SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 5

NASSAU COUNTY

SANTOS RUBIO, Individually and as Mother and Natural Guardian of STEFANY RIVERA, an Infant,

Plaintiffs,

-against-

COREY FITZGERALD and AVIS FITZGERALD,

Defendants.

INDEX NO.: 002213/09

MOTION SEQ. NO.: 001

MOTION DATE: 2/22/10

The following papers read on this motion (numbered 1-3):

Notice of Motion.....1
Affirmation in Opposition.....2
Reply Affirmation.....3

The motion by defendants COREY FITZGERALD and AVIS FITZGERALD for summary judgment pursuant to **CPLR §3212** is determined as follows.

Plaintiff STEFANY RIVERA, age 13 ("RIVERA"), alleges that on November 18, 2008, she was a pedestrian in Freeport crossing North Main Street at its intersection with Dean Street, when she was hit by a vehicle operated by defendant COREY FITZGERALD and owned by defendant AVIS FITZGERALD. Defendants COREY FITZGERALD and AVIS FITZGERALD now move for an order dismissing plaintiffs' complaint pursuant to **CPLR §3212**, on grounds that RIVERA failed to sustain a "serious injury" within the meaning of **Insurance Law §5102(d)**. Plaintiff SANTOS RUBIO, infant plaintiff RIVERA's mother, makes a derivative claim for loss of services.

Insurance Law §5102(d) provides that a "serious injury means a personal injury which results in (1) death; (2) dismemberment; (3) significant disfigurement; (4) a fracture; (5) loss of a fetus; (6) permanent loss of use of a body organ, member, function or system; (7) permanent consequential limitation of use of a body organ or member; (8) significant

limitation of use of a body function or system; or (9) 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" (numbered by the Court). The Court's consideration in this action is confined to whether RIVERA's injuries constitute a permanent consequential limitation of use of a body organ or member (7), significant limitation of use of a body function or system (8), or a medically determined injury which prevented RIVERA from performing all of the material acts constituting her usual and customary daily activities for ninety days of the first one hundred eighty days following the accident (9).

In support of their motion for summary judgment, defendants submit an affirmed report of examination, dated November 5, 2009, of orthopedist Jacquelin Emmanuel, MD, covering an examination of that date.

Using a goniometer, Dr. Emmanuel reported that physical examination of RIVERA's cervical spine, lumbar spine, left shoulder and left hip revealed normal range of motion results, comparing the results to norms. Dr. Emanuel's other reported findings include no motor or sensory deficits and muscle strength of 5/5 in the upper extremities, straight leg raising negative to 90 degrees bilaterally (normal 90 degrees), lower extremities' muscle strength of 5/5 bilaterally, no spasms in the lumbar spine, normal sensory examination of the lower extremities and no evidence of left hip tenderness. Dr. Emmanuel diagnosed "cervical and lumbar sprains/strains, resolved" and "left hip sprain, resolved" and concluded that RIVERA "has no orthopedic disability" and "is able to perform all activities of daily living and school activities without restrictions or limitations."

Defendants also submit the sworn deposition testimony of RIVERA conducted on September 22, 2009. After the accident, RIVERA, a seventh grade student, was taken by ambulance to the emergency room where she was given Motrin pills and x-rays, and released after four hours RIVERA stated that the hospital provided her with crutches (Deposition testimony, pp. 6, 68-69, 72). RIVERA testified that as, a result of the accident, she missed one week of school (Deposition testimony, pp. 12, 104), and that, although none of her doctors told her to stay out of school or placed a restriction on her activities, she stayed out of school because she did not feel well (Deposition testimony, pp. 13, 71-72, 76).

RIVERA stated that she sought medical attention one week after the accident with Walter E. Mendoza, DC ("Mendoza") (Deposition testimony, pp. 75-76). RIVERA testified that she went to his office three times a week, and continues to do so, and that her treatment includes acupuncture, massage, electric stimulation and adjustments (Deposition testimony, pp. 79-84). RIVERA stated that Mendoza sent her for a CAT scan of her lower back, and

MRIs, although she does not remember of what areas (Deposition testimony, pp. 84-85). Mendoza referred her to orthopedist Richard Parker, MD whom she saw three times, the first time one month after the accident (Deposition testimony, pp. 87-88) and to neurologist James Liguori, DO whom she saw four times, the first time a little more than one month after the accident (Deposition testimony, pp. 90-91). RIVERA testified that she saw Dr. Parker "four weeks ago" and Dr. Liguori "three weeks ago" (Deposition testimony, pp. 88, 91) but does not have any further appointments (Deposition testimony, pp. 88-89, 93-94). RIVERA stated that she made the decision on her own to give up her crutches two to three months after the accident (Deposition testimony, p. 90).

RIVERA testified that from the date of the accident in November 2008 until the end of the school year, she was unable to participate in gym and was given a note by chiropractor Mendoza stating same (Deposition testimony, p. 97). RIVERA testified that she can no longer play with her little brother, stand for more than twenty minutes, wash dishes, sweep, vacuum and do laundry (Deposition testimony, pp. 98-99, 103). RIVERA stated that, within the last several months, she has been feeling better but that she feels pain in her lower back and in her left hip which "comes and goes" for which she takes medication given to her by Dr. Liguori. RIVERA also testified that she still gets headaches and just lies down as a result (Deposition testimony, pp. 99-102).

The Court finds that the report of defendants' examining physician is sufficiently detailed in the recitation of the various clinical tests performed and measurements taken during the examinations to satisfy the Court that an "objective basis" exists for her opinion. Accordingly, the Court finds that defendants have made a *prima facie* showing, that plaintiff STEFANY RIVERA did not sustain a serious injury within the meaning of **Insurance Law §5102(d)**. With that said, the burden shifts to plaintiffs to come forward with some evidence of a "serious injury" sufficient to raise a triable issue of fact. **Gaddy v. Eyler**, 79 NY2d 955, 957.

Plaintiffs' counsel argues that defendants' examining physician, Dr. Emmanuel, in her report dated November 5, 2009, failed to address the claim asserted in plaintiffs' bill of particulars that RIVERA suffered a medically determined injury or impairment of a non-permanent nature which prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the November 18, 2008 accident. Plaintiffs' counsel argues that, consequently, defendants have failed to make a *prima facie* showing, that plaintiff RIVERA did not sustain a serious injury. In support, plaintiffs provide an affidavit of Mendoza, sworn to on January 27, 2010, attesting that he instructed RIVERA to refrain from participating in physical education until September 2009.

The Court determines that a defendant's physician's opinion given after a physical examination of a plaintiff, must be considered in the context of sworn statements made by a plaintiff regarding his or her condition during the period of not less than ninety days during the first 180 days following an accident. This approach has been alluded to by the Second Department in its determinations as to whether or not a defendant has met his or her *prima facie* burden with respect to this category of serious injury. In determining whether a defendant has adequately addressed a plaintiff's 90/180 claim asserted in a plaintiff's bill of particulars, the Second Department has considered a defendant's 'motion papers', including sworn deposition testimony and statements made by a plaintiff to a defendant's examining physician. *See* **Rouach v. Betts**, 2010 WL 1078003; **Encarnacion v. Smith**, 70 AD3d 628; **Breedy v. Jenkins**, 70 AD3d 618; **Pinder v. Salvatore**, 69 AD3d 823; **Belafrikh v. Tarzan Cab Corp.**, 69 AD3D 777; **Saetia v. VIP Renovations Corp.**, 68 AD3d 1092; **Layne v. Drouillard**, 65 AD3d 1197; **Alvarez v. Dematas**, 65 AD3d 598; **Richards v. Tyson**, 64 AD3d 760; **Berson v. Rosada Cab Corp.**, 62 AD3d 636; **Rahman v. Sarpaz**, 62 AD3d 979.

In the case at bar, even if Mendoza's recommendation was actually provided to RIVERA in the aftermath of the accident, the Court finds that RIVERA's deposition testimony that she did not participate in gym until the end of the school year, is insufficient to establish that RIVERA was unable to perform substantially all of the material acts which constituted her usual and customary daily activities. *See* **Ayala v. Douglas**, 57 AD3d 266; **Burns v. McCabe**, 17 AD3d 1111; **Ceruti v. Abernathy**, 285 AD2d 386; **Jones ex rel. Jones v. Norwich City School District**, 283 AD2d 809. *See generally* **Licari v. Elliot**, 57 NY2d 230. RIVERA also testified at her deposition that she can no longer play with her little brother, stand for more than twenty minutes, wash dishes, sweep, vacuum and do laundry (Deposition testimony, pp. 98-99, 103). Such self serving testimony is insufficient to satisfy this category of serious injury. *See* **Casimir v. Bailey**, 70 AD3d 994; **Pacheco v. Connors**, 69 AD3d 818; **Friscia v. Mak Auto, Inc.**, 59 AD3d 492; **Duke v. Saurelis**, 41 AD3d 770. Consequently, the Court finds that defendants have made a *prima facie* showing that RIVERA did not satisfy the 90/180 category of serious injury.

In opposition, plaintiffs submit the following MRI reports (1) an affirmed MRI report, of Richard J. Rizzuti, MD, dated January 3, 2009, covering an MRI of RIVERA's lumbosacral spine; and (2) an affirmed report of John Himelfarb, MD, dated January 10, 2009, covering an MRI of RIVERA's left hip. Plaintiffs also proffer (1) an affirmed report of orthopedist Richard Parker, MD, dated December 17, 2008, covering an examination conducted on that date; (2) an affidavit of Mendoza, sworn to on January 27, 2010, annexing (i) a list of dates RIVERA purportedly received treatment at his office; (ii) a "disability letter", dated November 29, 2008; (iii) a report, dated January 17, 2009, covering nerve conduction and EMG studies; and (iv) a report covering examinations conducted on November 18, 2008, September 29, 2009 and December 29, 2009; (3) affirmed reports, of

neurologist James Liguori, DO, dated April 13, 2009 and January 8, 2010, covering examinations conducted on those dates; (4) an affirmed addendum, dated January 25, 2010, to Dr. Liguori's January 8, 2010 report; and (5) an affidavit of RIVERA, sworn to on January 28, 2010.

The Court finds that RIVERA has raised an issue of fact through the affirmed MRI report of Dr. Rizzuti covering an MRI of RIVERA's lumbosacral spine, and the report of electrodiagnostic studies affirmed by chiropractor Dr. Mendoza. Dr. Rizutti reported that the MRI of RIVERA's lumbosacral spine revealed a "posterior disc herniation at L5-S1, abutting the left nerve root." The Court notes that the existence of a radiologically confirmed disc injury *alone* will not suffice to defeat summary judgment. *See* **Pommells v. Perez**, 4 NY3d 566 at 574; **Casimir v. Bailey**, *supra*; **Bleszcz v. Hiscock**, 69 AD3d 890; **Knopf v. Sinetar**, 69 AD3d 809; **Chanda v. Varughese**, 67 AD3d 947; **Ciancio v. Nolan**, 65 AD3d 1273; **Yun v. Barber**, 63 AD3d 1140; **Caraballo v. Kim**, 63 AD3d 976; **Jules v. Calderon**, 62 AD3d 958; **Ferber v. Madorran,** 60 AD3d 725; **Ponciano v. Schaefer**, 59 AD3d 605; **Pompey v. Carney**, 59 AD3d 416; **Luizzi-Schwenk v. Singh**, 58 AD3d 811; **Luna v. Mann**, 58 AD3d 699; **Joseph v. A and H Livery**, 58 AD3d 688; **Sealy v. Riteway-1, Inc.**, 54 AD3d 1018; **Kearse v. New York City Transit Authority**, 16 AD3d 45. However, in the case at bar, plaintiff additionally submitted an affirmed report of an electrodiagnostic study, which concluded that there was "evidence of right S1 radiculopathy." The Court finds that the MRI report, noting a posterior disc herniation at L5-S1 abutting the left nerve root, and the electrodiagnostic study report noting an S1 radiculopathy, taken together, are sufficient, although marginally, to raise a triable issue of fact as to whether or not RIVERA sustained a serious injury under the permanent consequential limitation (7) and/or significant limitation (8) categories of **Insurance Law §5102(d)**.

Based on the foregoing, it is

ORDERED, that the motion by defendants COREY FITZGERALD and AVIS FITZGERALD for summary judgment dismissing the complaint of plaintiffs SANTOS RUBIO, Individually, and as Mother and Natural Guardian of STEFANY RIVERA, an Infant, pursuant to **CPLR §3212**, on the grounds that plaintiff STEFANY RIVERA failed to sustain a "serious injury" within the meaning of **Insurance Law §5102(d)**, is **denied**.

This constitutes the Order of the Court.

Dated: 6/10, 2010

J.S.C.

ENTERED
JUN 29 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE