SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

- x

YULIYA KIM, Infant, by Father and Natural Guardian, VIKTOR KIM,

Plaintiff,

- against -

JIM S. KIM,

Defendant.

- x

Index No.: 3262/2009

Motion Date: 02/10/2011

Motion No.: 28

Motion Seq.: 2

The following papers numbered 1 to 8 were read on this motion by defendant JIM S. KIM for an order pursuant to CPLR 3212 granting summary judgment and dismissing the complaint on the ground that the infant plaintiff, YULIA KIM, has not sustained a serious injury within the meaning of Insurance Law §§ 5102 and 5104:

	Papers Numbered
Notice of Motion-Affidavits-Exhibits	1 - 3
Affirmation in Opposition-Affidavits-Exhibits	4 - 6
Reply Affirmation	7 - 8

This is a personal injury action in which the infant plaintiff, Yulia Kim, seeks to recover damages for injuries she sustained as a result of a motor vehicle accident that occurred at approximately 2:30 p.m. on October 9, 2008, on Northern Boulevard at the intersection with 150th Street, Queens County, New York.

At the time of the accident, Ms. Kim, a 14-year-old student at Fiorello H. LaGuardia High School, was a pedestrian who was struck by the motor vehicle owned and operated by defendant Jin S. Kim. The plaintiff commenced an action against the defendant by filing a Summons and Verified Complaint on February 11, 2009. Issue was joined by service of defendant's Verified Answer dated April 8, 2009. The plaintiff filed a note of issue on May 21, 2010.

The defendant now moves for an order pursuant to CPLR 3212(b), granting summary judgment to the defendant and dismissing the plaintiff's complaint on the ground that the plaintiff did not suffer a serious injury as defined by Insurance Law § 5102.

In support of the motion, the defendant submits an affidavit from counsel, Marcella Gerbasi Crewe, Esq.; a copy of the pleadings; plaintiffs' Verified Bill of Particulars; a copy of the transcript of Ms. Kim's examination before trial; the EMT ambulance report; the plaintiff's emergency room records from Flushing Hospital Medical Center; the affirmed medical report of Dr. Sol Farkas, a board certified orthopedic surgeon; and a copy of the plaintiff's school attendance reports for the 2009-2010 school year.

In her Verified Bill of Particulars the plaintiff states that as a result of the accident she sustained, inter alia, "a

partial tear of the triangular fibrocartilage in the left wrist; cervicalgia; posttraumatic headache; cervical disk displacement; cervical joint disfunction; cervical strain and sprain; abrasions and scarring to the face, torso and legs."

Plaintiff contends that she sustained a serious injury as defined in Insurance law §5102(d) in that she sustained significant disfigurement; a fracture; permanent loss of use of a body organ, member, function or system; permanent consequential limitation or use of a body organ or member; significant limitation of use of a body function or system; a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff from performing substantially all of the material acts which constitute his 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.

The plaintiff was examined by Dr. Sol Farkas, a board certified orthopedic surgeon, who was retained by the defendant. In his examination of March 16, 2010, which was approximately 1½ years after the accident, Dr. Farkas performed quantified and comparative range of motion tests. The plaintiff told Dr. Farkas that she sustained injuries to her head, neck right leg, and left wrist. At the time of the examination she had complaints of dizziness and pain in the head and neck. Upon examination, Dr.

Farkas found that the plaintiff had no limitations of range of motion of the cervical spine; and no pain or limitations in range of motion of the left wrist. Dr. Farkas diagnosed the plaintiff with "resolved cervical sprain; resolved sprain of the left wrist; and resolved contusion of the right lower extremity." He states in conclusion that, "[I] find no orthopedic disability based on the physical examination at this time. The claimant may attend school and may carry out the daily activities of living, without restriction."

In her examination before trial, taken on January 28, 2010, Ms. Kim testified that she was crossing Northern Boulevard at 150th Street in the crosswalk and when she about 85% across the street she was struck on her right side by the defendant's vehicle. She stated that as a result she fell on her left side and sustained abrasions to her neck, forehead, left elbow and left hip. Her left hand was also bleeding. She was removed from the scene by ambulance and treated at the emergency room but did not receive stitches for any of her cuts. The EMT ambulance report indicates that the plaintiff's chief complaint was "slight elbow pain." The emergency room records indicate that the X-ray of her left wrist was negative for fractures and the MRI of her brain was negative for intracranial injury. She was discharged four hours later. The plaintiff stated that the accident occurred on a Thursday on which there was no school. She was

absent the following Friday and missed a total of about ten days to go to doctor appointments over a period of 1 - 2 months. She missed gym for one semester. She stated she was never confined to bed and only stayed home for one day after the accident.

Ms. Kim began receiving acupuncture, heat pads, electrical stimulation and massage from Dr. Sales at East West Medical commencing three days after the accident and ending about four months later. She stated that as a result of the accident there are no activities that she can no longer perform. She still has minor pain in her back, left wrist and neck which is improving but she still gets headaches about five times a week.

Defendant's counsel contends that the plaintiff's admissions contained in her deposition testimony as well as the affirmed medical report of Dr. Farkas is sufficient to establish, prima facie, that the defendant has not sustained a fracture, significant disfigurement, permanent loss of a body organ, member, function or system; that she has not sustained a permanent consequential limitation of a body organ or member or a significant limitation of use of a body function or system. Counsel also contends that there is no proof in the record that the plaintiff has not sustained a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff, for not less than 90 days during the immediate one hundred days following the occurrence, from performing

substantially all of her usual daily activities. Counsel contends that plaintiff's admissions as to her minimal medical treatment and the fact that there are no activities she can no longer do as a result of her injuries demonstrates that she did not suffer a "serious injury" pursuant to Insurance Law § 5102(d).

In opposition, plaintiff's counsel, Roman Avshalumov, Esq., contends that the defendant has failed to establish a prima facie entitlement to summary judgment as a matter of law. Counsel contends that plaintiff's left wrist tear is a serious and permanent injury and meets the serious injury threshold. Counsel also contends that the plaintiff's injury qualifies as a serious injury and falls within the categories of "permanent consequential limitation of use of a body organ or member or a "significant limitation of use of a body function or system."

Plaintiff submits the affirmed report of radiologist Dr. Richard Heiden dated December 24, 2010 regarding his review of the MRI films of plaintiff's left wrist which was conducted on November 4, 2008, one month after the accident. He states that the MRI shows a "partial tear of the triangular fibrocartilage."

The plaintiff also submits a copy of the affirmed medical report of Dr. Benigno R. Sales a physician from East West Medical Center. Dr Sales first examined the plaintiff on October 24, 2008. At that time the plaintiff complained of headaches as well as pain in her neck and left wrist. Dr. Sales report states that

there was full range of motion in all joints of the upper an lower extremities as well as full range of motion in the thoracic and lumbar spine. Dr. Sales diagnosed the plaintiff at that time as suffering from cervical sprain/strain and left wrist sprain/strain both caused by the subject accident. In his next examination of November 28, 2008, Dr. Sales found no limitations in range of motion and stated that the plaintiff had full range of motion of the wrist. On December 12, 2008, Dr. Sales, utilizing visual inspection, observed limitations in range of motion of the plaintiff's cervical spine and lumbosacral spine.

The plaintiff also submits the affirmed report of Dr. Ida Tetro who examined the plaintiff on December 29, 2010. On that date she presented with headaches, occasional neck pain and left wrist, partial tear. She found minor limitations in range of motion in the cervical spine, which was categorized as "10% impairment of the cervical spine causally related to the accident. Dr. Tetro also stated that the plaintiff has pain in the left wrist which is a permanent and consequential impairment causally related to the subject accident.

Plaintiff's counsel contends that the medical reports submitted on behalf of the plaintiff are sufficient to raise a genuine issue of material fact as to whether the plaintiff sustained a significant range of motion restrictions in her cervical spine and left wrist.

On a motion for summary judgment, where the issue is whether the plaintiff has sustained a serious injury under the no-fault law, the defendant bears the initial burden of presenting competent evidence that there is no cause of action (see Wadford v. Gruz, 35 AD3d 258 [1st Dept. 2006]). "[A] defendant can establish that [a] plaintiff's injuries are not serious within the meaning of Insurance Law § 5102(d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (Grossman v Wright, 268 AD2d 79 [1st Dept. 2000]). Whether a plaintiff has sustained a serious injury is initially a question of law for the Court (Licari v Elliott, 57 NY2d 230 [1982]).

Initially, it is defendant's obligation to demonstrate that the plaintiff has not sustained a "serious injury" by submitting affidavits or affirmations of its medical experts who have examined the litigant and have found no objective medical findings which support the plaintiff's claim (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]). Where defendant's motion for summary judgment properly raises an issue as to whether a serious injury has been sustained, it is incumbent upon the plaintiff to produce evidentiary proof in admissible form in support of his or her allegations. The burden, in other words, shifts to the plaintiff

to come forward with sufficient evidence to demonstrate the existence of an issue of fact as to whether he or she suffered a serious injury (see Gaddy v. Eyler, 79 NY2d 955 [1992]; Zuckerman v. City of New York, 49 NY2d 557[1980]; Grossman v. Wright, 268 AD2d 79 [2d Dept 2000]).

Here, the proof submitted by the defendant, including the affirmed medical report of Dr. Farkas was sufficient to meet its prima facie burden by demonstrating that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler,79 NY2d 955 [1992]).

In opposition the plaintiff failed to raise a triable issue of fact (see Srebnick v Quinn, 75 AD3d 637[2d Dept. 2010]). The plaintiff failed to proffer any competent medical evidence that revealed the existence of any significant limitations in her cervical spine or left wrist that were contemporaneous with the subject accident (see Catalano v Kopmann, 73 AD3d 963 [2d Dept. 2010]; Bleszcz v Hiscock, 69 AD3d 890 [2d Dept. 2010]). In his reports dated October 24, 2008 and November 28, 2008, Dr. Sales found that the plaintiff had no limitations of range of motion and in fact found that she had full range of motion in her wrist. In his report dated December 12, 2008, Dr. Sales found limitations of range of motion in the plaintiff's cervical spine

but failed to indicate any objective test utilized to quantify the limitation and failed to set forth any objective medical testing he performed (see Robinson-Lewis v Grisafi, 74 AD3d 774 [2d Dept. 2010]). Further, plaintiff's complaints of subjective pain are insufficient to raise a triable issue of fact regarding serious injury (see Scheer v Koubek, 70 NY2d 678 [1987]; Catalano v Kopmann, 73 AD3d 963 [2d Dept. 2010]). Thus, plaintiff failed to provide any evidence of initial limitations in range of motion that were significant in nature (see Husbands v Levine, 79 AD3d 1098 [2d Dept. 2010]; Posa v Guerrero, 77 AD3d 898 [2d Dept. 2010]). Although the plaintiff sustained a tear in the cartilage of the left wrist, the mere existence of a tear not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the injury and its duration (see Catalano v Kopmann, 73 AD3d 963 [2d Dept. 2010]; Vilomar v Castillo, 73 AD3d 758 [2d Dept. 2010]; Keith v Duval, 71 AD3d 1093 [2d Dept. 2010]).

In addition, the more recent report submitted by Dr. Tetro did not indicate any significant range of motion limitations of the left wrist or cervical spine. The 11% range of motion limitations of the cervical spine are not considered significant for purposes of the no-fault law (see McLoud v Reyes, 2011 NY Slip Op 1810 [2d Dept. 2011] [the approximate 12% limitation in range of motion noted was insignificant within the meaning of the

no-fault statute]).

Lastly, the plaintiff failed to submit evidence of any fractures or significant disfigurement and failed to submit competent medical evidence that the injuries allegedly sustained by the infant as a result of 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 following the accident (see Sainte-Aime v Ho, 274 AD2d 569 [2d Dept. 2000]). The plaintiff herself testified that she did not miss more than ten days of school as a result of the accident.

The plaintiff also failed to adequately explain the cessation of the her medical treatment four months after the accident (see Pommells v Perez, 4 NY3d 566 [2005]; West v Martinez, 78 AD3d 934 [2d Dept. 2010]; Vasquez v John Doe # 1, 73 AD3d 1033 [2d Dept. 2010]; Haber v Ullah, 69 AD3d 796 [2d Dept. 2010]).

Accordingly, based upon the foregoing, it is hereby

ORDERED, that the defendant's motion for summary judgment is granted and the plaintiff's complaint is dismissed.

Dated: April 1, 2011
Long Island City, N.Y.

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ROBERT J. MCDONALD
J.S.C.