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SHORT FORM ORDER

INDEX No. 10-35597

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. # 003 - MG; CASEDISP

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CHRISTINA ORLANDO, an infant under the age of eighteen by her mother and natural guardian, LAURA L. ORLANDO, and LAURA L. ORLANDO, individually,

Plaintiffs,

- against -

SHAYLIN A. GRAHAM,

Defendant.

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Upon the following papers numbered 1 to 19 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 14 - 19; Replying Affidavits and supporting papers __; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the defendant Shaylin Graham seeking summary judgment dismissing the complaint is granted.

The plaintiff Laura Orlando commenced this action on behalf of herself and her infant daughter, the infant plaintiff Christina Orlando, to recover damages for injuries the infant plaintiff allegedly sustained as a result of a motor vehicle accident that occurred at the intersection of Montauk Highway and Patchogue Avenue in the Town of Islip on August 25, 2009. The accident allegedly occurred when the infant plaintiff, who was 14 years old at the time, was struck by the defendant's vehicle as she was riding a skateboard. The plaintiffs, by their bill of particulars, allege that the infant plaintiff sustained various personal injuries as a result of the subject accident, including chondromalacia patella of the left knee, a popliteal cyst, and permanent and disfiguring scarring of the face, back and left leg. The plaintiffs further allege that the infant plaintiff was confined to her bed for approximately two days and to her home for approximately two weeks as a result of the injuries she sustained in the accident.

The defendant now moves for summary judgment on the basis that the infant plaintiff's alleged injuries fail to meet the "serious injury" threshold requirement of Insurance Law § 5102(d). In support of the motion, the defendant submit copies of the pleadings, the infant plaintiff's deposition transcript, the sworn medical reports of Dr. Michael Katz and Dr. Samuel Roth, and photographs of the infant plaintiff taken by Dr. Roth. Dr. Katz conducted an independent orthopedic examination of the infant plaintiff and Dr. Roth performed an independent examination of the infant plaintiff at the defendant's request in September 2011.

It has long been established that the "legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries" (Dufel v Green, 84 NY2d 795, 798 [1995]; see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]). Therefore, the determination of whether or not a plaintiff has sustained a "serious injury" is to be made by the court in the first instance (see Licari v Elliott, 57 NY2d 230 [1982]; Porcano v Lehman, 255 AD2d 430 [2d Dept 1988]; Nolan v Ford, 100 AD2d 579 [2d Dept 1984], aff'd 64 NY2d 681 [1984]).

Insurance Law § 5102 (d) defines a "serious injury" as "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 eighty days immediately following the occurrence of the injury or impairment."

A defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred under the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a "serious injury" (see Toure v Avis Rent A Car Sys., supra; Gaddy v Eyler, 79 NY2d 955 [1992]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant's own witnesses, "those findings must be in admissible form, [such as], affidavits and affirmations, and not unsworn reports" to demonstrate entitlement to judgment as a matter of law (Pagano v Kingsbury, 182 AD2d 268, 270 [2d Dept 1992]). A defendant may also establish entitlement to summary judgment using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (see Fragale v Geiger, 288 AD2d 431 [2d Dept 2001]; Grossman v Wright, 268 AD2d 79 [2d Dept 2000]; Vignola v Varrichio, 243 AD2d 464 [2d Dept 1997]; Torres v Micheletti, 208 AD2d 519 [2d Dept 1994]). Once a defendant has met this burden, the plaintiff must then submit objective and admissible proof of the nature and degree of the alleged injury in order to meet the threshold of the statutory standard for "serious injury" under New York's No-Fault Insurance Law (see Dufel v Green, supra; Tornabene v Pawlewski, 305 AD2d 1025 [4th Dept 2003]; Pagano v Kingsbury, supra).

Here, the defendant established her prima facie entitlement to judgment as a matter of law that the infant plaintiff did not sustain a serious injury within the meaning of the Insurance Law as a result of the subject accident (see Toure v Avis Rent A Car Sys., supra; Gaddy v Eyler, supra; Sirma v Beach, 59 AD3d 611 [2d Dept 2009]). The defendant's examining orthopedist, Dr. Katz, tested the ranges of

motion in the infant plaintiff's spine, hips, pelvis, and knees using a goniometer, and set forth his specific measurements, and compared the infant plaintiff's ranges of motion to the normal ranges (see Cantave v Gelle, 60 AD3d 988 [2d Dept 2009]; Staff v Yshua, 59 AD3d 614 [2d Dept 2009]). Dr. Katz states in his medical report that an examination of the infant plaintiff's spine reveals that she has full range of motion in that region, that her gait is normal without antalgic or Trendelenburg component, that the straight leg raising test is negative, and that no paravertebral muscle spasm is present. Dr. Katz states that an examination of the infant plaintiff's right and left knee reveals that there is no swelling or effusion in either knee, that she has full range of motion, and that her knees are stable to varus and valgus stress. Dr. Katz also states that there is no crepitus of the knees, that the Lachman and patellar apprehension tests are negative, and that there is no medial or lateral joint line tenderness. Dr. Katz opines that the strains that the infant plaintiff sustained to her spine and the left knee and calf derangement as a result of the accident have resolved. Dr. Katz further states that the infant plaintiff currently shows no signs or symptoms of permanent injury relative to her neck, back or left knee, that she is not disabled, and that she is capable of her activities of daily living and full time studies.

In addition, the defendant's examining plastic surgeon, Dr. Roth, states in his medical report that there are no visible scars on the infant plaintiff's face, left shoulder, chest or left leg, although there are two scars on her right lower extremity located on the medial aspect of the ankle. Dr. Roth states that one scar measures approximately one and an half centimeters by one-quarter centimeters, that it is flat, has good color, is non-tender, and is minimally visible. Dr. Roth states the second scar measures approximately one centimeter by one millimeter, and is flat, soft, non-tender and slightly hyperpigmented. Dr. Roth opines that the infant plaintiff's two scars are well healed and are minimally visible, and that she does not have any functional disability as a result of the abrasions that she sustained as a result of the subject accident.

The defendant, by submitting the infant plaintiff's deposition transcript, also established that the infant plaintiff's alleged injuries did not prevent her from performing substantially all of the material acts constituting her customary daily living activities during at least 90 of the first 180 days following the subject accident (see Bamundo v Fiero, 88 AD3d 831 [2d Dept 2011]; Dunbar v Prahovo Taxi, Inc., 84 AD3d 862 [2d Dept 2011]; Richards v Tyson, 64 AD3d 760 [2d Dept 2009]). Therefore, the defendant has shifted the burden to the plaintiffs to come forward with evidence in admissible form to raise a material triable issue of fact as to whether the infant plaintiff sustained an injury within the meaning of the Insurance Law (see Pommells v Perez, 4 NY3d 566 [2005]; see generally Zuckerman v City of New York, 49 NY2d 557 [1980]).

The plaintiffs oppose the motion on the ground that the defendant failed to meet her prima facie burden that the infant plaintiff did not sustain an injury within the meaning of the Insurance Law. The plaintiffs contend that the injuries sustained by the infant plaintiff to her neck, back and left leg as a result of the subject accident fall within the "limitations of use" and "90/180" categories of Insurance Law. The plaintiffs further assert that the scars that the infant plaintiff sustained to her face, left shoulder, chest and left leg as a result of the accident constitute a serious injury within the meaning of Insurance Law § 5102(d). In opposition to the motion, the plaintiffs submit the infant plaintiff's affidavit, the affidavits of Dr. John Kuri and Dr. Ira Chernoff, and photographs of the infant plaintiff's scars.

A plaintiff claiming a significant limitation of use of a body function or system must substantiate his or her complaints with objective medical evidence showing the extent or degree of the limitation caused by the injury and its duration (see Ferraro v Ridge Car Serv., 49 AD3d 498 [2d Dept 2008]; Mejia v DeRose, 35 AD3d 407 [2d Dept 2006]; Laruffa v Yui Ming Lau, 32 AD3d 996 [2d Dept 2006]; Kearse v New York City Tr. Auth., 16 AD3d 45 [2d Dept 2005]). Whether a limitation of use or function is 'significant' or 'consequential' (i.e. important . . .), relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part" (Dufel v Green, 84 NY2d at 798 [1995]). To prove the extent or degree of physical limitation with respect to the "limitations of use" categories, either objective evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration based on a recent examination of the plaintiff must be provided 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 (seePerl v Meher, 18 NY3d 208 [2011]; Toure v Avis Rent A Car Systems, Inc., supra at 350; see also Valera v Singh, 89 AD3d 929 [2d Dept 2011]; Rovelo v Volcy, 83 AD3d 1034 [2d Dept 2011]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (see Licari v Elliott, 57 NY2d 230 [1982]). However, evidence of contemporaneous range of motion limitations is not a prerequisite to recovery (see Perl v Meher, supra; Paulino v Rodriguez, 91 AD3d 559 [1st Dept 2012]).

Moreover, to establish a claim for "significant disfigurement" within the meaning of Insurance Law §5102 (d), plaintiff must demonstrate that "a reasonable person viewing plaintiff's body in its altered state would regard the condition as unattractive, objectionable or as the subject of pity or scorn" (Edwards v De Haven, 155 AD2d 757, 758 [3d Dept 1989]; see Licygiewicz v Stearns, 61 AD3d 1254 [3d Dept 2009]; Baker v Thorpe, 43 AD3d 535 [3d Dept 2007]; Johnson v Grant, 3 AD3d 720 [3d Dept 2004]). Furthermore, while the question of whether a plaintiff's scar constitutes a significant disfigurement generally is submitted to the trier of fact (see Prieston v Massaro, 107 AD2d 742 [2d Dept 1985]; Benitez v Sexton, 139 AD2d 686 [2d Dept 1988]), it still is for the court to determine in the first instance whether plaintiff has a prima facie case of serious injury within the meaning of the No-Fault Insurance Law (Licari v Elliott, 57 NY2d 230, 237 [1982]; Prieston v Massaro, supra; see e.g. Sirmans v Mannah, 300 AD2d 465 [2d Dept 2002]; Jordan v Baine, 241 AD2d 894 [3d Dept 1997]; Caruso v Hall, 101 AD2d 967 [3d Dept 1984], aff'd 64 NY2d 843 [1985]).

In opposition to the defendant's prima facie showing, the plaintiffs failed to raise a triable issue of fact as to whether the infant plaintiff's injuries to her spine and left knee come within the meaning of the serious injury threshold requirement of the Insurance Law (see Licari v Elliott, supra; Griffiths v Munoz, __ AD3d __, 2012 NY Slip Op 6190 [2d Dept 2012]), and as to whether scars on her face, chest, left shoulder and left leg, constitute a "significant disfigurement" within the meaning of Insurance Law § 5102(d) (see Maldonado v Piccirilli, 70 AD3d 785 [2d Dept 2010]; Lynch v Iqbal, 56 AD3d 621 [2d Dept 2008]). The plaintiffs' submissions fail to establish that the infant plaintiff's injuries are permanent or that the injury to her left knee constitutes more than a mild, minor or slight limitation (see Licari v Elliott, supra; McIntosh v O'Brien, 69 AD3d 585 [2d Dept 2010]). "While a significant limitation of use of a body function or member need not be permanent in order to constitute a serious injury... any assessment of the significance of a bodily limitation necessarily requires consideration not only of the extent of degree of limitation of its duration as well, notwithstanding the fact that the

Insurance Law § 5102(d) does not expressly set forth any temporal requirement for a significant limitation" (Lively v Fernandez, 85 AD3d 981, 982 [2d Dept 2011], quoting Partlow v Meehan, 155 AD2d 647 [2d Dept 1989]). The affidavits by Dr. Kuri and Dr. Chernoff inexplicably fail to meet this requirement, since they are not based upon recent examinations of the infant plaintiff (see Lively v Fernandez, supra; Jean v Labin-Natochenny, 77 AD3d 623 [2d Dept 2010]). Instead, each doctor's affidavit states in an extremely perfunctory and conclusory manner that the infant plaintiff continues to suffer a condition of the knee, left shoulder and neck that was caused by the subject accident. Furthermore, the photographs submitted by the plaintiffs depicting the infant plaintiff's purported scars were not authenticated and do not constitute evidentiary proof in admissible form (see CPLR 4518[a]; New York v Patterson, 93 NY2d 80 [1999]; Read v Ellenville Nat'l Bank, 20 AD3d 408 [2d Dept 2005]; see also Holloman v City of New York, 74 AD3d 750 [2d Dept 2010]). Finally, in the absence of any competent medical evidence, the self-serving affidavit of the infant plaintiff was insufficient to demonstrate the existence of a serious injury (see Maffei v Santiago, 63 AD3d 1011 [2d Dept 2009]; Gochnour v Quaremba, 58 AD3d 680 [2d Dept 2009]; Duke v Saurelis, 41 AD3d 770 [2d Dept 2007]).

Accordingly, defendant's motion for summary judgment dismissing the complaint is granted.

Dated: November 20, 2012

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

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION