

M.O. v City of New York

2023 NY Slip Op 33620(U)

October 17, 2023

Supreme Court, New York County

Docket Number: Index No. 155623/2012

Judge: Judy H. Kim

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JUDY H. KIM PART 05RCP

Justice

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INDEX NO. 155623/2012

M.O. by and through her mother and natural guardian,
JESSICA LOPEZ, and JESSICA LOPEZ, individually

MOTION DATE 06/23/2023

Plaintiffs,

MOTION SEQ. NO. 002

- v -

THE CITY OF NEW YORK, THE NEW YORK CITY
DEPARTMENT OF EDUCATION, LAURA GARCIA, MAGDA
KONTONICOLAOU, JAQUELINE KIRKLAND,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 99, 100, 101, 102, 103, 104, 105

were read on this motion for DISCOVERY.

Upon the foregoing documents, the motion by defendants the City of New York, the New York City Department of Education, Laura Garcia, Magda Kontoncolaou, and Jacqueline Kirkland (collectively, the “City”) to compel the infant plaintiff to appear for an independent medical examination (“IME”) and further examination before trial (“EBT”) is granted for the reasons set forth below.

On August 30, 2012, plaintiffs commenced this action alleging that the infant plaintiff was injured when a wooden cubby fell on her when she was at PS 225 on November 15, 2010 (NYSCEF Doc. No. 87 [Compl. at ¶20]). On February 4, 2014, the parties entered into a Case Scheduling Order (“CSO”) which directed the City to conduct infant plaintiff’s independent medical examination (“IME”) within forty-five days from the date of her examination before trial

(“EBT”) (NYSCEF Doc. No. 103 [CSO]). The CSO also provided that the City reserved its right “to a further [IME] ... as to any new injuries claimed in any supplemental bill of particulars served by plaintiff(s)” (Id.).

At the examinations before trial (“EBT”) of both plaintiffs on February 5, 2018, plaintiffs’ counsel stated, on the record, as follows:

Before the deposition gets started, I just want to place the City on notice that there will be an amendment to the Bill of Particulars. The amendment that is anticipated will include amending the time for which [infant plaintiff] was unable to go to school and absent from school, approximately a week following the accident. In addition, during the incident, in addition to the listed injuries, she also suffered blunt head trauma and has had frequent headaches since then with a frequency of three to five times per month since the incident.

(NYSCEF Doc. No. 90 [Olmo EBT at p. 5] [emphasis added]).

Thereafter, in so-ordered stipulations dated February 6, 2018 and April 17, 2018, the City reserved its right to conduct the infant plaintiff’s IME (NYSCEF Doc. No. 91). However, nine subsequent so-ordered stipulations between the parties—dated September 6, 2018, January 8, 2019, May 15, 2019, June 18, 2019, September 24, 2019, November 12, 2019, January 7, 2020, February 11, 2020, February 25, 2020—make no reference to the infant plaintiff’s IME (See NYSCEF Doc. No. 104).

On August 26, 2020, plaintiff served a First Supplemental Verified Bill of Particulars on the City alleging that, as a result of the subject incident, the infant plaintiff sustained a “TBI,” or traumatic brain injury (NYSCEF Doc. No. 92 [Supplemental Bill of Particulars at ¶3]).

The City now moves for an order, pursuant to CPLR §3124, compelling plaintiffs to appear for additional EBTs related to the infant plaintiff's alleged traumatic brain injury and compelling the infant plaintiff to appear for an IME¹. The City argues that plaintiffs' counsel's statements prior to plaintiffs' EBTs did not provide the City with notice of the infant plaintiff's alleged traumatic brain injury, and therefore deprived the City of an opportunity to elicit testimony as to that injury. The City further argues that it reserved its right to an IME and would be prejudiced by the inability to conduct one. Plaintiffs oppose the motion, arguing that the City: (i) was provided notice of the infant plaintiff's traumatic brain injury and, therefore, the opportunity to depose the plaintiffs as to same at their EBTs; and (ii) waived its right to an IME of the infant plaintiff.

DISCUSSION

The City's motion is granted in its entirety. Even assuming, arguendo, that the City has waived its right to an IME of the infant plaintiff, the Court relieves this waiver as no prejudice will result to plaintiff (See Wise v Blue, 289 AD2d 131 [1st Dept 2001]; May v Am. Red Cross, 282 AD2d 285 [1st Dept 2001]), particularly since a note of issue has not been filed and discovery is still ongoing (See Smith v Cardella Trucking Co., Inc., 113 AD3d 750, 750 [2d Dept 2014]). In addition, the City would be prejudiced should it be prevented from physically examining the infant plaintiff (Hickey v City of New York, 159 AD3d 511 [1st Dept 2018]).

The City is also entitled to further EBTs of both plaintiffs, limited to the newly alleged traumatic brain injury (See Brown v Brink El. Corp., 125 AD3d 421, 422 [1st Dept 2015] ["[a]fter plaintiff exercised her right to serve a second supplemental bill of particulars concerning continuing disabilities in her cervical spine, defendant was 'entitled to newly exercise any and all

¹ While the City also moved for an order compelling plaintiff to produce authorizations for the infant plaintiff's medical records as to the newly alleged traumatic brain injury, it is undisputed that plaintiffs produced such authorizations after the instant motion was filed (See NYSCEF Doc. No. 99 [Weisberg Affirm. in Opp. at ¶¶8-11]). Accordingly, that branch of the City's motion is denied as moot.

rights of discovery’ with respect to such newly alleged continuing disabilities,” including a further EBT and IME]; see also Ortega v Rockefeller Ctr. N. Inc., 2014 NY Slip Op 33667[U] [Sup Ct, NY County 2014]; Burgdoerfer v CLK/HP 90 Merrick, LLC, 2014 WL 11271252 [Sup Ct, NY County 2014]). Contrary to plaintiffs’ contentions, plaintiffs’ counsel’s statements prior to plaintiffs’ EBTs that the infant plaintiff sustained “blunt head trauma” did not provide the City with sufficient notice of the infant plaintiff’s alleged traumatic brain injury.

Accordingly, it is

ORDERED that the City of New York’s motion to compel is granted; and it is further

ORDERED that plaintiffs are directed to appear for EBTs within sixty days from the date of this decision and order, at a date and time mutually agreeable to counsel for the parties; and it is further

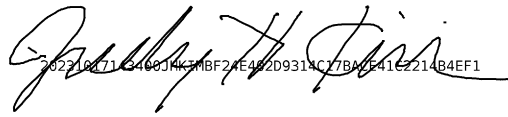
ORDERED that the infant plaintiff is directed to appear for an independent medical examination within sixty days of the date of this decision and order, at a date and time mutually agreeable to counsel for the parties; and it is further

ORDERED that counsel for defendants shall serve a copy of this decision and order, with notice of entry, upon defendants as well as the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk’s Office (60 Centre Street, Room 119) within fifteen days of the date of this decision and order; and it is further

ORDERED that service upon the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website

at the address www.nycourts.gov/supctmanh).

This constitutes the decision and order of the Court.



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10/17/2023
DATE

HON. JUDY H. KIM, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER			<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE