Beall v Kings Park Cent. Sch. Dist.
2017 NY Slip Op 30703(U)
April 12, 2017
Supreme Court, Suffolk County
Docket Number: 13-13871
Judge: James Hudson
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SHORT FORM ORDER

COPY

INDEX No. 13-13871

CAL. No. 16-00186MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 40 - SUFFOLK COUNTY

PRESENT:

Hon. JAMES HUDSON
Acting Justice of the Supreme Court

MOTION DATE 6-24-16 (003)
MOTION DATE 10-12-16 (004)
ADJ. DATE 10-12-16
Mot. Seq. # 003 - MG; CASEDISP
004 - MD

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ANITA BEALL, Individually and as parent and natural guardian of ELIZABETH BEALL, an infant under the age of fourteen (14) years,

Plaintiffs,

- against -

KINGS PARK CENTRAL SCHOOL DISTRICT,

Defendant.

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Upon the following papers numbered 1 to 55 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 40 ; Notice of Cross Motion and supporting papers __ ; Answering Affidavits and supporting papers 41 - 47; 48 - 50 ; Replying Affidavits and supporting papers 51 - 52; 53 - 55 ; Other __ ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Kings Park Central School District and the motion by plaintiff Anita Beall are consolidated for purposes of this determination; and it is further

ORDERED that the motion by defendant Kings Park Central School District for summary judgment in its favor is granted; and it is further

ORDERED that the motion (incorrectly denominated as a cross motion) by plaintiff Anita Beall for summary judgment in her favor is denied.

This is an action to recover damages for injuries allegedly sustained by infant plaintiff Elizabeth Beall on March 29, 2012 while she was a passenger on a school bus traveling from William T. Rogers Middle School, a school within the Kings Park Central School District, to her home. The incident allegedly occurred when the school bus struck a curb, causing the right side of infant plaintiff's head to strike the window of the school bus. By her verified complaint, as amplified by her verified bill of particulars, plaintiff Anita Beall, suing individually and on behalf of her daughter, alleges that, as a result of the incident, infant plaintiff Elizabeth suffered serious injuries and symptoms, namely herniated discs of her cervical and thoracic spine, degeneration of discs in her lumbar spine, neck and lower back pain, severe migraines, a cerebral concussion with post-concussive syndrome, post-traumatic headache consistent with chronic migraines, and dizziness.

Defendant seeks an order granting summary judgment dismissing the complaint on the grounds that Insurance Law § 5104 precludes plaintiff from pursuing a personal injury claim because infant plaintiff did not suffer a "serious injury" within the meaning of Insurance Law § 5102 (d). Defendant submits, in support of the motion, copies of the pleadings, the transcripts of the 50-h hearing and deposition testimony of plaintiffs, various medical records, and the affirmed medical reports of neurologist Dr. Howard Reiser and orthopedic surgeon Dr. Edward Toriello.

Plaintiff argues, in opposition to defendant's motion, that Dr. Reiser's and Dr. Toriello's reports are insufficient because their examinations were not conducted within 180 days of the incident and the medical records on which they rely are not submitted as evidence. Plaintiff also moves for summary judgment in her favor on the issue of liability, arguing the defendant was negligent, as the substitute bus driver drove erratically. Plaintiff submits, in opposition to defendant's motion and in support of the motion, the affidavit of infant plaintiff, the affirmation of Dr. Jennifer McMonigle, various medical records, and the transcripts of the deposition testimony of Justin Poganik and Richard Wright. The Court notes that plaintiff's supplemental affirmation in support of the motion and attached exhibits were not considered in its determination of the motion, as they are not properly before the Court (*see* CPLR 2214 [c]).

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party who must proffer evidence in admissible form and must show facts sufficient to require a trial of any issue of fact to defeat the motion for summary judgment (CPLR 3212 [b]; ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

Insurance Law § 5102 (d) defines "serious injury" as "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."

A defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred by the No-Fault Insurance Law bears the initial burden of establishing, prima facie, that the plaintiff did not sustain a "serious injury" (*see* ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Beltran v Powow Limo, Inc.***, 98 AD3d 1070, 951 NYS2d 231 [2d Dept 2012]). When such a defendant's motion relies upon the findings of the defendant's own witnesses, those findings must be in admissible form, such as affidavits and affirmations, and not unsworn reports, to demonstrate entitlement to judgment as a matter of law (*see* ***Brite v Miller***, 82 AD3d 811, 918 NYS2d 349 [2d Dept 2011]; ***Damas v Valdes***, 84 AD3d 87, 921 NYS2d 114 [2d Dept 2011], *citing* ***Pagano v Kingsbury***, 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). Once a defendant meets this burden, the plaintiff must present proof, in admissible form, which raises a material issue of fact (*see* ***Gaddy v Eyler***, *supra*; ***Zuckerman v City of New York***, *supra*; ***Beltran v Powow Limo, Inc.***, *supra*).

A plaintiff claiming injury within the "permanent consequential limitation" or "significant limitation" of use categories of the statute must substantiate his or her complaints of pain with objective medical evidence demonstrating the extent or degree of the limitation of movement caused by the injury and its duration (*see* ***Schilling v Labrador***, 136 AD3d 884, 25 NYS3d 331 [2d Dept 2016]; ***Rovelo v Volcy***, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]; ***McLoud v Reyes***, 82 AD3d 848, 919 NYS2d 32 [2d Dept 2011]). To prove significant physical limitation, a plaintiff must present either objective quantitative evidence of the loss of range of motion and its duration based on a recent examination or a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose, and use of the body part (*see* ***Perl v Meher***, 18 NY3d 208, 936 NYS2d 655 [2011]; ***Toure v Avis Rent A Car Systems, Inc.***, *supra*; ***McEachin v City of New York***, 137 AD3d 753, 25 NYS3d 672 [2d Dept 2016]). Proof of a herniated disc, without additional objective medical evidence establishing that the accident resulted in significant physical limitations, is not sufficient to establish a "serious injury" within the meaning of the statute (*see* ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]; ***Hayes v Vasilios***, 96 AD3d 1010, 947 NYS2d 550 [2d Dept 2012]; ***Scheker v Brown***, 91 AD3d 751, 936 NYS2d 283 [2d Dept 2012]; ***Stevens v Sampson***, 72 AD3d 793, 898 NYS2d 657 [2d Dept 2010]; ***Catalano v Kopmann***, 73 AD3d 963, 900 NYS2d 759 [2d Dept 2010]; ***Keith v Duval***; 71 AD3d 1093, 898 NYS2d 184 [2d Dept 2010]). Likewise, sprains and strains are not serious injuries within the meaning of Insurance Law § 5102 (d) (*see* ***Rabolt v Park***, 50 AD3d 995, 858 NYS2d 197 [2008]; ***Washington v Cross***, 48 AD3d 457, 849 NYS2d 784 [2008]; ***Maenza v Letkajornsook***, 172 AD2d 500, 567 NYS2d 850 [1991]). Further, a plaintiff seeking to recover damages under the "90/180-days" category of "serious injury" must prove the injury is "medically determined," meaning that the condition must be substantiated by a physician, and the condition must be causally related to the accident (*see* ***Pryce v Nelson***, 124 AD3d 859, 2 NYS3d 214 [2d Dept 2015]; ***Strenk v Rodas***, 111 AD3d 920, 976 NYS2d 151 [2d Dept 2013]; ***Beltran v Powow Limo, Inc.***, *supra*). A plaintiff must demonstrate that his or her usual activities were curtailed to a "great

extent rather than some slight curtailment" (*see* ***Licari v Elliott***, 57 NY2d 230, 236, 455 NYS2d 570 [1982]).

Defendant's submissions established a prima facie case that the alleged injuries to infant plaintiff's spine do not constitute "serious injuries" within the meaning of Insurance Law § 5102 (d) (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, *supra*; ***Beltran v Powow Limo, Inc.***, *supra*). Defendant has presented competent medical evidence that none of infant plaintiff 's alleged injuries fall under the "permanent consequential limitation," "permanent loss," or "significant limitation" of use categories of the statute (*see* ***Perl v Meher***, *supra*; ***Schilling v Labrador***, *supra*; ***Rovelo v Volcy***, *supra*). The affirmed medical report of Dr. Reiser states, in relevant part, that infant plaintiff reported mild discomfort upon palpation of the interscapular region of her thoracic spine and that her head was normocephalic and atraumatic. Dr. Reiser's cranial nerve examination revealed, *inter alia*, full visual fields, benign fundi, full extraocular mobility, normal facial strength and sensation, and normal cranial nerves. He concludes that infant plaintiff's neurological examination revealed "only transient nystagmus on both lateral gazes, which is generally a normal variant" and no evidence of an "objective ongoing neurological disorder causally related to the incident." The affirmed medical report of Dr. Toriello states, in relevant part, that infant plaintiff exhibited normal joint function during range of motion testing of her cervical spine, lumbosacral spine, and shoulders, and that no muscle spasm or atrophy was detected. Dr. Toriello diagnosed plaintiff as having suffered strains of the cervical spine and shoulder causally related to the subject incident, and concluded that such strains have resolved (*see* ***Brite v Miller***, *supra*; ***Damas v Valdes***, *supra*; ***Pagano v Kingsbury***, *supra*). In addition, through infant plaintiff's own testimony that she returned to school after a few days, albeit with some limitations and an altered schedule, defendant established, prima facie, that infant plaintiff did not suffer injury within the "90/180-days" category of the statute (*see* ***Pryce v Nelson***, *supra*; ***Strenk v Rodas***, *supra*; ***Beltran v Powow Limo, Inc.***, *supra*).

Defendant having met its initial burden on the motion, the burden shifted to plaintiff to raise a triable issue of fact (*see* ***Gaddy v Eyler***, *supra*; ***Zuckerman v City of New York***, *supra;* ***Beltran v Powow Limo, Inc.***, *supra*; ***Pagano v Kingsbury***, *supra*). Plaintiff failed to raise an issue of fact as to whether infant plaintiff's injuries constitute "serious injuries." Dr. McMonigle's affirmation and underlying reports failed to present objective quantitative evidence of infant plaintiff's loss of range of motion in her cervical or lumbar spine during a recent examination (*see* ***Perl v Meher***, *supra*; ***Toure v Avis Rent A Car Systems, Inc.***, *supra*; ***McEachin v City of New York***, *supra*) and, therefore, are insufficient to raise a triable issue of fact (*see* ***Schilling v Labrador***, *supra*; ***Rovelo v Volcy***, *supra*; ***McLoud v Reyes***, *supra*). Infant plaintiff's complaint of continued pain are also insufficient to establish a triable issue of fact (*see* ***Licari v Elliott***, *supra*; ***Christian v Waite***, 61 AD3d 581, 877 NYS2d 319 [1st Dept 2009]; ***Dantini v Cuffie***, 59 AD3d 490, 873 NYS2d 189 [2d Dept 2009]; ***Coloquhoun v 5 Towns Ambulette***, 280 AD2d 512, 720 NYS2d 385 [2d Dept 2001]). Furthermore, although infant plaintiff could not participate in gym or music classes and had an altered school schedule for the remainder of the school year following the incident, such evidence is insufficient to show that she was unable to perform substantially all of her usual activities (*see* ***Licari v Elliott***, *supra*; ***Burns v McCabe***, 17 AD3d 1111, 794 NYS2d 267 [4th Dept 2005]).

Accordingly, defendant's motion for summary judgment in its favor is granted. In light of the foregoing, plaintiff's motion for summary judgment in her favor on the issue of liability is denied, as moot.

Dated: April 12th 2017

A.J.S.C.

HON. JAMES HUDSON

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION