Acevedo v Guzman

2019 NY Slip Op 31217(U)

May 1, 2019

Supreme Court, Kings County

Docket Number: 510375/15E

Judge: Debra Silber

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9

____x

GRACE ACEVEDO, mother and natural guardian of J.B., a minor, and GRACE ACEVEDO, Individually,

Plaintiffs,

-against-

ODALYS GUZMAN and NIGEL HILLAIRE,

Defendants.

____x

DECISION / ORDER

Index No. 510375/15E
Motion Seq. No. 5 & 6
Date Submitted: 3/7/19
Cal No. 1, 2

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendant Guzman's motion and defendant Hillaire's motion for summary judgment.

Papers	NYSCEF Doc.
Notice of Motion, Affirmation and Exhibits Annexed.................	37-48
Notice of Motion, Affirmation and Exhibits Annexed................	49-51
Answering Affirmation and Exhibits Annexed	63-64
Reply Affirmations..	66, 80

Upon the foregoing cited papers, the Decision/Order on these motions is as follows:

This is a personal injury action arising out of a motor vehicle accident. On June 24, 2014, plaintiff Acevedo was a front seat passenger and plaintiff J.B. was a rear seat passenger in a vehicle owned and driven by defendant Guzman which was involved in an accident with a vehicle owned and driven by defendant Hillaire. The accident took place at the intersection of East 141st Street and Bruckner Boulevard in the Bronx. Plaintiff J.B. was seven years old at the time of the accident. He was taken to Lincoln Hospital where he was treated and released. Plaintiff's bill of particulars alleges that he sustained a "low-grade partial tear of

the anterior cruciate ligament of the left knee" as a result of the accident.

Defendants move for summary judgment dismissing only plaintiff J.B.'s complaint, pursuant to CPLR Rule 3212, on the ground that plaintiff J.B. did not sustain a "serious injury" as defined by Insurance Law § 5102(d). Defendants support their motions with the pleadings, the plaintiffs' bill of particulars, plaintiff J.B.'s EBT transcript (taken when he was ten years old, after a "swearability" hearing), an affirmation from an orthopedist and an affirmation from a radiologist.

The court first notes that defendant Guzman's attorney seeks the court's permission to consider the motion despite the fact that it was filed two days late, as counsel's mother passed away and she left the office suddenly. This request is, of course, granted. Defendant Hillaire's "me too" motion was filed months later, but contains no new evidence, and as such, the court elects to consider it as well.

Next, the court wishes to point out that the motion papers are not properly redacted. The child's name is pervasive throughout the medical records submitted by plaintiffs' counsel in the opposition papers. Further, all of plaintiff's exhibits are included in one E-filed document, which is not the proper manner to E-file motion exhibits. Referring to the child by his initials in the attorney's work product is not sufficient. His date of birth (other than the year) and his name must be redacted, as stated in Uniform Rule §202.5 (e). Therefore, the court has directed at the end of this decision that the E-Filed documents which contain the child's medical records be sealed. In addition, plaintiffs' counsel has included the child's full name in the caption on the Note of Issue, so the court has asked the County Clerk to delete it from the system and return it for correction. Finally, Dr. Melissa Sapan Cohn's affirmation (Exhibit H to Motion Seq. #5 and E-file document #47) includes the child's name in one place, which was presumably

inadvertent, but the first page needs to be replaced with a redacted page. Thus, the court has asked the County Clerk to return it to movant's counsel for correction. Counsel for defendant Hillaire put an entire copy of the Guzman motion in his motion papers as one exhibit, and while only one page, the first page of the Sapan Cohn affirmation, needs to be redacted, that entire exhibit has been sealed as it is all one document in the E-File System.

Turning to the merits of the motion, Dr. Melissa Sapan Cohn, a radiologist, reviewed the MRI of plaintiff J.B's left knee and provides an affirmation dated May 21, 2017 which states "normal left knee MRI." She opines that everything looks normal, and that there are no tears and no swelling. [Exhibit H] She concludes "there is no evidence for pathology or acute traumatic related injury."

Dr. Edward A. Toriello, an orthopedist, examined plaintiff J.B. on June 28, 2017, three years after the accident. Plaintiff was ten years old at the time. Dr. Toriello erroneously discusses the injury to plaintiff's right [not left] knee, and states that he "continues to complain of right knee pain." Luckily, Dr. Toriello's range of motion testing included both of plaintiff's knees, as well as his spine, shoulders, elbows, wrists and hands. Dr. Toriello reports that these tests produced completely normal results. He concludes that plaintiff "reveals evidence of a resolved right [*sic*] knee contusion."

Counsel for movant Guzman, aware that she was overdue in completing this motion, notes in her affirmation at Footnote 1 "Dr. Toriello is aware of his typographical error indication [*sic*] 'right' knee, rather than 'left' knee. We are in the process of obtaining an amended report correcting the typographical error." However, the affirmation was not corrected. Nonetheless, as he examined both knees, the court will disregard this error.

The court finds that defendants have made a prima facie case with regard to all of the

applicable categories of injury, including "a medically determined injury or impairment which prevented the party from performing substantially all of the material acts which constituted his or her customary daily activities for not less than 90 days during the 180 days immediately following the accident." With regard to this latter category, plaintiff J.B. testified at his EBT that he did not miss any school as a result of the accident. He testified that he did have some physical therapy, but no surgeries or medical procedures.

Plaintiff opposes the motion with an attorney's affirmation, an affidavit from Grace Acevedo, plaintiff J.B.'s mother, an affirmation from his radiologist, an undated affirmation from his treating doctor, Anson M. Moise M.D. which essentially certifies the reports from his office which are annexed to his affirmation, and a number of medical records and reports which are not in admissible form and could not be considered.

The court finds that plaintiff has failed to overcome the motion and raise a triable issue of fact. While the plaintiff's radiologist claims he sees a "low-grade partial tear of the anterior cruciate ligament" ("ACL") on the August 15, 2014 MRI of plaintiff's left knee, while defendants' radiologist states that she does not see a tear and the MRI is completely normal, a tear of the ACL is not a "serious injury" without objective evidence of the extent of the alleged physical limitations resulting from the injury and its duration. Plaintiff has failed to provide this objective evidence. As the Appellate Division, Second Department explained in *Caraballo v Kim*, 63 AD3d 976, 977 [2d Dept 2009] [1]:

This Court has held that a herniated or bulging disc, or even a tear in a tendon, is

[1] In this case, the plaintiff claimed injuries to, *inter alia*, his ACL. Subsequent appellate decisions have continued to hold that a tear of the anterior cruciate ligament (ACL) is not evidence of a serious injury in the absence of objective evidence of the extent ot the alleged physical limitations resulting from the injury and its duration. *See Rodriguez v Grant*, 71 AD3d 659 [2d Dept 2010]; *Acosta v Alexandre*, 70 AD3d 735 [2d Dept 2010]; *Little v Locoh*, 71 AD3d 837 [2d Dept 2010] and *Sorto v Morales*, 55 AD3d 718 [2d Dept 2008].

> 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 *Magid v Lincoln Servs. Corp.*, 60 AD3d 1008, 877 NYS2d 127 [2009]; *Washington v Mendoza*, 57 AD3d 972, 871 NYS2d 336 [2008]; *Cornelius v Cintas Corp.*, 50 AD3d 1085, 1087, 857 NYS2d 637 [2008]; *Shvartsman v Vildman*, 47 AD3d 700, 849 NYS2d 600 [2008]; *Tobias v Chupenko*, 41 AD3d 583, 837 NYS2d 334 [2007]). A tendon is defined as "[t]he cord of tough connective tissue which forms the end of a muscle and which connects the muscle to the bone" (5-T-TG Attorneys' Dictionary of Medicine at 974 [2005 ed]). Tendons "are bands of fibrous connective tissue" (5-15A Attorneys' Textbook of Medicine at 15A.10 [3d ed]). A ligament is defined as "[a] band of tough but flexible tissue which serves to connect bones (as in the formation of a joint), to hold organs in place, etc." (3-L Attorneys' Dictionary of Medicine at 2302 [2005 ed]). Ligaments, like tendons, are "bands of tough, fibrous connective tissue" (4-13 Attorneys' Textbook of Medicine at 13.10 [3d ed]). Thus, injuries involving tendons and ligaments must be treated similarly under Insurance Law § 5102 (d). Evidence of the extent and duration of any alleged limitation arising from injury to the plaintiff's discs or ligaments was clearly lacking here. The deposition testimony of the injured plaintiff was insufficient to supply such evidence (see *Washington v Mendoza*, 57 AD3d 972, 871 NYS2d 336 [2008]).

Here, plaintiff first provides the emergency room records from Lincoln Hospital, which are not in admissible form and could not be considered. In any event, these records could not provide the needed objective evidence. Next, plaintiff provides plaintiff's EBT transcript, which cannot supply such evidence. *See Caraballo v Kim.* The records from the treating doctor, Anson M. Moise M.D. of Health East Medical Group P.C., indicate that by the October 23, 2014 follow-up exam, plaintiff had full range of motion in his left knee without pain. On January 8, 2015, the follow-up report is the same - full range of motion without pain. Plaintiff did not receive any treatment for his knee other than physical therapy, and the papers do not provide any evidence of when the plaintiff stopped going to physical therapy. Then, on February 2, 2016, plaintiff returned for a follow-up visit and saw Dr. Baynes. His report states that he found "tenderness to palpation at the patellar tendon and he has decreased range of motion lacking 5 degrees of extension, able to flex to 110 before pain." He states that his impression is

"partial patellar tendon tear with tendinitis leading to anterior knee pain." He recommended a "jumper's knee strap" (also known as a patellar tendon strap) for plaintiff's patellar tendinitis (also known as "jumper's knee") [2]. This exam was a year after the one before it, and the doctor diagnoses plaintiff with an entirely different injury than plaintiff claims resulted from the accident in this action. The patellar tendon is in the front of the knee and connects the patella (the kneecap) to the shinbone (tibia). The ACL, which plaintiff claims he injured in the accident on June 24, 2014, connects the thighbone (femur) to the shinbone (tibia). These are both in the knee, but are not the same. There is no evidence in the record that this injury is in any way related to the accident.

Plaintiff lastly provides a medical report from an "expert" who first saw plaintiff in October of 2018, presumably to oppose the motion. It is not affirmed and thus is not in admissible form and could not be considered.

Accordingly, it is

ORDERED that the motions are both granted and the complaint is dismissed as to plaintiff J.B., a minor. And it is further

ORDERED that E-File documents 51 and 64 are ordered to be sealed, as they contain information that should have been redacted.

This constitutes the decision and order of the court.

Dated: May 1, 2019

ENTER:

Hon. Debra Silber, J.S.C.

Hon. Debra Silber
Justice Supreme Court

[2] https://www.hopkinsmedicine.org/health/conditions-and-diseases/patellar-tendonitis-jumpers-knee