

Harris v Saenz

2020 NY Slip Op 34372(U)

December 9, 2020

Supreme Court, Kings County

Docket Number: 512266/2018

Judge: Lara J. Genovesi

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 34 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 9th day of December 2020.

P R E S E N T:

HON. LARA J. GENOVESI,
J.S.C.

-----X
NICOLE HARRIS

Index No.: 512266/2018

Plaintiff,

DECISION & ORDER

-against-

CHRISTIAN J. SAENZ and J.B. COMMERCIAL
CORP.,

Defendants.

-----X

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

	<u>NYSCEF Doc. No.:</u>
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed _____	13-23
Opposing Affidavits (Affirmations) _____	24-30
Reply Affidavits (Affirmations) _____	33-35

Defendants move (sequence number one) for summary judgment on the grounds that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d). Plaintiff commenced this action for personal injuries as the result of a motor vehicle accident on October 25, 2017. In the bill of particulars, plaintiff alleged injuries

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to her lumbar spine, cervical spine and right shoulder (*see* NYSCEF Doc. # 16 at ¶ 5).

Plaintiff further alleges that the injuries sustained meet the following categories of Insurance Law § 5102: (1) permanent consequential limitation, (2) a significant limitation, and (3) a non-permanent medically determined injury which prevented him from his usual and customary activities for 90 out of the first 180 days following the accident (*see id.* at ¶ 18).

Defendants failed to meet their burden and establish that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d). Defendant provided the sworn medical report of Dr. Dana A. Mannor, M.D., who examined plaintiff on May 22, 2019 and found, after measurement with a goniometer, that plaintiff's range of motion is normal in her cervical spine, lumbar spine and right shoulder (*see* NYSCEF Doc. # 21). The doctor opined that there is a causal relationship between the accident and plaintiff's injuries but found that the sprain/strain to cervical spine, lumbar spine and right shoulder are resolved (*id.*). Defendant further provided the sworn medical report of Dr. Jean-Robert Desrouleaux, M.D., who examined plaintiff on May 16, 2019 and similarly found, after measurement with a goniometer, that plaintiff's range of motion is normal in her cervical spine and lumbar spine (*see* NYSCEF Doc. # 23). Dr. Desrouleaux also opined that there is a causal relationship between the accident and plaintiff's injuries but found that the cervical and lumbar spine myofascitis is resolved (*id.*). Defendant further provided the sworn medical report of Dr. Melissa Sapan Cohn, M.D., who reviewed plaintiff's MRIs and opined that plaintiff's cervical and lumbosacral spine are normal and there is minimal degeneration in plaintiff's right shoulder (*see* NYSCEF Doc. # 22).

However, "[t]he papers submitted by the defendant failed to eliminate triable issues of fact regarding the plaintiff's claim, set forth in the bill of particulars, that he sustained a serious injury under the 90/180-day category of Insurance Law § 5102(d)" (*Reid v. Edwards- Grant*, 186 A.D.3d 1741, 129 N.Y.S.3d 798 [2 Dept., 2020]; *see also Hall v. Stargot*, 187 A.D.3d 996, 131 N.Y.S.3d 250 [2 Dept., 2020]).

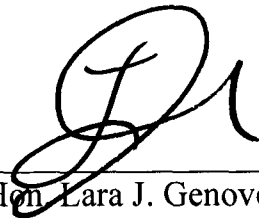
"While the defendant relied upon the transcript of the plaintiff's deposition testimony to establish her prima facie entitlement to judgment as a matter of law with respect to the 90/180-day category, this evidence failed to identify the plaintiff's usual and customary daily activities during the specific relevant time frame, and did not compare the plaintiff's pre-accident and post-accident activities during that relevant time frame" (*id.*). At her deposition, when asked "are there any activities that you were able to do before the accident that you can now do with some level of difficulty or you're now limited in doing?" plaintiff responded "lifting, bending, daily routines like comb her hair, brushing her teeth. It hurts when I put too much pressure on my right arm" (*see* NYSCEF Doc. # 17 at 92). When asked if she is "allowed to lift or to bend, or are you limited in how you could do that?" plaintiff testified "At the time of the accident I couldn't do anything. Then when it was time for me to go back to work it was up to I believe 10 to 20 pounds...maximum" (*id.* at 91).

As defendants did not meet their burden, this Court need not examine the sufficiency of plaintiff's opposition papers. However, even assuming, arguendo, that defendants met their burden, plaintiff provided credible medical evidence sufficient to raise a triable issue of fact on the significant limitation and permanent consequential

limitation categories of Insurance Law 5102(d). The affidavit of Dr. Robert C. Reiss, D.C., shows range of motion loss up to 33% at the most recent examination on January 7, 2020, in plaintiff's lumbar spine and causally relates plaintiff's injuries to this accident (*see* NYSCEF Doc. # 26).

Accordingly, defendants' motion for summary judgment (sequence number one) pursuant to Insurance Law § 5102(d) is denied.

ENTER:



Hon. Lara J. Genovesi
J.S.C.

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