

Smith v Hines GS Properties, Inc.

2006 NY Slip Op 30023(U)

October 31, 2006

Supreme Court, New York County

Docket Number: 2_30011/5216

Judge: Louis B. York

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

PRESENT: LOUIS B. YORK
J.S.C. Justice

PART 2

Smith
- v -
Genesis G.S. Properties, Inc.

INDEX NO. 115216/01
MOTION DATE 10/4/06
MOTION SEQ. NO. 004
MOTION CAL. NO. _____

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

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

FILED
NOV 09 2006
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10/31/06

Luy
LOUIS B. YORK
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE

Supreme Court of the State of New York
County of New York

Index No. 115216/2001

Part 2

DOUGLAS P. SMITH,

Decision/Order

Plaintiff,

Present:
Hon. Louis B. York
Justice, Supreme Court

– against –

HINES GS PROPERTIES, INC., FDA QUEENS
L.P., JOHN SMITH (name being fictitious as
General Partners) and TURNER CONSTRUCTION
COMPANY,

Defendants.

HINES GS PROPERTIES, INC., FDA QUEENS
L.P. and TURNER CONSTRUCTION
COMPANY,

Third-party Index No.
59072/2002

Third-party Plaintiff,

– against –

KOEHLER MASONRY CORP. and
LIBERTY MECHANICAL COMPANY,

Third-party Defendants.

FILED
NOV 09 2006
COUNTY NEW YORK

Currently, defendants move – and two of the third-party defendants cross-move
separately – to strike plaintiff's supplemental Bill of Particulars and preclude plaintiff
from introducing any evidence pertaining to the injuries and damages to which he refers

in the supplemental Bill. Alternatively, all three motions ask that the case be stricken from the trial calendar while the parties conduct further discovery based on the newly alleged damages. For the reasons below, the court grants the motion and cross-motion to the extent of directing that the case be stayed on the trial calendar while the parties conduct additional discovery.

According to defendants' motion, the supplemental Bill improperly alleges new injuries and new economic losses because plaintiff submitted it to them in July of 2006 – over two years after the Note of Issue filing date, and over four years after the date of service of the original Bill of Particulars. Plaintiff opposes the motion, stating that he sufficiently referred to the injuries and damages at issue in the original Bill. Therefore, they are not “new” and the court should not strike the allegations. In addition or in the alternative, plaintiff requests that this court vacate the Note of Issue and allow defendants to conduct a further deposition and medical examination with respect to any of the allegations in the Supplemental Bill.

The pertinent paragraphs of the original Bill are:

17. (a) Plaintiff . . . has been incapacitated from his employment from the date of his accident . . . and continuing indefinitely.
(b) Loss of Earnings – That plaintiff . . . has lost earnings from the date of his accident . . . to date in the amount of \$169,369.20 based upon an earning rate of \$1283.10 per week based upon a five (5) day work week. Plaintiff has also lost fringe benefits including pension, annuity, vacation and welfare, from the date of his accident . . . continu[ing] indefinitely.
19. (a) . . . Plaintiff . . . has been confined to (b) bed and (c) home from the date of the accident June 8, 1999 thereafter until present and continuing indefinitely except for visits to health care providers and physicians.

The pertinent provisions in the supplemental Bill of Particular, which relates to plaintiff's expert testimony are:

Diminution of Earnings Capacity

... Mr. Smith earned \$56,219.00 during the year 1998. Through the end of the year 2006, the terms of Mr. Smith's union agreement [were] utilized to assess his wage and benefit increases. It is [estimated that plaintiff's] pay would have increased yearly at the average rate of 3.50% Assuming the plaintiff would have retired at age 65, plaintiff's loss of earnings projects to the sum of approximately \$1,187,470.00.

Loss in the Vacation Fund

... Based upon 1400 hours worked per year . . . \$11,014.00 would be contributed to this fund. This contribution is increased by 3.50%. The loss . . . is \$178,505.00.

Loss in Health Insurance

... Mr. Smith was provided with health insurance for him and his wife. As a result of his inability to work he lost his health insurance. The replacement cost is \$12,000.00 in . . . 2005. . . . [T]he costs for health care [increase approximately] at an average annual rate in excess of 6%. The loss in health insurance is \$234,064.00.

Loss in Additional Security Benefit Fund

... [I]n the year 2006, Mr. Smith would have \$1,400.00 contributed to the fund [by the employer. Applying the historical rate of increase,] [t]he loss in the additional security benefit fund is \$59,387.00.

Loss in the Accumulation in the Value of the Pension and the 401K Plan

... Based upon the Agreement, \$7770.00 would be contributed into the pension plan and \$4,200.00 would be contributed into the 401k plan in . . . 2006. . . . [Estimating] an average investment return of 7% per year . . . an additional \$222,003.00 would have accumulated in the pension fund and \$82,911.00 would have accumulated in the 401k plan.

As defendant and third party defendant note, the assertion of new claims of damages close to trial would unduly prejudicial. Accordingly, this court would limit the expert economist to testify as to the types of economic damages to which plaintiff

originally referred in his Bill of Particulars. See Chapman v. State, 227 A.D.2d 867, 868, 642 N.Y.S.2d 975, 976 (3rd Dept. 1996); see also Arguinzoni v. Parkway Hosp., 14 A.D.3d 633, 634, 789 N.Y.S.2d 317, 319 (2nd Dept. 2005)(striking proposed expert testimony which exceeded bounds of allegations in plaintiff's bill of particulars).

Here, however, plaintiff has not added to his allegations of injuries, but amplified the claims of financial damages to which he alluded in his original Bill of Particulars. Thus, he does not allege new or distinct injuries necessitating an order of preclusion. Stevens v. Dacion Corp., 184 A.D.2d 377, 585 N.Y.S.2d 214 (1st Dept. 1992), and Masi v. Jackson, 196 A.D.2d 838, 602 N.Y.S.2d 32, upon which movant relies, are distinguishable because they involve allegations of new injuries after the plaintiff had filed the Note of Issue. Here, on the other hand, plaintiff does not allege new physical or psychological injuries; indeed, he does not indicate new damages. Instead, he provides a summary of his expert testimony, and in this context quantifies future lost earnings and benefits. In addition – although, as all movants note, plaintiff waited a long time to supplement the materials – plaintiff has not provided the Supplemental Bill on the eve of trial; indeed, it appears that there is not a trial date yet. Consequently, as “[t]his is not a new injury or claim and was timely made within the 30 days . . . it is permissible.” Cuevas v. Borg, 9 Misc.3d 1129(A) (Sup. Ct. N.Y. County 2005)(avail at 2005 WL 3067914, at *1).

Defendants and the third-party cross-movant allege they have been improperly deprived of the ability to conduct a meaningful vocational rehabilitation examination of plaintiff because they did not have the figures cited in the Supplemental Bill of Particulars. However, plaintiff already provided authorizations for many of the

economic injuries alleged in the supplemental Bill of Particulars – union records; tax forms; social security statements; and the like. In addition, plaintiff has already made himself available for a vocational rehabilitation examination, and movants have not specified how they were prejudiced in that examination. At his deposition, movants questioned plaintiff regarding the types of benefits to which he currently refers, including pension benefits. All of this indicates that, contrary to the suggestion in their papers, movants were not completely surprised by items included in the supplemental discovery.

In its cross-motion, third-party defendant Koehler Masonry Corporation (“Koehler”) also alleges that plaintiff has asserted new mental/emotional injuries to which he did not allude in his original Bill of Particulars. However, as plaintiff points out, the original Bill of Particulars contains allegations of depressive disorder, mood swings, anxiety attacks, irritability, sleeping problems, major depression with concomitant nightmares and loss of libido, and exacerbation of plaintiff’s prior and asymptomatic depression. Accordingly, cross-movant has misstated the facts. Plaintiff asks this court to sanction third-party defendant for its blatantly misleading comments. The court shall not entertain this request; to obtain affirmative relief, plaintiff must make his request in the form of a motion or cross-motion, thus affording all parties proper notice and the opportunity to respond. However, it does admonish counsel to be more careful before it makes representations to the court about the conduct of another party.

In addition, Koehler incorrectly asserts that plaintiff did not disclose until July 2006 that he was treated at the Greene County Medical Health Center in 2002 and 2003. In fact, at page 155 of the transcript of his September 4, 2003 deposition,

plaintiff states, "I go to the Green County Mental Health Care facility. . . ." He elaborated that he saw a Dr. Hamad and a therapist named Jason, adding, "I forgot [Jason's] last name." (Dep. 155, lines 9-22). In response to subsequent questions at the same deposition, plaintiff also identified medications that he currently took for his depression. (See id. at 156, lines 4-13). Moreover, the moving parties do not allege that they sought discovery based on these statements and that plaintiff refused to provide them.

Finally, in response to the motion and cross-motions, plaintiff has stated that – although he does not believe he has prejudiced the other parties – he nonetheless is willing to provide discovery based upon the supplemental disclosure, including a further deposition and further medical and vocational examinations. He also agreed to strike the Note of Issue if necessary while discovery is completed. As alternative relief, the parties all seek to strike the Note of Issue while discovery is completed. Thus, the parties seemingly agree to this middle ground. At any rate, because plaintiff does not object to providing further discovery relating to the Supplemental Bill, the court adopts the parties' own compromise. It is not necessary to strike the Note of Issue. Instead, the court shall stay the Note of Issue while the additional discovery is completed. It shall limit the stay to 120 days, rather than allow defendants an indefinite period of time to conduct supplemental discovery or allow plaintiff an indefinite amount of time in which to provide it.

Accordingly, it is

ORDERED that the motion and cross-motions are granted to the extent of staying the Note of Issue in this matter for 120 days from the date of entry of this order,

in order to allow for supplemental discovery; and it is further

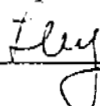
ORDERED that defendant and third-party defendants have 30 days from the date of entry of this order to serve any discovery demands relating to the supplemental Bill of Particulars upon plaintiff; and it is further

ORDERED that plaintiff shall have 21 days from the date of such service to provide any new authorizations; and it is further

ORDERED that plaintiff shall have 60 days from the date of such service to respond to document demands, and the parties shall have 45 days from the date of service to conduct an additional mental health and occupational health examination, and to conduct a further deposition of plaintiff.

Dated: 10/31/06

ENTER:



Louis B. York, J.S.C.

LOUIS B. YORK
J.S.C.

FILED

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