages for the personal injuries sustained by the plaintiffs as a result of a two car motor vehicle accident which occurred at Auerbach Lane, Lawrence, NY on August 15, 2007. Plaintiff Amilcar Vasquez was the owner and operator of one car, and Francisco Vasquez was a passenger. The other car was owned by defendant Amy J. Haimm and operated by defendant Harold Harber.

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" *Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986). Once the movant has demonstrated a *prima facie* showing of entitlement to judgment, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. *Zuckerman v. City of New York*, 49 NY2d 557 (1980).

In support of this application with respect to plaintiff Amilcar Vasquez, defendant's submit the sworn report of neurologist K. Sachdev. After reviewing Amilar Vasquez's medical records and an exam on 4/16/09 administering objective tests, Dr. Sachdev concluded: "My diagnoses of Mr. Vasquez's injuries are resolved cervical and lumbar sprain/strain, sprain hip, knee and ankle joints bilaterally-resolved. Mr. Vasquez's prognosis is good. He is able to return to pre-loss activity levels, including occupational duties."

Defendants' orthopedist R. Isreal examined Plaintiff Amilar Vasquez on 5/15/09 using objective range of motion tests and concluded : "Resolved sprain of the cervical spine. Resolved sprain of the thoracic spine.; Resolved sprain of the lumbar spine; Resolved sprain of the right knee." "**DISABILITY:** Based on my examination from an orthopedic point-of-view, the claimant has no disability as a result of the accident of record. "

In opposition, Plaintiff Amilcar Vasquez submits the 11/28/07 sworn cervical MRI report of radiologist Alan Greenfield . Dr. Greenfield concluded that: "**IMPRESSION:** 1. Exaggerated cervical lordosis 2. Suspected torticollis versus scoliosis of the lower cervical spine, centered at C7-T1. 3. Bulging disc at C3-C4."

Plaintiff Amilcar Vasquez's treating chiropractor D. Levine reviewed Amilcar Vasquez's medical history including the MRI and on 3/3/09 administered range of motion objective tests to conclude that: "Based on the subjective complaints by the patient of continuous pain and my objective findings, I can state with a reasonable degree of chiropractic certainty that the patient has sustained a permanent injury to his cervical and lumbar spine. It is also my opinion that a casual relationship exists between the injuries sustained and the accident above."

Dr. Levine examined the patient on 8/20/07 five days after the accident and concluded: "Based on the subjective complaints by the patient of continuous pain and my objective findings, I can state with a reasonable degree of chiropractic certainty that the patient has sustained a permanent injury to her cervical and lumbar spine. It is also my opinion that a casual relationship exists between the injuries sustained and the accident above."

The parties' 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). Plaintiff Amilcar Vasquez in his sworn testimony, admits that there was a subsequent accident in February of 2008. Plaintiff Amilcar Vasquez also answers "no" to questions regarding "pain in your neck as a result of the first accident"; pain to your back at all?"; "pain to your right leg?"; "pain to your right shoulder?". Neither plaintiff Amilcar Vasquez nor his experts explained the gap in treatment since the August 15, 2007 accident or the effect of the second accident on his alleged injuries.. *Ayala v Katsionis* 67 AD3d 836 (2<sup>nd</sup> Dept., 2009) .

In support of this application on behalf of Plaintiff Francisco Vasquez, defendants' submit the sworn report of neurologist K. Sachdev who examined Plaintiff Francisco Vasquez on 4/16/09. After reviewing Francisco Vasquez's medical records including the lumbar and cervical MRIs and administering objective tests, Dr. Sachdev concluded that, "My diagnosis of Mr. Vasquez's injuries are resolved post-traumatic headaches, resolved cervical, thoracic and lumbar spine sprain/strain and resolved bilaterally shoulder sprain. Mr. Vasquez's prognosis is good. He is able to return to pre-loss activity levels, including occupational duties."

Defendant's orthopedist R. Isreal examined Plaintiff Francisco Vasquez on 5/15/09 and reviewed his medical records including the cervical and lumbar MRIs and concluded: "Resolved sprain of the cervical spine. Resolved sprain of the lumbar spine. Resolved sprain of the right shoulder. Resolved sprain of the right knee." "Based on my examination from an orthopedic point-of-view, the claimant has no disability as a result of the accident record."

In opposition, Plaintiff Francisco Vasquez submits the sworn reports of chiropractor Dr. Levine who examined plaintiff Francisco Vasquez on 8/20/07 and 3/3/10, administered objective tests and on 3/3/10 concluded "Based on the subjective complaints by the patient of continuous pain and my objective findings, I can state with a reasonable degree of chiropractic certainty that the patient has sustained a permanent injury to his cervical and lumbar spine. It is also my opinion that a casual relationship exists between the injuries sustained and the accident above."

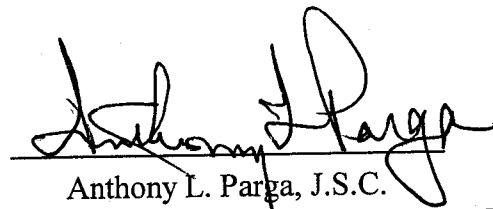
Radiologist Alan Greenfield's sworn 11/27/07 MRI report for Francisco Vasquez notes:  
1. Torticollis versus scoliosis at the lower cervical spine is suspected with the apex directed toward the right, as indicated above. 2. Left paracentral disc herniation at C3-C4 indenting the dural sac. 3. Bulging disc with coexistent shallow central disc herniation and downward extrusion at C4-C5. 4. A bulging disc at C5-C6. "

The Plaintiff Francisco Vasquezs' 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). Plaintiff Francisco Vasquez admits to "a little bit" of pain

in the neck and back and, "Q- other than that, are there any activities that you used to be able to do before this accident that you can't do at all now? A- No, No." Neither Plaintiff Francisco Vasquez nor his experts have expressly explained the reason for the cessation in treatment of the alleged, "serious injuries". [*Ayala v. Katsionis* 67AD3d 836 (2<sup>nd</sup> Dept. 2009) ].

Neither Plaintiff has demonstrated questions of fact sufficient to defeat a motion for summary judgment directed to the threshold issue of whether the plaintiff has suffered serious physical injury. Plaintiffs' statements, and those of their doctors reiterating their claims, that they were otherwise limited due to their own subjective complaints of pain, are also insufficient to defeat summary judgment. *Georgia v. Ramataur*, 180 AD2d 713 (2nd Dept. 1992); *Scheer v. Koubek*, 70 NY2d 678 (1987).

Dated: June 21, 2010



Anthony L. Parga, J.S.C.

**ENTERED**

JUN 23 2010

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**