

**Etienne v Raquot**

2018 NY Slip Op 34388(U)

June 13, 2018

Supreme Court, Orange County

Docket Number: Index No. EF000242/2017

Judge: Maria S. Vazquez-Doles

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.

At a term of the IAS Part of the Supreme Court of the State of New York,  
held in and for the County of Orange, at the 1841 Court House,  
101 Main Street, Goshen, New York 10924 on the 13th day of June, 2018.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ORANGE

STEPHANIE ETIENNE,

PLAINTIFF,

-AGAINST-

TRICIA L. RAQUOT,

DEFENDANTS.

VAZQUEZ-DOLES, J.S.C.

To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, on all parties.

**DECISION & ORDER**  
INDEX #EF000242/2017  
Motion date: March 28, 2018  
Motion Seq.# 1

The following papers numbered 1 - 6 were read on Defendant's motion for summary judgment dismissing the complaint alleging no serious injury:

Notice of Motion/ Affirmation and Exhibits A - G . . . . .	1 - 3
Affirmation in Opposition and Exhibits 1 - 3 . . . . .	4 - 5
Reply Affirmation . . . . .	6

**Background and Procedural History**

This personal injury action arises out of a motor vehicle accident that took place on September 2, 2016. Plaintiff, a pedestrian, was struck by Defendant's vehicle as she was walking in the parking lot of Quick Check Gas Station located on County Road 108 and its intersection with Dolson Avenue in the City of Middletown, County of Orange, State of New York. Plaintiff commenced this action by filing a Summons and Complaint (Exhibit B to moving papers) in NYSCEF on January 11, 2017. Defendants served a Verified Answer with affirmative defenses in NYSCEF on March 17, 2017. (NYSCEF Doc.#3) On or about December 14, 2017, plaintiff served a Verified Bill of Particulars. (Exhibit G) The Bill of Particulars alleged various injuries

including severe sprain/strain to her right ankle, right shoulder, lumbar and cervical spine as well as complete anterior cruciate ligament tear of her right knee requiring surgery and decreased range of motion.

The Examination Before Trial of plaintiff was held on October 19, 2017. (Exhibit C) Plaintiff filed her Note of Issue in NYSCEF on May 1, 2018.

### **Plaintiff's Deposition Testimony**

On September 2, 2016, plaintiff was walking in the parking lot of the Quick Check located on County Route 108 in Middletown, New York from the gas pumps to the Quick Check to use the ATM machine. (Exhibit C at 29-30) As she was walking across the entrance to the parking lot, she was struck by defendant's vehicle making contact with her left side hip/waist. (Exhibit C at 47-48) Plaintiff testified that she complained only of right ankle pain immediately after the accident. (Exhibit C at 50, 55) Plaintiff was taken by ambulance to Orange Regional Medical Center with complaints of pain in her left rib and right ankle. (Exhibit C at 93) X-rays of her right leg and chest were taken and plaintiff was discharged after a few hours with crutches and no pain medication. (Exhibit C at 94) Within a couple of weeks of the accident, her attorneys referred her to Dolson Avenue Medical where she received physical therapy and chiropractic care (Exhibit C at 96 - 99) She ceased treatment with this facility in December of 2016 and began seeing orthopedists, Dr. Fabio and Dr. Episalla in November 2016. (Exhibit C at 99 -103) Plaintiff stated that her complaints were of only right knee pain as her right ankle had healed by that point. (Exhibit C at 103-104) It was recommended she go for an MRI study of her right knee which was performed on November 9, 2016. The knee study showed a tear of the anterior cruciate ligament and meniscus prompting a recommendation for surgical intervention.

(Exhibit C at 107-108) Dr. Episalla performed the surgery on March 28, 2017 and plaintiff ceased orthopedic treatment for this accident around the first week in June, 2017. (Exhibit C at 114)

Prior to this accident, plaintiff injured her right knee on November 30, 2015 when she fell down the stairs at home catching herself on the handrail. She was taken to Orange Regional Medial Center with complaints of right knee pain. (Exhibit C at 125) X-rays were taken, her right knee was place in an immobilizer and she was given crutches and prescribed Percocet for the pain. (Exhibit E at 535 - 539) Plaintiff also admits to injuring her neck and back in a work-related accident in 2013. (Exhibit C at 119)

At the time of the subject accident, plaintiff was on maternity leave from her employment with Medline Industries, returning to work full-time at the end of her maternity leave in October 2016. (Exhibit C at 105-106) Plaintiff testified that she was out of work from February 2017 until June 2017 because of her surgery and then she quit because she was offered a position with the Correction Officer Academy. She was medically cleared for training and an active participant in all exercises required each day up until June 8, 2017, when she re-injured her right knee while doing a training exercise. (Exhibit C at 10-13)

#### **Defendants' Motion for Summary Judgment**

Defendants move for summary judgment on the ground that plaintiff failed to establish a serious personal injury in accordance with the threshold predicates of Insurance Law §5102. In support of their motion, defendants offer the independent medical examination (IME) report of orthopedist, Robert C. Hendler, M.D., dated December 4, 2017. Dr. Hendler's report is affirmed in compliance with Civil Practice Law & Rules §2106. His report states that he reviewed, *inter*

*alia*, the Bill of Particulars; emergency room records from Orange Regional Medical Center dated September 2, 2016 and December 1, 2015; medical records from Dolson Avenue Medical (ChiroCare, Middletown P.T. & Pain Management and Physical Medicine & Diagnostic Testing P.C.); and the MRI report of the right knee dated November 9, 2016.

Dr. Hendler examined plaintiff on November 29, 2017. On that day, plaintiff denied any prior problems with her neck, back of knees antecedent to the subject accident. However, the submitted medical records revealed a history of her falling and injuring her right knee in 2015, and an episode of stabbing pain in her lower back on May 7, 2015, both resulting in her being evaluated in the emergency room. Plaintiff complained of ongoing pain and discomfort in her neck and lower back with no radiation, numbness, weakness or parenthesis. With regard to her right knee she complains of difficulty when walking up and down stairs, as well as some swelling. It should be noted that Dr. Hendler's examination was subsequent to plaintiff re-injuring her right knee almost six months prior. It should also be noted that at the time of Dr. Hendler's examination, plaintiff was in her sixth month of pregnancy. Upon examination, plaintiff's cervical and lumbar spine had full range of motion as well as her right knee. Right knee had no joint line tenderness, no effusion or atrophy.

Based upon his examination, review of the medical records and prior history, it is Dr. Hendler's opinion that at the time of the subject accident plaintiff sustained an injury only to her right foot and ankle area. Plaintiff never complained of right knee pain in the emergency room and examination of her right knee was normal. If she had sustained a tear at the time of the accident there would have been swelling and pain. Further, when initially seen at Dolson Avenue Medical, there may have been some mild swelling but there was no significant effusion

noted. Dr. Hendler did not find any permanent orthopedic disability nor did he find a causal relationship between the injury to her right knee and the subject accident.

Defendants argue that plaintiffs have failed to establish a “serious injury” as that term is defined in Insurance Law §5102(d). That section provides, in relevant part, that:

A “serious injury” is a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss 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.

Plaintiff’s Bill of Particulars alleges injuries that resulted in a permanent, consequential limitation of use of a body organ, member, function or system; a significant limitation of use of a body function or system; and a medically-determined injury or impairment of a non-permanent nature that prevented plaintiff from performing substantially all of the material acts which constitute her usual and customary daily activities for not less than 90 of the 180 days immediately following the accident. Defendants assert, however, that plaintiff’s right knee injury was not causally related to the subject accident but to a pre-existing injury. Further, defendants assert that their expert found there was no orthopedic disability.

#### **Plaintiffs’ Opposition**

Plaintiff asserts that she sustained a right knee injury, a tear of the cruciate ligament and meniscus which resulted in surgery to repair the torn ACL which included the insertion of permanent screws in plaintiff’s knee. Plaintiff asserts the injury to her right knee has resulted in

a permanent and significant limitation of use and that it prevented her from performing substantially all of her ADLs for not less than ninety days during the one hundred eighty days immediately following the incident. Plaintiff's own deposition testimony demonstrates prima facie that she has no valid 90/180 claim. See *Ferazzoli v Hamilton*, 141 AD3d 686 (2d Dept 2016). She was on maternity leave at the time of the accident and returned to work full time the following month until mid-February 2017.

Primarily, plaintiffs argue that defendants failed to meet their *prima facie* burden to demonstrate the absence of triable issues of fact. Plaintiff points to the report of Dr. Hendler in which he found full range of motion in plaintiff's neck, back and right knee but failed to describe what tests he used or what measurements he obtained as compared to normal values when measuring range of motion. Such argument is belied by the fact that Dr. Hendler stated the normal range of motion was obtained by reference to the AMA Guide of the Evaluation of Permanent Impairment 6<sup>th</sup> Ed., and continually referred to the names of tests he performed. More importantly, plaintiff's expert, Charles W. Episalla, M.D. also found full range of motion in plaintiff's neck, back and right knee. Dr. Episalla's report differs from Dr. Henler's in that, he opines plaintiff's right knee injury relates to the subject accident. Plaintiff argues that the objective medical evidence demonstrates that she suffered a qualifying injury to her right knee as a result of the accident. At the very least, plaintiffs assert, such evidence creates issues of fact precluding summary judgment.

#### Discussion

Section 3212(b) of the Civil Practice Law & Rules states, in pertinent part, that a motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of

action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." Section 3212(b) further states that "the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact."

"Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a material and triable issue of fact." (*Anyanwu v Johnson*, 276 AD2d 572, 714 NYS2d 882 [2d Dept 2000]) Issue finding, not issue determination, is the key to summary judgment. (*Krupp v Aetna Casualty Co.*, 103 AD2d 252 [2d Dept 1984]) In deciding the motion, the court must view the evidence in the light most favorable to the non-moving party. (*See, Kutkiewicz v Horton*, 83 AD3d 904, 920 N.Y.S.2d 715 [2d Dept 2011])

Defendants move for summary judgment, claiming that plaintiff has failed to meet the threshold requirements of Insurance Law §5102, because she has not provided proof that she sustained a serious injury *as a result of the accident*. Defendants bear the initial burden of establishing a *prima facie* case that plaintiff did not sustain a serious injury. (*Toure v. Avis Rent-A-Car Sys.*, 98 NY 2d 345 [2002]) In this matter, defendant has met her *prima facie* burden by establishing plaintiff's right knee injury was not causally related to the subject accident but to a preexisting injury. Although Dr. Episalla opines that it was causally related to the accident, he fails to explain plaintiff's prior injury and qualifies his opinion by stating it is based in part upon the history received from plaintiff which was clearly inaccurate (plaintiff denied any prior injury and stated she was tossed in the air and landed on the ground). Dr. Episalla reserved the right to change his opinion. He further specifically stated that he could not assess permanency while stating that further treatment was indicated. It should be noted that both Dr. Hender and Dr. Episalla examined plaintiff after the re-injury to the right knee in June 2017 and while plaintiff

was six months pregnant. Also, prior to the re-injury, plaintiff had been cleared by Dr. Episalla without restriction to enter the academy and to perform all required activities and exercises. Whatever the cause of plaintiff's right knee condition, it was corrected by the surgery and the only medical evidence submitted by plaintiff, the report of Dr. Episalla, fails to rebut the defendant's prima facie showing that plaintiff did not suffer any permanent or significant injuries related to the subject accident. (See, *Baker v Thorpe*, 43 AD3d 535 [3d Dept 2007]).

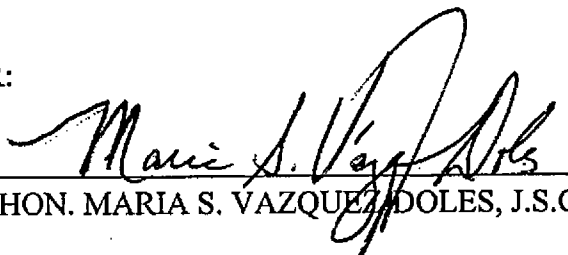
Based upon the foregoing it is hereby

**ORDERED** that defendant's motion dismissing plaintiffs' claims of serious injury is granted; and it is further

**ORDERED** that the complaint is dismissed.

Dated: June 13, 2018  
Goshen, New York

ENTER:

  
HON. MARIA S. VAZQUEZ DOLES, J.S.C.

To: Counsel of Record via NYSCEF