SHORT FORM ORDER

INDEX NO. 10886/04

Supreme Court of the State of New York
IAS Part 43- County of Suffolk

PRESENT:

HON. ARTHUR G. PITTS

JUSTICE OF THE SUPREME COURT

EULALIO PERDOMO, MARIBEL NAVARRO and EVRI PERDOMO, an infant by his father and natural guardian, EULALIO PERDOMO,

Plaintiffs,

-against-

ANTHONY M. SCOTT and VENESSA E. VALENZUELA,

Defendants.

ORIG. RETURN DATE: 11/27/06
FINAL SUBMIT DATE: 2/1/07
MOTION SEQ. NO.: 003-MD
004-MG

PLTF'S/PET'S ATTY:
LAW OFFICE OF STEVEN COHN, P.C.
One Old Country Road, Suite 497
Carle Place, New York 11514

HAMMILL, O'BRIEN, CROUTIER, DEMPSEY & PENDER, P.C.
Attys for Ptlf. Eulalio Perdomo on counterclaim
154 Terry Road
P.O. Box 883
Smithtown, New York 11787

DEFT'S/RESP'S ATTY:
MARTIN, FALLON & MULLE
By Maryellen David
100 East Carver Street
Huntington, New York 11743

Upon the following papers numbered 1 to 34 read on this motion / summary judgment
Notice of Motion/OSC and supporting papers 1-14 ; Notice of Cross-Motion and supporting papers 15-21 ; Affirmation/affidavit in opposition and supporting papers 22-34 ; Affirmation/affidavit in reply and supporting papers ___ Other _____; ~~(and after hearing counsel in support of and opposed to the motion)~~ it is,

ORDERED that defendants Anthony M. Scott and Vanessa E. Valenzuela's motion for summary judgment is determined as follows:

The within action arose out of a motor vehicle accident that occurred on November 29, 2002 in which plaintiffs Eulalio Perdomo, Maribel Navarro and Evri Perdomo's each allegedly sustained a serious personal injury. As a basis of the instant motion the defendants assert that the plaintiffs have not sustained such serious injury as defined by Insurance Law 5102 (d).

Said section provides in part that "serious injury means 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 constitute such person's usual and customary daily activities for not less than ninety days during the one hundred and eighty days immediately following the occurrence of the injury or impairment." (Insurance Law 5102 (d)) In the context of the plaintiff's claims, the term "consequential" means important or significant (***Kordana v. Pomellito,*** 121 A.D.2d 783, 503 N.Y.S.2d 198 , 200 [3rd Dept. 1986] , App. Dis. 68 N.Y.2d 848, 508 N.Y.S.2d 425) The term, "significant" as it appears in the statute has been defined as "something more than a minor limitation of use" and the term "substantially all" has been construed to mean "that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment" (***Licari v. Elliott,*** 57 N.Y.2d 230, 455 N.Y.S.2d 570 [1982])

On a motion for summary judgment to dismiss the complaint for failure to set forth a prima facie case of serious injury as defined by Insurance Law 5102 (d), the initial burden is on the defendant "to present evidence, in competent form, showing that the plaintiff has no cause of action. " (***Rodriguez v. Goldstein,*** 182 A.D.2d 396, 582 N.Y.S.2d 395, 396 [1st Dept. 1992]) Once the defendant has met the burden, the plaintiff must then, by competent proof, establish a prima facie case that such serious injury exists. (***DeAngelo v. Fidel Corp. Services, Inc.,*** 171 A.D.2d 588, 567 N.Y.S.2d 454, 455 [1st Dept. 1991]) Such proof in order to be in a competent or admissible form, shall consist of affidavits or affirmations. (***Pagano v. Kingsbury,*** 182 A.D.2d 268, 587 N.Y.S.2d 692 [2nd Dept. 1992]) The proof must be viewed in a light most favorable to the non-moving party. (***Cammarere v. Villanova,*** 166 A.D.2d 760, 562 N.Y.S.2d 808, 810 [3rd Dept. 1990]).

Plaintiff Eulalio Perdomo

Plaintiff Eulalio Perdomo by way of his verified bill of particulars alleges that he sustained the following injuries as a result of the subject accident: Post concussion syndrome; post traumatic headaches; vertigo; cervical and lumbar radiculopathy; disc space narrowing at C3-4, C4-5, T5-T6, T6-T7, L1-L2, L2-L3; encroachment of neuroforamina at C3-4, C4-5, L5-S1; Cervical, lumbar, left hip and left knee strain/sprain; loss of range of motion of cervical spine, left shoulder, lumbar spine, left knee; partial tear of the rotator cuff of left shoulder; disc bulge at L5-S1.

The defendants in support of the instant motion have submitted the affirmed reports of S. Farkas, M.D. an orthopedic surgeon and Ira M. Turner, M.D. a neurologist. Dr. Farkas conducted an examination of plaintiff Eulalio Perdomo on March 14, 2006 and also had an opportunity to review relevant medical records. After such examination, which included various range of motion testing and review, he diagnosed the plaintiff with having sustained a resolved cervical sprain, resolved lumbar sprain, resolved sprain of the left shoulder, resolved sprain of the left knee concluding " I find no

orthopedic impairment based upon the physical examination at this time. This is also based upon the available medical documentation which was reviewed. The claimant may continue to perform the usual duties of his occupation as a warehouse worker and may carry out the daily activities, without restriction." Dr. Turner also examined the plaintiff on June 14, 2006 and reviewed relevant medical records. After such examination and review, he determined that all primary and cortical sensory modalities were intact concluding with a normal neurological examination. "There is no objective evidence of any permanent or even temporary neurological injury causally related to the reported accident of 11/29/01. There is no need for any neurological care or work up." Notwithstanding the findings of Dr. Turner and Dr. Farkas, it has consistently been held that a defendant's moving papers are insufficient for purposes of a motion for summary judgment based upon a plaintiff's failure to set forth a prima facie case of serious injury when the affirmed medical reports relied upon fail to provide the objective testing performed to arrive at their conclusions. (***Walters v. Papanastassiou,*** 31 A.D.3d 439, 819 N.Y.S.2d 48 [2nd Dept 2006]) In the matter at bar, neither Dr. Turner nor Dr. Farkas set forth the objecting testing that they performed in arriving to their diagnosis and as such, the defendants have failed to met their burden of establishing that the plaintiff Eulalio Perdomo does not have a cause of action. Accordingly, based upon the foregoing and the circumstances presented herein, the defendants' motion as to him is denied.

Plaintiff Maribel Navarro

Plaintiff Maribel Navarro by way of her verified bill of particulars alleges that she sustained the following injuries as a result of the subject accident: Cervical and lumbar sprain/strain; disc narrowing at c2-C3, T4-T4; encroachment or neuroforamina at C6-7, L5-S1; chest contusion; disc bulge at L3-L4, L4-L5, L5-S1; and facet hypertrophy.

The defendants in support of the instant motion have proffered the affirmed reports of S. Farkas, M.D., an orthopedic surgeon who examined the plaintiff on March 14, 2006 as well as reviewed relevant medical records and Ira M. Turner, M.D., a neurologist who examined the plaintiff on March 8, 2006. After conducting his examination Dr. Farkas diagnosed the plaintiff with a resolved cervical sprain, resolved lumbar sprain and resolved sprain of the left knee. He further concluded that "I find no orthopedic impairment based on the physical examination at this time. This is also based upon the available medical documentation, which was reviewed. The claimant may continue to perform the usual duties of her occupation assembling electronics and may carry out the daily activities of living without restriction." Dr. Turner after conducting his examination found a "normal neurological examination " and 'there is no neurological disability."However, notwithstanding Dr. Farkas' and Dr. Turner's diagnosis and conclusions, as with their examinations of plaintiff Eulalio Perdomo, they each failed to proffer the objecting testing performed in reaching such diagnosis and conclusions. As set forth above, such affirmations are insufficient to met the defendants' prima facie burden of establishing that plaintiff Maribel Navarro did not sustain a serious injury and as

such their motion for summary judgment as to her is denied. (***Walters v. Papanastassiou,*** supra)

Infant plaintiff Evri Perdomo

Infant plaintiff Evri Perdomo by way of his verified bill of particulars alleges that he sustained the following injuries as a result of the subject accident: post traumatic headaches. The defendants in support of the instant motion have submitted the affirmed report of Freddie M. Martin, M.D. a neurologist who examined the infant plaintiff on September 21, 2006. After such examination Dr. Martin concluded that had no neurological injury or disability. The defendants in further support of the instant motion proffered the transcript of plaintiff Eulalio Perdomo's examination before trial as it related to the infant plaintiff, his son. He testified that after the accident he was taken to the emergency room at Southside Hospital complaining of upper back pain and head pain. He was treated on five occasions by a chiropractor which ceased after one month of the accident. He missed no days from school, nor were any of his activities affected due to the accident. Based upon the foregoing, the defendant has demonstrated, as a matter of law, that the plaintiff has not sustained a serious injury. (***Reeves v. Scopaz,*** 227 A.D.2d 606, 643 N.Y.S.2d 620 [2nd Dept. 1996] ; ***Horan v. Mirando,*** 221 A.D.2d 506, 633 N.Y.S.2d 402 [2nd Dept. 1995] ; ***Fitzmaurice v. Chase,*** 288 A.D.2d 651, 732 N.Y.S.2d 690 [3rd Dept. 2001])

"In order to successfully oppose the motion for summary judgment, the plaintiff must set forth 'competent medical evidence based upon objective medical findings and diagnostic tests to support his claim .... because subjective complaints of pain .... absent other proof are insufficient to establish a serious injury'. (***Eisen v. Walter & Samuels,*** 215 A.D.2d 149, 150, 626 N.Y.S.2d 109)" (***Tankersley v. Szesnat.*** 235 A.D.2d 1010, 1012, 653 N.Y.S.2d 184 [3rd Dept 1997]) Herein, the infant plaintiff has failed to submit any evidence in opposition to the defendants' prima facie showing that he has failed to sustain a serious injury. Accordingly, the motion for summary judgment as to infant plaintiff Evri Perdomo is granted under the circumstances presented herein.

This shall constitute the decision and order of the Court.

Submit judgment.

Dated: Riverhead, New York
April 17, 2007

J.S.C.

____ FINAL DISPOSITION __X_ NON-FINAL DISPOSITION ____ DO NOT SCAN