

Hinds v Dailey

2017 NY Slip Op 30178(U)

January 30, 2017

Supreme Court, Queens County

Docket Number: 13309/2014

Judge: Robert J. McDonald

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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

MARSHALEE A. HINDS, CHANELL CAMPBELL,
AN INFANT BY HER MOTHER AND NATURAL
GUARDIAN MARSHALEE A. HINDS AND
MARSHALEE A. HINDS, INDIVIDUALLY,

Index No.: 13309/2014
Motion Date: 1/17/17
Motion No.: 72
Motion Seq.: 3

Plaintiffs,

- against -

CHRYSTAL DAILEY,

Defendant.

- - - - - x

The following papers numbered 1 to 10 read on this motion by defendant for an order pursuant to CPLR 3212, granting defendant summary judgment and dismissing infant plaintiff's complaint on the ground that infant plaintiff did not sustain a serious injury within the meaning of Insurance Law §§ 5104(a) and 5102(d):

| | <u>Papers</u> <u>Numbered</u> |
|---|----------------------------------|
| Notice of Motion-Affirmation-Memo. of Law-Exhibits..... | 1 - 5 |
| Affirmation in Opposition-Exhibits..... | 6 - 8 |
| Reply Affirmation..... | 9 - 10 |

In this negligence action, infant plaintiff seeks to recover damages for personal injuries allegedly sustained as a result of a motor vehicle accident that occurred on January 9, 2014 on 140th Avenue at 170th Street, in Queens County, New York. In the verified bill of particulars, infant plaintiff alleges that she sustained serious injuries to, inter alia, her cervical spine and lumbar spine, including disc bulges.

Plaintiffs commenced this action by filing a summons and complaint on September 4, 2014. Issue was joined by service of defendant's verified answer dated December 10, 2014. Defendant now moves for an order pursuant to CPLR 3212(b), granting summary judgment and dismissing infant plaintiff's complaint on the ground that infant plaintiff did not suffer a serious injury as defined by Insurance Law § 5102.

In support of the motion, defendant submits an affirmation from counsel, Lauren E. Marron, Esq.; a memorandum of law; a copy of the pleadings; a copy of the note of issue and so ordered stipulation extending the time to move for summary judgment; a copy of the verified bill of particulars; copies of the transcripts of the examinations before trial of infant plaintiff and plaintiff Marshalee A. Hinds; and a copy of the affirmed medical report of William Walsh, M.D.

At her deposition, taken on March 25, 2016, infant plaintiff testified that she was involved in the subject accident. She did not lose consciousness, bleed or bruise as a result of the accident. She was taken by ambulance to the hospital. She was not admitted to the hospital, did not have x-rays performed, and was not given any medication, prescriptions or any orthopedic device. She first sought treatment about a week after the accident at Premier Physical Medicine and Rehabilitation which constituted of electrical stimulation and using the bicycle and treadmill. She saw the doctor at Premier Physical Medicine and Rehabilitation two or three times. At the time of the deposition, she was no longer treating there because the doctor told her that she was good and did not need to come back. She saw a psychologist two or three times following the accident. No doctor ever gave her any prescriptions, medications or any other orthopedic devices. No doctor ever recommended surgery or injections. She was never confined to bed or home following the accident. She missed one day of school following the accident and missed less than a month of gym following the accident. She did not have a doctor's note telling her not to go to gym class. Her current limitations are taking out the garbage, bending down for long periods of time, jogging for long periods of time, and sleeping. She is currently playing volleyball for a league and is able to practice twice a week.

Plaintiff Marshalee A. Hinds appeared for a deposition on March 25, 2016. She testified that infant plaintiff missed one day of school following the accident. Infant plaintiff's limitations are taking out the garbage, doing laundry, and lifting/carrying heavy bags. Infant plaintiff was able to dance at her art gala after the accident. She never gave infant plaintiff any creams, Tylenol or anything else to treat any of her injuries.

Dr. Walsh examined infant plaintiff on August 29, 2016. Infant plaintiff presented with current complaints of pain in her neck and low back. Dr. Walsh identifies the medical records he reviewed and performed objective range of motion testing using a goniometer. He found full range of motion in infant plaintiff's

cervical spine and lumbar spine. Dr. Walsh concludes that there is no evidence of permanent orthopedic disability, and infant plaintiff may perform her usual studies as she was doing prior to the accident.

Defendant's counsel contends that the medical report and transcripts of the deposition testimony are sufficient to demonstrate that infant plaintiff did not sustain a significant disfigurement; a fracture; a permanent loss of use of a body, organ, member, function or system; a permanent consequential limitation of use of a body organ or member; a significant limitation of use of a body function or system; or a medically determined injury or impairment of a nonpermanent nature which prevented infant plaintiff from performing substantially all of the material acts which constitute her 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.

In opposition, infant plaintiff submits an affirmation from counsel, Samantha Fried, Esq.; a copy of the motor vehicle police accident report; a copy of the affirmed medical report of Raj Tolat, M.D.; a copy of the MRI reports of infant plaintiff's cervical spine and lumbar spine; a copy of the initial physiatric evaluation with annexed physical therapy notes from Premier Physical Medicine & Rehabilitation, P.C.; and a copy of a psychological report from Roy Aranda, Psy.D

Infant plaintiff first presented to Dr. Tolat on January 23, 2014 with complaints of episodic neck pain with radiation to the left trapezius muscle, episodic low back pain, intermittent headaches, posttraumatic nervousness, and anxiety. Dr. Tolat performed range of motion testing with a goniometer and found limited range of motion regarding infant plaintiff's cervical spine and lumbar spine. He ordered MRIs of the cervical spine and lumbar spine and physical therapy. The MRIs revealed, inter alia disc bulges at C3/4, C4/5, C5/6, C6/7, L1/2, L2/3, L4/5, and L5/S1. Infant plaintiff was last seen by Dr. Tolat on May 14, 2014, at which point he felt that infant plaintiff had plateaued and reached maximal medical benefit. Therefore, physical therapy was discontinued.

Most recently on September 21, 2016, Dr. Tolat re-evaluated infant plaintiff. While range of motion testing regarding infant plaintiff's cervical spine revealed normal ranges, Dr. Tolat noted limited range of motion regarding infant plaintiff's lumbar spine. He concludes that the loss of range of motion is significant and constitutes a permanent loss. His prognosis for

any full recovery of the lumbar spine remains extremely poor. Dr. Tolat opines that infant plaintiff's injuries and disabilities stem from the subject accident and are partial and permanent.

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 (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]).

Where the 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 competent proof submitted by defendant, including the affirmed medical report of Dr. Walsh and infant plaintiff's deposition testimony that she only missed one day of school following the subject accident, is sufficient to meet defendant's prima facie burden by demonstrating that infant 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]; Carballo v Pacheco, 85 AD3d 703 [2d Dept. 2011]; Ranford v Tim's Tree & Lawn Serv., Inc., 71 AD3d 973 [2d Dept. 2010]).

In opposition, this Court finds that infant plaintiff raised triable issues of fact as to whether she sustained a serious injury to her lumbar spine by submitting the affirmed medical report of Dr. Tolat attesting to the fact that infant plaintiff sustained injuries as a result of the subject accident, finding that infant plaintiff had significant limitations in ranges of motion both contemporaneous to the accident and in a recent examination regarding her lumbar spine, and concluding that the

limitations are permanent and causally related to the accident (see Perl v Meher, 18 NY3d 208 [2011]; David v Caceres, 96 AD3d 990 [2d Dept. 2012]; Martin v Portexit Corp., 98 AD3d 63 [1st Dept. 2012]; Ortiz v Zorbas, 62 AD3d 770 [2d Dept. 2009]; Azor v Torado, 59 AD2d 367 [2d Dept. 2009]).

Additionally, infant plaintiff and Dr. Tolat adequately explained the gap in infant plaintiff's treatment stating that infant plaintiff had plateaued and reached maximal medical benefit (see Abdelaziz v Fazel, 78 AD3d 1086 [2d Dept. 2010]; Tai Ho Kang v Young Sun Cho, 74 AD3d 1328 [2d Dept. 2010]; Domanas v Delgado Travel Agency, Inc., 56 AD3d 717 [2d Dept. 2008]; Black v Robinson, 305 AD2d 438 [2d Dept. 2003]).

As such, infant plaintiff demonstrated issues of fact as to whether she sustained a serious injury to her lumbar spine under the permanent consequential and/or the significant limitation of use categories of Insurance Law § 5102(d) as a result of the subject accident (see Khavosov v Castillo, 81 AD3d 903 [2d Dept. 2011]; Mahmood v Vicks, 81 AD3d 606 [2d Dept. 2011]; Compass v GAE Transp., Inc., 79 AD3d 1091 [2d Dept. 2010]; Evans v Pitt, 77 AD3d 611 [2d Dept. 2010]).

However, as to infant plaintiff's cervical, although the MRI reveals disc bulges, to raise a triable issue of fact these positive findings must be accompanied by objective findings of either a specific percentage of the loss of range of motion or a sufficient description of the qualitative nature of infant plaintiff's limitations based on the normal function, purpose, and use of that body part (see Toure v Avis Rent A Car Systems, Inc., 98 NY2d 345 [2002]; Bent v Jackson, 15 AD3d 46 [1st Dept. 2005]). Here, the most recent examination of infant plaintiff's cervical spine by her own treating doctor revealed a normal range of motion. As such, infant plaintiff failed to raise a triable issue of fact as to a serious injury of her cervical spine since there was no evidence of recent range of motion deficit or qualitative limitation of use in the cervical spine (see Luetto v Abreu, 105 AD3d 558 [1st Dept. 2011]).

Accordingly, for the reasons set forth above, it is hereby,

ORDERED, that the motion by defendant for an order granting summary judgment dismissing plaintiff's complaint is denied.

Dated: January 30, 2017
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C