

**Tucker v Tishman Constr.**

2007 NY Slip Op 30069(U)

March 6, 2007

Supreme Court, New York County

Docket Number: 0110235

Judge: Carol R Edmead

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PRESENT: HON. CAROL EDMEAD  
*Justice*

PART 35

Tucker, Thomas

INDEX NO. 110235/02

MOTION DATE 3/6/07

MOTION SEQ. NO. 006

MOTION CAL. NO. \_\_\_\_\_

- v -

Tishman Construction

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for amend

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

The order to show cause by plaintiffs to amend the Bill of Particulars to include injuries to plaintiff's neck is granted in accordance with the below:

In this action, plaintiffs allege that plaintiff Thomas Tucker was working at the subject site on February 28, 2002 when he stepped on an unsecured piece of steel and other debris, which moved, causing him to trip and fall sustaining serious injuries. Plaintiffs filed the note of issue on September 10, 2004, and this action is scheduled for mediation on April 18, 2007 and for trial on May 16, 2007.

Plaintiffs contend that on February 9, 2007, the Workers Compensation Board issued a decision causally relating Mr. Tucker's neck injury to his accident of February 28, 2002, giving rise to the instant application.

Plaintiffs argue that the defendants were fully advised that Mr. Tucker suffered a neck injury, that Dr. Michael Weintraub had indicated said injury was related to the incident, and that plaintiffs were awaiting a Worker's Compensation Board decision. Plaintiffs also contend that Mr. Tucker testified at his deposition in January 2006 of his treatment for pain in his neck in 2005, and that he saw several specialists concerning his neck injury. Mr. Tucker also stated that he discussed the results of an MRI which indicated that he had two herniated discs in his cervical spine which may require surgery in the future. Further, Mr. Tucker testified that according to Dr.

Dated: \_\_\_\_\_

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

Weintraub, the neck injury is “playing a role” with the accident-related injury underneath his arm.

In support, plaintiffs submit the following medical reports previously exchanged with defendants, including, but not limited to: (a) a July 13, 2005 report of Dr. Michael Weintraub, exchanged in November 2005, indicating that after the incident, he was “out of work for 15.6 weeks . . . He noticed at that time and before then, . . . there was pain radiating up to the neck, etc.” and that an “MRI of the neck examination confirmed herniated disc at C3-4 and C4-5 . . .”; (b) a November 29, 2005 report of Dr. Weintraub, exchanged in 2006, indicating that Mr. Tucker “has a herniated disk at C3-4 and C4-5”; (c) a February 15, 2006 report of Dr. Weintraub, exchanged in May 2006, indicating that “From what the patient describes, his accident of 2/28/02 produced not only neck pain but also the original ruptured biceps . . . .” He has double crush syndrome” . . . the only credible understanding is that this is all related to the accident of 2/28/02 . . .”; (d) a March 8, 2006 report of an examination by Dr. William Unis, exchanged in April 2006, indicating a “loss of motion in the neck . . . that Mr. Tucker has a double cruss [sic] syndrome as a result of the injury of February 28, 2002.

Plaintiffs also contend that Mr. Tucker is available for a further IME of his neck. Thus, defendants cannot show prejudice and or surprise.

Defendants argue that the case is certified ready for trial, and that plaintiffs failed to establish that there is any causal connection between the alleged neck injury and alleged negligence upon which this action is based. And, the Worker’s Compensation Board decision, which indicates that the purported neck injuries were related to Mr. Tucker’s work as a mason, is not binding upon this Court. Further, plaintiffs failed to submit a medical affidavit to establish the merits of the proposed amendment. Moreover, Mr. Tucker did not attribute his neck injury to the subject incident. Rather, Mr. Tucker expressly testified that his neck injury was brought on over the “years” of heavy work rather than one specific incident, and that he did not begin to experience any neck pain until sometime in 2005. In the event this Court permits the amendment, defendants request a further IME and deposition of Mr. Tucker, and that this matter be restored upon the completion of further discovery.

Defendants also argue that the portion of plaintiffs’ proposed amended Bill of Particulars includes a cause of action under NYCRR 23-1.30, which was dismissed from the action by this Court, on the merits. The Appellate Division affirmed the dismissal of plaintiffs’ claim under NYCRR 23-1.30.

### Analysis

It is well settled that leave to amend the Bill of Particulars should be freely granted provided there is no prejudice to the nonmoving party (*Cepeda v Hertz Corp.*, 141 AD2d 394, 529 NYS2d 760 [1<sup>st</sup> Dept 1997]). In light of the evidence that Mr. Tucker’s neck injury was connected to the injuries suffered in the incident at issue, as well as defendants’ failure to allege any specific prejudice resulting from the delay, leave to amend the Bill of Particulars to allege neck injuries is granted, solely to the extent of those neck injuries identified in the previously exchanged medical records (*see Roman v 1185 Ave. of the Americas Assocs.*, 239 AD2d 101, 656 NYS2d 630 [1<sup>st</sup> Dept 1997]).

The Court notes that the Workers' Compensation Board decision, on which plaintiffs rely in support of amending the Bill of Particulars, indicates that the neck injuries were related to occupational disease, rather than a specific accident. However, the medical records dating from 2005 and 2006 arguably indicated the causal relationship between Mr. Tucker's neck injury and the accident in February 2002. Yet, plaintiffs failed to amend the Bill of Particulars in either 2005 or 2006. Thus, since this action has long been certified for trial, and further discovery is warranted, including a further deposition of Mr. Tucker, further IMEs related to the alleged neck injuries, and the exchange of further medical reports, the note of issue is hereby stricken and the mediation is hereby cancelled.

In addition, the Court notes that the supplemental Bill of Particulars submitted with plaintiffs' instant order to show cause includes a claim pursuant to NYCRR 23-1.30. This Court previously dismissed such a claim, and the Appellate Division affirmed the Court's determination. Therefore, as plaintiffs' inclusion of NYCRR 23-1.30 is erroneous, plaintiffs are precluded from including any reference to NYCRR 23-1.30, or to any other claim previously dismissed in this action.

Accordingly, it is hereby

ORDERED that plaintiffs' order to show cause to amend the Bill of Particulars to include a claim for neck injuries is granted solely to the extent that plaintiffs's Supplemental Bill of Particulars shall include those injuries identified in the medical reports submitted in support of the instant application, and shall not include any reference to NYCRR 23-1.30, or to any other claim previously dismissed in this action; and it is further

ORDERED that plaintiffs shall serve the Supplemental Bill of Particulars within 20 days of the date of this order;

ORDERED that the note of issue is vacated and the action is removed from the mediation calendar.

ORDERED that plaintiffs shall file the note of issue on September 28, 2007.

This constitutes the decision and order of the Court.

Dated 3/6/07

ENTER:  J.B.C.

HON. CAROL EDMEAD

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

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**FILED**  
MAR 13 2007  
NEW YORK  
COUNTY CLERK'S

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