

Mena v Mena

2013 NY Slip Op 30965(U)

April 29, 2013

Sup Ct, New York County

Docket Number: 100041/09

Judge: Arlene P. Bluth

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. ARLENE P. BLUTH

PRESENT: _____
Justice

PART 22

Index Number : 100041/2009
MENA, RAFAEL
vs.
MENA, MARIA
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 3, were read on this motion to/for def's mss on serious m

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). <u>1</u>
Answering Affidavits — Exhibits _____	No(s). <u>2</u>
Replying Affidavits _____	No(s). <u>3</u>


Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED
MAY 06 2013
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4.29.13



ARLENE P. BLUTH J.S.C.
J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

**SUPREME COURT OF THE STATE OF NY
COUNTY OF NEW YORK: PART 22**

**Index No.: 100041/09
Motion Seq. 04 and 05**

**Rafael Mena, Jodelly Mena, an infant by
her grandfather and natural guardian
Jose Perez, Justin Perez, an infant by
his grandfather and natural guardian
Jose Perez, and Juan Mena individually,**

Plaintiffs,

-against-

Maria Mena,

Defendant.

DECISION/ORDER

HON. ARLENE P. BLUTH, JSC

Motion sequence numbers 04 and 05 are consolidated for joint disposition.

Defendant's motion for summary judgment dismissing the complaint against on the grounds that plaintiffs Jodelly and Justin Mena have not suffered a "serious injury" under Insurance Law §5102 is denied (seq 04). Plaintiffs' motion for summary judgment on liability is denied as untimely; that branch of the motion seeking leave to supplement Jodelly's bill of particulars is also denied (seq 05).

Plaintiffs' Summary Judgment Motion on Liability

In this action, plaintiffs seek to recover for personal injuries allegedly sustained as a result of a one-car motor vehicle accident that occurred on March 9, 2008 in the town of Wallkill, New York. Plaintiffs filed their note of issue on April 12, 2012, and served their motion for summary judgment on liability on August 6, 2012, almost 4 months later. Pursuant to the case scheduling order, para.13 (exh A to opp), all summary judgment motions had to be made not later than 60 days after filing the note of issue; plaintiffs did not seek or receive permission to file this motion beyond the 60 day deadline set forth in Justice

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Wooten's court rules. Accordingly, the branch of plaintiffs' motion seeking summary judgment on liability is denied as untimely.

Amended/Supplemental Bill of Particulars

Defendant served her motion for summary judgment dismissing the claims of Justin and Jodelly on the grounds of serious injury on June 1, 2012; plaintiffs served their motion for leave to serve a supplemental bill of particulars on August 6, 2012. In the original verified bill, Jodelly listed various injuries, and stated her lumbar injury as "displacement of lumbar intervertebral disc" (exh B, p. 4). Jodelly's counsel claims that his office only recently received a copy of Dr. White's report of Jodelly's April 2, 2008 lumbar MRI taken at Doshi Diagnostics stating that she had disc bulge at L5-S1 (exh G to moving papers), and that the results of this MRI taken on April 2, 2008, one month after the accident, "were not known" when the original bill was prepared in December 2009 (aff. in supp., para. 7).

Plaintiffs seek "to supplement" the bill of particulars with Dr. White's finding of a disc bulge (see exh H to moving papers). However, plaintiffs are not seeking to add continuing consequences of the injuries set forth in the original bill; they are seeking to add a new injury, a bulging disc.

While plaintiffs' counsel claims that his office "only recently received" Dr. White's report, he provides no explanation; somehow this report came into his possession in time for plaintiffs to use to oppose defendant's serious injury motion. Plaintiffs submitted Dr. White's report along with an affirmation from a Dr. Doshi indicating that Dr. White retired (opp., exh E). Dr. Doshi does not identify herself as a principal of Doshi, or otherwise state how she knows Dr. White retired, or how she knows that all the information contained in

Dr. White's report is "true and accurate" (aff. in opp., exh E, para. 5). Dr. Doshi does not state that she viewed the film and makes an independent diagnosis based upon her own expertise. Moreover, Dr. Doshi's affirmation does not change the fact that Dr. White's report was not affirmed, and cannot be used to either in support of the motion to serve a supplemental bill, or in opposition to defendant's serious injury motion.

Moreover, Dr. White's report, electronically signed and not affirmed by him, was apparently ordered by and sent to Dr. Hellinger, Jodelly's chiropractor. Dr. White's report clearly indicates that Dr. Hellinger, Jodelly's chiropractor, sent her to Doshi Diagnostic for a lumbar MRI and Dr. White sent him a copy of his report. Dr. Hellinger is listed as the referring provider, and in the last line of his report, Dr. White thanks him for his referral; yet plaintiffs' counsel does not acknowledge this. Instead, counsel claims that defendant should have known about the disc bulge finding because in his February 22, 2012 report, defendant's doctor, Dr. Israel indicated that he reviewed Dr. White's April 2, 2008 MRI report (exh I). This Court's examination of Dr. Israel's report reveals that is not correct. Dr. Israel indicated that he reviewed the actual April 2, 2008 lumbar spine MRI, not Dr. White's report; additionally, at his recent examination of Jodelly, Dr. Israel found that she had no disability.

In opposition, defendant's counsel indicates that the motion to supplement the bill of particulars must be denied because plaintiffs did not submit a medical affirmation finding a causal connection between this injury and the accident. In reply, plaintiffs cite to Dr. Hellinger's report (seq 04, aff in opp., exh D) where he opines to a reasonable degree of chiropractic certainty that the disc bulge at L5-S1 was caused by the accident and not a pre-existing condition. However, because Dr. Hellinger, a chiropractor, stated that he relied

on Dr. White's unaffirmed report, plaintiffs still have not provided competent proof in support of their motion. Accordingly, the branch of plaintiffs' motion for leave to supplement Jodelly's bill of particulars after the note of issue was filed is denied.

See Diaz v Ford Motor Company, 29 AD3d 339, 814 NYS2d 606 (1st Dept 2006). The Court will consider the serious injury motion in connection with the injuries listed in the original bill of particulars.

Serious Injury

To prevail on a motion for summary judgment, the defendant has the initial burden to present competent evidence showing that the plaintiff has not suffered a "serious injury" (*see Rodriguez v Goldstein*, 182 AD2d 396 [1992]). Such evidence includes "affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (*Shinn v Catanzaro*, 1 AD3d 195, 197 [1st Dept 2003], *quoting Grossman v Wright*, 268 AD2d 79, 84 [1st Dept 2000]). Where there is objective proof of injury, the defendant may meet his or her burden upon the submission of expert affidavits indicating that plaintiff's injury was caused by a pre-existing condition and not the accident (*Farrington v Go On Time Car Serv.*, 76 AD3d 818 [1st Dept 2010], *citing Pommells v Perez*, 4 NY3d 566 [2005]).

In order to establish prima facie entitlement to summary judgment under the 90/180 category of the statute, a defendant must provide medical evidence of the absence of injury precluding 90 days of normal activity during the first 180 days following the accident (*Elias v Mahlah*, 2009 NY Slip Op 43 [1st Dept]). However, a defendant can establish prima facie entitlement to summary judgment on this category without medical evidence by citing other

evidence, such as the plaintiff's own deposition testimony or records demonstrating that plaintiff was not prevented from performing all of the substantial activities constituting customary daily activities for the prescribed period (*id.*).

Once the defendant meets his or her initial burden, the plaintiff must then demonstrate a triable issue of fact as to whether he or she sustained a serious injury (*see Shinn*, 1 AD3d at 197). A plaintiff's expert may provide a qualitative assessment that has an objective basis and compares plaintiff's limitations with normal function in the context of the limb or body system's use and purpose, or a quantitative assessment that assigns a numeric percentage to plaintiff's loss of range of motion (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350-351 [2002]). Further, where the defendant has established a pre-existing condition, the plaintiff's expert must address causation (*see Valentin v Pomilla*, 59 AD3d 184 [1st Dept 2009]; *Style v Joseph*, 32 AD3d 212, 214 [1st Dept 2006]).

Plaintiff Jodelly Mena

The bill of particulars (para. 3) alleges that Jodelly sustained the following injuries: cerebral concussion, brachial neuritis, lacerations to face, scalp and neck, displacement of cervical intervertebral disc, cervicalgia, cervical radiculopathy, cervical sprain/strain, displacement of thoracic intervertebral disc, thoracic radiculopathy, thoracic sprain/strain, lumbago and displacement of lumbar intervertebral disc. She was 14 years old on the day of the accident.

In support, defendants submit the affirmed report of Dr. Israel, an orthopedist who examined Jodelly on behalf of defendants on February 22, 2012 (moving papers, exh F). Dr. Israel found full range of motion in her cervical, thoracic and lumbar spine using a

goniometer and in accordance with AMA Guidelines. Additionally, he performed several tests (cervical compression, Soto Hall, Valsalva) all of which were all negative. Dr. Israel's impressions were resolved sprain of the cervical, thoracic and lumbar spine; he found that Jodelly has no disability as a result of the subject accident.

Additionally, defendant indicates that Jodelly was not incapacitated from her customary daily activities for at least 90 days during the 180 days following the accident because at her deposition she testified that she missed only two days from school after the accident (exh H, T. 60).

Based on the foregoing, defendant has satisfied her burden of establishing prima facie that plaintiff Jodelly Mena did not suffer a serious injury, and the burden shifts to plaintiff to raise a triable factual question as to whether she sustained a serious injury.

In opposition, plaintiff submits the affidavit of Kurt Hellinger, Jodelly's treating chiropractor, who examined Jodelly on March 10, 2008, one day after the subject accident, and found restriction in her cervical and lumbar ranges of motion, positive results in orthopedic testing and diminished reflexes (opp., exh D). He states that he treated Jodelly for eight months at which time he determined maximum chiropractic benefit had been achieved. Dr. Hellinger again examined Jodelly on July 6, 2012, and found restriction in her cervical and lumbar ranges of motion. He opines that her injuries are permanent, consequential and significant, are causally related to the subject motor vehicle accident, not due to the aging process and that her disability will increase in the future. Based on the foregoing, plaintiffs have raised an issue of fact sufficient to defeat summary judgment.

Plaintiff Justin Mena

The bill of particulars (para. 3) alleges that Justin sustained the following injuries: cerebral concussion, brachial neuritis, lacerations to face, scalp and neck, displacement of cervical intervertebral disc, cervical radiculopathy, cervical sprain/strain, displacement of thoracic intervertebral disc, thoracic radiculopathy, and thoracic sprain/strain. He was 11 years old on the day of the accident.

In support, defendants submit the affirmed report of Dr. Israel, an orthopedist who examined Justin on behalf of defendants on February 22, 2012 (moving papers, exh G). Dr. Israel found full range of motion in his cervical and thoracic spine, and in his left shoulder using a goniometer and in accordance with AMA Guidelines. Additionally, he performed several tests (cervical compression, Soto Hall, Valsalva, drop arm, Yergason's, Hawkins) all of which were all negative. Dr. Israel's impressions were resolved sprain of the cervical and thoracic spine, and the left shoulder; he found that Justin has no disability as a result of the subject accident.

Additionally, defendant indicates that Justin was not incapacitated from her customary daily activities for at least 90 days during the 180 days following the accident because at his deposition he testified that he did not miss any days from school after the accident (exh I, T. 41).

Based on the foregoing, defendant has satisfied her burden of establishing prima facie that plaintiff Justin Mena did not suffer a serious injury, and the burden shifts to plaintiff to raise a triable factual question as to whether he sustained a serious injury.

In opposition, plaintiff submits the affidavit of Kurt Hellinger, Justin's treating chiropractor, who examined Justin on March 10, 2008, one day after the subject accident, and found restriction in his cervical and lumbar ranges of motion, positive results in orthopedic testing and diminished reflexes (opp., exh C). He states that he treated Justin for six months at which time he determined maximum chiropractic benefit had been achieved. Dr. Hellinger again examined Justin on July 6, 2012, and found restriction in his cervical and lumbar ranges of motion, and positive results to numerous orthopedic tests. He opines that Justin's injuries are permanent, consequential and significant, are causally related to the subject motor vehicle accident, not due to the aging process and that he is partially disabled. Based on the foregoing, plaintiffs have raised an issue of fact sufficient to defeat summary judgment.

Accordingly, it is

ORDERED that defendant's motion for summary judgment dismissing the complaint against on the grounds that plaintiffs Jodelly and Justin Mena have not suffered a "serious injury" under Insurance Law §5102 is denied (seq 04); and it is further

ORDERED that plaintiffs' motion for summary judgment on liability is denied as untimely; that branch of the motion seeking leave to supplement Jodelly's bill of particulars is also denied (seq 05).

This is the Decision and Order of the Court.

Dated: April 29, 2013

New York, New York

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