

**Kumar v Khan**

2011 NY Slip Op 31125(U)

April 8, 2011

Supreme Court, Queens County

Docket Number: 9373/2009

Judge: Robert J. McDonald

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

- - - - - x

RAVINDER KUMAR, Index No.: 9373/2009
Plaintiff, Motion Date: 02/10/2011
- against - Motion No.: 29
Motion Seq.: 1
YASIN KHAN and NAMBA CAB CORP.,
Defendant.

- - - - - x

The following papers numbered 1 to 10 were read on this motion by
defendants for an order pursuant to CPLR 3212 granting summary
judgment and dismissing the plaintiff's complaint on the ground
that plaintiff, Ravinder Kumar, has not sustained a serious
injury within the meaning of Insurance Law §§ 5102 and 5104:

Papers
Numbered

Notice of Motion-Affidavits-Exhibits-Memorandum of Law...1 - 3
Affirmation in Opposition-Affidavits-Exhibits.....4 - 7
Reply Affirmation.....8 - 1

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This is a personal injury action in which the plaintiff,
Ravinder Kumar, seeks to recover damages for injuries he
sustained as a result of a motor vehicle accident that occurred
at approximately 1:00 a.m. on October 25, 2007 on the southbound
entrance ramp to the Henry Hudson Parkway near West 170th Street,
Manhattan, New York.

At the time of the accident, the plaintiff was a attempting
to enter the Henry Hudson Parkway at 170th Street when his
vehicle was struck in the rear by a taxi cab owned by defendant
Namba Cab Corp. and operated by defendant, Yasin Kahn. The
plaintiff contends that he injured both knees, his neck and his
back as a result of the impact.

The plaintiff commenced an action against the defendants by filing a Summons and Verified Complaint on April 10, 2009. Issue was joined by service of defendants' Verified Answer dated May 1, 2009.

The defendants now move for an order, pursuant to CPLR 3212(b), granting summary judgment dismissing the plaintiff's complaint on the ground that the plaintiff did not suffer a serious injury as defined by Insurance Law § 5102.

In support of the motion, defendant submits an affirmation from counsel, Cary S. Nosowitz, Esq.,; a copy of the pleadings; plaintiff's verified bill of particulars; a copy of the transcript of plaintiff's examination before trial; the affirmed MRI report of plaintiff's right knee and lumbar spine from Dr. David A. Fisher, a board certified radiologist; the affirmed medical report of Dr. Gregory Montalbano; the hospital records from the Elmhurst Hospital center emergency room; and the report of Dr. Azar, a radiologist, concerning the MRI of the plaintiff's lumbar spine.

In his verified Bill of Particulars, the plaintiff, age 24, states that as a result of the accident he sustained, inter alia, a tear of the meniscus of the right knee for which he underwent arthroscopic surgery; tear of the ACL in the right and left knees; and disc herniation at L4-L5. On March 5, 2009, the plaintiff underwent arthroscopic surgery of his right knee. In his examination before trial taken on November 4, 2009, the plaintiff stated that as a result of he accident he stayed home and was confined to his bed for a month and a half after the accident. In his Bill of Particulars he states he was confined to his house for a one month after his surgery.

Plaintiff contends that he sustained a serious injury as defined in Insurance law §5102(d) in that he sustained permanent loss of a body organ, member, function or system; permanent consequential limitation or use of a body organ or member; significant limitation of use of a body function or system; a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff from performing substantially all of the material acts which constitute his 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.

Dr. Fisher reviewed the MRI studies of the plaintiff's right knee and lumbar spine. In affirmed reports dated August 27, 2009 he states that he observed a bone contusion not related to the

accident of October, 2007. In addition, he states that no meniscal or ligament tear was seen. In his review of the lumbar spine dated September 14, 2009 he observed mild disc bulges compatible with degenerative changes at the L4-L5 and L5-S1 level. There were no herniations observed. There was no evidence of traumatic or causally related injury.

The plaintiff was examined by Dr. Gregory Montalbano, a board certified orthopedic surgeon, who was retained by the defendant. In his examination of December 4, 2009, Dr. Montalbano performed quantified and comparative range of motion tests. He found that the plaintiff had no limitations of range of motion in the lumbar/thoracic spine, right shoulder and left shoulder. He did find some limitation in range of motion of the left and right knees. Dr. Montalbano explained that the plaintiff suffers from a mal-alignment condition which, in conjunction with the plaintiff's extreme obesity, resulted in a degenerative condition of the knee. "This pre-existing condition is the likely cause of the claimants continued knee pain. Therefore it is my opinion that the claimant did not sustain any substantial injury to the right knee as a result of the accident." He also stated that the pain in his left knee was also associated with degenerative joint disease unrelated to the subject accident.

Defendants' counsel contends that the medical reports submitted are sufficient to establish, prima facie, that the defendant has not sustained a permanent loss of a body organ, member, function or system; that he has not sustained a permanent consequential limitation of a body organ or member or a significant limitation of use of a body function or system. Counsel also contends that the plaintiff has not sustained a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff, for not less than 90 days during the immediate one hundred days following the occurrence, from performing substantially all of his usual daily activities.

In opposition, the plaintiff submits his own affidavit dated January 6, 2011, in which he states that as a result of the accident he still has pain in his right and left knees, his back and his neck. In addition, the plaintiff submits the affirmed report of radiologist Dr. Audrey Eisenstadt showing no meniscal tears of the right knee. Her review of the Lumbar spine shows a central L4-5 disc herniation. In his affirmed report dated January 11, 2011, orthopedic surgeon, Dr. Robert Haar states that he examined the plaintiff on September 12, 2008 at which time plaintiff presented with bilateral knee pain. His review of the MRI showed a tear of the meniscus of the right knee. On March 5, 2009, Dr. Haar performed right

knee arthroscopic surgery. The plaintiff also submits the affirmed report of Dr. Mikelis who first examined the plaintiff on November 2, 2007. At that time using objective testing he found limitations in the plaintiff's range of motion of his cervical spine, lumbar spine, left knee and right knee. He re-evaluated the plaintiff on December 22, 2010 at which time using objective testing he found limitations in range of motion of the plaintiff's lumbar spine and right knee. He states that "the injuries represent a significant limitation in use of his lumbar spine and right knee and a permanent partial disability." He states that he attributes the plaintiff's decreased work performance and his need to work shorter days to the injuries he sustained in the motor vehicle accident of October 25, 2007.

Plaintiff's counsel contends that the defendants have failed to make a prima facie showing of entitlement to judgment as a matter of law. Counsel states that the report of Dr. Montalbano is not determinative as Dr. Montalbano reports positive findings with respect to limitation of motion in the plaintiff's knees.

On a motion for summary judgment, where the issue is whether the plaintiff has sustained a serious injury under the no-fault law, the defendant bears the initial burden of presenting competent evidence that there is no cause of action (Wadford v. Gruz, 35 AD3d 258 [1st Dept. 2006]). "[A] defendant can establish that a 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 [1st Dept. 2000]). Whether a plaintiff has sustained a serious injury is initially a question of law for the Court (Licari v Elliott, 57 NY2d 230 [1982]).

Initially it is defendant's obligation to demonstrate that the plaintiff has not sustained a "serious injury" by submitting affidavits or affirmations of its medical experts who have examined the litigant and have found no objective medical findings which support the plaintiff's claim (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]). Where defendants' motion for summary judgment properly raises an issue as to whether a serious injury has been sustained, it is incumbent upon the plaintiff to produce evidentiary proof in admissible form in support of his or her allegations. The burden, in other words, shifts to the plaintiff to come forward with

sufficient evidence to demonstrate the existence of an issue of fact as to whether he or she suffered a serious injury (see Gaddy v. Eyler, 79 NY2d 955 [1992]; Zuckerman v. City of New York, 49 NY2d 557 [1980]; Grossman v. Wright, 268 AD2d 79 [2d Dept 2000]).

Here, the proof submitted by the defendants, including the affirmed medical reports of Dr. Fisher and Dr. Montalbano was sufficient to meet its prima facie burden by demonstrating that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]). Although Dr. Montalbano did find limitations of range of motion in the plaintiff's knees, he fully explained that the limitations were not causally connected to the accident in question but rather, were caused by a degenerative condition (cf. Burns v. Stranger, 31 AD3d 360 [2d Dept. 2006]).

However, this Court finds that the plaintiff raised triable issues of fact by submitting the affirmed medical reports of Dr. Mikelis attesting to the fact that the plaintiff had significant limitations in range of motion of his right knee and lumbar spine both contemporaneous to the accident and in a recent examination, and concluding that the plaintiff's limitations were significant and permanent and resulted from trauma causally related to the accident (see Ortiz v. Zorbas, 62 AD3d 770 [2d Dept. 2009]; Azor v Torado, 59 ADd 367 [2d Dept. 2009]). As such, the plaintiff raised a triable issue of fact as to whether he sustained a serious injury under the permanent consequential and/or the significant limitation of use categories of Insurance Law § 5102(d) as a result of the subject accident (see Khavosov v Castillo, 2011 NY Slip Op 1442 [2d Dept. 2011]; Mahmood v Vicks, 2011 NY Slip Op 653 [2d Dept. 2011]; Compass v GAE Transp., Inc., 2010 NY Slip Op 9881 [2d Dept. 2010]; Evans v Pitt, 77 AD3d 611 [2d Dept. 2010]; Tai Ho Kang v Young Sun Cho, 74 AD3d 1328 743 [2d Dept. 2010]).

Although Dr. Mantalbano and defendant's radiologist, Dr. Fisher opined that the plaintiff's knee and back injuries were caused by degeneration, the Appellate Division, Second Department has recently held that even if the plaintiff's doctor does not specifically address the findings in the reports submitted by the defendants that the abnormalities in the tested areas were degenerative, rather than traumatic, the findings of the plaintiff's doctor that plaintiff's injuries were indeed traumatic and were causally related to

the collision is sufficient as it implicitly addressed the defendants' contentions that the injuries were degenerative (see Fraser-Baptiste v New York City Transit Authority, 2011 N.Y. Slip Op 1429 [2d Dept. 2011]; Harris v Boudart, 70 AD3d 643 [2d Dept. 2010]).

Accordingly, for the reasons set forth above, it is hereby,

ORDERED, that the motion of the defendants for an order granting summary judgment dismissing plaintiff's complaint is denied.

Dated: April 8, 2011  
Long Island City, N.Y.

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**ROBERT J. MCDONALD**  
**J.S.C.**