

Vattel v Knipel

2019 NY Slip Op 34200(U)

February 15, 2019

Supreme Court, Queens County

Docket Number: 701205/2017

Judge: Leslie J. Purificacion

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2/15/19
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

Part 39

-----X
YURY VATTEL,

Index Number 701205/2017

Plaintiff,

DECISION/ORDER

--against--

Motion Sequence: 3

LORI F. KNIPEL and LAWRENCE S.
KNIPEL,

Defendants.

-----X

The following papers numbered 1 to 9 read on defendants' motion pursuant to CPLR §3212 dismissing the complaint of the plaintiff on the grounds that plaintiff's alleged injuries fail to meet the serious injury threshold requirement of Insurance Law §5102(d).

	<u>PAPERS NUMBERED</u>
N.M., Aff., Exhibits and Service.....	1-4
Opp. Aff., Exhibits and Service.....	5-7
Reply and Service.....	8-9

FILED
MAR 06 2019
COUNTY CLERK QUEENS COUNTY

Upon the foregoing papers, the motion is decided as follows:

Plaintiff commenced this action to recover damages for injuries allegedly sustained on August 20, 2014, as a result of a motor vehicle accident that occurred on the entrance ramp of the westbound Brooklyn Queens Expressway at Congress Street, County of Kings, New York. In his verified bill of particulars, plaintiff alleges injuries to his cervical spine, lumbar spine and a laceration to his mouth. Plaintiff asserts that as a result of the accident he suffered: "a permanent loss of use of a body organ, member, function or system"; "a permanent consequential limitation of use of a body organ or member"; "a significant

limitation of use of a body function or system"; "significant disfigurement"; and "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 90 days during the 180 days immediately following the occurrence of the injury or impairment" (Insurance Law §5102[d]). Defendants assert that plaintiff's alleged injuries do not meet the threshold requirement of Insurance Law §5102(d), and therefore summary judgment dismissing plaintiff's complaint is warranted.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact, (see CPLR §3212[b]; Alvarez v Prospect Hosp., 68 N.Y.2d 320; Winegrad v New York Univ. Med. Ctr., 64 N.Y.2d 851; Zuckerman v City of New York, 49 N.Y.2d 557). The question of whether plaintiff sustained a "serious injury" as defined by Insurance Law §5102(d) is one of law that can be disposed of by summary judgment and defendant in seeking same has the burden to show that plaintiff's injuries do not rise to the level of those set forth in the statute (see Gaddy v Eyler, 79 N.Y.2d 955; Licari v Elliot, 57 N.Y.2d 230). This may be accomplished through submission of plaintiff's deposition testimony and/or affidavits, affirmations or sworn reports of medical experts who examine the plaintiff and conclude that no objective medical findings support the plaintiff's claim (see Grossman v Wright, 268 A.D.2d 79; Toure v Avis Rent A Car Sys., 98 N.Y.2d 345).

In support of their application, defendants submit the properly affirmed report of orthopedist Howard V. Katz, M.D. FACS, FAAOS, plaintiff's verified bill of particulars and plaintiff's examination before trial testimony.

On March 15, 2018, Dr. Howard V. Katz performed an orthopedic examination of the plaintiff. In his report, Dr. Katz indicates the medical records he reviewed and the means by which certain tests were performed including objective quantified range of motion testing by use of a goniometer. Dr. Katz found that range of motion of the cervical spine and lumbar spine were all within normal ranges. All other objective testing was negative. Dr. Katz opined that plaintiff's cervical spine sprain and lumbar spine sprain were resolved. He further stated that there was no objective evidence of disability.

The court finds that the defendants have met their prima facie burden with respect to whether plaintiff has sustained "a permanent loss of use of a body organ, member, function or system"; "a permanent consequential limitation of use of a body organ or member"; "a significant limitation of use of a body function or system"; and "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 90 days during the 180 days immediately following the occurrence of the injury or impairment" (Insurance Law §5102[d]). The court notes, however, that the defendants did not proffer any evidence with respect as to whether the scarring on the plaintiff's lip constituted a "significant disfigurement". Plaintiff testified that he found the scarring to be unattractive and caused him to feel uncomfortable when he spoke to people. Plaintiff has also grown facial hair to cover up the scar. In any event, the burden shifts to the plaintiff to raise a triable issue of fact as to whether he has suffered a "serious injury" in the remaining categories as defined by Insurance Law 5102(d).

In opposition to the motion, plaintiff has submitted an initial examination report from plaintiff's chiropractor Edwin Kasten D.C.; MRI reports of the cervical spine and lumbar spine from plaintiff's radiologist Michael Shapiro, M.D.; an initial evaluation report from Robert Klass, D.C. of New Beginnings Chiropractic, P.C.; an EMG/ NCV report from Robert Klass, D.C. of New Beginnings P.C.; a consultation report and procedure report from plaintiff's treating orthopedist Joshua B. Reimer, M.D. of Kings Highway Orthopedic Associates, P.C.; an affirmed final narrative report from plaintiff's treating orthopedist Joshua Reimer, M.D.; a re-evaluation report from Lorimer Acupuncture, P.C.; an initial comprehensive evaluation report from Noel Blackman of Blackman Medical, P.C.; an initial report from Gamil Kostandy, M.D. of Reliable Medical P.C.. The court notes that all the reports mentioned above, except the affirmed report of Joshua Reimer, M.D., were reviewed by the defendants' orthopedist Dr. Howard Katz and as such, the plaintiff may rely upon them in his opposition papers (see Raso v Statewide Auto Auction, 262 AD2d 387).

The court finds that the reports of plaintiff's treating doctors, chiropractor and radiologist are sufficient to raise a triable issue of fact with respect to whether plaintiff has sustained a permanent loss of use of a body organ, member, function or system, a permanent consequential limitation of use of a body organ or member and a significant limitation of use of a body function or system to her cervical and lumbar spine. However, the court further finds that plaintiff has failed to raise a triable issue of fact with respect to whether he suffered "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

90 days during the 180 days immediately following the occurrence of the injury or impairment”.

Accordingly, defendants’ motion is granted to the extent that the portion of plaintiff’s complaint asserting “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 90 days during the 180 days immediately following the occurrence of the injury or impairment” is dismissed.

This is the decision and order of the court.

Date: **FEB 15 2019**



Hon. Leslie J. Purificacion, J.S.C.

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QUEENS COUNTY