

**McNamee v GC Fire, Inc.**

2013 NY Slip Op 32724(U)

October 24, 2013

Supreme Court, Queens County

Docket Number: 14340/11

Judge: Howard G. Lane

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE**  
**Justice**

**IAS PART 6**

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EUGENE MCNAMEE,  
  
                                Plaintiff,  
  
                                -against-  
  
GC FIRE, INC. and NOUREDDINE  
BENBEDDA,  
  
                                Defendants.  
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Index No. 14340/11  
  
Motion  
Date August 21, 2013  
  
Motion  
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Upon the foregoing papers it is ordered that this motion by defendants for summary judgment dismissing the complaint of plaintiff, Eugene McNamee pursuant to CPLR 3212, on the ground that plaintiff has not sustained a serious injury within the meaning of Insurance Law § 5102(d) is decided as follows:

This action arises out of an automobile accident that occurred on July 27, 2009. Defendants have not submitted proof in admissible form in support of the motion for summary judgment for any category except for the ninth category of "90/180 days". Defendants submitted, inter alia, affirmed reports from an independent examining orthopedist, an independent examining neurologist, and an independent evaluating radiologist; and plaintiff's own verified bill of particulars.

**APPLICABLE LAW**

Under the "no-fault" law, in order to maintain an action for personal injury, a plaintiff must establish that a "serious injury" has sustained (Licari v. Elliot, 57 NY2d 230 [1982]). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of

fact and the right to judgment as a matter of law (Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]; Winegrad v. New York Univ. Medical Center, 64 NY2d 851 [1985]). In the present action, the burden rests on defendants to establish, by the submission of evidentiary proof in admissible form, that plaintiff has not suffered a "serious injury" (Lowe v. Bennett, 122 AD2d 728 [1st Dept 1986], affd, 69 NY2d 701, 512 NYS2d 364 [1986]). When a defendant's motion is sufficient to raise the issue of whether a "serious injury" has been sustained, the burden shifts and it is then incumbent upon the plaintiff to produce prima facie evidence in admissible form to support the claim of serious injury (Licari v. Elliot, supra; Lopez v. Senatore, 65 NY2d 1017 [1985]).

In support of a claim that plaintiff has not sustained a serious injury, a defendant may rely either on the sworn statements of the defendant's examining physician or the unsworn reports of plaintiff's examining physician (Pagano v. Kingsbury, 182 AD2d 268 [2d Dept 1992]). Once the burden shifts, it is incumbent upon plaintiff, in opposition to defendant's motion, to submit proof of serious injury in "admissible form". Unsworn reports of plaintiff's examining doctor or chiropractor will not be sufficient to defeat a motion for summary judgment (Grasso v. Angerami, 79 NY2d 813 [1991]). Thus, a medical affirmation or affidavit which is based on a physician's personal examination and observations of plaintiff, is an acceptable method to provide a doctor's opinion regarding the existence and extent of a plaintiff's serious injury (O'Sullivan v. Atrium Bus Co., 246 AD2d 418 [1st Dept 1998]). Unsworn MRI reports are not competent evidence unless both sides rely on those reports (Gonzalez v. Vasquez, 301 AD2d 438 [1st Dept 2003]; Ayzen v. Melendez, 749 NYS2d 445 [2d Dept 2002]). However, in order to be sufficient to establish a prima facie case of serious physical injury the affirmation or affidavit must contain medical findings, which are based on the physician's own examination, tests and observations and review of the record rather than manifesting only the plaintiff's subjective complaints. It must be noted that a chiropractor is not one of the persons authorized by the CPLR to provide a statement by affirmation, and thus, for a chiropractor, only an affidavit containing the requisite findings will suffice (see, CPLR 2106; Pichardo v. Blum, 267 AD2d 441 [2d Dept 1999]; Feintuch v. Grella, 209 AD2d 377 [2d Dept 2003]).

In any event, the findings, which must be submitted in a competent statement under oath (or affirmation, when permitted) must demonstrate that plaintiff sustained at least one of the categories of "serious injury" as enumerated in Insurance Law § 5102(d) (Marquez v. New York City Transit Authority, 259 AD2d 261 [1st Dept 1999]; Tompkins v. Budnick, 236 AD2d 708 [3d Dept

1997]; Parker v. DeFontaine, 231 AD2d 412 [1st Dept 1996]; DiLeo v. Blumberg, 250 AD2d 364 [1st Dept 1998]). For example, in Parker, supra, it was held that a medical affidavit, which demonstrated that the plaintiff's threshold motion limitations were objectively measured and observed by the physician, was sufficient to establish that plaintiff has suffered a "serious injury" within the meaning of that term as set forth in Article 51 of the Insurance Law. In other words, "[a] physician's observation as to actual limitations qualifies as objective evidence since it is based on the physician's own examinations." Furthermore, in the absence of objective medical evidence in admissible form of serious injury, plaintiff's self-serving affidavit is insufficient to raise a triable issue of fact (Fisher v. Williams, 289 AD2d 288 [2d Dept 2001]).

## **DISCUSSION**

**A. Defendants failed to establish a prima facie case that plaintiff did not suffer a "serious injury" as defined in Section 5102(d) for all categories except for the ninth category of "90/180 days".**

The affirmed report of defendants' independent evaluating radiologist, Sheldon P. Feit, M.D., indicates that an MRI of the Lumbar Spine taken on September 3, 2009 revealed an impression of inter alia, a small left-sided herniation at L5-S1, which herniation is posttraumatic and related to the injury from the accident on July 27, 2009. Such a positive finding prevents the establishment of a prima facie case by defendants (Omar v. Bello, 13 AD3d 430 [2d Dept 2004]; see, Skinner v. St. Juste, 243 AD2d 554 [2d Dept 1997]).

However, defendants established a prima facie case for the category of "90/180 days". The plaintiff's verified bill of particulars indicates he was only confined to his bed and home on an intermittent basis after the accident. Such evidence shows that the plaintiff was not curtailed from nearly all activities for the bare minimum of 90/180, required by the statute.

The aforementioned evidence amply satisfied defendants' initial burden of demonstrating that plaintiff did not sustain a "serious injury" only for the category of "90/180 days". Since the defendants failed to establish a prima facie case that the plaintiff had not sustained a serious injury for all categories except for the ninth category, the burden does not shift to the plaintiff to produce evidence in admissible form to support the

claim of serious injury, for any category other than the category of "90/180 days". Thus, the burden then shifted to plaintiff to raise a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law (see, Gaddy v. Eyler, 79 NY2d 955 [1992]) only to the category of "90/180 days". Failure to raise a triable issue of fact requires the granting of summary judgment and dismissal of the complaint (see, Licari v. Elliott, supra). The motion must be denied as to these categories regardless of the sufficiency of the opposing papers (see, Alvarez, supra). The Court "need not consider whether the plaintiff's papers in opposition to the defendants' motion were sufficient to raise a triable issue of fact," for all categories except for that of "90/180 days" (see, Loadholt, supra).

***B. Plaintiff fails to raise a triable issue of fact as to the category of "90/180 days".***

The plaintiff has failed to come forward with sufficient evidence to create an issue of fact as to whether the plaintiff sustained a medically-determined injury which prevented him from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than 90 of the 180 days immediately following the underlying accident (Savatarre v. Barnathan, 280 AD2d 537 [2d Dept 2001]). The record must contain objective or credible evidence to support the plaintiff's claim that the injury prevented plaintiff from performing substantially all of his customary activities (Watt v. Eastern Investigative Bureau, Inc., 273 AD2d 226 [2d Dept 2000]). When construing the statutory definition of a 90/180-day claim, the words "substantially all" should be construed to mean that the person has been prevented from performing his usual activities to a great extent, rather than some slight curtailment (see, Gaddy v. Eyler, 79 NY2d 955; Licari v. Elliott, 57 NY2d 230 [1982]; Berk v. Lopez, 278 AD2d 156 [1<sup>st</sup> Dept 2000], lv denied 96 NY2d 708 [2001]). Plaintiff fails to include experts' reports or affirmations which render an opinion on the effect the injuries claimed may have had on the plaintiff for the 180-day period immediately following the accident. As such, plaintiff's submissions were insufficient to establish a triable issue of fact as to whether plaintiff suffered from a medically determined injury that curtailed him from performing his usual activities for the statutory period (Licari v. Elliott, 57 NY2d 230, 236 [1982]). Accordingly, plaintiff's claim that his injuries prevented him from performing substantially all of the material acts constituting his customary daily activities during at least 90 of the first 180 days following the accident is insufficient to raise a triable issue of fact (see, Graham v. Shuttle Bay, 281 AD2d 372 [1st Dept 2001]; Hernandez v. Cerda, 271 AD2d 569 [2d

Dept 2000]; Ocasio v. Henry, 276 AD2d 611 [2d Dept 2000]).

Therefore, plaintiff's submissions are insufficient to raise a triable issue of fact as to the ninth category of "90/180 days" (see, Zuckerman v. City of New York, 49 NY2d 557 [1980]).

Accordingly, the motion is denied as to all categories except as to the ninth category of "90/180 days".

The clerk is directed to enter judgment accordingly.

Movant shall serve a copy of this order with Notice of Entry upon the other parties of this action and on the clerk. If this order requires the clerk to perform a function, movant is directed to serve a copy upon the appropriate clerk.

The foregoing constitutes the decision and order of this Court.

Dated: October 24, 2013

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**Howard G. Lane, J.S.C.**