Progressive Specialty Ins. Co. v Lubeck
2011 NY Slip Op 34062(U)
December 19, 2011
Sup Ct, Queens County
Docket Number: 29050/10
Judge: Jaime Antonio Rios

DS 12/19/11 MB

ORIGINAL

MDEC

MEMORANDUM

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JAIME A. RIOS IA PART 8
Justice

X

PROGRESSIVE SPECIALTY INSURANCE COMPANY,

Petitioner,

- against -

RONI LUBECK,

Respondent.

X

Index Number: 29050/10

Petitioner commenced this CPLR Article 75 proceeding to permanently stay uninsured motorist arbitration upon a claim that the Respondent's injuries did not arise from physical contact with a hit-and-run motor vehicle and or that the Respondent failed to report the accident to the police , a judicial or peace officer or the commissioner of the Department of Motor Vehicles.

Pursuant to an order of this court (Rios, J.) dated March 30, 2011, the arbitration was temporarily stayed pending a framed issue hearing on the contact and reporting issues raised. The controversy proceeded to trial on September 20, 2011, at which time the Respondent testified as to basis of his claim for uninsured benefits. According to the Respondent, on the early morning of August 24, 2010 he was riding his bicycle in Cunningham Park (Queens County) when while traversing the parking lot (adjacent to Union Turnpike), an automobile accelerated from a parking spot causing the Respondent to abruptly apply his bicycle brakes. The Respondent testified that the sudden stop propelled him onto and eventually off the hood of the departing vehicle.

Respondent maintains that while he lay on the ground the adverse driver alighted from his car momentarily and then returned to his vehicle and drove off. The Respondent did not obtain the automobile or adverse driver information, nor did he use his cell phone to call the police or seek emergency assistance. The Respondent's excuse was that he was experiencing severe pain to his left arm. The Respondent related that he left his bicycle in the park and walked to his home a few blocks away. Upon arriving at his residence, he telephoned his brother-in law, Michael Warshaw, who drove him to Long Island Jewish Hospital for emergency medical attention.

At the hospital Respondent was diagnosed to have suffered a "traverse fracture through the radial neck". The hospital records reflect the following statement: "he flew off bike and landed on parked car". The records also indicate that he told the hospital staff that he was "riding mountain bike at less than 20 mph (and) stopped quickly to avoid car." Respondent claimed that while at the hospital he approached an unidentified male attired in an EMS uniform. Respondent maintains that he told the EMS officer that he was injured in an accident with an automobile which left the scene of the accident.

Michael Warshaw testified that he drove the Respondent to the hospital and waited while Respondent received emergency treatment. He corroborated Respondent's claim of a conversation with an EMS worker.

The Petitioner presented evidence that Respondent never reported the incident to the Police Department, or the Department of Motor Vehicles.

Findings and Conclusions of Law

It is well settled that the Respondent bears the burden of demonstrating that his injuries arise from physical contact with an unidentified motor vehicle (Matter of Nova Cas. Co. v. Musco 48 AD 3d 572; Matter of Newark Ins. Co. v. Caruso, 14 AD 3d 613).

Whether the Respondent met his burden begins with an analysis of the probability or improbability of the Respondent's tale. Pursuant to Vehicle and Traffic Law § 600.2(a) a driver has a duty to remain at the scene of an accident and identify themselves before leaving. One leaving the scene of an accident where injuries are sustained, constitutes the commission of a Class A misdemeanor, yet; the Respondent contends that the adverse driver exited his vehicle, but did not offer to render any assistance. The Respondent also claims that on this bright clear morning he was unable to discern the license plate of the fleeing vehicle or obtain the identity of the driver. The Respondent also maintains that he chose to walk home with an injured arm, rather than telephone 911 for medical or police assistance.

The un-controverted testimony of the Respondent and his comments to hospital personnel contained in the records of Long Island Jewish hospital, establish his claim that he was injured following contact with an unidentified motor vehicle. Despite the unlikely circumstances of the described event and without attributing any negligence to the motor vehicle operator, the court cannot rule out that the accident occurred.

Assuming contact occurred as the Respondent claims, an issue remains as to whether the hit-and-run accident was properly reported to the authorities as required by the insurance policy endorsement for uninsured benefits. The SUM endorsement mandated by Insurance regulations 11NYCRR §60-2.3 (f)(c)(i) provides as a condition precedent to coverage that:

> "the insured or someone on the insured's behalf shall have reported the accident within 24 hours or as soon as reasonably possible to a police, peace or judicial officer or to the Commissioner of Motor Vehicles...."

The Respondent avers that he complied with this condition when he told an EMS attired person at the hospital about the hit-and-run accident. Petitioner contends that such a conversation, if credited, does not constitute compliance with the policy provision. Petitioner argues that an EMS technician is not a peace or judicial officer. The Respondent maintains that an EMS technician is a uniform member of the New York City Fire Department (FDNY) and by definition such members are peace officers. The Petitioner replies that the definition of "uniform member" is applicable only to firefighters.

The Criminal Procedure Law (CPL) § 2.10 (28) provides: "all officers and members of the uniformed force of the New York City fire department..." shall have the powers and shall be peace officers. The New York City Administrative Code §15-116 mandates that all officers and members of the uniform force of the FDNY shall have the powers and perform the duties of peace officers.

The New York City charter (§15-101(2)(b))grants the Fire Commissioner the authority to organize bureaus within the department. On March 17, 1996, the New York City Emergency Medical Services, formerly a part of the New York City Health and Hospitals Corporation, was merged with the FDNY and became the bureau of EMS.

A review of the CPL identifies more than seventy five categories of peace officers throughout the State of New York. Included as peace officers are: (8) inspectors and officers of the New York City department of health when acting pursuant to their special duties; (13) persons designated as special policemen by the director of a hospital; (16) employees of the department of health designated pursuant to their duties regarding controlled substances (Public Health Law §3385). Recognizing the important public service, ambulance attendants and medical technicians render, it would be logical to assume that the legislature is

aware of their existence, and the failure to specifically exclude them from the "peace officer" definition for members of the Fire Department as contained in the CPL and Administrative Code was intentional. Therefore, it is the opinion of this court that uniform members of the FDNY-EMS Command are peace officers.

Judgment

As unlikely as the Respondent's explanation of how he sustained his injuries may be, the Respondent's claim is uncontroverted. Accordingly, the Respondent is entitled to proceed to arbitration of his uninsured motorist claim upon completion of the pre arbitration discovery demanded in the petition.

Settle judgment.

Dated: December 19, 2011
Index No.: 29051/11

J.S.C.

QUEENS COUNTY CLERK
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