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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NASSAU

PRESENT:

**Hon. Burton S. Joseph,
Justice.**

MELISSA SWINTON and REBECCA SWINTON, an
Infant by her Mother and Natural Guardian MELISSA
SWINTON,

Plaintiffs,

- against -

Trial/IAS Part 13
Index No. 10577/2002
Motion No. 003
Motion Date 3/10/2004

LOUIS W. TREUMAN, JR.,

Defendant.

Papers Numbered

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Motion by the attorney for defendant for an Order pursuant to CPLR 3212 and Article 51 of the New York Insurance Law granting summary judgment to defendant, Louis W. Treuman, Jr., and dismissing plaintiffs' complaint for non-economic loss allegedly sustained in an accident on December 18, 2001 on the ground that the injuries claimed by plaintiffs, Melissa Swinton and Rebecca Swinton, do not satisfy the "serious injury" threshold requirement of Section 5102(d) of the New York Insurance Law, and thus, plaintiffs' claim for non-economic loss are barred by Section 5104(a) of the Insurance Law is granted.

This is an action to recover for personal injuries allegedly sustained by the plaintiff on December 18, 2001 as a result of a two car accident.

Defendant has submitted the affirmed report of an orthopedist who examined Rebecca Swinton four months after the accident and found that she had normal range of motion and function of her right knee. He concluded that she had a "resolved sprain of the right knee" that would not produce any permanent residuals. He further opined that she had no disability at the time of the examination four months after the accident. (Def. Ex. I.) Dr. Jerrold Gorski and Dr. Erik Entin, examined Rebecca Swinton, performed a variety of clinical tests, reviewed her medical records, and found "no objective evidence for any impairment, disability or permanency resulting from this accident" and no limitations on the performance of her routine daily activities. (Def. Ex. J., K.) Defendant has submitted *prima facie* proof that plaintiff, Rebecca Swinton, did not sustain a "serious injury" to her knee in the accident.

Defendant also made a *prima facie* showing that plaintiff, Melissa Swinton, did not suffer a "serious injury" to her neck and back in the accident. In her Bill of Particulars she claims only sprains and strains of her neck and back with their associated symptoms of pain, inflammation and limited motion. (Def. Ex. D.) The defendant's orthopedist who examined Melissa Swinton four months after the accident found that she had normal range of motion and function of her cervical and lumbar spine; and concluded that she had a "resolved sprain of the cervical and lumbar spine", "no permanency as a result of this accident"; and "is capable of working and performing all of her normal activities of daily living without any limitations". (Def. Ex. O.) Dr. Jerrold Gorski and Dr. Erik Entin, examined Melissa Swinton, performed a variety of clinical tests, reviewed her medical records, and found "no objective evidence for any impairment, disability or permanency resulting from this motor vehicle accident" and no

limitations on the performance of her routine daily activities. (Def. Ex. P., Q.)

Defendants have submitted *prima facie* proof that neither plaintiff sustained a “serious injury”. The burden shifts to each plaintiff to come forward with evidentiary proof in admissible form sufficient to raise a triable issue as to whether each sustained a “serious injury”.

Not one of the medical reports submitted by the plaintiffs, annexed as Exhibits D., E., F., and G. to their opposition papers are sworn to or affirmed. Findings and conclusions of plaintiff’s doctors must be submitted in the form of an affidavit or affirmation to defeat a motion for summary judgment directed to the threshold issue of “serious injury”. *See, Marte v. NYC Transit Authority*, 253 AD2d 519. Since the medical reports submitted by the plaintiffs are not sworn to or affirmed they may not be used as competent evidence to defeat a motion for summary judgment. As a result plaintiffs have not met their burden. Even if there were proper compliance with the affirmation requirements of CPLR 2106, the contents of the medical records and reports prepared by plaintiff’s treating physicians establish that plaintiffs did not suffer “serious injuries” related to the accident. *See, CPLR 2106, Franchini v. Palmieri*, 1NY3rd 536; *Lowe v. Bennett*, 122 AD2d 728.

Plaintiffs’ affidavits are insufficient to raise a triable issue as to whether they suffered a “serious injury” under the ninth category specified in the Insurance Law since they have failed to tender any medical affidavit or affirmed medical report from any doctor who stated they were medically disabled from performing substantially all of their customary daily activities for at least 90 days during that 180 day period. *See, Licari v. Elliot*, 57 NY2d 536.

Even if affirmed, Dr. Goodman’s January 29, 2004 report does not constitute competent medical proof that Melissa Swinton suffered a “serious injury” to her right knee in the accident because she does not claim a right knee injury in her Bill of Particulars. In his

unaffirmed report, Dr. Goodman states that Melissa Swinton came to his office on January 29, 2004 “with complaints of about the right knee, which she has had for over last five months or so”; he examined her and took x-rays and diagnosed her with “chondrocalcinosis” of her right knee. (Pl, Ex. F.) Chondrocalcinosis is defined as “pseudogout; chronic recurrent arthritis clinically similar to gout. The crystals found in synovial fluid are calcium pyrophosphate dehydrate and not urate crystals.” See, *Taber’s Cyclopedic Medical Dictionary*, 16th ed. 1989, p. 348. In her Verified Bill of Particulars, Melissa Swinton does not claim any injury to her right knee from the accident. (Def. Ex. C., para. 5) Nor did the plaintiff ever seek permission from the court to amend her Bill of Particulars to allege any right knee injury casually related to the accident. In *Zapata v. Dagostino*, 265 AD2d 324, the Court excluded plaintiff’s proof as to aggravation of a preexisting injury since the plaintiff failed to allege the damages in the complaint or the Bill of Particulars. Even if affirmed, Dr. Goodman has not provided any information as to the nature of Melissa Swinton’s short-term treatment or any explanation for the 20-month gap between that treatment and her visit to Dr. Goodman on January 29, 2004. Further the findings of Melissa’s orthopedist indicate she had no restrictions in cervical or lumbar motion two days after the accident.

Dr. McCleavey’s MRI report dated December 20, 2001, even if affirmed, does not constitute competent proof that Rebecca Swinton has a “serious injury” to her right knee caused by the Accident because he attributed the positive MRI findings to a soft tissue “strain”, not a permanent injury. (Pl. Ex. G.) The Emergency Room Report of South Nassau Hospital where plaintiff, Rebecca Swinton was examined after the accident indicates that she had normal range of motion of her right knee with no swelling or bruising, and was diagnosed with a “right knee/ankle contusion”. (Def. Ex. E.) Rebecca Swinton was a high school student in her junior

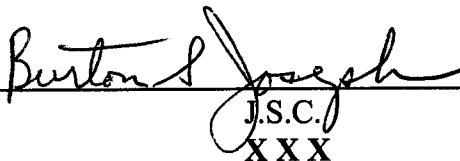
year at the time of the accident and missed 21 days of school during the balance of her junior year. She also worked part-time as a tutor and missed about three weeks of work after the accident. (Def. Ex. F.) The x-rays taken of Rebecca's right ankle and right knee at the Hospital and the results of the MRI performed on plaintiff's right knee showed a soft tissue strain, not any meniscal tear or permanent injury to her right knee. (Def. Ex. G.) Rebecca's orthopedist found that plaintiff had full range of motion of her right knee two days after the accident and a history of patellofemoral dislocation unrelated to the accident. (Def. Ex. H.)

Plaintiffs Rebecca Swinton and Melissa Swinton have failed to come forward with any medical proof sufficient to raise a triable issue as to whether they each sustained a "serious injury" within the meaning of Insurance Law Section 5102(d).

Defendants motion for summary judgment is granted in its entirety. This decision is the Order and Judgment of the Court and terminates all proceedings under Index No. 10577/2002.

ENTER:

Dated: Mineola, New York
March 25, 2004



J.S.C.
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ENTERED

MAR 30 2004

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**