

Lapsker v Rose

2021 NY Slip Op 30301(U)

January 29, 2021

Supreme Court, Kings County

Docket Number: 516173/2017

Judge: Edgar G. Walker

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: IAS PART 90

PRESENT: HON. EDGAR G. WALKER, J.S.C.

-----X
KEVIN LAPSKER,

Plaintiff,

-against-

IVERAM AISHA ROSE, BROMLEY A. SYNMOIE
and ALEXANDER VARSHAVKSY,

Defendants.
-----X

Decision and Order

Index No. 516173/2017

Defendants’ motions for summary judgment, seeking dismissal of the plaintiff’s action based upon their contention that plaintiff fails to satisfy the threshold for serious injury pursuant to the Insurance Law, are granted to the extent that the plaintiff’s claims of fracture, significant disfigurement, permanent and total loss of use of a body organ, member, function or system and a medically determined injury or impairment of a non-permanent nature which prevented him from performing substantially all of the material acts which constitute his usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment are dismissed. The remainder of the motions are denied.

In support of the motions the defendants offer the affirmed reports of an orthopedist, Dr. Rafael A. Lopez Steuart; a radiologist, Dr. Audrey Eisenstadt; and an otolaryngologist, Dr. Daniel Arick. In his report from his physical examination of the plaintiff, Dr. Steuart noted that, upon conducting range of motion tests, he found reductions in right and left cervical rotation, cervical extension, and right lateral flexion when compared to normal. Dr. Steuart concluded that the plaintiff sustained cervical, thoracic and lumbar strains, all of which are resolved and concluded that the plaintiff had a normal orthopedic exam. He offers no other comment or

opinion regarding the plaintiff's loss of range of motion in his cervical spine or how someone with the deficits identified could still have a "normal" examination, and he offers no opinion regarding causation.

In her review of the plaintiff's MRIs, Dr. Eisenstadt reports that the plaintiff has cervical disc bulges at the C3/4 and C4/5 levels, as well as lumbar disc bulges at the L2/3, L3/4 and L4/5 levels. Remarkably, despite the fact that the plaintiff was only seventeen years old when the MRIs were conducted, Dr. Eisenstadt attributes her findings to degeneration and arthritis, and offers no comment about the plaintiff's young age and/or how such unusual degenerative changes can be present in someone so young. The Court also notes that Dr. Eisenstadt's report is silent regarding plaintiff's claims of cervical disc bulges at the C5/6 and C6/7 levels and of a lumbar bulge at the L1/2 level. Dr. Eisenstadt's review of the MRI of the facial bones found no evidence of a nasal fracture.

Dr. Daniel Arick, the otolaryngologist who examined the plaintiff with regard to his claim of a nasal fracture, found that the plaintiff had a "[n]ormal ear, nose and throat examination."

Based upon the foregoing, the Court finds that the defendants have failed to establish *prima facie* entitlement to judgment as to whether the plaintiff sustained a permanent consequential limitation of use of a body organ or member or a significant limitation of use of a body function or system. In the absence of a *prima facie* showing by the defendants, the motions must be denied regardless of the sufficiency of the opposition. Alvarez v. Prospect Hospital, 68 NY2d 320. Even if the defendants had made a *prima facie* showing, plaintiff's papers in opposition are sufficient to raise an issue of fact as to these categories.

With regard to the branch of the defendants' motions addressing plaintiff's claim that he

satisfies the 90/180 category, the defendants point to portions of the plaintiff's deposition transcript wherein he testified that he missed no time from school and was not confined to his bed or home for any period of time following the accident. The defendants have submitted sufficient evidence to shift the burden of proof to the plaintiff with regard to the 90/180 category. In opposition to this branch of the defendants' motions, the plaintiff fails to submit any evidence that would show that a question of fact exists as to whether the he can satisfy the 90/180 category. As such, the defendants' motions are granted as to 90/180 category.

Although the plaintiff's bill of particulars specifies that he is making claims under the significant limitation, permanent consequential limitation, and 90/180 categories of the Insurance Law, his opposition to the motions alleges that he satisfies the fracture, significant disfigurement, permanent loss, significant limitation, and permanent consequential limitation categories. However, there is no proof offered by the plaintiff that he satisfies the fracture, significant disfigurement, or permanent loss categories. Both the plaintiff's and the defendants' radiologists found no evidence of nasal fracture, and there is no evidence that the plaintiff satisfies either the significant disfigurement or permanent loss categories.

As such, the defendants' motions for summary judgment are granted to the extent that the plaintiffs' claims of fracture, significant disfigurement, permanent and total loss of use of a body organ, member, function or system and a medically determined injury or impairment of a non-permanent nature which prevented him from performing substantially all of the material acts which constitute his usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment are dismissed. The remainder of the motions, seeking dismissal of plaintiff's claims that he sustained a permanent

consequential limitation of use of a body organ or member, or a significant limitation of use of a body function or system are denied.

This constitutes the decision and order of the court.

ENTER,



J. S. C.

MS # 001, 003

Dated: January 29, 2021