SHORT FORM ORDER

INDEX No. 02-23623

SUPREME COURT - STATE OF NEW YORK
POST NOTE MOTION PART - SUFFOLK COUNTY

P R E S E N T :

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 6-9-06
Mot. Seq. # 005 – SJ – MG
#006X – SJ – MG

ROBIN CORRADINO, Individually and as Mother and Natural Guardian of SUSAN CORRANDINO, an Infant over the age of 14, Plaintiffs, - against - CONNETQUOT CENTRAL SCHOOL DISTRICT OF ISLIP, DENNIS I. MITCHELL, RAY-VIN TRANSPORTATION, INC., and LAWRENCE C. HUDSON, JR., Defendants.	PLAINTIFFS' ATTORNEY: ANTHONY J. MONTIGLIO, ESQ. 300 Old Country Road Mineola, New York 11501 DEFENDANTS' ATTORNEYS: WHITE, CIRRITO & NALLY, LLP 58 Hilton Avenue Hempstead, New York 11550 BAKER, McEVOY, MORRISSEY & MOSKOVITS, P.C. 333 West 33rd Street, 7th Floor New York, New York 10001

Upon the following papers numbered 1 to 3 read on this motion for summary judgment; Notice of Motion/ ~~Order to Show Cause~~ and supporting papers 1; Notice of Cross Motion and supporting papers 2; Answering Affidavits and supporting papers 3; Replying Affidavits and supporting papers ___; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendants Ray-Vin Transportation, Inc. and Lawrence C. Hudson, Jr. for an order granting them summary judgment dismissing plaintiffs' complaint upon the ground that the infant plaintiff has not suffered a serious injury as that term is defined in the Insurance Law and this cross motion by defendants Connetquot Central School District of Islip and Dennis I. Mitchell for the same relief are considered by the Court and are determined as follows:

This is an action commenced by plaintiffs seeking to recover for injuries sustained by the infant plaintiff in a motor vehicle accident in which she was a passenger in one of the vehicles which occurred on October 5, 2001 on Veterans Memorial Highway at its intersection with Locust Avenue in the Town of Islip, New York. Plaintiff Robin Corradino asserts a cause of action for medical expenses and loss of service. In their bill of particulars, plaintiffs allege, *inter alia*, that as a result of this accident, the infant plaintiff sustained injuries to her cervical, lumbar and thoracic spine, certain contusions and TMJ syndrome.

In support of their motion, defendants Ray-Vin Transportation, Inc. and Lawrence C. Hudson, Jr. submit to the Court the affirmed report of Dr. Burton S. Diamond, a neurologist, who examined plaintiff at defendants' request. In his report, Dr. Diamond concludes that there was no evidence of any neurological disability. After an examination of plaintiff wherein he performed certain enumerated tests, including Straight leg raising and the Romberg tests, and after several negative findings including finding no paravertebral spasm, he concludes that the sprain suffered by plaintiff to her cervical, lumbar and thoracic spine was resolved. Dr. Diamond reports his findings with respect to the various ranges of motion of plaintiff's cervico-dorsal and lumbar spine and compares them to the normal ranges of motion. All were within normal limits. He concludes that while plaintiff did suffer a sprain to her spine, said injury has since been resolved.

Defendant's also submit the affirmed report of Dr. Evan Temkin, a board certified dentist. In his report, Dr. Temkin set forth the extent of the examination he conducted including a clinical examination, a TMJ examination and the palpation of the muscles of mastication as well as the results of those examinations. He concludes after his examination that plaintiff suffers no disability from a dental perspective including nothing which would preclude her from all of her usual daily activities.

In order to prevail on this type of motion, defendant has the initial burden of establishing that plaintiff did not sustain the type of "serious injury" necessary to satisfy the threshold requirement of Insurance Law § 5102(d) (*see*, Gaddy v. Eyler, 79 NY2d 955, 956-957, 582 NYS2d 990; Boehm v. Estate of Mack, 255 AD2d 749, 749-750, 680 NYS2d 732). As with all summary judgment motions, defendant was required to come forward with proof, in admissible form, sufficient to justify the Court granting him judgment as a matter of law (*see*, Winegrad v. New York University Medical Center, 64 NY2d 851, 487 NYS2d 316; Zuckerman v. City of New York, 49 NY2d 557, 427 NYS2d 595). In order to sustain this initial burden, defendant produced plaintiffs' bill of particulars along with the affirmed independent medical examination reports of a board certified neurologist and a board certified dentist. This evidence was clearly sufficient to meet defendant's initial burden on the threshold issue of serious injury and required plaintiff to come forward with evidence in admissible form creating a genuine triable issue of fact as to whether plaintiff sustained a serious injury as a result of the accident (*see*, Gaddy v. Eyler, *supra*; Morgan v. Beh, 256 AD2d 752, 681 NYS2d 394; Weaver v. Derr, 242 AD2d 823, 661 NYS2d 684; Rennell v. Horan, 225 AD2d 939, 639 NYS2d 171).

Plaintiff has not met that burden. The evidence submitted by plaintiff is neither sworn to nor affirmed and therefore, may not be considered by the Court. It is insufficient to meet plaintiff's burden of proof (*see*, Hernandez v. Taub, 19 AD3d 368, 796 NYS2d 169; Sammut v. Davis, 16 AD3d 658, 792 NYS2d 192). Although plaintiff argues that the affirmed report of defendant's own dentist, Evan Temkin, is sufficient to establish a triable issue of fact on the question of whether plaintiff sustained a serious injury, this Court does not agree. Dr. Temkin states that from a dental perspective, plaintiff does not suffer from any disability as a result of this accident. The fact that she may still suffer from a clicking on her left side when opening her mouth, is insufficient to establish the existence of a serious physical injury within the meaning of the Insurance Law (*see*, Keegan v. Prout, 215 AD2d 629, 628 NYS2d 124).

Accordingly, upon the plaintiffs' failure to offer sufficient proof to raise a triable issue of fact on the question of whether the infant plaintiff sustained a serious injury, defendants are entitled to summary judgment dismissing plaintiffs' complaint. The motion and cross motion are granted and the complaint dismissed.

Dated: MARCH 29, 2007

J.S.C.

__X__ FINAL DISPOSITION _____ NON-FINAL DISPOSITION