

Conforti v Bancroft
2021 NY Slip Op 33435(U)
July 1, 2021
Supreme Court, Orange County
Docket Number: Index No. EF000412-2019
Judge: Maria S. Vazquez-Doles
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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 285 Main Street,
Goshen, New York 10924 on the 1st day of July, 2021.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

CHRISTEN CONFORTI,

PLAINTIFF,

-AGAINST-

TARA E. BANCROFT & HARTLEY S. BANCROFT II,

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 #EF000412-2019
Motion date: 3/22/2021
Motion Seq. #1 & #2

The following papers were read on this motion by defendants for summary judgment, pursuant to CPLR §3212, dismissing the complaint alleging plaintiff's failure to meet the serious injury threshold, and plaintiff's cross-motion to amend the bill of particulars:

Notice of Motion/Affirmation in Support/Exhibits A - G	1 - 9
Notice of Cross-Motion/Affirmation in Support/Exhibits 1 - 3	10 - 14
Reply Affirmation and Opposition	15

Background and Procedural History

This personal injury action arises out of a motor vehicle accident that occurred on December 31, 2017 by Route 32 in the Town of Woodbury. Plaintiff commenced this action by filing a Summons and Verified Complaint on January 14, 2019, and defendant filed an Answer on March 15, 2019 (Exhibit A to moving papers). Defendants move here for summary judgment, and plaintiff moves here to amend the bill of particulars.

Discussion

Defendants argue that plaintiff's injuries are degenerative in nature and related to preexisting conditions, and are thus not causally related to the subject accident. Plaintiff injured her right knee, neck, and back and left shoulder in a prior car accident on March of 2007. In addition, she injured her left knee and lower back in a slip and fall incident on December of 2013. Plaintiff was also involved in an accident on December 31, 2018. In support of their motion, defendants offered plaintiff's Bill of Particulars, deposition transcript, and medical records (Exhibits B, C, D, and E). Defendants also submitted an operative report by Dr. Anil S. Ranawat, who conducted an arthroscopic surgical procedure on March 11, 2019, and an orthopedic expert report by Dr. Robert C. Hendler (Exhibits F and G). Defendants further argues that plaintiff did not sustain a serious injury under the 90/180 threshold.

Plaintiff avers that the movant has failed to sustain his initial burden of proof. That defendant has failed to show, *prima facie*, lack of a serious injury which results in a permanent consequential limitation of use of a body organ or member or the significant limitation of a body function or system. Plaintiff provided MRI reports and a report from orthopedist, Dr. Harvey L. Seigel (Exhibits 2 and 3). Plaintiff argues that a triable issue of fact exists as to whether there was an aggravation or exacerbation of plaintiff's pre-existing conditions that were caused by the subject accident. Furthermore, defendants failed to address the claim of economic loss in excess of basic economic loss, which plaintiff alleged in the complaint. Plaintiff conceded as to the permanent loss of use and the non-permanent 90/180 categories.

Plaintiff also cross-moves for leave to amend the bill of particulars to claim activation and exacerbation of previously asymptomatic degenerative conditions. Dr. Seigel's report

indicated that plaintiff sustained an aggravation of prior labral repair, requiring revision surgery to her left shoulder. Plaintiff claims that the activation of the conditions is not an entirely new injury. Defendants oppose such leave, arguing that they were not made aware of plaintiff's intent to amend until after this motion was filed.

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 [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 (*Kutkiewicz v Horton*, 83 AD3d 904 [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 defined by that section, "'serious injury' means a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; 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" (*D'Iorio v. Brancoccio*, 115 AD2d 634 [2d Dept 1985]). Defendant bears 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 NY2d 345 [2002]). Here, Dr. Seigel's orthopedic report provided limitations of the range of motion in plaintiff's cervical spine and left shoulder (Exhibit 2). Defendants have failed to meet their initial burden of establishing a *prima facie* case. Plaintiff's papers in opposition are sufficient to raise a triable issue of fact (*Omar v Bello*, 13 AD3d 430 [2d Dept 2004]; *see Coscia v 938 Trading Corp.*, 238 AD2d 538 [2d Dept 2001]; *see also Mariaca-Olmos v Mizrhy*, 226 AD2d 437 [2d Dept 1996]).

Pursuant to CPLR Rule 3025(b), "A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading." Plaintiff seeks to amend the bill of particulars to claim activation and exacerbation of previously asymptomatic degenerative conditions. However, Dr. Seigel failed to establish whether such aggravation was causally related to the December 31, 2017 incident. Thus, plaintiff's motion to amend the bill of particulars is denied.

Conclusion

Based upon the foregoing it is hereby

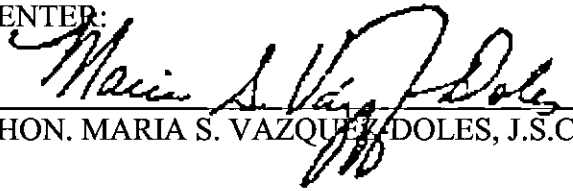
ORDERED that defendants motion for summary judgment is **DENIED**, and it is further

ORDERED that plaintiff's cross-motion to amend the bill of particulars is **DENIED**.

The foregoing constitutes the Decision and Order of this Court.

Dated: July 1st, 2021
Goshen, New York

ENTER:


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

To: Counsel of Record Via NYSCEF