SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LISA HEADLEY **PART** 22

Justice

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CORINTH SANARE, ETHLEEN GOLLEY-MORGAN, ETHAN SANARE, SYDNEY SANARE

Plaintiff,

- v -

DUSTIN FRALEY, KRISHNA DAS,

Defendant.

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INDEX NO. 155727/2018

MOTION DATE 08/31/2021, 06/17/2021

MOTION SEQ. NO. 003 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 70, 72

were read on this motion to/for VACATE/STRIKE - NOTE OF ISSUE/JURY DEMAND/FROM TRIAL CALENDAR.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 65, 66, 67, 68, 69, 71

were read on this motion to/for JUDGMENT - SUMMARY.

This is a personal injury action arising out of a motor vehicle accident that took place on July 30, 2017. In motion sequence no. 003, defendant Krishna Das moves to strike plaintiffs' note of issue and certificate of readiness on the ground that discovery has not been completed, or in the alternative, plaintiff moves to compel discovery or preclude plaintiffs from offering evidence of damages. Co-defendant Dustin James Fraley cross-moves for the same relief. In motion sequence no. 004, both named defendants move for summary judgment pursuant to *CPLR §3212* dismissing this action on the ground that neither plaintiff has suffered a "serious injury" as required by *Insurance Law §§ 5102(d) and 5104(a)*.

Defendants' Motions to Strike the Note of Issue – (Motion Seq. No. 3)

The note of issue and certificate of readiness were filed on June 30, 2020. (*See, NYSCEF Doc. No. 38*). Defendants assert that at that time, neither plaintiff had submitted to an independent medical examination, and the deposition of defendant Fraley had not been conducted. Additionally, plaintiffs had not responded to some outstanding demands for medical, employment and property damage records.

The motion and cross motion to strike were filed on July 13, 2020 and July 30, 2020 respectively. (*See, NYSCEF Doc. Nos. 31 and 39*). However, in connection with the motions for summary judgment, discussed below, defendants submitted the reports of the examining physicians which indicate that plaintiff Sanare's IME was conducted on July 10, 2020 and that plaintiff Golley-Morgan's IME was conducted on July 30, 2020, the same day the cross-motion

was filed. At this time, the movants contend that defendant Fraley's deposition was not completed, and the defendants' other demands for records had not been satisfied.

Notwithstanding that certain discovery was outstanding, the motion and cross motion for summary judgment were filed on October 27, 2020 and December 1, 2020, respectively. (*See, NYSCEF Doc. Nos. 53 and 65*). By order dated November 13, 2020 (*See, NYSCEF Doc. No. 64*), this court granted an earlier-filed motion by plaintiff Sanare (motion sequence no. 002) to join her minor children, Ethan and Sydney, as necessary parties. In response, counsel for co-defendant Krishna Das filed a supplemental affirmation arguing that the motion to strike should be granted on the additional ground that discovery was required of the two new plaintiffs. (*See, NYSCEF Doc. No. 72*)

The court's order, dated November 13, 2020, directed plaintiffs to serve an amended complaint with notice of entry of the order within 30 days. Upon review of the court file, no such pleadings were filed in the docket. However, on February 4, 2021, plaintiffs' counsel filed a document entitled, "Motion for Leave to Amend Caption," however said document was not filed in proper form, in that the "motion" was not accompanied by a notice of motion or an amended pleading. (*See, NYSCEF Doc. No. 75*). Instead, counsel annexed an affidavit from plaintiff Sanare in which she averred that her two children were evaluated and released from St. Barnabas Hospital after the accident, after which "Ethan had difficulty sleeping for the next months" and "Sydney had pain in her right arm which lasted three months." Also annexed were a copy of a police report, and the court's December 8, 2020 interim scheduling order. The scheduling order directed plaintiffs to serve a supplemental motion in connection with the pending summary judgment motions by December 29, 2020, with defendants' opposition due on January 12, 2021 and plaintiffs' reply on January 22, 2021. To date, no such motion was filed.

This court finds that the defendants' motion and cross-motion to strike is denied as moot. Although there was some discovery outstanding when the motion was filed, after the IME's were submitted defendants had sufficient information to go forward with their motions for summary judgment. As to discovery from the new minor plaintiffs, plaintiffs failed to serve the amended complaint as directed, which in any event would likely be dismissed for the same reasons this court is dismissing the existing claims.

Defendants' Motion for Summary Judgment – (Motion Seq. No. 4)

In support of the motion for summary judgment on the issue that plaintiffs had not sustained a serious injury under the Insurance Law, defendants submitted sworn statements from three physicians who examined the plaintiffs. Dr. Kevin F. Hanley, MD, a board-certified orthopedic surgeon, examined plaintiff Corinth Sanare on July 10, 2020. (*See, NYSCEF Doc. No. 61*). Stuart Stauber, board certified in internal medicine, examined plaintiff Ethleen Golley-Morgan on July 23, 2020 (*See, NYSCEF Doc. No. 62*). Pierce Ferriter, a board-certified orthopedic surgeon examined plaintiff Corinth Sanare and plaintiff Ethleen Golly-Morgan on September 21, 2020. (*See, NYSCEF Doc. Nos. 68 and 69, respectively*).

Dr. Hanley's medical opinion of plaintiff Corinth Sanare concluded with a reasonable degree of medical certainty, he did not believe that Corinth Sanare has any objective signs or subjective complaints that would be reasonably attributed to the injury of July 30, 2017. Dr. Hanley opined that Corinth is not limited in her activity levels, and she does not require ongoing or future medical treatment. She has a normal examination of the neck and the back at this point. Further, Dr. Hanley opined that the diagnosis of soft tissue injury to the spinal axis at the time of the incident was reasonable, at the time of his examination, Corinth does not hold that same diagnosis, as there

are no objective findings or subjective complaints. Further, the natural history of a soft tissue injury is to resolve with time.

Dr. Ferriter's medical opinion after an examination of plaintiff Corinth Sanare concluded that she presents with a normal orthopedic examination on all objective testing. The orthopedic examination is objectively normal and indicates no findings which would result in orthopedic limitations in use of the body parts examined. Further, Dr. Ferriter opined that Corinth is capable of functional use of the examined body parts for normal activities of daily living, and there is no functional disability or permanency, and the claimant may continue working as she currently does. Finally, Dr. Ferriter's conclusion concerning plaintiff Golley-Morgan was identical to that regarding plaintiff Sanare in that he opined that there is no functional disability or permanency, and the plaintiff Golley-Morgan may continue working as she currently does.

Dr. Stauber's medical opinion, after an examination of plaintiff Golley-Morgan and review of the medical records from St. Barnabas, various physical therapy notes and evaluations, including a discharge evaluation, conclude that plaintiff Golley-Morgan is presently not disabled as a result of the motor vehicle accident of July 30, 2017. As of July 23, 2020, plaintiff Golley-Morgan can continue to work and perform her regular activities of daily living without any restrictions. Despite plaintiff Golley-Morgan's subjective complaints pertaining to her lower back, there were no objective findings on examination to warrant further treatment.

In opposition, plaintiffs have not submitted the reports of any medical experts to rebut defendants' doctors' findings. Nor have the plaintiffs submitted their own affidavits. Instead, plaintiffs rely on a three-page document titled "Plaintiffs' Opposition to Defendant's Krishna Das Notice of Cross-Motion." (*See, NYSCEF Doc. No. 73*) signed by one of their attorneys. However, said document is not denominated as an affirmation and is not affirmed to be true under the penalties of penalties as proscribed by *CPLR §2106(a)*. It does not refer to any medical testimony or records, but alludes, without citation, to testimony in plaintiffs' depositions regarding their treatment, therapy and the physical pain they experience.

Pursuant to *Insurance Law §5102(d)*, "[s]erious injury" means 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. *See, Insurance Law §5102(d).*

The purpose of the No-Fault statute is to "weed out frivolous claims and limit recovery to significant injuries." *Ramkumar v. Grand Style Transp. Enterprises Inc.*, 22 N.Y.3d 905, 907 (2013), *quoting, Dufel v. Green*, 84 N.Y.2d 795, 798 (1995). Accordingly, a plaintiff must present objective proof rather than subjective complaints to meet the serious injury threshold. *Toure v. Avis Rent A Car Sys.,* 98 N.Y.2d 345, 350 (2002). However, to prevail on a motion for summary judgment under this statute, it is the defendant that has "the initial burden to present competent evidence showing that the plaintiff has not suffered a serious injury." *Spencer v. Golden Eagle, Inc.*, 82 A.D.3d 589, 590 (1st Dep't 2011) [internal quotation marks omitted]; *Holloman v. Am. United Transportation Inc.*, 162 A.D.3d 423, 423 (1st Dep't 2018); *Rodriguez v. Goldstein*, 182 A.D.2d 396 (1st Dep't 1992).

Further, to meet its summary judgment burden under the 90/180 category of the statute, a defendant must provide medical evidence of the lack of an injury preventing 90 days of normal

activity during the first 180 days following the accident. *Elias v. Mahlah*, 58 A.D.3d 434, 435 (1st Dep't 2009). However, a defendant may prevail on this issue without medical evidence by relying on other evidence, such as the plaintiff's own deposition testimony or records demonstrating that plaintiff was not prevented from performing all of the substantial activities constituting customary daily activities during the relevant period. *Holloman v. Am. United Transportation Inc.*, *supra* at 424.

The affirmations from the defendants' examining and reviewing physicians constitute competent medical evidence that plaintiffs' alleged injuries were not serious within the meaning of *Insurance Law §5102(d)*. Here, plaintiffs have not submitted competent evidence to oppose the motion, and plaintiffs failed to submit any meaningful or admissible proof that they were unable to perform substantially all of their customary activities for the statutorily prescribed length of time. As such, the movant-defendants' motion to dismiss this action is granted.

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment on the issue that plaintiffs have not sustained a serious injury under the Insurance Law is GRANTED; and it is further

ORDERED that the defendants' motion and cross-motion to strike are DENIED as moot, and it is further

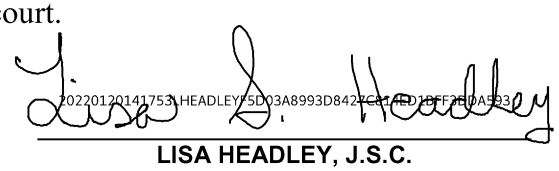
ORDERED that the complaint is DISMISSED with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further hereby

ORDERED that any relief sought not expressly addressed herein has nonetheless been considered; and it is further

ORDERED that within 30 days of entry, defendants shall serve a copy of this decision/order upon the plaintiffs with notice of entry.

This constitutes the Decision and Order of the court.



1/20/2022
DATE

LISA HEADLEY, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE