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SHORT FORM ORDER

INDEX No. 09-8625
CAL. No. 13-01412MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 6-28-13
ADJ. DATE 6-13-14
Mot. Seq. # 005 - MG; CASEDISP

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KAITLYN SULLIVAN, an infant by her father and natural guardian, MICHAEL SULLIVAN,

Plaintiff,

- against -

SAMUEL F. MARTIN, JR.,

Defendant.

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Upon the following papers numbered 1 to 16 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 9 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 10-14 ; Replying Affidavits and supporting papers 15-16 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the defendant Samuel Martin, Jr. seeking summary judgment dismissing the complaint and all cross claims against him is granted.

Michael Sullivan commenced this action on behalf of his daughter, the infant plaintiff Kaitlyn Sullivan, to recover damages for injuries that she allegedly sustained as a result of a motor vehicle accident that occurred at the intersection of Higbie Lane and Udall Road in the Town of Islip on May 20, 2006. It is alleged that the accident occurred when the vehicle in which the infant plaintiff was riding as a front seat passenger was struck in the rear by the vehicle owned and operated by the defendant Samuel Martin, Jr., while it was stopped at a red light. By her bill of particulars, the infant plaintiff alleges that she sustained various personal injuries as a result of the subject accident, including herniated discs at levels C2 through C5 and cervical radiculopathy. The infant plaintiff alleges that as a result of the injuries she sustained in the subject accident she was confined to her home and bed for approximately four days.

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The defendant moves for summary judgment on the basis that the infant plaintiff's alleged injuries 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, and the sworn medical report of Dr. Isaac Cohen. Dr. Cohen, at the defendant's request, conducted an independent orthopedic examination of the infant plaintiff on April 4, 2013. The infant plaintiff opposes the motion on the grounds that the defendant failed to establish a prima facie case that she did not sustain a serious injury as a result of the subject collision, and that the evidence submitted in opposition demonstrates that she sustained injuries within the "limitations of use" and the "90/180" categories of the Insurance Law. In opposition to the motion, the infant plaintiff submits her own affidavit, the sworn medical report of Dr. Craig Shalmi, and uncertified copies of her own medical reports.

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, 622 NYS2d 900 [1995]; *see* ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [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, 455 NYS2d 570 [1982]; ***Porcano v Lehman***, 255 AD2d 430, 680 NYS2d 590 [2d Dept 1988]; ***Nolan v Ford***, 100 AD2d 579, 473 NYS2d 516 [2d Dept 1984], *aff'd* 64 NY2d 681, 485 NYS2d 526 [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, 582 NYS2d 990 [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, 587 NYS2d 692 [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, 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 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, 758 NYS2d 593 [4th Dept 2003]; ***Pagano v Kingsbury***, *supra*).

Here, the defendant through the submission of 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 as a result of the subject accident (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, *supra*; ***Torres v Ozel***, 92 AD3d 770, 938 NYS2d 469 [2d Dept 2012]; ***Singh v City of New York***, 71 AD3d 1121, 898 NYS2d 218 [2d Dept 2010]). Defendant's examining orthopedist, Dr. Cohen, used a goniometer to test the infant plaintiff's ranges of motion in her spine and shoulders, set forth his specific findings, and compared those findings to the normal ranges (*see* ***Martin v Portexit Corp.***, 98 AD3d 63, 948 NYS2d 21 [1st Dept 2012]; ***Staff v Yshua***, 59 AD3d 614, 874 NYS2d 180 [2d Dept 2009]; ***DeSulme v Stanya***, 12 AD3d 557, 785 NYS2d 477 [2d Dept 2004]). Dr. Cohen, in his medical report, states that the infant plaintiff has full range of motion in her cervical spine and shoulders, that upon palpation of her paraspinal muscles there is no evidence of muscle spasm or trigger points, that the straight leg raising test is normal, and that there is no evidence of muscle atrophy, sensory deficits or motor weakness. Although Dr. Cohen's examination of the infant plaintiff's lumbar spine revealed limitations in her range of motion, the observed limitations were not significant within the meaning of the Insurance Law (*see* ***Licari v Elliott***, *supra*; ***Brand v Evagelista***, 103 AD3d 539, 962 NYS2d 52 [2d Dept 2013]). Moreover, Dr. Cohen opines that the strains the infant plaintiff sustained to her spine have resolved and that she has full functional capacity of her spine and her upper and lower extremities. Dr. Cohen further states that the infant plaintiff is capable of performing her normal activities of daily living without restrictions, and that her complaints of cervical spine pain are subjective, because no objective evidence of spinal limitation was observed during the physical examination.

In addition, Dr. Cohen states that a review of the magnetic resonance imaging ("MRI") films of the infant plaintiff's cervical spine performed in 2006 revealed an unremarkable MRI, with no evidence of posttraumatic pathology. Dr. Cohen also states that the MRI revealed minimal degenerative disc disease at levels C2 through C4, and a small bulging disc at level C5/C6, which were not casually related to the subject accident. In addition, Dr. Cohen states his review of the cervical spine MRI performed on November 19, 2007, showed an unremarkable MRI and was essentially unchanged from the prior 2006 cervical spine MRI, except for the presence of degenerative disc disease throughout the infant plaintiff's cervical spine and there was no evidence of a herniated disc.

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]).

In opposition, the infant plaintiff has failed to raise a triable issue of fact as to whether she sustained a serious injury as a result of the subject accident (***Gaddy v Eyler***, *supra*; ***Licari v Elliott***, *supra*; ***Frisch v Harris***, 101 AD3d 941, 957 NYS2d 235 [2d Dept 2012]). The infant plaintiff has proffered insufficient medical evidence to demonstrate that she sustained an injury within the limitations of use categories (*see* ***Licari v Elliott***, *supra*; ***Ali v Khan***, 50 AD3d 454, 857 NYS2d 71 [1st Dept 2008]), or within the 90/180 category of the Insurance Law (*see* ***Jack v Acapulco Car Serv., Inc.***, 72 AD3d 646, 897 NYS2d 648 [2d Dept 2010]; ***Bleszcz v Hiscock***, 69 AD3d 639, 894 NYS2d 481 [2d Dept 2010]; ***Nguyen v Abdel-Hamed***, 61 AD3d 429, 877 NYS2d 26 [1st Dept 2009]). The affirmed medical report of Dr. Shalmi failed to raise a triable issue of fact, since his initial evaluation of the infant plaintiff was on May 11, 2007, approximately one year after the subject accident's occurrence (*see* ***Perl v Meyer***, *supra*; ***Kremierman v Sutnis***, 74 AD3d 753, 902 NYS2d 180 [2d Dept 2010]). Therefore, Dr. Shalmi's report does not substantiate the extent or degree of the limitation to the infant plaintiff's cervical spine caused by the alleged injury 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]; ***Diaz v Turner***, 306 AD2d 241, 761 NYS2d 93 [2d Dept 2003]). Further, while Dr. Shalmi states that the infant plaintiff sustained a whiplash injury at the time of the accident and that she has a chronic condition, he failed to account for her cessation of medical treatment (*see* ***Pommells v Perez***, *supra*; ***Islam v Apjeet Singh Makkar***, 95 AD3d 1277, 944 NYS2d 897 [2d Dept 2012]; ***Ning Wang v Harget Cab Corp.***, 47 AD3d 777, 850 NYS2d 537 [2d Dept 2008]; *cf.* ***David v Caceres***, 96 AD2d 990, 947 NYS2d 159 [2d Dept 2012]). Despite stating that the infant plaintiff has had persistent symptoms for eight years, Dr. Shalmi concludes his report by stating that there are no findings upon examination of the infant plaintiff to indicate she is disabled, and that she is able to engage in activities and employment "to the end range of her discomfort level." Thus, the infant plaintiff's medical evidence fails to demonstrate that she sustained an injury within the meaning of the Insurance Law as a result of the subject collision (*see* ***Larrabee v Bradshaw***, 96 AD3d 1257, 947 NYS2d 659 [3d Dept 2012]; ***Picott v Lewis***, 26 AD3d 319, 809 NYS2d 541 [2d Dept 2006]). Evidence of complaints of pain and discomfort alone, unsupported by credible medical evidence that diagnoses and identifies the injuries, is insufficient to sustain a finding of serious injury (*see* ***Scheer v Koubek***, 70 NY2d 678, 518 NYS2d 788 [1987]; ***Young v Russell***, 19

AD3d 688, 798 NYS2d 101 [2d Dept 2005]; ***Grant v Fofana***, 10 AD3d 446, 781 NYS2d 160 [2d Dept 2004]).

Furthermore, while a plaintiff may rely upon unsworn medical reports if they were submitted by the defendant in support of his or her motion for summary judgment (*see* ***Zelman v Mauro***, 81 AD3d 936, 917 NYS2d 581 [2d Dept 2011]; ***Kearse v New York City Tr, Auth.***,16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]), here, the defendant, in support of his motion, did not submit the medical reports relied upon by the infant plaintiff in opposition to the motion for summary judgment (*see* ***Khan v Finchler***, 33 AD3d 966, 824 NYS2d 340 [2d Dept 2006]; ***Pagano v Kingsbury***, 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). Additionally, the infant plaintiff's self-serving affidavit failed to raise a triable issue of fact as to whether she sustained a serious injury under the no-fault statute (*see* ***Strenk v Rodas***, 111 AD3d 920, 976 NYS2d 151 [2d Dept 2013]; ***Leeber v Ward***, 55 AD3d 563, 865 NYS2d 614 [2d Dept 2008]).

As to the infant plaintiff's 90/180 claim, the Court notes that a plaintiff must submit competent medical evidence that the injuries she allegedly sustained in the subject accident rendered her unable to perform substantially all of her daily activities for not less than 90 days of the first 180 days subsequent to the subject accident (*see* ***Ly v Holloway***, 60 AD3d 1006, 876 NYS2d 482 [2d Dept 2009]). Aside from the infant plaintiff's own deposition testimony, wherein she states that she missed approximately 1½ weeks from school and that she had a lot of difficultly swimming competitively due to the pain in her right shoulder, the infant plaintiff has failed to submit any competent medical evidence demonstrating that she was restricted from performing such activities during 90 out of the first 180 days following the subject collision (*see e.g.* ***Rasporskaya v New York City Tr. Auth.***, 73 AD3d 727, 899 NYS2d 665 [2d Dept 2010]; ***Knox v Lennihan***, 65 AD3d 615, 884 NYS2d 171 [2d Dept 2009]). Accordingly, the defendant's motion for summary judgment dismissing the complaint and all cross claims against him is granted.

Dated: 7/24/14

THOMAS F. WHELAN, J.S.C.