

Lee v No Frills Tire Inc.
2013 NY Slip Op 30409(U)
February 13, 2013
Supreme Court, Queens County
Docket Number: 26498/08
Judge: Howard G. Lane
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

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

IAS PART 6

JAMES S. LEE,

 Plaintiff,

 -against-

NO FRILLS TIRE INCORPORATED and
B.A. LAFFIN-ROSE,

 Defendants.

Index No. 26498/08

Motion
Date January 11, 2013

Motion
Cal. No. 93

Motion
Sequence No. 7

	<u>Papers Numbered</u>
Notice of Motion-Affidavits-Exhibits.....	1-6
Opposition.....	7-12
Reply.....	13-14

Upon the foregoing papers it is ordered that the motion by defendants for summary judgment dismissing the complaint of plaintiff, James L. Lee pursuant to CPLR 3212, on the ground that plaintiff has not sustained a serious injury within the meaning of the Insurance Law § 5102(d) is decided as follows:

This action arises out of an automobile accident that occurred on June 9, 2008. Defendants have submitted proof in admissible form in support of the motion for summary judgment. Defendants submitted inter alia, affirmed reports from an independent examining radiologist and an independent examining orthopedic surgeon, 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 been 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 established a prima facie case that plaintiff did not suffer a "serious injury" as defined in Section 5102(d).

The affirmed report of defendants' independent evaluating radiologist, Roger A. Berg, M.D., indicates that an MRI of the Lumbar Spine dated July 23, 2008 shows no herniations or bulges, no bony injury and no spondylolisthesis and shows only degenerative disease.

The affirmed report of defendants' independent evaluating radiologist, Roger A. Berg, M.D., indicates that an MRI of the Right Shoulder taken on August 8, 2008 "shows only age appropriate degeneration in the rotator cuff without a tear and without radiographic evidence of a clinical impingement syndrome."

The affirmed report of defendants' independent evaluating radiologist, Roger A. Berg, M.D., indicates that an MRI of the Cervical Spine taken on July 11, 2008 revealed chronic degenerative disc disease. Dr. Berg concludes that plaintiff sustained no discernible injuries to the cervical spine, lumbar spine, or right shoulder.

The affirmed report of defendants' independent examining orthopedic surgeon, Peter A. Godsick, M.D., indicates that an examination of plaintiff on June 11, 2012 reveals that plaintiff's cervical condition pre-existed the accident of

June 6, 2008 and plaintiff's lumbar and shoulder conditions are not causally related to the accident of June 6, 2008. He opines that he finds no objective orthopedic findings with regard to the lumbar spine and right shoulder, but only mild subjective abnormalities which are due to age appropriate degeneration. Dr. Godsick concludes that plaintiff requires no further treatment and/or diagnostic testing. Dr. Godsick concludes that plaintiff sustained no discernible injuries to the cervical spine, lumbar spine, or right shoulder.

Additionally, defendants established a prima facie case for the category of "90/180 days." The plaintiff's verified bill of particulars indicates that plaintiff was only confined to bed for approximately two weeks and intermittently thereafter and confined to home for approximately four weeks and intermittently thereafter. 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." 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]). Failure to raise a triable issue of fact requires the granting of summary judgment and dismissal of the complaint (*see, Licari v. Elliott, supra*).

B. Plaintiff raises a triable issue of fact as to all categories except for "90/180 days."

In opposition to the motion, plaintiff submitted: an attorney's affirmation; plaintiff's own affidavit; an affirmation and sworn narrative reports of plaintiff's physician, Sang Y. Lee, M.D., unsworn MRI Reports, an affirmation and sworn MRI Reports of plaintiff's physician, Thomas M. Kolb, M.D., and plaintiff's own examination before trial transcript testimony.

A medical affirmation or affidavit which is based upon a physician's personal examinations and observation 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, 688 NYS2d 167 [1st Dept 1980]). The causal connection must ordinarily be established by competent medical proof (*see, Kociocek v. Chen*, 283 AD2d 554 [2d Dept 2001]; *Pommels v. Perez*, 772 NYS2d 21 [1st Dept 2004]). Plaintiff submitted medical proof that was contemporaneous with the accident showing range of motion

limitations of the right shoulder (Pajda v. Pedone, 303 AD2d 729 [2d Dept 2003]). Plaintiff has established a causal connection between the accident and the right shoulder injury. The affirmation submitted by plaintiff's treating physician, Sang Y. Lee, M.D., sets forth the objective examination, tests, and review of medical records which were performed contemporaneously with the accident (on the same day as the accident) to support his conclusion that the plaintiff suffered from significant injury to the right shoulder, to wit: range of motion limitations of the right shoulder. Dr. Lee's affirmation details plaintiff's symptoms, including neck pain and stiffness radiating to the right shoulder and pain in the shoulder. He further opines that the injuries sustained by the plaintiff in the accident were causally related to the motor vehicle accident of June 9, 2008 and not the result of degenerative disease. Furthermore, plaintiff has provided a recent medical examination detailing the status of his injuries at the current point in time (Kauderer v. Penta, 261 AD2d 365 [2d Dept 1999]). The affirmation of Dr. Lee provides that a recent examination by Dr. Lee on December 7, 2012 sets forth the objective examination, tests, and review of medical records which were performed to support his conclusion that the plaintiff suffers from significant injuries, to wit: range of motion limitations of the right shoulder. He further opines that the right shoulder injury is permanent in nature, significant, causally related to the motor vehicle accident of June 9, 2008 and not the result of degenerative changes, and result in a permanent limitation in the plaintiff's range of motion. Clearly, the plaintiff's experts' conclusions are not based solely on the plaintiff's subjective complaints of pain, and therefore are sufficient to defeat the motion (DiLeo v. Blumber, supra, 250 AD2d 364, 672 NYS2d 319 [1st Dept 1998]).

Since there are triable issues of fact regarding whether the plaintiff sustained a serious injury to his right shoulder, plaintiff is entitled to seek recovery for all injuries allegedly incurred as a result of the accident (Marte v. New York City Transit Authority, 59 AD3d 398 [2d Dept 2009]).

However, 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 her 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 [1st 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 her 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 sufficient to raise a triable issue of fact for all categories except for that of "90/180 days" (see, Zuckerman v. City of New York, 49 NY2d 557 [1980]).

The foregoing constitutes the decision and order of this court.

Dated: February 13, 2013

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