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SHORT FORM ORDER

INDEX No. 12-8530
CAL No. 14-00813MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. DANIEL MARTIN

MOTION DATE 9-30-14
ADJ. DATE ~~10-28-14~~ 11-25-14
Mot. Seq. # 001 - MG/CASE DISP

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TIMOTHY PETERSON, an infant over the age of fourteen (14) years, by his natural guardian, DOROTHY NEWTON, DOROTHY NEWTON and PAUL NEWTON,

Plaintiffs,

- against -

A.C. CORTES-VELAZQUEZ,

Defendant.

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Upon the following papers numbered 1 to 27 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 15; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 16 -24; Replying Affidavits and supporting papers 25 - 27; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the defendant A.C. Cortes-Velazquez seeking summary judgment dismissing the cause of action by the infant plaintiff Timothy Peterson is granted.

This is an action to recover damages for injuries allegedly sustained by the plaintiffs Dorothy Newton, Paul Newton and the infant plaintiff Timothy Peterson as a result of a motor vehicle accident that occurred at the intersection of Second Street and Suffolk Avenue in the Town of Islip on November 10, 2011. It is alleged that the accident occurred when the vehicle operated by the plaintiff Dorothy Newton was struck in the rear by the vehicle operated by the defendant Ana Cortes-Velazquez, s/h/a A.C. Cortes-Velazquez, while it was stopped at a red traffic light on Second Avenue. At the time of the accident, the plaintiff Paul Newton was a back seat passenger and the infant plaintiff Timothy Peterson was a front seat passenger in the Newton vehicle. By his bill of particulars, the infant plaintiff alleges that he sustained various personal injuries as a result of the subject accident, including lumbar derangement, lumbar radiculitis and lumbar strain/sprain. The infant plaintiff further alleges that he was confined to his home and bed and incapacitated from attending school for approximately two days.

The defendant now moves for summary judgment on the basis that the injuries alleged to have been sustained by the infant plaintiff as a result of the subject accident do not meet the serious injury threshold requirement of § 5102(d) of the Insurance Law. In support of the motion, the defendant submits copies of the pleadings, the infant plaintiff's deposition transcript, uncertified copies of the infant plaintiffs medical records pertaining to the injuries at issue, and the sworn medical report of Dr. Edward Toriello. At the defendant's request, Dr. Toriello conducted an independent orthopedic examination of the infant plaintiff on April 7, 2014.

The purpose of New York State's No-Fault Insurance Law is to "assure prompt and full compensation for economic loss by curtailing costly and time-consuming court trial[s]" (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]), and requiring every case, even those with minor injuries, to be decided by a jury would defeat the statute's effectiveness (*see* ***Licari v Elliott***, *supra)*. Therefore, the No-Fault Insurance law precludes the right of recovery for any "non-economic loss, except in the case of serious injury, or for basic economic loss" (*see* Insurance Law § 5104 [a]; ***Martin v Schwartz***, 308 AD2d 318, 766 NYS2d 13 [1st Dept 2003]). Any injury not falling within the definition of "serious injury" is classified as an insignificant injury, and a trial is not allowed under the No-Fault statute (*see* ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Martin v Schwartz***, *supra*).

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 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, 733 NYS2d 901 [2d Dept 2001]; ***Grossman v Wright***, 268 AD2d 79, 707 NYS2d 233 [2d Dept 2000]; ***Vignola v Varrichio***, 243 AD2d 464, 662 NYS2d 831 [2d Dept 1997]; ***Torres v Micheletti***, 208 AD2d 519, 616 NYS2d 1006 [2d Dept 1994]). Once defendant has met this burden, 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***, 84 NY2d 795, 622 NYS2d 900 [1995]; ***Tornabene v Pawlewski***, 305 AD2d 1025, 758 NYS2d 593 [2d Dept 2003]; ***Pagano v Kingsbury***, 182 AD2d 268, 270, 587 NYS2d 692 [2d Dept 1992])). However, if a defendant does not establish a prima facie case that the plaintiff's injuries do not meet the serious injury threshold, the court need not consider the sufficiency of the plaintiff's opposition papers (*see* ***Burns v Stranger***, 31 AD3d 360, 819 NYS2d 60 [2d Dept 2006]; ***Rich-Wing v Baboolal***, 18 AD3d 726, 795 NYS2d 706 [2d Dept 2005]; *see generally*, ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

Here, the defendant, by submitting the infant plaintiff's deposition transcript and competent medical evidence, established a prima face case that the infant plaintiff did not sustain an injury within the meaning of § 5102(d) of the Insurance Law (*see* ***Toure v Avis Rent A Car Sys.***, ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]); ***Gaddy v Eyler***, *supra*; ***Torres v Ozel***, 92 AD3d 770, 938 NYS2d 469 [2d Dept 2012]; ***Wunderlich v Bhuiyan***, 99 AD3d 795, 951 NYS2d 885 [2d Dept 2007]). Defendant's examining orthopedist, Dr. Toriello, states in his medical report that the infant plaintiff has full range of motion in his spine, shoulders, wrists and hands; that there is no evidence of paraspinal muscle spasm or weakness upon palpation of the paraspinal muscles; that the straight leg raising test is negative, bilaterally; that the strain to the infant plaintiff's lumbar spine sustained in the subject collision is resolved; and that the infant plaintiff does not have any objective evidence of an orthopedic disability or permanency, and is capable of performing his normal daily living activities without restriction.

The defendant, having made a prima facie showing that the infant plaintiff did not sustain a serious injury within the meaning of the statute, shifted the burden to the infant plaintiff to come forward with evidence to overcome the defendant's submissions by demonstrating the existence of a triable issue of fact that a serious injury was sustained (*see* ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]). 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, 854 NYS2d 408 [2d Dept 2008]; ***Mejia v DeRose***, 35 AD3d 407, 825 NYS2d 772 [2d Dept 2006]; ***Laruffa v Yui Ming Lau***, 32 AD3d 996, 821 NYS2d 642 [2d Dept 2006]; ***Kearse v New York City Tr. Auth.***, 16 AD3d 45, 789 NYS2d 281 [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***, *supra* at 798). 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 (*see* ***Perl v Meher***, 18 NY3d 208, 936 NYS2d 655 [2011]; ***Toure v Avis Rent A Car Systems, Inc.***, *supra* at 350; *see also* ***Valera v Singh***, 89 AD3d 929, 923 NYS2d 530 [2d Dept 2011]; ***Rovelo v Volcy***, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*see* ***Licari v Elliott***, *supra*). 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, 937 NYS2d 198 [1st Dept 2012]).

The infant plaintiff in opposition to the motion argues that he sustained injuries within the "limitations of use" and the "90/180" categories of the Insurance Law as a result of the subject accident, and that the evidence submitted in opposition raises triable issues of fact as to such. In opposition to the motion, the infant plaintiff submits his own affidavit, the affidavit of the plaintiff Dorothy Newton, certified copies of the infant plaintiff's medical records regarding the injuries at issue, and the sworn medical reports of Dr. Arthur Thompson, Dr. Dan Acaru, and Dr. Alvin Stein.

In opposition, the infant plaintiff has failed to raise a triable issue of fact as to whether he sustained a serious injury within the "limitation of use" categories or the 90/180 category of the Insurance Law (***Gaddy v Eyler***, *supra*; ***Licari v Elliott***, *supra*; ***Frisch v Harris***, 101 AD3d 941, 957 NYS2d 235 [2d Dept 2012]). A plaintiff is required to present nonconclusory expert evidence sufficient to support a finding not only that the alleged injury is within the serious injury threshold of Insurance Law § 5102(d), but also that the injury was casually related to the subject accident in order to recover for noneconomic loss related to personal injury sustained in a motor vehicle accident (*see* ***Valentin v Pomilla***, 59 AD3d 184, 873 NYS2d 537 [1st Dept 2009]). The medical evidence proffered by the infant plaintiff was insufficient to establish a serious injury or to defeat the defendant's prima facie showing. Moreover, the infant plaintiff's affidavit, as well as the affidavit of the plaintiff Dorothy Newton, who is the infant plaintiff's great grandmother and legal guardian, are insufficient to raise a triable issue of fact as to whether he sustained a serious injury, since both affidavits are self-serving, contradict the earlier deposition testimony of the infant plaintiff, and merely raise feigned issues of fact (*see* ***Lipsker v 650 Crown Equities, LLC***, 81 AD3d 789, 917 NYS2d 249 [2d Dept 2011]; ***Marcelle v New York City Tr. Auth.***, 289 AD2d 459, 735 NYS2d 580 [2d Dept 2001]).

Furthermore, the infant plaintiff's medical submissions are contradictory, and fail to raise a triable issue of fact. While Dr. Alvin Stein states that he re-evaluated the infant plaintiff on August 29, 2014, approximately two and half years after the subject accident, and that the infant plaintiff has sustained lumbar derangement due to the subject accident, he failed to state when his initial examination of the infant plaintiff occurred or what his objective findings were during such examination and, as a result, he is unable to substantiate the extent or degree of the limitation to the infant plaintiff's lumbar spine caused by the alleged injuries and its duration (see ***Caliendo v Ellington***, 104 AD3d 635, 960 NYS2d 471 [2d Dept 2013]; ***Bacon v Bostany***, 104 AD3d 625, 960 NYS2d 190 [2d Dept 2013]; ***Calabro v Petersen***, 82 AD3d 1030, 918 NYS2d 900 [2d Dept 2011]). In addition, Dr. Stein's report impermissibly relies upon other doctors' unaffirmed reports in reaching his conclusions (*see* ***Moore v Sarwar***, 29 AD3d 752, 816 NYS2d 503 [2d Dept 2006]; ***Mahoney v Zerillo***, 6 AD3d 403, 774 NYS2d 378 [2d Dept 2004]). It also affirms the medical reports of other doctors located at the medical practice known as B2 Medical, P.C., which is impermissible and fails to properly place the reports or the records contained therein before the Court (*see* ***Irizarry v Lindor***, 110 AD3d 846, 973 NYS2d 296 [2d Dept 2013]). Concomitantly, Dr. Stein's conclusion that the infant plaintiff's injuries to his lumbar spine are permanent not only contradict his prior statements in the same report that "the infant plaintiff's lower back complaints have resolved and that the range of motion studies were within normal limits," but also are in opposition to his affirmed report, dated August 29, 2014, where he found that the infant plaintiff's magnetic resonance image film was normal, that palpation of the bone and joints revealed no gross abnormalities and that the injuries to the infant plaintiff's lumbar spine were resolved.

Moreover, although Dr. Arthur Thompson, who initially treated the infant plaintiff on January 9, 2012 and continued to treat him until March 23, 2012, stated that he found the infant plaintiff to be partially disabled and recommended that he continue with physical therapy, Dr. Acaru, who began treating the infant plaintiff on November 28, 2011, in his affirmed medical report, dated June 7, 2012, stated that the infant plaintiff had full range of motion in his lumbar spine, that "pain [upon palpation] was absent," and that he recommended discharging the infant plaintiff from active care.

Finally, the infant plaintiff failed to produce any objective medical evidence to substantiate the existence of an injury which limited his usual and customary daily activities for at least 90 of the first 180 days immediately following the subject accident (*see* ***Catalano v Kopmann***, 73 AD3d 963, 900 NYS2d 759 [2d Dept 2010]; ***Haber v Ullah***, 69 AD3d 796, 892 NYS2d 531 [2d Dept 2010]). Accordingly, the defendant's motion for summary judgment dismissing the infant plaintiff's cause of action on the grounds that he failed to sustain a serious injury as a result of the subject accident is granted.

Dated: JULY 20, 2015

A.J.S.C.

__X__ FINAL DISPOSITION _____ NON-FINAL DISPOSITION