SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX : PART 22

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NADIA MATTHEW, Individually, and as Mother and Natural Guardian of J.W.,

Plaintiffs,

Index No: 350276/2013

-against-

DECISION/ORDER

PABLO OVALLES, JUAN MRECEDES, HERMENEGILDO CARINO, JOSE J. CARINO and TAMARA BUTTON,

Defendants.

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HON. NORMA RUIZ:

This negligence action arises out of a multi-vehicle collision that occurred on December 10, 2012 in which plaintiff JW ("the infant plaintiff"), a minor at the time of the accident, was a seat-belted right front seat passenger in a vehicle operated by plaintiff Nadia Matthew ("Matthew") when the vehicle was rear-ended while stopped at a red-light. The infant plaintiff's verified bill of particulars sets forth permanent injuries allegedly sustained to the left knee and back. Defendants Pablo Ovalles and Juan Mercedes (together "the Ovalles defendants") seek summary judgment dismissing the complaint and all cross-claims as against them on the ground that the infant plaintiff's injuries fail to satisfy the threshold requirements of Insurance Law § 5102(d). Defendant Tamara Button ("Button") also seeks summary judgment dismissing the complaint as against her on the same ground. Defendants Hermenegildo Carino and Jose J. Carino (together "the Carino defendants") "cross-move"[1] for summary judgment dismissing the complaint and all cross-claims as against them on the ground that the infant

[1]The Corino defendants' "cross-motion" is an improper vehicle to seek relief against plaintiffs who are non-moving parties; however, the court elects to consider the merits of that application (*see Daramboukas v Samlidis*, 84 AD3d 719 [2nd Dept 2010]).

plaintiff's injuries fail to satisfy the threshold requirements of Insurance Law § 5102(d). In so cross-moving, the Corino defendants incorporate the arguments and evidence of the Ovalles defendants. Plaintiffs have not filed any opposition to the motions.

The motions and cross motion are all determined as follows:

At the outset, this Court, by short form order, dated April 25, 2017, granted the Corino defendants' motion for summary judgment dismissing all claims and cross claims as against them on the ground that no liability attaches.

The Court will address the motions of the Ovalles defendants and Button together, inasmuch as both motions are premised upon the same evidence, including the independent medical examination of Dr. Robert Y. Pick, an orthopedist.

A defendant seeking summary judgment in an action governed by Insurance Law § 5102 must demonstrate that the plaintiff did not sustain a "serious injury" or that the plaintiff's injuries were not causally related to the accident at issue (*see Baez v Rahamatali*, 6 NY3d 868 [2006]; *Pommells v Perez*, 4 NY3d 566 [2005]). In the event defendant meets this burden, plaintiff must come forward with evidence demonstrating the existence of a triable issue of fact (*see Gaddy v Eyler*, 79 NY2d 955 [1992]). A plaintiff's subjective claim of pain and limitation of motion must be corroborated by verified objective medical findings (*see Stevens v Bolton,* 135 AD3d 647 [1st Dept 2016]; *see also Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Bent v Jackson*, 15 AD3d 46 [1st Dept 2005]).

Defendants have met their prima facie burden of showing that the infant plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) under the categories of permanent consequential limitation, significant limitation or 90/180-day injury, as a result of the subject accident (*see Malupa v Oppong,* 106 AD3d 538 [1st Dept 2013]; *Barry v Arias,* 94 AD3d 499 [1st Dept 2012]; *see also Lowe v Bennett*, 122 AD2d 728 [1st Dept 1986], aff'd 69 NY2d 701[1986]; *Rose v Tall,* 149 AD3d

554 [1st Dept 2017]). In support of their respective motions, the Ovalles defendants and Button submit a copy of the pleadings; the verified bill of particulars; the infant plaintiff's deposition transcript; and the affirmed report of Dr. Pick.

Dr. Pick reviewed the infant plaintiff's unsworn and uncertified medical records (*see Shapiro v Spain Taxi, Inc.*, 146 AD3d 451 [1st Dept 2017]; *Francis v Nelson*, 140 AD3d 467 [1st Dept 2016]), took range-of-motion measurements using a goniometer, and documented comparisons to normal range of motion, finding no causal connection between the subject accident and plaintiff's alleged injuries to either his left or right knees. Dr. Pick noted that the infant plaintiff stated, and Matthew confirmed, that the infant plaintiff sustained injuries to the right knee as a result of the subject accident. Dr. Pick's diagnosis was "left knee sprain/strain/contusion resolved." Further, he noted that both the infant plaintiff and Matthew confirmed that infant plaintiff had not sustained any injury to his back, therefore, Dr. Pick did not examine same.

Both Button and the Ovalles defendants argue that the infant plaintiff's deposition testimony and statements to Dr. Pick during the independent medical examination are inconsistent with the allegations set forth in the verified bill of particulars wherein the infant plaintiff alleged that he sustained injury to the left knee and back. Additionally, the movants rely upon the infant plaintiff's testimony wherein he admitted that he was neither confined to home and/or bed for any period of time, nor did he miss any school. Thus, these defendants establish, prima facie, that the infant plaintiff's injuries did not satisfy the 90/180-day category (*see Scheer v Koubek*, 70 NY2d 678 [1987]; *Dziuma v Jet Taxi, Inc.*, 148 AD3d 573 [1st Dept 2017]; *Stevens v Bolton*, supra; *Sougstad v Meyer*, 40 AD3d 839 [2d Dept 2007]; *Blackmon v Dinstuhl*, 27 AD3d 241 [1st Dept 2006]).

Having established, prima facie, that the infant plaintiff's injuries fail to satisfy the statutory serious injury threshold requirements of Insurance Law § 5102, the burden now shifts to plaintiffs to

raise a triable issue of fact. Notably, plaintiffs have not opposed any of the motions submitted herein (*see Dziuma v Jet Taxi, Inc.*, supra ["plaintiff failed to come forward with evidence to rebut defendant's showing, since she presented no medical evidence to substantiate her claims"]; *see also Windham v. New York City Tr. Auth.*, 115 AD3d 597 [1st Dept 2014]; *Turner v. Benycol Transp. Corp.*, 78 AD3d 506 [1st Dept 2010]).

For the foregoing reasons, it is hereby

ORDERED that the Oralles defendants' motion seeking summary judgment dismissing the claims of the infant plaintiff and any cross claims related thereto is granted and those claims and cross claims are dismissed; and it is further,

ORDERED that defendant Button's motion seeking summary judgment dismissing the claims of the infant plaintiff and any cross claims related thereto is granted and those claims and cross claims are dismissed; and it is further,

ORDERED that the Carino defendants' cross motion is denied as moot; and it is further,

ORDERED that the clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

Dated: July 10, 2017

Norma Ruiz, J.S.C.