

**McAlpine v Baig**

2022 NY Slip Op 33666(U)

October 25, 2022

Supreme Court, Kings County

Docket Number: Index No. 502742/2020

Judge: Debra Silber

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : PART 9**

X

**FARRIA J. McALPINE and MARQUIS MARTIN,**

**Plaintiffs,**

**-against-**

**DECISION / ORDER**

**Index No. 502742/2020  
Motion Seq. No. 002**

**MIRZA A. BAIG,**

**Defendant.**

X

*Recitation, as required by CPLR 2219 (a), of the papers considered in the review of defendant's motion for summary judgment*

<b>Papers</b>	<b>NYSCEF Doc.</b>
Notice of Motion, Affirmations, Affidavits and Exhibits.....	<u>31-52</u>
Affirmation in Opposition, Affidavits and Exhibits Annexed.....	<u>61-73</u>
Reply .....	<u>74-75</u>

**Upon the foregoing cited papers, the Decision/Order on this motion is as follows:**

This is an action for personal injuries arising from a motor vehicle accident that occurred on December 16, 2018 on Eastern Parkway at or near its intersection with Albany Avenue in Brooklyn, New York. Plaintiff Farria McAlpine was the driver and plaintiff Marquis Martin was a passenger in the automobile owned and operated by plaintiff McAlpine. Plaintiffs claim their vehicle was struck from behind while stopped at a red traffic light by the vehicle owned and operated by the defendant. At the time of the accident, plaintiff McAlpine was approximately thirty-nine years old and plaintiff Martin was approximately thirty-five years old. Both plaintiffs were removed from the scene in an ambulance. Both sought medical care after the accident.

The defendant moves for summary judgment and an order dismissing the complaint of both plaintiffs on the basis that neither plaintiff sustained a serious injury as defined by Insurance Law § 5102 (d).

In their bill of particulars, plaintiff McAlpine claims she sustained injuries to her cervical and lumbar spine as a result of the accident. Plaintiff Martin also claims that he sustained injuries to his cervical and lumbar spine as a result of the accident.

Defendant provides, in support of his motion, an attorney's affirmation, copies of the pleadings, both plaintiffs' EBT transcripts, affirmed IME reports from an orthopedist, Dr. Gregory Chiaramonte, who examined both plaintiffs, and an affirmed IME report from a radiologist, Dr. Scott Springer, who reviewed the MRIs of plaintiff McAlpine's cervical and lumbar spine. Each plaintiff will be discussed separately.

#### Plaintiff Farria McAlpine

Dr. Chiaramonte examined the plaintiff in July of 2021, more than two and a half years after the subject accident. The only item that he reviewed was the plaintiff's verified bill of particulars. He tested plaintiff McAlpine's range of motion and reports normal ranges of motion in her cervical spine, as well as normal ranges of motion in all planes of the plaintiff's lumbar spine, except for flexion, where Dr. Chiaramonte reports that the plaintiff's range of motion was only to 45 degrees, when the normal measure is to 60 degrees. He diagnosed plaintiff McAlpine with a "sprain/strain" to both the cervical and thoracic spine, both of which are "resolved." Dr. Chiaramonte also diagnosed the plaintiff "status post lumbar spine surgery in July 2019 – healed by examination." The court notes that Dr. Chiaramonte did not review the plaintiff's medical records. His report is, essentially, silent regarding the plaintiff's lumbar surgery. Plaintiff's undated bill of particulars omits any mention of it, but it had to have been prepared after the surgery. Dr. Chiaramonte opines

that the plaintiff is “able to work without limitations” and can “perform normal activities of daily living without limitations.” He concludes by opining that “[t]here is no evidence of orthopedic disability, permanency, or residuals” and states that the “[d]eferred range of motion is what was allowed by the claimant.”

Dr. Springer reviewed the MRI films of the plaintiff’s cervical spine, which were taken approximately one month after the subject accident, as well as the MRI films of the plaintiff’s lumbar spine, which were taken approximately a month and a half following the subject accident. The court notes that none of the MRI reports from the radiologist who initially interpreted the plaintiff’s MRIs are provided for comparative purposes. In his review of the plaintiff’s cervical MRI, Dr. Springer notes disc bulges at the C3-4, C5-6 and C6-7 levels, as well as disc herniations at the C3-4 and C4-5 levels. He also notes “mild-to-moderate degenerative changes,” “[d]isc desiccation,” and “[d]isc space height loss” at the C2-3 through C6-7 levels. He opines that the degenerative changes are a “chronic process and could not have occurred in the time interval between the incident and the examination” and that the disc desiccation “is a drying out and loss of disc substance process” that “could not have developed in the one month and three day interval between the examination and the incident and is indicative of degenerative disc disease.” He states that “[t]he most common cause for disc herniations is degenerative disc disease and there is clear evidence of degenerative change, particularly the C3-C4 disc bulging at the same level as the herniation, which supports the chronicity of the disc herniations.” He opines that the disc bulging observed in plaintiff McAlpine’s cervical MRI “has no traumatic basis” and concludes that there are “[n]o posttraumatic changes causally related to the 12/16/2018 incident.”

In his review of the plaintiff's lumbar spine MRI, Dr. Springer reports disc bulges at the L4-5 and L5-S1 levels, as well as a disc herniation at the L4-5 level. At the L4-5 level, he notes "a small right paracentric disc herniation with mild mass effect on the anterior and right side of the thecal sac" and that "[t]here is abutment with the traversing right L5 nerve root." He opines that "[t]he most common cause for disc herniations is degenerative disc disease and there is clear evidence of degenerative change, particularly the L4-L5 disc bulging at the same level as the herniation, which supports the chronicity of the disc herniation seen." At the L5-S1 level, he notes a "mild disc bulge with mild mass effect on the anterior thecal sac" with "mild degenerative changes," as well as "[d]isc desiccation with moderate loss of disc space height." He states that "desiccation is a drying out and loss of disc substance process" and opines that "[t]his could not have developed in the one month and 17 day interval between the examination and the incident." He further opines that "[d]isc bulging has no traumatic basis" and repeats his opinion that it is "degenerative in origin," and concludes his report by stating that he found "[n]o posttraumatic changes causally related to the 12/16/2018 incident."

The defendant argues that his "proof rules out the 90/180 category of the statute." The court notes that in defense counsel's affirmation in support, the argument regarding the 90/180 category is only made with reference to one of the two plaintiffs, but the movant fails to identify which plaintiff he is referring to by name. The court concludes that the defendant's 90/180 argument is made in reference to plaintiff McAlpine, based on the movant's use of the phrase "*her* usual and customary activities" in his argument. The defendant argues that plaintiff McAlpine's EBT testimony indicates that she only missed two weeks from her job as a school safety officer following the accident [Doc 43, Page 21], and that there was no time when she was bedridden.

### Conclusions of Law

With regard to the 90/180-day category of injury, as previously indicated, the plaintiff's deposition testimony is clear that, aside from the two week period immediately following the accident, the plaintiff did not miss 90 days' time from work as a school safety officer in the six months following the accident. As such, the court finds that the defendant has made a *prima facie* case with regard to the 90/180 category of injury.

The affirmed reports from Dr. Chiamonte and Dr. Springer also establish that the plaintiff has not sustained a permanent loss of use of a body organ, member, function or system.

However, the court finds that the defendant has not made a *prima facie* showing of his entitlement to summary judgment with regard to the other applicable categories of injury claimed by the plaintiff in her bill of particulars (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyer*, 79 NY2d 955, 956-957 [1992]).

As the court previously noted, Dr. Chiamonte found a significant loss of range of motion in the plaintiff's lumbar spine upon flexion, which he suggested was a result of what the plaintiff "allowed," with no other explanation. It is unclear why Dr. Chiamonte casts doubt on the flexion measurement but does not cast doubt on any of the other measurements of the plaintiff's range of motion that he took during his exam. Although plaintiff made him aware of the fact that she had lumbar discectomy surgery at the L4-5 and L5-S1 levels, he neither comments on the surgery nor opines on whether it was causally related to the subject accident, and he fails to offer any opinion as to what affect, if any, that surgery has had on the plaintiff's range of motion in her lumbar spine.

As such, the court finds that the report of Dr. Chiamonte is insufficient to establish that the plaintiff did not sustain a "serious injury" to her neck or back, in that he does not

establish that plaintiff did not, as a matter of law, sustain a “permanent consequential limitation of use of a body organ or member” or “a significant limitation of use of a body function or system,” the remaining applicable categories of injury in Insurance Law § 5102(d) claimed by plaintiff McAlpine.

Since the defendant has failed to meet his burden of proof as to all of plaintiff McAlpine’s claimed injuries and all applicable categories of injury in Insurance Law § 5102 (d), the motion must be denied. It is unnecessary to consider the papers submitted by the plaintiff in opposition (see *Yampolskiy v Baron*, 150 AD3d 795 [2d Dept 2017]; *Valerio v Terrific Yellow Taxi Corp.*, 149 AD3d 1140 [2d Dept 2017]; *Koutsoumbis v Paciocco*, 149 AD3d 1055 [2d Dept 2017]; *Aharonoff-Arakanchi v Maselli*, 149 AD3d 890 [2d Dept 2017]; *Lara v Nelson*, 148 AD3d 1128 [2d Dept 2017]; *Sanon v Johnson*, 148 AD3d 949 [2d Dept 2017]; *Weisberg v James*, 146 AD3d 920 [2d Dept 2017]; *Marte v Gregory*, 146 AD3d 874 [2d Dept 2017]; *Goeringer v Turrisi*, 146 AD3d 754 [2d Dept 2017]; *Che Hong Kim v Kossoff*, 90 AD3d 969 [2d Dept 2011]).

Even if defendant had established a prima facie case for summary judgment, plaintiff McAlpine’s submissions are sufficient to overcome the motion and raise a triable issue of fact. In particular, the affirmation and affirmed reports of Dr. Conrad Cean, an anesthesiologist and pain management doctor who first saw the plaintiff approximately three weeks after the subject accident report that he found reduced ranges of motion in her cervical and lumbar spine, when compared to “normals.” In his affirmation, he states that he reviewed the narrative report of Dr. Chiaramonte and disagrees with his findings and his conclusion that the plaintiff’s back and neck injuries have resolved. The plaintiff also offers an affirmation and affirmed records of Dr. William Jones, a physical medicine and rehabilitation doctor who treated the plaintiff and performed the surgery on the plaintiff’s

lumbar spine. At the time that Dr. Jones issued his report in April of 2022, he had last seen the plaintiff less than one month earlier. At this exam he found that the plaintiff still had significantly reduced ranges of motion in both her cervical and lumbar spine, when compared to “normals.” Dr. Jones reviewed the narrative report of the defendant’s expert, Dr. Chiaramonte, and also disagrees with his findings and his conclusion that the plaintiff’s cervical and lumbar spine injuries have resolved. Dr. Jones opines that plaintiff McAlpine sustained a permanent partial disability of the cervical and lumbar spine and concludes that the injuries are causally related to the subject accident.

Plaintiff Marquis Martin

Dr. Chiaramonte examined this plaintiff on July 26, 2021, more than two and a half years after the subject accident. The only item that he reviewed was the plaintiff’s verified bill of particulars. He tested plaintiff Martin’s range of motion and reports normal ranges of motion in his cervical spine, thoracic spine, lumbar spine, and right hip. He diagnoses plaintiff Martin with cervical, thoracic, and lumbar spine sprains/strains, as well as a right hip sprain/strain, all of which have “resolved.” The court notes that Dr. Chiaramonte failed to review, or request to review, either the records from Dr. Cean, the doctor who performed three separate nerve root block procedures on plaintiff Martin’s lumbar spine, or the films or report of the MRIs of plaintiff Martin’s cervical spine, which revealed disc herniations at the C4-5 and C5-6 levels, or those of his lumbar spine. As such, Dr. Chiaramonte offers no opinion on plaintiff’s claims of herniated discs in his cervical spine or on the three, separate nerve root block procedures that plaintiff Martin had to his lumbar spine. Although Dr. Chiaramonte opines that “[t]here is no evidence of orthopedic disability, permanency or residuals,” and that the plaintiff is “capable of working without restrictions” and can “perform his activities of daily living as he was doing prior to the accident,” the court finds

his opinions to be speculative as a result of his failure to consider or address plaintiff's claims of cervical herniated discs or plaintiff's claim that his lumbar spine injury required three nerve block procedures. Finally, the court notes that Dr. Chiaramonte offers no opinion on whether the plaintiff's claimed injuries are causally related to the subject accident.

Although the movant had a radiologist review the MRI films of co-plaintiff McAlpine, he inexplicably failed to have plaintiff Martin's cervical or lumbar MRI studies reviewed and, as such, plaintiff Martin's claims of cervical disc herniations are not addressed by any physician in defendant's motion papers. Plaintiff Martin also claims he has sustained cervical and lumbar radiculopathy, which is also not addressed by the defendant's doctors.

The defendant contends that his "proof rules out the 90/180 category of the statute," but as the court previously observed, defense counsel's affirmation in support only mentions plaintiff McAlpine, based on the movant's use of the phrase "*her usual and customary activities*" in his argument. As such, defense counsel makes no argument in his affirmation with regard to plaintiff Martin and the 90/180 category. Defense counsel does point out plaintiff Martin's deposition testimony, wherein he testified that he only missed 4-5 days from his job as a security guard at the Aladdin Hotel [Doc 45, Page 22]. However, plaintiff Martin also testified that when he returned to work, he worked "limited duty" for four to five months following the accident. [Doc 45, Page 23].

### **Conclusions of Law**

With regard to the 90/180-day category of injury, as previously indicated, the plaintiff's deposition testimony is clear that he only missed 4-5 days from his job as a security guard at the Aladdin Hotel following the accident, but he also testified that after those 4-5 days, he returned to work on a limited-duty basis for 4-5 months. As the movant

makes no argument regarding the 90/180 category of injury with regard to plaintiff Martin, the court find that the movant has failed to make a prima facie showing of entitlement to summary judgment with regard to this category, and that questions of fact exist as to whether plaintiff Martin sustained a medically determined injury or impairment of a non-permanent nature which prevented plaintiff Martin from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the accident.

The court finds that the affirmed report from Dr. Chiaramonte establishes that the plaintiff has not sustained a permanent loss of use of a body organ, member, function or system. However, the court finds that the defendant has not made a *prima facie* showing of his entitlement to summary judgment with regard to the other applicable categories of injury claimed by the plaintiff in his bill of particulars (see *Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyster*, 79 NY2d 955, 956-957 [1992]).

As the court previously noted, Dr. Chiaramonte failed to review the plaintiff's medical records or MRIs and he declined to opine on the nerve block procedures or on the issue of causality. The movant also declined to have the plaintiff's MRI studies reviewed by a radiologist, leaving plaintiff Martin's claims of disc herniations at the C4-5 and C5-6 levels, as well as his claims of cervical and lumbar radiculopathy, completely unaddressed.

As such, the court finds that the report of Dr. Chiaramonte is insufficient to establish that the plaintiff did not sustain a "serious injury" to his neck or back, in that he does not establish that plaintiff did not, as a matter of law, sustain a "permanent consequential limitation of use of a body organ or member" or "a significant limitation of use of a body function or system," the remaining applicable categories of injury in Insurance Law § 5102(d) claimed by plaintiff Martin.

Since the defendant has failed to meet his burden of proof as to all of plaintiff Martin's claimed injuries and all applicable categories of injury in Insurance Law § 5102 (d), the motion must be denied. It is unnecessary to consider the papers submitted by the plaintiff in opposition (see *Yampolskiy v Baron*, 150 AD3d 795 [2d Dept 2017]; *Valerio v Terrific Yellow Taxi Corp.*, 149 AD3d 1140 [2d Dept 2017]; *Koutsoumbis v Paciocco*, 149 AD3d 1055 [2d Dept 2017]; *Aharonoff-Arakanchi v Maselli*, 149 AD3d 890 [2d Dept 2017]; *Lara v Nelson*, 148 AD3d 1128 [2d Dept 2017]; *Sanon v Johnson*, 148 AD3d 949 [2d Dept 2017]; *Weisberg v James*, 146 AD3d 920 [2d Dept 2017]; *Marte v Gregory*, 146 AD3d 874 [2d Dept 2017]; *Goeringer v Turrisi*, 146 AD3d 754 [2d Dept 2017]; *Che Hong Kim v Kossoff*, 90 AD3d 969 [2d Dept 2011]).

Even if defendant had established a prima facie case for summary judgment, plaintiff Martin's submissions are sufficient to overcome the motion and raise a triable issue of fact. In particular, the affirmation and affirmed reports of Dr. Conrad Cean, an anesthesiologist and pain management doctor, who first saw the plaintiff approximately three weeks after the subject accident, found reduced ranges of motion in his cervical spine, when compared to "normals." Dr. Cean also performed the nerve block injections for the pain in the plaintiff's lumbar spine. In his affirmation, he states that he reviewed the narrative report of Dr. Chiaramonte and disagrees with his findings and his conclusion that the plaintiff's neck and back injuries have resolved. The plaintiff also offers an affidavit and records from Edmund Cerebelli, a chiropractor, who first saw the plaintiff two days after the subject accident and treated him until, in Dr. Cerebelli's opinion, the plaintiff had reached "maximal medical improvement" in July of 2019. When Dr. Cerebelli first examined plaintiff Martin he found significantly reduced ranges of motion in his cervical and lumbar spine, and when he last examined plaintiff Martin in November of 2021, he still found reduced

ranges of motion in both the plaintiff's cervical and lumbar spine when compared to the "normals." Dr. Cerebelli reviewed the narrative report of the defendant's expert, Dr. Chiaramonte, and disagrees with his findings and his conclusion that the plaintiff's cervical and lumbar spine injuries have resolved. Dr. Cerebelli opines that plaintiff Martin sustained a permanent partial disability of the neck and back and that his injuries are causally related to the subject accident.

Accordingly, it is **ORDERED** that defendant's motion (Seq. #2) for summary judgment dismissing the complaint is denied with regard to both plaintiffs.

This constitutes the decision and order of the court.

Dated: October 25, 2022

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Hon. Debra Silber, J.S.C.