

Esposito v Port Auth. of N.Y. & N.J.

2011 NY Slip Op 31808(U)

June 30, 2011

Supreme Court, New York County

Docket Number: 100051/94

Judge: Louis B. York

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

LOUIS B. YORK
J.S.C.

PART 2

PRESENT

Index Number : 100051/1994

ESPOSITO, SUSAN

vs

PORT AUTHORITY

Sequence Number : 018

VACATE NOTE OF ISSUE/ READINESS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

FILED

Cross-Motion: Yes No

JUL 06 2011

Upon the foregoing papers, It is ordered that this motion

NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION.**

Dated: 6/30/11

Lby
LOUIS B. YORK J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____ FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

-----X
SUSAN ESPOSITO,

Plaintiff,

-against-

THE PORT AUTHORITY OF NEW YORK AND NEW
JERSEY,

Defendant.
-----X

Index No.: 100051/94

FILED

JUL 06 2011

NEW YORK
COUNTY CLERK'S OFFICE

YORK, J.:

In this case, plaintiff Susan Esposito alleges that she sustained injuries as a result of exiting the World Trade Center during the bombing which occurred in February of 1993. Defendant The Port Authority of New York and New Jersey, moves, pursuant to Title 22, Part 202.21 (e) of New York Codes, Rules and Regulations, to vacate the note of issue and to strike the case from the trial calendar.

Plaintiff cross-moves, pursuant to CPLR 2221 (e), for leave to renew this court's September 29, 2010 order, which granted defendant's motion to strike plaintiff's first amended bill of particulars, and denied plaintiff's cross motion to amend the second supplemental bill of particulars.

FACTUAL ALLEGATIONS

Plaintiff commenced this action in January of 1994. On April 20, 1995, plaintiff served a verified bill of particulars which set forth the injuries which she sustained in February of 1993 at the World Trade Center. The bill of particulars includes allegations of injuries to plaintiff's cervical and lumbar spine, resulting in pain, numbness, and weakness in her extremities, and a decreased range of motion. In July of 1997, plaintiff served a supplemental bill of particulars, in

which plaintiff alleges further injuries to her cervical and lumbar spine.

Defendant contends that after a substantial period of inactivity, Michael Flomenhaft, Esq., of Flomenhaft & Cannata, LLP, took over as new counsel for plaintiff. On August 18, 2008, plaintiff served a second supplemental bill of particulars alleging injuries including dysautonomia, orthostatic hypotension and fainting spells secondary to dysautonomia, brain injury due to chronic pain, and progressive neurocognitive loss due to chronic pain. Defendant maintains that following another period of inactivity, on August 31, 2009, Lawrence Rosenblatt, Esq., of Aaronson, Rappaport, Feinstein & Deutsch, assumed representation of plaintiff.

On March 8, 2010, plaintiff served a first amended bill of particulars. Defendant moved to strike the amended bill of particulars and argued that it was not the "first" amended bill of particulars, but was the "second" amended bill of particulars, and therefore, pursuant to CPLR 3042 (b), plaintiff was required to seek leave of the court before serving it on defendant. On September 29, 2010, the court granted defendant's motion to strike plaintiff's amended bill of particulars. On October 25, 2010, plaintiff filed the note of issue.

DISCUSSION

Defendant argues that the note of issue must be vacated, because it has not had an opportunity to conduct an IME or an EBT regarding the injuries discussed in the 2008 second supplemental bill of particulars. Defendant maintains that the supplemental IME and EBT were not scheduled because of the change of plaintiff's counsel, the case being marked off of the court's calendar, and due to the motion practice which ensued. Defendant contends that the second supplemental bill of particulars alleges new injuries including dysautonomia, orthostatic hypotension and fainting spells, brain injury due to chronic pain, progressive neurocognitive loss, and exacerbation of preexisting anxiety and depression.

Defendant maintains that in 2002, it served a notice on plaintiff for an IME to be conducted by a forensic psychologist. However, counsel for plaintiff moved for a protective

order, seeking to preclude the examination, because no psychological injuries were alleged. The motion for the protective order was subsequently withdrawn, but plaintiff did not undergo an IME or EBT regarding psychological injuries. Defendant also contends that in the May 4, 2010 affirmation of defendant's counsel M. Regina Philips, Esq., which accompanied the motion to strike, Ms. Philips addressed a possible need to conduct an EBT and IME related to the injuries discussed in the 2008 second supplemental bill of particulars.

Plaintiff's counsel argues that the note of issue should not be vacated, because defendant has had adequate time to conduct further discovery, that it has provided defendant's counsel with more than fifty HIPPA-compliant authorizations, and that defendant has known about plaintiff's medical allegations for a long period, because it provided workers compensation records which discussed the injuries eight years ago. Plaintiff maintains that if the court permits the further discovery to be completed, than the case should remain on the active trial calendar.

After reviewing both plaintiff and defendant's arguments, the court declines to vacate the note of issue or permit any further discovery. Not only does this case greatly exceed the Court System's standards and goals as the RJI was filed on May 3, 1994, but also, two pre-trial conferences have already been held, where this discovery issue could have been addressed. While the court understands that this case was delayed due to plaintiff's need to obtain new counsel and there was a period of time in which the case was inactive, the bill of particulars was served in 2008, and defendant had over two years to serve a request to take a further IME or EBT for the alleged phsychological injuries, or could have moved to compel such examinations before the discovery end date.

Plaintiff cross-moves, for leave to renew the September 29, 2010 order of this court, which granted the motion to strike plaintiff's first amended bill of particulars, and which denied plaintiff's cross motion to amend the second supplemental bill of particulars. Plaintiff argues that the motion to renew should be granted because new facts now exist to support the relief. These "new facts" are that (1) defendant has moved to vacate the note of issue due its need for

further discovery; and (2) plaintiff submits an affidavit dated December 9, 2010.

CPLR 2221 (e) provides that a motion for leave to renew should "be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and . . . shall contain reasonable justification for the failure to present such facts on the prior motion." Furthermore, the First Department has held that a party seeking renewal must show that they exercised due diligence in making their factual presentation in the prior motion. *See Jones v 170 E. 92nd St. Owner Corp.*, 69 AD3d 483, 484 (1st Dept 2010).

Although plaintiff's counsel submits an affidavit from his client which attempts to clarify why there was a delay in supplementing the bill of particulars, plaintiff's counsel contends that it was not "an unreasonable decision" to not have previously submitted the affidavit with the prior motions. Plaintiff's counsel maintains that it did not submit an affidavit from the plaintiff in opposition to defendant's motion to strike the first amended bill of particulars, because the note of issue was not filed, because he was newly representing the plaintiff and was merely clarifying the bill of particulars, and because the trial on liability was pending before the court.

None of these excuses are persuasive. Plaintiff's counsel fails to demonstrate that the information provided in his client's affidavit was unavailable or unknown when he opposed the motion to strike the first amended bill of particulars, that he exercised due diligence in obtaining the information, or that new facts exist which were not provided in the prior motion that would change the court's determination. Therefore, the cross motion to renew must be denied.

CONCLUSION and ORDER

In conclusion, it is ORDERED that the motion of defendant The Port Authority of New York and New Jersey to vacate the note of issue is denied; and it is further

ORDERED that plaintiff Susan Esposito's cross motion to renew the court's September 29, 2010 order is denied.

Dated: June 30, 2011

ENTER: Ley
J.S.C.

LOUIS B. YORK
J.S.C.

FILED

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