

Sam v Arkadiusz

2021 NY Slip Op 32178(U)

October 25, 2021

Supreme Court, Kings County

Docket Number: Index No. 509048/2019

Judge: Ingrid Joseph

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At an I.A.S Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 25th day of October 2021.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS
P R E S E N T: HON. INGRID JOSEPH, J.S.C

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CHRISTINE SAM,

Mot. Seq. 1, 3
Index No.: 509048/2019

Plaintiffs,

-against-

DECISION/ORDER

GARNCARZ ARKADIUSZ, DEZAMAT AZER and
ZAFAR IQBAL,

Defendants.

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Recitation, as required by CPLR §2219(a), of the papers considered in the review of Plaintiffs' Motion:

| <u>Papers</u> | <u>NYSCEF Nos.</u> |
|---|---------------------------|
| Notice of Motion/Affirmation/Affidavits/Exhibits..... | 37 - 44; 26 - 29; 47 - 61 |
| Opposition/Affirmation/Exhibits Annexed..... | 64 - 72; 73 - 81 |
| Reply | 84; 86 |

In this action to recover damages for personal injuries allegedly sustained as a result of motor vehicle accident, defendants, Dezamat Azer and Zafar Iqbal (“defendants Azer and Iqbal”), move for summary judgment pursuant to CPLR § 3212 (Motion Seq. 1), dismissing the complaint of plaintiff, Christine Sam (“plaintiff”), based upon their contention that plaintiff’s alleged injuries do not satisfy the “serious injury” threshold requirement outlined in Section 5102 (d) of the Insurance Law. Defendant, Arkadiusz Garncarz (“defendant Garncarz”), moves by notice of motion (Motion Seq. 3) for the same relief.

In the verified bill of particulars, plaintiff alleged that she sustained multiple injuries from the motor vehicle accident that occurred on August 8, 2018 on Atlantic Avenue at or near

the intersection of Hoyt Street, Brooklyn, New York. Specifically, plaintiff claimed to have sustained injuries to her neck, upper and lower back, all of which meet the “serious injury” threshold requirements outlined in Section 5102(d) of the New York Insurance Law under the permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or 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 ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment categories.

Upon review, the court finds that the defendants, in their respective motions, met their prima facie burden of establishing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2d 2002]). Defendants Azer and Iqbal submitted the reports of radiologist, Jessica F. Berkowitz, M.D., and orthopedist, Dana A. Mannor, both of whom opined that plaintiff’s condition is not causally related to the accident. Dr. Berkowitz, in her report dated October 16, 2019, opined that plaintiff’s disc bulges were chronic and degenerative in origin and there was no evidence of acute traumatic injury of plaintiff’s disc spaces, spinal cord contusion or epidural hematoma. Dr. Berkowitz also concluded that plaintiff’s MRI examination revealed no causal relationship to the alleged accident. Dr. Mannor, in the report dated September 30, 2020, opined that his examination of plaintiff revealed no evidence of orthopedic disability, permanency or residuals.

Defendant Garcarnz submitted plaintiff’s emergency room records to show that plaintiff had normal ranges of motion in her cervical and lumbar spine and that there were no injuries to her neck or back immediately following the accident. Defendant Garcarnz corroborated plaintiff’s medical records with testimony adduced at an examination before trial, during which

plaintiff recalled having no complaints of pain or injury at the scene of the accident and confirmed waiting nearly two weeks before seeking treatment. Defendant Garcarnz also points out that plaintiff, during her deposition, admitted that she was not prevented from performing substantially all of her customary daily activities for at least 90 days of the 180 days immediately following the accident. In fact, plaintiff testified that she missed only a week-and-a-half from work. Plaintiff further testified that she could bend over, lift items, do laundry, clean, exercise and essentially, that there were no activities that she was prohibited from doing the first 90 of the first 180 days following the accident.

Additionally, defendant Garcarnz established that plaintiff never underwent acupuncture or chiropractic treatment, received no injections in her neck or back, was never recommended for surgery, and ceased physical therapy after six months of treatment. In support of this assertion, defendant Garcarnz produced the reports of plaintiff's primary care physician, Filomena Lombardi, M.D., plaintiff's physiatric examiner, Nicolas El-Khoury, M.D. of DHD Medical, P.C., plaintiff's radiologist, Alan Greenfield, M.D., and orthopedist, Dorothy Scarpinato, M.D.) Dr. Lombardi noted that plaintiff had minimal apparent scoliosis but opined her condition was not caused by the accident. Dr. El-Khoury reported that plaintiff had normal ranges of motion in her cervical and lumbar spine with slight 11 - 12% limitations in flexion, rotation and lateral bending. However, Dr. El-Khoury also indicated that the condition was not causally related to the accident. The radiologist, Dr. Greenfield, reported that plaintiff suffered from significant and long-standing degeneration in her cervical spine and found trauma related changes in that region. Moreover, the orthopedist, Dorothy Scarpinato, M.D., who diagnosed plaintiff with resolved cervical and lumbar strains, concluded that plaintiff had no permanent disability or residuals from the accident.

In opposition, plaintiff provided the reports of radiologist, Robert Diamond, M.D., physical therapist, Yolande Bernard, M.D., and orthopedic surgeon, Marc M. Silverman, M.D. Dr. Diamond reported that the plaintiff had bulging discs at L2/3, L3/4, L4/5 and L5-S1, as well

as scoliotic thoracic curvature, with no opinion as to the cause of plaintiff's condition. However, in January 2021, Dr. Bernard diagnosed plaintiff with post-accident cervical disc displacement, radiculopathy, and limited range of motion of the lumbar spine and pelvis. Dr. Bernard also opined that plaintiff had no pre-existing conditions. Dr. Bernard also indicated that plaintiff's injuries were permanent. The orthopedic surgeon, Dr. Silverman, reported that the plaintiff had resolving lumbar spine sprains and strains with mild orthopedic disability. Dr. Silverman indicated that plaintiff had no pre-existing conditions but opined that her current injuries were causally related to the accident. Dr. Silverman and Dr. Bernard also opined that plaintiff's injuries were not an aggravation or exacerbation of a pre-existing condition.

Upon review of the parties' respective experts opinions, the court finds that plaintiff failed to proffer competent medical evidence to rebut the defendants' experts opinions regarding her claims that arise under the 90/180 statutory category outlined in Insurance Law 5102(d). However, plaintiff's experts raised issues of fact concerning causality and whether plaintiff's sustained injuries under the permanent loss, permanent consequential limitation, and significant limitation categories.

Accordingly, it is hereby

ORDERED, that summary judgment is granted in favor of defendants Dezamat Azer and Dezamat Azer (Motion Seq. 1) and Garnearz Arkadiusz (Motion Seq. 3) solely to the extent that plaintiff's claim arising under the 90/180 statutory category is dismissed.

This constitutes the decision and order of the court.



HON. INGRID JOSEPH, J.S.C.

**Hon. Ingrid Joseph
Supreme Court Justice**