

Moreira v STV Transp. Corp.
2018 NY Slip Op 32915(U)
November 20, 2018
Supreme Court, Kings County
Docket Number: 511416/16
Judge: Debra Silber
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

x

**JAQUAN MOREIRA and J.M., an infant under the age of
14 years by her mother and natural guardian, MELISSA
CATO and MELISSA CATO, individually,**

DECISION / ORDER

Plaintiffs,

**Index No. 511416/16
Motion Seq. No. 7
Date Submitted: 9/27/18
Cal No. 42**

-against-

**STV TRANSPORTATION CORP. and CARLOS M.
CORNIEL,**

Defendants.

x

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendants' motion for summary judgment.

Papers	NYSCEF Doc.
Notice of Motion, Affirmation and Exhibits Annexed.....	<u>89-107</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>108-116</u>
Reply Affirmation.....	<u>117</u>

**Upon the foregoing cited papers, the Decision/Order on this application is
as follows:**

This is a personal injury action arising out of a March 22, 2016 motor vehicle accident. Plaintiffs Jaquan Moreira and J.M. (father and daughter) were rear seat passengers in a cab operated by defendant Carlos M. Corniel and owned by defendant STV Transportation Corp. which rear-ended a motor vehicle owned and operated by Merek Kasica.¹ Their mother was not in the vehicle and her claim is solely derivative.

¹Plaintiffs were granted summary judgment on liability against defendants and the Third-Party complaint against the other vehicle owner was dismissed by an October 5, 2017 order.

Plaintiffs' bill of particulars, dated October 14, 2016, claims that as a result of the accident, Jaquan Moreira sustained injuries to his left shoulder and both knees, including a left shoulder rotator cuff tear requiring arthroscopic surgery, tears of the body and the posterior horn of the medial meniscus of the right knee and a peripheral undersurface tear of the medial meniscus of the left knee, all with resulting pain and restrictions and limitations of motion, as well as a herniated disc at C3-4 and a bulging disc at C5-6. The infant plaintiff, J.M., claims that she sustained pain and muscle spasms in her lower back, pain and injury to her right hand/middle finger, and pain and derangement in her knees.

Defendants contend that plaintiff Jaquan Moreira did not sustain a "serious injury" as a result of this accident inasmuch as his alleged injuries were pre-existing and/or causally unrelated to the subject accident and that plaintiff J.M.'s claimed injuries do not qualify as serious injuries. Plaintiffs do not oppose the motion as to J.M., an infant.

Defendants have not made a prima facie showing of their entitlement to summary judgment dismissing plaintiff Moreira's complaint, with the affirmations of Edward A. Toriello, M.D., Ronald A. Paynter, M.D., David A. Fisher, M.D. and Robert S. April M.D., who all assert that plaintiff Jaquan Moreira's claimed injuries are not causally related to the subject accident (*see White v Dangelo Corp.*, 147 AD3d 882 [2d Dept 2017]; *Young Chan Kim v Hook*, 142 AD3d 551, 552 [2d Dept 2016]).

Defendants do make a prima facie case with regard to plaintiff J.M., with affirmations from Dr. Toriello and Dr. April with regard to plaintiff J.M. along with her EBT, which states she didn't miss any school as a result of the accident.

Edward A. Toriello, M.D. conducted an orthopedic exam of plaintiff Moreira on June 28, 2017 and found all test results were negative, and plaintiff's ranges of motion were normal, except for slight restrictions in both knees and plaintiff's left shoulder. He implies that the positive findings were caused by plaintiff's "habitus," or weight. He concludes that plaintiff did not suffer a left shoulder injury from this accident, and plaintiff's arthroscopic surgery was not made necessary by the subject accident because plaintiff did not have "complaints referable to his left shoulder when seen in the E.R.," and because the MRI "revealed no evidence of a casually related injury . . . that would have required surgery." Based upon the emergency room records and a post-accident MRI of plaintiff's left shoulder, Dr. Toriello found no evidence of a causally related injury to the plaintiff's left shoulder that would have required surgery (*see Meely v 4 G's Truck Renting Co.*, 16 AD3d 26, 30 [2d Dept 2005]). Rather, he found that as a result of the subject accident, plaintiff suffered only a resolved cervical strain, a resolved left shoulder strain and resolved knee contusions.

Ronald A. Paynter, M.D. reviewed the plaintiff's emergency room records and concludes in his affirmation that they are inconsistent with the injuries alleged in the plaintiff's bill of particulars and instead show that the plaintiff's claimed injuries do not have an acute traumatic origin. He states that there are no acute traumatic findings to causally relate plaintiff's injuries to the subject accident, other than a mild left knee contusion and a mild left shoulder contusion.

David A. Fisher, M.D., a radiologist, reviewed the MRI films of plaintiff's left knee and left shoulder, both taken on May 18, 2016, and of his cervical spine taken on May 28, 2016. Dr. Fisher found the left knee MRI to be a normal study, with no meniscal or

ligament tear or radiographic evidence of any traumatic or causally related injury to the left knee. Dr. Fisher found the left shoulder MRI to be a normal study, with no rotator cuff or labral tear or any radiographic evidence of any traumatic or causally related injury to the plaintiff's left shoulder. With respect to the plaintiff's cervical spine MRI, he found mild degenerative changes at C3/4, C4/5 and C5/6, with "mild bulges" and no disc herniations or any radiographic evidence of any traumatic or causally related injury to the plaintiff's cervical spine (see *Gouvea v Lesende*, 127 AD3d 811 [2d Dept 2015]). Dr. Fisher did not review the MRI of plaintiff's right knee.

Finally, Robert S. April, M.D., a neurologist, provides an affirmation which states that plaintiff had a normal neurological examination and, in conjunction with his review of plaintiff's medical records, concludes that the accident did not produce any neurological disability, limitation or need for further medical intervention.

With respect to the 90/180 category, to the extent defendants' experts found there was no causal connection between the accident and the claimed injuries, defendants make out a prima facie showing of entitlement to summary judgment (see *Linton v Gonzales*, 110 AD3d 534, 535 [1st Dept 2013] ["Given the lack of evidence of causation, plaintiff cannot establish her 90/180-day injury claim"]).

However, the court finds that even if defendants had made out a prima facie case as to all alleged injuries and all applicable categories of injury, plaintiff Jaquan Moreira has overcome the motion and raised a triable issue of fact as to whether he sustained a "serious injury" as a result of the subject accident (see *White v Dangelo Corp.*, 147 AD3d 882 [2d Dept 2017]; *Young Chan Kim v Hook*, 142 AD3d 551, 552 [2d

Dept 2016]). The affirmation of David Milbauer, M.D., who read the MRIs of plaintiff's left shoulder and both knees taken two months after the accident states that he sees on the films the injuries to plaintiff's left shoulder and to both knees which are described in the plaintiff's bill of particulars. In addition, the certified medical records of plaintiff's treating orthopedic surgeon Robert J. Meislin, who performed arthroscopic surgery on plaintiff's left shoulder, state that he diagnosed plaintiff with a left rotator cuff tear both before and after surgery, and notes that plaintiff had no pre-existing injuries to his left shoulder. Further, Barry M. Katzman, M.D. conducted an orthopaedic exam of plaintiff on April 17, 2018, and found a reduced range of motion in plaintiff's left shoulder and right knee, along with "patellofemoral clicking," and "internal derangement," and "a tear of the medial meniscus," and concludes that the injuries to plaintiff's shoulder and right knee and the restrictions in plaintiff's range of motion are causally related to the subject accident. Dr. Katzman also states that plaintiff's pain and restrictions in his range of motion are permanent.

Accordingly, it is

ORDERED that the motion is denied with regard to Jaquan Moreira and granted with regard to plaintiff J.M., an infant.

This constitutes the decision and order of the court.

Dated: November 20, 2018

ENTER:



Hon. Debra Silber, J.S.C.

Hon. Debra Silber
Justice Supreme Court