Bocoum v Ruhman
2011 NY Slip Op 34138(U)
December 30, 2011
Sup Ct, Bronx County
Docket Number: 301996/09
Judge: Kibbie F. Payne

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 1

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ABDOUL BOCOUM

Plaintiff,

DECISION/ORDER

-against-

Index No. 301996/09

MOHAMMED RUHMAN, HAVA CAB CORP.
MOHAMMED BELAL and ASHKA CAB CORP.,

Defendants.

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KIBBIE F. PAYNE, J.:

Defendants Mohammed Ruhman and Hava Cab Corporation move, pursuant to CPLR 3212 and Article 51 of the Insurance Law for an order granting them summary judgment on the ground that the plaintiff, Abdoul Bocoum, did not sustain a serious injury a motor vehicle accident. Defendants Mohammed Belal and Ashka Cab Corporation cross-move for summary judgment on the identical grounds. The plaintiff opposes the motion and cross-motion arguing that he sustained a complex meniscal tear in his left knee that resulted in surgery and that he sustained a protruding disc herniation at L5-S1.

Under the no-fault automobile insurance law, in any action by a covered person for injuries arising out of negligence in the use or operation of a motor vehicle in New York, there is no right of recovery for economic or non-economic loss except in the case of a serious injury (70A NY Jur 2d Insurance § 1952). Insurance Law § 5102 (d) defines a 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 consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; 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.

The question of whether a plaintiff sustained a serious injury is an issue of both fact and law. Disputed material facts, including the extent of a claimant's injuries, are generally resolved by the jury (*Miller v Miller*, 68 NY2d 871; *Kellner v DeBushey Coach, Ltd.*, 138 AD2d 460). However, a motion for summary judgment should be granted where the plaintiff has not suffered a qualifying serious injury as a matter of law (*Schultz v Von Voight*, 86 NY2d 865; *Powell v Hurdle*, 214 AD2d 720; *Jean-Mehu v Berbec*, 215 AD2d 440).

In support of the motion defendants Ruhman and Hava submit the medical reports of a radiologist and an orthopedic surgeon. Both physicians reviewed the plaintiff's medical records and films. Additionally, Dr. Gregory Montalbano conducted an orthopedic examination of the plaintiff on May 21, 2010. Both physicians opined that there was no causal relation between the plaintiff's injuries and the accident. The radiologist, Dr.

Robert Tantleff noted longstanding wear and tear degenerative changes consistent with the plaintiff's age unrelated to the accident. Additionally he noted an increased habitus/obesity as a comorbidity for degenerative changes of the knee and degenerative changes of the meniscus. Dr. Montalbano, who performed all range of motion with a goniometer, noted a full range of motion in extension for plaintiff's left knee and that there was a slight decrease on flexion of the knee that the decrease range of motion was identical for both the right and left knee which would indicate a normal range of motion for Mr. Bocoum.

With respect to the lumbar and thoracic spine Dr. Montalbano found that the plaintiff had full ranges of motion in flexion, rotation, lateral bending in comparison to normal. Dr. Montalbano also reviewed the MRI films of the plaintiff's lumbrosacral spine and found them to be normal. And with respect to a non-permanent injury preventing the plaintiff from performing his usual and customary activities for the 90/180 day period, the plaintiff testified in his examination before trial that he returned to work within two weeks following the accident. The independent objective medication examinations found that the plaintiff did not sustain any substantial and/or permanent injuries.

The defendants met their initial prima facie burden of

demonstrating the absence of any serious injury to the plaintiff's left knee and to his lumbar and/or thoracic spine. The burden then shifted to the plaintiff to come forward with evidence to overcome the defendants' submissions by demonstrating the existence of a triable issue of fact that a serious injury was sustained (*see Pommells v Perez*, 4 NY23d 566; *Grossman v Wright*, 268 AD2d 79).

In opposition to the motion and cross-motion, plaintiff relied upon the medical records, counsel's affirmation, a photocopy of Dr. Shahid Mian's affirmation under penalty of perjury, an August 20, 2009 orthopedic examination report by Dr. Alvin Bergman and the plaintiff's affidavit. Counsel argues that the motion and cross-motion for summary judgment must be denied for the failure to dispute the existence of a meniscal tear resulting in surgery. This argument is unpersuasive. Surgery on its own is insufficient to satisfy the statutory requirements of a serious injury in that surgery was not specified in the statute's definitions as constituting serious injury (Insurance Law § 5102 [d]). Plaintiff must establish by objective medical evidence that he suffered a meniscal tear in his left knee requiring surgery and restrictions of motion of his knee and spine to raise a triable issue of fact as to whether he sustained a serious injury as a result of the motor vehicle accident (*see Smith v Vohrer*, 62 AD3d; *Nunez v Zhagui*, 60 AD3d 559). A review

of the examination conducted by Dr. Mian indicates that the plaintiff was under his care following the February 10, 2008 motor vehicle accident, he reviewed the operative report and the radiologist's report and the report of Dr. Tantleff and opined that the plaintiff's left knee injuries were causally related to the motor vehicle accident. Dr. Mian, further reported plaintiff's subjective complaints of pain in the mid and lower back. Notably Dr. Mian's report of his March 11, 2011 examination of the plaintiff, specified the degrees of the range of motion and compared those findings to the normal range of motion. The surgical report did not indicate the cause for the left knee lateral meniscal tear. The court is confronted with conflicting medical reports which cannot be resolved upon the papers now before the court and require a plenary trial for proper disposition. In view of the fact that it appears that the plaintiff had no restrictions to his left knee and spine prior to the accident, the plaintiff has raised sufficient triable issues to overcome defendants' motion and cross-motion. Accordingly, the motion and cross-motion are denied. The foregoing constitutes the decision and order of this court.

Dated: December 30, 2011
Bronx County

KIBBIE F. PAYNE
J.S.C.