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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 17 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

x

MARIA PAZ ARENAS and JAVIERA ARENAS, infants by their mother and natural guardian, CLAUDIA SILVA,

Plaintiff(s),

-against-

LINDA S. WOHST-TOBY and PETRA HRUBA and JUAN ARENAS,

Defendant(s).

x

Index No. 19522/08

Motion Submitted: 6/14/10
Motion Sequence: 002, 003

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....XX
Answering Papers.....X
Reply.....X
Briefs: Plaintiff's/Petitioner's.....
Defendant's/Respondent's.....

Defendants Wohst-Toby and Hruba move this Court for an Order granting summary judgment in their favor and dismissing the complaint on the ground that the infant plaintiffs ("plaintiffs") did not sustain a serious injury under Insurance Law § 5102(d) (Motion Sequence #2). Plaintiffs oppose the requested relief.

Plaintiffs' father, defendant Juan Arenas, cross-moves this Court for an Order granting summary judgment in his favor and dismissing the plaintiffs' complaint and the cross-claim against him on the ground that the evidence establishes that he is not liable for causing the accident in question. Defendant Arenas moves, in the alternative, for an Order granting summary judgment in his favor on the ground that the plaintiffs did not sustain a serious

injury within the meaning of the Insurance Law (Motion Sequence #3). Plaintiffs oppose the requested relief.

This action arises from a motor vehicle accident that occurred in Nassau County on December 24, 2003. At the time of the accident, the infant plaintiffs were riding in their father's (defendant Juan Arenas) car. Juan Arenas was operating the motor vehicle. Plaintiffs' mother, Claudia Silva, was also riding in the same vehicle. The vehicle operated by defendant Hruba (owned by defendant Wohst-Toby) came into contact with the Arenas vehicle at the intersection of Port Washington Boulevard and Main Street.

Following the accident, the plaintiffs were taken by ambulance to a local hospital where they were treated and released. At the time of the accident, plaintiffs were approximately six and nine years old, and they were on holiday recess from their local elementary school. When the recess was over, both plaintiffs returned to school.

The Court will address first the summary judgment motions regarding the issue of serious injury within the meaning of Insurance Law § 5102(d).

It is well recognized that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact. (***Andre v. Pomeroy,*** 35 N.Y.2d 361, 320 N.E.2d 853, 362 N.Y.S.2d 131 [1974]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact. (***Cauthers v. Brite Ideas, LLC,*** 41 A.D.3d 755, 837 N.Y.S.2d 594 [2d Dept., 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein the plaintiff. (***Makaj v. Metropolitan Transportation Authority***, 18 A.D.3d 625, 796 N.Y.S.2d 621 [2d Dept., 2005]).

A party moving for summary judgment must make a *prima facie* showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. (***Winegrad v. New York Univ. Med. Center,*** 64 N.Y.2d 851 (1985); ***Zuckerman v. City of New York,*** 49 N.Y.2d 557 [1980]). Here, the defendants must demonstrate that the plaintiffs did not sustain serious injuries within the meaning of Insurance Law Section 5102(d) as a result of this accident (***Felix v. New York City Transit Auth.,*** 32 A.D.3d 527, 819 N.Y.S.2d 835 [2d Dept., 2006]). Defendants Wohst-Toby, Hruba and Juan Arenas have met their burden.

In support of their motion for summary judgment, defendants Wohst-Toby and Hruba submit, *inter alia*, the affirmed medical report of Dr. Alan J. Zimmerman, defendants' examining orthopedic surgeon, and the deposition testimony of the plaintiffs' mother, Claudia Silva. Defendant Juan Arenas submits the same deposition testimony, plus his own deposition testimony, as well as that of the plaintiffs. In addition, defendant Arenas requests

in his moving papers that the Court "deem" all of the arguments and case law related to the issue of serious injury set forth in co-defendants' (Wohst-Toby and Hruba) motion be incorporated in his own motion for summary judgment on the same issue. The Court will consider the arguments and case law set forth in Wohst-Toby and Hruba's motion as if fully set forth in defendant Arenas' motion.

Plaintiffs were examined by Dr. Zimmerman on December 3, 2009, almost six full years after the accident giving rise to this action. With respect to each plaintiff, Dr. Zimmerman measured range of motion in the cervical and lumbar spine areas with a goniometer, and he set forth his specific findings, comparing those findings to normal range of motion. Dr. Zimmerman also performed various other tests, including muscle strength and reflex tests. Both plaintiffs were found to have normal orthopedic evaluations. According to Dr. Zimmerman, plaintiffs do not presently have any disability.

Claudia Silva's deposition testimony fails to establish that plaintiffs were prevented from performing substantially all of the material acts which constitute each of their usual and customary activities for at least 90 of 180 days following the accident (Insurance Law § 5102[d]). Ms. Silva testified that plaintiffs returned to school following the holiday recess, and that they finished out the balance of the school year. She also testified that plaintiffs were treated and released at the hospital emergency room on the night of the accident. Aside from some bruising, there is no evidence that plaintiffs suffered any injuries requiring stitches, surgery, or orthopedic appliances. Ms. Silva stated that she followed up with her pediatrician because Javiera complained of pain in her back, and Maria complained of pain in her shoulder. Ms. Silva could not recall which of Maria's shoulders was painful.

In any event, Ms. Silva testified that she brought plaintiffs to a chiropractor. Each of the plaintiffs treated with the chiropractor two or three times a week for approximately three months. Eventually, Maria underwent a course of physical therapy for her shoulder, which therapy lasted approximately four weeks. According to Ms. Silva, Maria received a note from the chiropractor excusing her from gym class for "a period of time." Ms. Silva could not specify the length of time that Maria was excused from gym class. Ms. Silva did not recall whether Javiera had to be excused from gym class. Neither of the plaintiffs was involved in any other school athletic activities at the time. Ms. Silva claimed that she had to take plaintiffs out of ballet classes in which they had been participating for a short period of time prior to the accident.

Likewise, the testimony of plaintiff Maria Paz Arenas and Javiera Arenas fail to establish that either one or both of them were prevented from performing their usual daily activities for 90 of the 180 days following the accident. Maria Paz Arenas testified that she did not remember anything from 2003, when she was six years old. She also testified that there are no activities that she does not do anymore because of the accident. Plaintiff Javiera

Arenas testified that she was eight at the time of the accident and does not recall missing any school gym classes in 2004.

The affirmed medical reports of defendants' physician, as well as the plaintiffs' deposition testimony can be sufficient to establish *prima facie* that the plaintiffs did not sustain a serious injury in a motor vehicle collision within the meaning of Insurance Law § 5102(d) (see ***Park v. Orellana***, 49 A.D.3d 721, 854 N.Y.S.2d 447 (2d Dept., 2008); ***Tarhan v. Kabashi***, 44 A.D.3d 847, 844 N.Y.S.2d 89 [2d Dept., 2007]).

Examining the reports of defendants' physician, there are sufficient tests conducted set forth therein to provide an objective basis so that their respective qualitative assessments of plaintiffs could readily be challenged by any of plaintiff's expert(s) during cross examination at trial, and be weighed by the trier of fact ***(Toure v. Avis Rent A Car Systems, Inc.,*** 98 N.Y.2d 345, 350, 774 N.E.2d 1197, 746 N.Y.S.2d 865 (2002); ***Gaddy v. Eyler,*** 79 N.Y.2d 955, 591 N.E.2d 1176, 582 N.Y.S.2d 990 [1992]).

Thus, as noted, defendant's submission of relevant portions of plaintiff's deposition (***Jackson v. Colvert***, 24 A.D.3d 420, 805 N.Y.S.2d 424 (2d Dept., 2005); ***Batista v. Olivo***, 17 A.D.3d 494, 795 N.Y.S.2d 54 [2d Dept., 2005]) and affirmations of defendant's physician are sufficient herein to make a *prima facie* showing that the plaintiffs did not sustain a serious injury within the meaning of Insurance Law § 5102(d) (***Paul v. Trerotola***, 11 A.D.3d 441, 782 N.Y.S.2d 773 [2d Dept., 2004]). The plaintiffs are now required to come forward with viable, valid objective evidence to verify their complaints of pain, permanent injury and incapacity (***Farozes v. Kamran***, 22 A.D.3d 458, 802 N.Y.S.2d 706 [2d Dept., 2005]). Plaintiffs have not met their burden.

Plaintiffs have not submitted any objective medical evidence establishing that they suffer from any permanent injury or substantial limitation as a result of this accident, nor that they were prevented from engaging in their daily activities for at least 90 of the 180 days following the accident. In their Bill of Particulars, plaintiffs claim that Maria Paz Arenas suffered a shoulder separation and a cervical strain/sprain. Javiera Arenas is alleged to have suffered a fractured T11 vertebral body. Aside from these statements in the Bill of Particulars, there is no objective proof of same submitted by plaintiffs. The Bill of Particulars also states that plaintiffs were confined to the house for one month; yet, their mother, Claudia Silva, testified that plaintiffs returned to elementary school when the holiday recess was over. Moreover, the assertions that Javiera was "totally incapacitated" from school for one month, and that Maria was "partially incapacitated" from school for three months are completely unsubstantiated.

A plaintiff must set forth competent medical evidence to establish that she sustained a medically determined injury or impairment of a nonpermanent nature, which prevented her

from performing substantially all of the material acts which constituted her usual and customary daily activities for 90 of the 180 days following the subject collision (***Ly v. Holloway***, 60 A.D.3d 1006, 876 N.Y.S.2d 482 [2d Dept., 2009]; ***Rabolt v. Park, supra)***. In providing only the self-serving statement of Claudia Silva and the claims made in the Bill of Particulars that plaintiffs were prevented from performing substantially all of her usual and customary activities for 90 of the 180 days following the accident, plaintiffs have failed to provide competent medical evidence of the same. Thus, plaintiffs have each failed to raise triable issues of fact as to whether they sustained a serious injury (see ***Niles v. Lam Pakie Ho***, 61 A.D.3d 657, 877 N.Y.S.2d 139 (2d Dept., 2009); ***Cantave v. Gelle***, 60 A.D.3d 988, 877 N.Y.S.2d 129 [2d Dept., 2009]).

The motion for summary judgment made by defendants Wohst-Toby, Hruba and Arenas on the ground that neither plaintiff sustained a serious injury under Insurance Law § 5102(d) is granted, and plaintiffs' complaint and all cross-claims are dismissed.

Defendant Arenas' motion for summary judgment on the ground that the evidence establishes that he is not liable for causing the accident in question is denied as moot.

The foregoing constitutes the Order of this Court.

Dated: September 13, 2010
Mineola, N.Y.

Karen V. Murphy
J. S. C.
XXY

ENTERED
SEP 17 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE