

McKenzie v Alsemadi
2019 NY Slip Op 33160(U)
October 10, 2019
Supreme Court, Kings County
Docket Number: 515727/2017
Judge: Paul Wooten
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**SUPREME COURT OF THE STATE OF NEW YORK
KINGS COUNTY**

PRESENT: HON. PAUL WOOTEN
Justice

PART 97

GLAYTON MCKENZIE,

Plaintiff,

- against -

**OMAR N. ALSEMADI and SAMAR
LIMOUSINE CORPORATION,**

Defendants.

INDEX NO. 515727/2017

MOT. SEQ NO. 1

In accordance with CPLR 2219(a), the following papers were read on this motion by defendant for summary judgment.

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____	<u>1</u>
Answering Affidavits — Exhibits (Memo) _____	<u>2</u>
Replying Affidavits (Reply Memo) _____	<u>3</u>
Transcript _____	

This is a personal injury action relating to a motor vehicle accident that occurred on January 11, 2017 at approximately 7:35 a.m. at or near the intersection of West Street and 12th Street in the county of New York, in the State of New York. On the date of the accident, Glayton McKenzie (plaintiff) was driving in a vehicle that had stopped at a red traffic light, when he was struck in the rear by an SUV car owned by defendant Samar Limousine Corporation and operated by defendant Omar N. Alsemadi. Plaintiff was transported via an ambulance to Lenox Hill Hospital the same day for evaluation and treatment. He was later released from the hospital that same day. Plaintiff commenced this action via Summons and Verified Complaint on August 14, 2017, alleging that he sustained serious bodily injuries to his neck, lower back,

shoulders and left knee as a result of the motor vehicle accident caused by the defendants' negligence. More specifically, in his Verified Bill of Particulars, plaintiff claims that as a result of the accident he sustained, *inter alia*, the following injuries: lumbar, cervical and thoracic strain/sprain; severe swelling pain and tenderness, marked restrictions in range of motion, intervertebral disc disorder and radiculopathy; and various disc bulges and herniations (see Notice of Motion [MS 1], exhibit B, unnumbered pages 2-3; affirmation in opposition, exhibit D, Affidavit by Dr. Ramzan, ¶¶ 1-9).

Before the Court is a motion by defendants for summary judgment, pursuant to CPLR 3212, dismissing the Complaint on the ground that the injuries claimed do not satisfy the "serious injury" threshold requirement of New York Insurance Law §§ 5102(d) and 5104. Plaintiff is in opposition to the motion and defendants have filed a reply.

SERIOUS INJURY THRESHOLD

A party seeking damages for pain and suffering arising out of a motor vehicle accident must establish that he or she has sustained at least one of the nine categories of "serious injury" as set forth in Insurance Law § 5102(d) (*see Licari v Elliott*, 57 NY2d 230 [1982]).

Insurance Law § 5102(d) defines "serious injury" as:

a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system [permanent loss]; permanent consequential limitation of use of a body organ or member [permanent consequential limitation]; significant limitation of use of a body function or system [significant limitation]; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment [90/180]

The Court must determine whether, as a matter of law, plaintiff has sustained a "serious injury" under at least one of the claimed categories. "Serious injury" is a threshold issue, and

thus, a necessary element of a plaintiff's prima facie case (*Licari*, 57 NY2d at 235; Insurance Law § 5104[a]). The serious injury requirement is in accord with the legislative intent underlying the No-Fault Law, which was enacted to "weed out frivolous claims and limit recovery to significant injuries" (*Toure v Avis Rent A Car Sys., Inc.*, 98 NY2d 345, 350 [2002], quoting *Dufel v Green*, 84 NY2d 795, 798 [1995]). As such, to satisfy the statutory threshold, the plaintiff is required to submit competent objective medical proof of his or her injuries (*id.* at 350). Subjective complaints alone are insufficient to establish a prima facie case of a serious injury (*id.*).

BURDEN OF PROOF

The issue of whether a claimed injury falls within the statutory definition of "serious injury" is a question of law for the Court, which may be decided on a motion for summary judgment (*see Licari*, 57 NY2d at 237). Where a defendant is the movant, the defendant, bears the initial burden of establishing, by the submission of evidentiary proof in admissible form, a prima facie case that plaintiff has not suffered a "serious injury" as defined in section 5102(d) (*see Toure*, 98 NY2d at 352; *Gaddy v Eyley*, 79 NY2d 955, 956-57 [1992]). Once the defendant has made such a showing, the burden shifts to the plaintiff to submit prima facie evidence, in admissible form, rebutting the presumption that there is no issue of fact as to the threshold question (*see Franchini v Palmieri*, 1 NY3d 536, 537 [2003]; *Rubenscastro v Alfaro*, 29 AD3d 436, 437 [1st Dept 2006]).

"In cases such as the present one, a defendant can establish that the plaintiff's injuries are not serious within the meaning of Insurance Law § 5102(d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (*Grossman v Wright*, 268 AD2d 79, 83-84 [2d Dept 2000]). "This established, the burden shifts to the plaintiff to come forward with evidence to overcome the defendant's submissions by demonstrating a triable issue of fact that a serious

injury was sustained within the meaning of the Insurance Law” (*id.*; see *Gaddy v Eyler*, 79 NY 2d 955 [1992]). The plaintiff must present objective evidence of the injury. The mere parroting of language tailored to meet statutory requirements is insufficient (see *Grossman*, 268 AD2d at 84). Further, a plaintiff’s subjective claim of pain and limitation of motion must be sustained by verified objective medical findings, which shall be based on a recent examination of the plaintiff (see *id.*; *Kauderer v Penta*, 261 AD2d 365 [2d Dept 1999]).

The 90/180 category requires a demonstration that plaintiff has been unable to perform substantially all of his or her usual and customary daily activities for not less than 90 days during the 180 days immediately following the injury (see *Licari*, 57 NY2d at 236). The words “substantially all” mean that the person has been “curtailed from performing his usual activities to a great extent rather than some slight curtailment” (*id.*).

DISCUSSION

After reviewing the papers and hearing oral arguments on the record on April 17, 2019, the Court finds that the defendants have met their prima facie burden of showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident on January 11, 2017 via the submission of affirmed medical reports of orthopedic surgeon, Dr. Edward A. Toriello, M.D. (Dr. Toriello), neurologist, Dr. Michael J. Carciente, M.D., and emergency medicine physician, Dr. Ronald A. Paynter, M.D. and the exhibits annexed thereto (see *Jean-Pierre v Park*, 138 AD3d 1064 [2d Dept 2016]; *Olagunju v Anna & Diane Cab Corp.*, 139 AD3d 924 [2d Dept 2016]). In particular, the medical report from Dr. Toriello showed, *inter alia*, that plaintiff’s range of motion of his cervical, thoracic and lumbar spine, right and left shoulders, right and left elbows, right and left knees, right and left hips and right and left wrists were normal and that any alleged injuries that were caused by the accident have been resolved (see Notice of Motion, exhibit E, pgs. 2-4).

In opposition, plaintiff submits, *inter alia*, his affidavit and deposition, the affidavit of Dr.

Sari Ramzan, a licensed chiropractor in the State of New York, an affirmation by Dr. Kamal A. Tadros, and an affidavit from Dr. Ronald Wagner, a radiologist licensed in the State of New York with attached MRI Scans of plaintiff's lumbar spine on February 15, 2017 and cervical spine on March 7, 2017. Plaintiff first presented for examination and treatment by Dr. Tadros, on January 12, 2017 (one day after the accident) and Dr. Ramzan on January 19, 2017. Each physician examined, treated, and performed medical tests, including *inter alia*, range of motion tests, neurological examination, Motor Muscle Strength Tests on plaintiff multiple times over a period of twenty-two months and most recently by Dr. Tadros on October 30, 2018, wherein he found, *inter alia*, significant range of motion limitations to plaintiff's lumbar spine.

The Court finds that the conflicting medical reports of the parties raise triable issues of fact as to whether plaintiff sustained serious injuries within the meaning of Insurance Law § 5102(d) (*see Pommells v Perez*, 4 NY3d 566, 576 [2005]; *see also Wilcoxon v Palladino*, 122 AD3d 727, 728 [2d Dept 2014]).

However, the Court finds that the defendants have demonstrated, *prima facie*, that plaintiff did not sustain a serious injury under the 90/180 category of Insurance Law § 5102(d) (*see McFarlane v Klein*, 131 AD3d 1139 [2d Dept 2015]; *Pryce v Nelson*, 124 AD3d 859 [2d Dept 2015]; *Lanzarone v Goldman*, 80 AD3d 667, 669 [2d Dept 2011]; *Jean v Labin-Natochenny*, 77 AD3d 623 [2d Dept 2010]). However, plaintiff has raised a triable issue of fact in opposition based upon the medical evidence submitted and his affidavit which states "Although Dr. Tadros told me that I am disabled and should not work, I was only able to stay home for two weeks because I have four children and support myself. I went to work regardless of the pain. As a maintenance man I am required to throw out garbage, clean and mop. Since the accident, I am unable to do that type of work that I did before the accident, I had to stop doing that job and I was put on light duty" (*see Affirmation in Opposition, exhibit A, Plaintiff's Affidavit ¶ 20, page 6*).

CONCLUSION

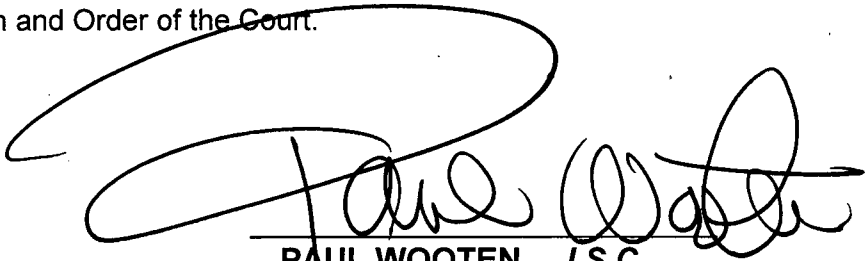
Accordingly it is hereby,

ORDERED that defendants' motion for summary judgment, pursuant to CPLR 3212, dismissing the Complaint on the ground that the injuries claimed do not satisfy the "serious injury" threshold requirement of New York Insurance Law §§ 5102(d) and 5104 is denied; and it is further,

ORDERED that counsel for plaintiff is directed to serve a copy of this Order with Notice of Entry upon the defendants.

This constitutes the Decision and Order of the Court.

Dated: 10/16/19


PAUL WOOTEN J.S.C.

2019 OCT 18 AM 8:19
KINGS COUNTY CLERK
FILED

