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SHORT FORM ORDER

INDEX No. 10-8571

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

Mot. Seq. # 002 - MD
003 - MD

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DAMIAN LOZADA, an infant by his mother and natural guardian, MARIA MENDEZ-LOZADA and MARIA MENDEZ-LOZADA, individually,

Plaintiffs,

- against -

MILAGROS PARES, VICTOR M. GRULLON and YUDERKA J. GRULLON,

Defendants.

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Upon the following papers numbered 1 to 26 read on this motion and cross motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers (002) 1 - 15 ; Notice of Cross Motion and supporting papers (003) 16-18 ; Answering Affidavits and supporting papers 19-24 ; Replying Affidavits and supporting papers 25-26 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (002) and (003) are consolidated for the purpose of this determination; and it is further

ORDERED that this pre-note of issue motion (002) by the defendant, Milagros Pares, pursuant to CPLR 3212 for summary judgment dismissing the complaint as asserted by the infant plaintiff, Damian Lozada, and his mother and natural guardian, Maria Mendez-Lozada, on the basis that the infant plaintiff has not sustained a serious injury as defined by Insurance Law §5102 (d), is denied; and it is

ORDERED that this pre-note of issue motion (003) by the defendants, Yuderka Grullon and Victor Grullon, pursuant to CPLR 3212 for summary judgment dismissing the complaint as asserted by the infant plaintiff, Damian Lozada, and his mother and natural guardian, Maria Mendez-Lozada, on the basis that the infant plaintiff has not sustained a serious injury as defined by Insurance Law §5102 (d), is denied.

This is an action for damages, personally and derivatively, for personal injuries allegedly sustained by the infant plaintiff, Damian Lozada, in a motor vehicle accident on Candlewood Road at or near its intersection with Connecticut Avenue, in Islip, New York, on August 4, 2008. The accident allegedly occurred when a vehicle which was operated by defendant Yuderka J. Grullon and in which the infant plaintiff was a passenger collided with a vehicle operated by defendant Milagros Pares. By way of a cross-claim, Milagros Pares seeks indemnification against the co-defendants in this action. By way of a cross-claim, the defendants Victor M. Grullon and Yuderka J. Grullon seek contribution and/or indemnification from Milagros Pares.

As a result of this accident, it is claimed that the infant plaintiff sustained a tear of the medial meniscus of the right knee; chondromalacia patella of the right knee; and a contusion of the right knee. In addition to the injuries claimed, it is further alleged that the infant plaintiff was confined to home from August 4, 2008 until about September 8, 2008, and that he was not able to participate in physical education activities as a result of the injuries until about December 2008, and was then limited in his physical education activities for the remainder of the school year.

The defendants, by way of their respective motions, seek summary judgment dismissing the complaint on the basis that the infant plaintiff did not sustain a serious injury as defined in Insurance Law § 5102 (d).

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 eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (Friends of Animals v Associated Fur Mfrs., 46 NY2d 1065 [1979]; Sillman v Twentieth Century-Fox Film Corporation, 3 NY2d 395 [1957]). The movant has the initial burden of proving entitlement to summary judgment (Winegrad v N.Y.U. Medical Center, 64 NY2d 851 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (Winegrad v N.Y.U. Medical Center, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (Castro v Liberty Bus Co., 79 AD2d 1014 [2d Dept 1981]).

Pursuant to Insurance Law § 5102(d), " '[s]erious 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 medical 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 eighty days immediately following the occurrence of the injury or impairment."

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 Elliot, 57 NY2d 230 [1982]).

On a motion for summary judgment to dismiss a 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 plaintiff has no cause of action" (Rodriquez v Goldstein, 182 AD2d 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 AD2d 588 [1st Dept 1991]). Such proof, in order to be in competent or admissible form, shall consist of affidavits or affirmations (Pagano v Kingsbury, 182 AD2d 268 [2d Dept 1992]). The proof must be viewed in a light most favorable to the non-moving party, here the plaintiff (Cammarere v Villanova, 166 AD2d 760 [3d Dept 1990]).

In order to recover under the "permanent loss of use" category, a plaintiff must demonstrate a total loss of use of a body organ, member, function or system (Oberly v Bangs Ambulance Inc., 96 NY2d 295 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, either a specific percentage of the loss of range of motion must be ascribed or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (Toure v Avis Rent A Car Systems, Inc., 98 NY2d 345 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (Licari v Elliott , *supra*).

In support of motion (002), Milagros Pares has submitted, inter alia, an attorney's affirmation; copies of the pleadings and plaintiff's bill of particulars; signed copies of the transcripts of the examinations before trial of the infant plaintiff dated November 16, 2010, Maria Mendez-Lozada dated November 16, 2010, Milagros Pares dated November 17, 2010; a copy of the infant plaintiff's school record/sport participation form; and the sworn reports of William Healy, M.D. dated December 20, 2010 concerning his independent orthopedic examination of the infant plaintiff, Sheldon Feit, M.D. concerning his independent radiology review of the MRI's of the plaintiff's right knee; copies of x-ray reports dated August 4, 2008 and August 29, 2008 of the plaintiff's right knee, and an MRI report of dated November 29, 2008 of the plaintiff's right knee; and a copy of a letter sworn to by Armand E. Abulencia, M.D. pursuant to an examination of the plaintiff at the request of Geico.

In support of motion (003), Yuderka Grullon and Victor Grullon have submitted an attorney's affirmation incorporating by reference the facts, legal arguments, exhibits and procedural history set forth in paragraphs 2 through 7, and 13 through 58 of the affirmation of Milagros Pares. It is noted,

however, that since Milagros Pares did not submit an affirmation, it is assumed that counsel for the Grullon defendants is referring the supporting affirmation of counsel for Pares.

Damian Lozado testified at his examination before trial that he was born on December 4, 1994, and was in 11th grade at the time of his testimony. He was involved in an automobile accident on August 4, 2008 while a passenger in the automobile being operated by Yuderka Grullon. He was seated in the rear right passenger seat. The vehicle in which he was riding was struck on the driver's side behind the driver's door. As a result of the impact, his right knee struck the door handle on the right rear passenger door, his right shoulder struck the window, and he hit his teeth and mouth on the can of ice tea he was drinking at the time of impact causing his right front tooth to chip. He immediately felt stiffness in his right leg and his tooth hurt. When he arrived home, his knee felt stiff, it would not bend all the way, and he had difficulty walking on it. His mother took him to Southside Hospital where his right knee was x-rayed and a brace was applied. He was advised that he had some sort of a tear in the right knee. He followed up with an orthopedic doctor, Dr. Cushner, who advised him of the possible need for surgery to his right knee for a suspected tear. More x-rays and an MRI were taken. He started physical therapy for soft exercise and stretching of the knee, two to three times a week for about two months, but he still had stiffness in his knee. He told Dr. Cushner he did not want surgery.

Lozado testified that he was involved in basketball, baseball and football on BYA teams (Yankees) for nine years. He played organized baseball with CYL2 in the year prior to the accident, but stopped as he moved into school baseball. At the time of the accident, he was employed as a summer custodian at the South Middle School from 7:15 to 2:30, but was off from work that day. As a result of the injury to his right knee, he was unable to return to his custodial job. He missed a week of school in September, and when he returned, he was unable to participate in physical education classes for about two months due to his knee injury. He continued to wear the knee brace for about three weeks after he started back to school. When he returned to his physical education classes, he could not play basketball in gym because he could not jump hard and high. However, he did continue to play basketball elsewhere. At the time of his deposition, he still had pain in his knee, but could jump. He experiences tingling and numbness in his knee, which interferes with his ability to run hard and jump.

The deposition transcripts of Maria Mendez-Lozado and Milagros Pares have been reviewed. Maria Mendez-Lozado testified that when she took her son to the emergency department at Southside Hospital following the accident, she was told that there was a possible tear of the ligament in his knee, as the x-ray showed some damage. She continued that Dr. Cushner ordered an MRI which revealed that he had fluid in his knee. Dr Cushner advised her he could be treated with knee surgery to remove the fluid, or wait it out. She opted for her son not to have the surgery performed right away, as she was concerned with a bad outcome and wanted him to try physical therapy first.

William Healy, M.D. set forth in his report concerning his examination of the infant plaintiff the records he reviewed, and from which he quoted. However, those records have not been submitted as evidence with the moving papers in support of Dr. Healy's opinions, as required pursuant to Friends of Animals v Associated Fur Mfrs., supra. Expert testimony is limited to facts in evidence. (*see, also,* Allen v Uh, 82 AD3d 1025 [2d Dept 2011]; Hornbrook v Peak Resorts, Inc. 194 Misc2d 273 [Sup Ct, Tompkins County 2002]; Marzuillo v Isom, 277 AD2d 362 [2d Dept 2000]; Stringile v Rothman, 142

AD2d 637 [2d Dept 1988]; O'Shea v Sarro, 106 AD2d 435 [2d Dept 1984]). He stated that no radiographs were available for review. Here, Dr. Healy may offer opinions based upon his own examination of the infant plaintiff.

Dr. Healy performed range of motion testing to both of plaintiff's knees, compared those findings to the normal ranges of motion, and reported no deficits. However, Dr. Healy failed to set forth the objective method employed to obtain such range of motion measurements of the plaintiff's knees, such as the goniometer, inclinometer or arthroidal protractor, leaving it to this court to speculate as to how he determined such ranges of motions when examining the plaintiff (*see* Martin v Pietrzak, 273 AD2d 361[2d Dept 2000]; Vomero v Gronrous, 19 Misc3d 1109A [Sup Ct, Nassau County 2008]). Although Dr. Healy sets forth that there is no crepitation in the medial or lateral femoral condyle in either knee, he notes painless crepitations to both the right and left knee, raising further factual issues. He also indicates that there is no effusion, but does not indicate the basis for this opinion.

Dr. Feit has reviewed the x-ray films of August 4th and 29th of 2008, and the MRI dated November 29, 2008. He notes a small effusion present in the right knee in the MRI film nearly three months following the accident, but then states that this is an "essentially normal study." He does not address the issue of the effusion and does not indicate whether or not the effusion is related to the accident or the cause of such effusion.

Defendants' examining physician, Dr. Healy's affidavit insufficient to demonstrate entitlement to summary judgment on the issue of whether either plaintiff was unable to substantially perform all of the material acts which constituted his usual and customary daily activities for a period in excess of 90 days during the 180 days immediately following the accident (Blanchard v Wilcox, 283 AD2d 821[3d Dept 2001]; *see*, Uddin v Cooper, 32 AD3d 270 [1st Dept 2006]; Toussaint v Claudio, 23 AD3d 268 [1st Dept 2005]). He does not offer an opinion concerning this category of serious injury. It is additionally noted that the plaintiff's testimony raises factual issues concerning his inability to substantially perform his normal work and sports activities for ninety out of 180 days following the accident, precluding summary judgment.

It is further noted that the report of Dr. Armand E. Abulencia, dated March 11, 2009, indicates that if the history is accurate, there is causal relationship of the plaintiff's condition to the accident of record. Although Dr. Abulencia states there is full range of motion, he does not set forth how he made such determination, does not set forth range of motion findings for the plaintiff's right knee, and does not compare any findings to the normal range of motion. Thus, his report does not establish the defendants' prima facie entitlement to summary judgment dismissing the complaint.

Based upon the foregoing, the defendants have failed to establish prima facie entitlement to summary judgment dismissing the complaint on the basis that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d).

Inasmuch as the moving parties have failed to establish their prima facie entitlement to judgment as a matter of law in the first instance on the issue of "serious injury" within the meaning of Insurance Law § 5102 (d), it is unnecessary to consider whether the opposing papers were sufficient to raise a

triable issue of fact (*see*, Yong Deok Lee v Singh, 56 AD3d 662 [2d Dept 2008]); Krayn v Torella, 40 AD3d 588 [2d Dept 2007]; Walker v Village of Ossining, 18 AD3d 867 [2d Dept 2005]), as the burden has not shifted to the plaintiffs.

Accordingly, motions (002) and (003) by the defendants for summary judgment dismissing the complaint as asserted by the infant plaintiff, Damian Lozada, and his mother and natural guardian, Maria Mendez-Lozada, on the basis that the infant plaintiff has not sustained a serious injury are denied.

Dated: February 27, 2012

HON. JOSEPH C. PASTORESSA, J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION