

**Rosales v Szabo**

2019 NY Slip Op 31287(U)

May 6, 2019

Supreme Court, New York County

Docket Number: 161958/2015

Judge: Adam Silvera

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

**PRESENT: HON. ADAM SILVERA** PART IAS MOTION 22

*Justice*

-----X  
EVELIA ROSALES, INDEX NO. 161958/2015  
Plaintiff, MOTION DATE 07/26/2018  
- v - MOTION SEQ. NO. 004  
FRANK SZABO, TRISTATE PLUMBING SERVICES CORP.

**DECISION AND ORDER**

Defendant.

-----X  
The following e-filed documents, listed by NYSCEF document number (Motion 004) 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109 were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, it is ORDERED that defendants’ motion for summary judgment and to dismiss plaintiff’s complaint is denied. Before the court is defendants Frank G. Szabo (“Szabo”) and Tristate Plumbing Services Corp.’s (“Tristate”) motion for an Order pursuant to CPLR §3212 granting summary judgment in favor of defendants to dismiss the Complaint of plaintiff Evelia Rosales for failure demonstrate that plaintiff has suffered a “serious injury” as defined under Section 5102(d) of the Insurance Law.

The suit at bar stems from a motor vehicle collision which occurred on July 16, 2015, Eastbound on 59<sup>th</sup> Street at the intersection of 5<sup>th</sup> Avenue in the County, City, and State of New York when a vehicle operated by defendant Szabo and owned by Tristate entered the crosswalk and struck plaintiff pedestrian Rosales which allegedly resulted in the serious injury of plaintiff.

**Summary Judgment**

“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 from the case” (*Winegrad v New York University Medical Center*, 64

NY2d 851, 853 [1985]). Once such entitlement has been demonstrated by the moving party, the burden shifts to the party opposing the motion to “demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure ... to do [so]” (*Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]).

In order to satisfy their burden under Insurance Law § 5102(d), a plaintiff must meet the “serious injury” threshold (*Toure v Avis Rent a Car Systems, Inc.*, 98 NY2d 345, 352 [2002] [finding that in order establish a prima facie case that a plaintiff in a negligence action arising from a motor vehicle accident did sustain a serious injury, plaintiff must establish the existence of either a “permanent consequential limitation of use of a body organ or member [or a] significant limitation of use of a body function or system”]).

The Court notes that summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently established that it is warranted as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). “In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility” (*Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 [1st Dep’t 1992], citing *Dauman Displays, Inc. v Masturzo*, 168 AD2d 204 [1st Dep’t 1990]). As such, summary judgment is rarely granted in negligence actions unless there is no conflict at all in the evidence (*See Ugarriza v Schmieder*, 46 NY2d 471, 475-476 [1979]).

### **Discussion**

Here, defendant alleges that plaintiff did not sustain a serious injury. In support of their motion defendants attach the Prehospital Care Report Summary, the deposition of Melissa Feliz Perez who prepared the Report, Emergency Room Records from New York Presbyterian, the deposition of Emergency Room Nurse, Michelle Penfold, the deposition of plaintiff Rosales, the

sworn medical reports of Dr. Edward S. Crane, Dr. Adam Bender, and records from the Neurological Independent Medical Examination performed by Dr. Adam N. Bender (Mot, Exh H, I, J, K, L, M, N, & O). X-rays of plaintiff's left shoulder, pelvis, left knee, left tibia, and left fibia were all negative for fracture or dislocation and a hip x-ray revealed degenerative changes in the lower lumbar spine (Mot, Exh K). Degenerative changes were also recorded in plaintiff's left knee, left tibia and fibula (*id.*).

Plaintiff testified at deposition on March 9, 2017 to have sustained prior injuries to her neck, back, and both wrists (*id.*, Exh L at 9, ¶12-14 & 52, ¶13-15). In his May 22, 2017 report, Dr. Crane noted that the examination of plaintiff revealed no objective findings and that a partial rotator cuff seen from an August 21, 2015 MRI did not have significant differences to that revealed in a November 2, 2004 MRI of plaintiff's left shoulder (*id.*, Exh M). Dr. Crane also noted that plaintiff underwent arthroscopic left shoulder surgery on November 17, 2015 (*id.*) Dr. Crane concluded that "there is no objective evidence that the accident of 7/16/15 exacerbated the pre-existing condition in her lower back, or that there is a causal connection between the accident of 7/16/15 and the lower back surgery that was performed. To a reasonable degree of medical certainty, she has no orthopedic residuals in regard to her neck, left wrist, or left knee causally connected to the accident of 7/16/15" (*id.*).

In a report dated October 11, 2017, Dr. Bender noted that plaintiff has pre-existing conditions including, right shoulder arthrosis, left shoulder arthrosis, cervical disc protrusions, decreased latencies across right elbow, and bilateral hip, hand and forearm pain (*id.*, Exh O). Dr. Bender concludes that injuries, if any, from the incident at issue were relatively minor and that MRI of the cervical and lumbar spine show changes that are likely degenerative (*id.*). Defendants

have made a prima facie showing of entitlement to summary judgment and the burden shifts to plaintiff to raise an issue of fact.

In opposition, plaintiff addresses defendants' claims of pre-existing conditions and argues that defendants ignore evidence which demonstrates that plaintiff has been asymptomatic for years prior to the accident at issue. Plaintiff attaches the medical reports of Dr. Jason M. Gallina and Dr. Mark S. McMahon to demonstrate that she did indeed suffer a serious injury (Aff in Op, Exh 1 & 2). Dr. Gallina's report notes that plaintiff had pre-existing injuries which had since resolved before the accident at issue occurred (*id.*, Exh 1). Dr. Gallina concludes that it is his opinion to a reasonable degree of medical certainty that plaintiff's lumbar spine and cervical spine pathology are a result of the accident at issue (*id.*).

Dr. McMahon found a decreased range of motion in plaintiff's cervical spine, lumbar spine, left shoulder, wrist, hip and left knee (*id.*, Exh 2 at 7-8). Dr. McMahon's report notes that the injuries are causally related to the accident at issue and not from plaintiff's prior accidents or conditions (*id.* at 8). The report concludes that plaintiff's prognosis is poor and that her condition is permanent (*id.* at 9). The Court finds that plaintiff's doctors' affirmations sufficiently explain that her current condition is causally related to the accident and explains why plaintiff's physical deficits were not caused by her degeneration and preexisting injuries (*See Rosa v Delacruz*, 32 NY3d 1060, 2018 N.Y. Slip Op. 07040 [2018]). Thus, plaintiff has raised an issue of fact precluding defendants' motion for summary judgment on the issue of serious injury.

Accordingly, it is

ORDERED that defendants' motion for summary judgment to dismiss plaintiff's Complaint on the grounds that plaintiff allegedly has not sustained a "serious injury" as defined in 5102 of the Insurance Law is denied; and it is further

ORDERED that within 30 days of entry, plaintiff shall serve a copy of this decision/order upon defendants with notice of entry.

This constitutes the Decision/Order of the Court.

5/6/2019  
DATE

ADAM SILVERA, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE