

Madubugwu v Bona Taxi, Inc.

2013 NY Slip Op 33952(U)

August 1, 2013

Supreme Court, Bronx County

Docket Number: 309409/10

Judge: Ben R. Barbato

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX**

Present: Honorable Ben R. Barbato

IFEANYI MADUBUGWU,

Plaintiff,

-against-

BONAO TAXI, INC. and MAMADOU ABOUDIOP,

Defendants.

DECISION/ORDER

Index No.: 309409/10

The following papers numbered 1 to 7 read on this motion for summary judgment noticed on June 12, 2012 and duly transferred on July 8, 2013.

<u>Papers Submitted</u>	<u>Numbered</u>
Notice of Motion, Affirmation & Exhibits	1, 2, 3
Memorandum of Law	4
Affirmation in Opposition & Exhibits	5, 6
Reply Affirmation	7

Upon the foregoing papers, and after reassignment of this matter from Justice Allison Y. Tuitt on July 8, 2013, Defendants, Bonao Taxi, Inc. and Mamadou Aboudiop, seek an Order granting summary judgment and dismissing Plaintiff's Complaint for failure to satisfy the serious injury threshold under Insurance Law §5102(d).

This is an action to recover for personal injuries allegedly sustained as a result of a motor vehicle accident which occurred on April 28, 2010, at or near the intersection of Rogers Avenue and Church Avenue, in the County of Kings, City and State of New York.

Defendants offer the report of Dr. David A. Fisher, a radiologist appointed by Defendants to review the MRIs of Plaintiff's left knee and left shoulder. Dr. Fisher's review of Plaintiff's left knee MRI, performed nine days following the accident, reveals a small popliteal fossa cyst, otherwise a normal examination with no meniscal or ligament tear. Dr. Fisher's review of

Plaintiff's left shoulder MRI, performed two weeks following the accident, reveals degenerative changes at the acromioclavicular joint which he opines reflect a chronic preexisting condition. Dr. Fisher states that the supraspinatus tendinosis found in Plaintiff's rotator cuff is compatible with the amount of degenerative change present. Dr. Fisher determines that there is no radiographic evidence of traumatic or causally related injury to Plaintiff's left knee or left shoulder.

On February 21, 2012, the Plaintiff appeared for an orthopedic examination conducted by Defendants' appointed physician Dr. Edward M. Decter. Upon examination and review of Plaintiff's medical records, which included Plaintiff's MRI films and intraoperative photographs, Dr. Decter determined that Plaintiff did not sustain a permanent orthopedic injury to the left shoulder or left knee. Dr. Decter notes that Plaintiff's left shoulder and left knee exhibited well-healed arthroscopic incisional sites with no identifiable acute pathology. Dr. Decter states that no mechanism of injury in the subject accident would have caused a torn meniscus or torn anterior cruciate ligament and that Plaintiff's surgery to these body parts were elective and not causally related to the accident of April 28, 2010. With respect to Plaintiff's lumbar spine, Dr. Decter finds full ranges of motion and further opines that Plaintiff did not sustain a permanent orthopedic injury to the lumbar spine. Dr. Decter notes that Plaintiff has reached maximum medical improvement and that he is able to participate fully in activities of daily living and work without restrictions.

Defendants also offer the report of Dr. Fernando Jara, who reviewed Plaintiff's Bill of Particulars, Police Accident Report and Emergency Room records. Dr. Jara notes that there is no indication that Plaintiff sustained any significant injury as a result of the accident in question other than muscle spasm.

Plaintiff offers the Affirmation of Dr. Jean Claude Compas, who states that he initially examined the Plaintiff on May 5, 2010. Upon examination, Dr. Compas found range of motion limitations in Plaintiff's left shoulder and left knee. Dr. Compas determined that Plaintiff suffered from left shoulder derangement and left knee derangement as a result of the accident of April 28, 2010 and referred him to undergo MRIs. Dr. Compas reviewed Plaintiff's MRIs, agreed with the findings of the radiologist and opined that Plaintiff's injuries were of a traumatic nature. On May 25, 2010, Dr. Bhansali performed surgery on Plaintiff's left knee and noticed a partial tear of the lateral meniscus, a partial tear of the anterior cruciate ligament, chondral injury to the lateral tibial condyle and synovitis. On September 14, 2010, Dr. Bhansali performed surgery on Plaintiff's left shoulder and noticed chondral injury to the glenoid cavity, partial tear of the glenoid labrum, partial tear of the rotator cuff, synovitis and impingement syndrome. On June 21, 2012, Dr. Compas re-examined Plaintiff and found continuing range of motion limitations in his left knee and left shoulder. Dr. Compas opines that Plaintiff's injuries to his left knee and left shoulder are permanent, not related to any pre-existing conditions and causally related to the accident of April 28, 2010.

Plaintiff also offers the Affirmations of Dr. Harold S. Parnes, a radiologist, who performed the MRIs of Plaintiff's left knee and left shoulder. The left knee MRI performed on May 7, 2010 revealed a tear through the posterior horn of the medial meniscus and the left shoulder MRI performed on May 14, 2010 revealed a partial tear of the subscapularis tendon, a partial tear of the mid and anterior glenoid labrum, impingement and a partial tear of the supraspinatus tendon.

Under the "no fault" law, in order to maintain an action for personal injury, a plaintiff must establish that a "serious injury" has been sustained. *Licari v. Elliot*, 57 N.Y.2d 230 (1982).

The proponent of a motion for summary judgment must tender sufficient evidence to the absence of any material issue of fact and the right to judgment as a matter of law. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 (1986); *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 (1985). In the present action, the burden rests on defendant to establish, by submission of evidentiary proof in admissible form, that plaintiff has not suffered a "serious injury." *Lowe v. Bennett*, 122 A.D.2d 728 (1st Dept. 1986) *aff'd* 69 N.Y.2d 701 (1986). Where a defendant's motion is sufficient to raise the issue of whether a "serious injury" has been sustained, the burden then shifts and it is incumbent upon the plaintiff to produce *prima facie* evidence in admissible form to support the claim of serious injury. *Licari*, *supra*; *Lopez v. Senatore*, 65 N.Y.2d 1017 (1985). Further, it is the presentation of objective proof of the nature and degree of a Plaintiff's injury which is required to satisfy the statutory threshold for "serious injury". Therefore, disc bulges and herniated disc alone do not automatically fulfil the requirements of Insurance Law §5102(d). See: *Cortez v. Manhattan Bible Church*, 14 A.D.3d 466 (1st Dept. 2004). Plaintiff must still establish evidence of the extent of his purported physical limitations and its duration. *Arjona v. Calcano*, 7 A.D.3d 279 (1st Dept. 2004).

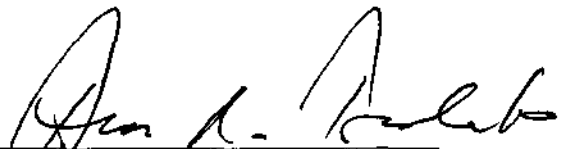
In the instant case Plaintiff has demonstrated by admissible evidence an objective and quantitative evaluation that he has suffered significant limitations to the normal function, purpose and use of a body organ, member, function or system sufficient to raise a material issue of fact for determination by a jury. Further, he has demonstrated by admissible evidence the extent and duration of his physical limitations sufficient to allow this action to be presented to a trier of facts. The role of the court is to determine whether bona fide issues of fact exist, and not to resolve issues of credibility. *Knepka v. Tallman*, 278 A.D.2d 811 (4th Dept. 2000). The moving party must tender evidence sufficient to establish as a matter of law that there exist no triable

issues of fact to present to a jury. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 (1986). Based upon the exhibits and deposition testimony submitted, the Court finds that Defendants have not met that burden. However, based upon the medical evidence and testimony submitted, Plaintiff has not established that he has been unable to perform substantially all of his normal activities for 90 days within the first 180 days immediately following the accident and as such is precluded from raising the 90/180 day threshold provision of the Insurance Law.

Therefore it is

ORDERED, that Defendants, Bonaio Taxi, Inc. and Mamadou Aboudiop's motion for an Order granting summary judgment and dismissing Plaintiff's Complaint for failure to satisfy the serious injury threshold pursuant to Insurance Law §5102(d) is **granted** to the extent that Plaintiff is precluded from raising the 90 /180 day threshold provision of the Insurance Law.

Dated: August 1, 2013



Hon. Ben R. Barbato, A.J.S.C.