Perez v Oliveira
2019 NY Slip Op 32176(U)
July 22, 2019
Supreme Court, New York County
Docket Number: 158914/2015
Judge: Adam Silvera
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

---X

YANIRYS PEREZ,

Plaintiff,

- v -

SEBASTIAN OLIVEIRA, SEB TRUCKING

Defendant.

---X

INDEX NO. 158914/2015

MOTION DATE 01/26/2018

MOTION SEQ. NO. 003

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 003) 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58

were read on this motion to/for DISMISS.

Upon the foregoing documents, it is ORDERED that defendants Sebastian Oliveira and Seb Trucking's motion, for summary judgment, pursuant to CPLR 3212, against plaintiff Yanirys Perez on the issue of "serious injury" as defined under Section § 5102(d) of the Insurance Law is denied.

The matter at issue stems from a motor vehicle accident which occurred on the Macombs Bridge in the County of Bronx, City and State of New York, as a result of a motor vehicle accident which occurred on August 11, 2014, between plaintiff Yanirys Perez and a vehicle operated by defendant Sebastian Oliveira and owned by defendant SEB Trucking which allegedly led to plaintiff's serious injury. Plaintiff's Bill of Particulars and Supplemental Bill of Particulars allege injuries to the lumbar spine, left knee, and cervical spine as a result of the accident at issue.

"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"]).

Defendants allege that plaintiff has failed to demonstrate the existence of a "serious injury" as defined under Section 5102(d) of the Insurance Law. Defendants allege that the injuries plaintiff is seeking relief for are not causally related to the underlying accident and are a result of degenerative disc disease and her "significant pre-accident medical and surgical history." In support of their motion defendants attach plaintiff's deposition held on February 28, 2017, in which plaintiff testified that she was last employed in 2005 and stopped working due to back pain (Mot, Exh D at 10-13). Plaintiff further testified that she treated for her back pain and underwent back surgery in 2005 and 2007 and continued treating for the surgery through 2013 (*id.*, at 15-21). Plaintiff also testified that in 2007 she was diagnosed with both osteoporosis and osteogenesis imperfecta (*id.*, at 75-76, 82).

Defendants attach the Independent Medical Examination report of Dr. Robert Goldstein who examined plaintiff on May 3, 2017 along with June 19, 2017 and January 16, 2018 supplemental affirmed reports by Dr. Goldstein (Mot, Exh H). Dr. Goldstein's report noted that

plaintiff underwent lumbar fusion and decompression in 2005 and 2007 with implantation of a bone stimulator in 2007 (*id.*, at 2). The report further indicated that plaintiff had a normal range of motion of the hips, normal range of motion in both knees, and normal range of motion in the ankles (*id.*, at 5-6). Dr. Goldstein noted that plaintiff's left knee had evidence of generative changes, not an acute injury to the knee, and that such changes/damage were preexisting conditions (*id.*, at 1-3).

Defendants also attach the September 15, 2017 and January 20, 2018 Independent Medical Examination reports of Dr. Afshin Razi (Mot, Exh I). Dr. Razi examined plaintiff on May 26, 2017 and conducted range of motion testing to the cervical spine and lumbar spine finding a normal range of motion in the cervical spine and a decreased range of motion in the lumbar spine (*id.*, at 4). *Dr.* Razi reviewed plaintiff's medical records and found that a CT scan of the lumbar spine from January 30, 2015 revealed degeneration in plaintiff's lumbar spine and that an X-ray of the cervical spine in 2015 showed spondylosis in the cervical spine which is a degenerative disease (*id.*, at 1). Dr. Razi concluded that the degeneration in both the cervical spine and lumbar spine was preexisting and not causally related to the subject accident on August 11, 2014 (*id.*, at 5 & 14). Thus, 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' allegations that plaintiff's lumbar spine, cervical spine, and knee injuries are preexisting. Plaintiff avers that while plaintiff did have preexisting issues in her back and degeneration of the knee, that plaintiff's injuries were exacerbated by the underlying accident and that plaintiff had no preexisting condition in her neck which she avers was directly injured as a result of the accident at issue. In support of her

opposition plaintiff attaches the affirmation of Dr. Michael Gerling who examined, treated, and performed surgery on plaintiff (Aff in Op, Exh C).

Dr. Gerling opined that plaintiff's neck was injured as a direct cause of the accident, that plaintiff's preexisting lumbar spine condition was exacerbated by the accident, and that there was no preexisting condition in the knee which was also injured as a result of the August 11, 2014 accident (*id.*, ¶ 19). Plaintiff's responding medical submissions raise a triable issue of fact as to plaintiff's injuries. In *Rosa v Delacruz*, 32 NY3d 1060, 2018 N.Y. Slip Op. 07040 [2018], the Court of Appeals found that where a plaintiff's doctor opined that tears were causally related to the accident, but did not address findings of degeneration or explain why the tears and physical deficits found were not caused by the preexisting degenerative conditions, plaintiff failed to raise a triable issue of fact as it "failed to acknowledge, much less explain or contradict, the radiologist's finding. Instead, plaintiff relied on the purely conclusory assertion of his orthopedist that there was a causal relationship between the accident" (*See id.*)

Here, unlike the plaintiff in *Rosa,* plaintiff's doctor explains why plaintiff's injuries to the neck, knee and spine were not caused by preexisting degenerative conditions but rather due to the accident at issue. Thus, the Court finds that defendants have failed to demonstrate that plaintiff has not suffered a serious injury and defendants' motion for summary judgment to dismiss plaintiff's complaint on the grounds that the injuries alleged by plaintiff do not constitute a "serious injury" is denied.

Accordingly, it is

ORDERED that defendants' motion for summary judgment, on the grounds that plaintiff Yanirys Perez has not sustained a "serious injury" as defined in 5102 and 5104 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.

7/22/2019
DATE

ADAM SILVERA, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE