

**Pavlovich v IBM Rests., Inc.**

2007 NY Slip Op 32176(U)

July 17, 2007

Supreme Court, Suffolk County

Docket Number: 0004127/2005

Judge: Robert W. Doyle

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claims in her bill of particulars, dated October 7, 2005, that she sustained a displaced subcapital fracture of the right hip requiring closed reduction and percutaneous internal fixation under anesthesia, and a nondisplaced tuberosity fracture of the shoulder. On November 5, 2005, plaintiff was admitted to Carillon Nursing and Rehabilitation Center where she underwent a course of physical therapy and was discharged on November 28, 2005. She then continued physical therapy until April, 2005.

Defendant seeks an order vacating the note of issue and striking the supplemental bill of particulars dated February 7, 2007, arguing that the original bill of particulars claims plaintiff sustained a fracture of the right hip and non-displaced fracture of the shoulder, and does not allege a vascular or ischemic necrosis of the right femur, reflex sympathetic dystrophy of the right foot, liposarcoma of the right thigh, fibrodysplasia and various labral tears of the right shoulder, among other injuries. Instead, argues defendant, these are new injuries which have been set forth in plaintiff's supplemental bill of particulars dated February 7, 2007, and accordingly, defendant argues further discovery and medical examinations by an orthopedist and neurologist are necessary to prepare for trial.

In support of this application, defendant has submitted a copy of the pleadings and answer, copies of the bill of particulars dated October 7, 2005, and the supplemental bill of particulars dated February 7, 2007 with annexed medical reports and records, and a copy of the Note of Issue and Certificate of Readiness served upon defendant December 19, 2006.

Pursuant to a supplemental bill of particulars dated February 7, 2007, it is claimed plaintiff further developed an avascular necrosis of the right femur, ischemic necrosis of the right femur, reflex sympathetic dystrophy of the right foot, traumatized sclerosis liposarcoma of the right thigh, ossified lesion of the right shoulder humerus, fibrodysplasia of the right shoulder humerus, extensive anterior right labral tear propagating from the long head of the biceps origin down to the 6 o'clock position, tear in the right posterosuperior labrum, right paralabral cyst, fluid in the right subdeltoid burs indicating bursitis and/or impingement, joint effusion in the subcapsularis joint recess indicating synovitis and/or intra-articular debris, acromioclavicular joint osteoarthritis, anterior downward slanting of the acromion and thickened anterior downward slanting of the acromion and thickened coracoacromial ligament resulting in narrowing of the supraspinatus outlet, and traumatic arthritis of the right arm and right leg.

Plaintiffs oppose this motion, and in support have submitted, inter alia, a copy of a supplemental bill of particulars dated March 21, 2007 with annexed medical records and reports; and a copy of the letter, and multiple authorizations for medical records and reports provided to defendant with the supplemental bill of particulars dated February 7, 2007.

Pursuant to the supplemental bill of particulars dated March 21, 2007, plaintiff alleges as a result of the occurrence of October 30, 2004, plaintiff sustained the following injuries either caused by, exacerbated by, or aggravated by the occurrence: fracture right hip with pinning, secondary avascular necrosis requiring removal of screws on January 24, 2007 with further coring of the anterolateral aspect of the head, harvesting of bone marrow harvest system, grafting with autogenous

bone marrow cells and demineralized bone matrix under fluoroscopic control. However, it is only the bill of particulars dated February 7, 2007 which defendant seeks to strike.

Pursuant to 22 NYCRR §202.21(e) a motion to vacate the note of issue for lack of readiness must be filed within twenty days of the note being filed (*Schroeder v IESI NY Corporation*, 24 AD3d 180, 305 NYS2d 79 [1<sup>st</sup> Dept 2005]). Plaintiffs served and filed the Note of Issue and Certificate of Readiness December 19, 2006. Accordingly, defendant's motion to vacate the note of issue served March 2, 2007, is untimely in that it has not been brought within twenty days of the filing of the Note of Issue.

22 NYCRR §202.21(e) also provides that "After such period...no such motion shall be allowed except for good cause shown." It is determined defendant has demonstrated good cause for this court to consider the instant application in that the supplemental bill of particulars dated February 7, 2007 was served well outside the twenty days following the filing of the Note of Issue and Certificate of Readiness.

It is noted, however, that plaintiff served multiple authorizations for medical records and reports along with the supplemental bill of particulars dated February 7, 2007 to enable defendant to obtain additional records with regard to plaintiff's claimed injuries. Therefore, defendant may not claim surprise or ambush with regard to the claims set forth in the supplemental bill of particulars as they have already had ample time to obtain such medical records and reports.

Defendant has also been provided copies of medical records relating to the claims set forth in the supplemental bills of particulars of February 7, 2007. It is noted that the bill of particulars sets forth what at first blush may appear to be new injuries, but actually reflects an ongoing sequelae and consequence arising out of the original injuries sustained on October 30, 2004, as supported by the records and reports submitted by defendant in support of the instant application.

In reviewing the medical records and reports submitted by defendant, it is clearly noted on the Hospital for Special Surgery Operative Record dated January 24, 2007 provided to defendant, that Mary Pavlovich's admitting diagnosis is fractured hip with pinning and secondary avascular necrosis. Post operative diagnosis is fractured hip with pinning and secondary avascular necrosis. The procedure performed was, in part, removal of the screws inserted with the first surgery. This operative report indicates the avascular necrosis is secondary to the fractured hip with pinning and is thus a sequelae to the original injury.

Defendant has provided to this court the copy of the MRI report of December 2, 2004 of plaintiff's right shoulder which sets forth that plaintiff is status non displaced greater tuberosity fracture of the right shoulder, with a tear outlined by bone marrow edema. The "swelling and edema change of the supraspinatus insertion portion is most likely related to status post trauma." There was no tear in the rotator cuff noted, but fibrous dysplasia was most likely noted in the abnormal area of bone marrow signal involving the proximal humerus. An extensive tear was noted involving the superior and entire anterior labrum. Acromioclavicular joint osteoarthritis, anterior downward slanting of the acromion and thickened coracoacromial ligament resulting in narrowing of the

supraspinatus outlet were also noted. These diagnoses are part of the sequela associated with the initial injury to the shoulder as set forth in this diagnostic test December 2, 2004.

Defendant has also provided a copy of the Isotope study of November 2, 2004 performed from plaintiffs hips to her feet with additional spot views of the pelvis and hips which demonstrated the absence of tracer activity to the head of the femur compatible with an avascular necrosis or ischemic necrosis. The report also demonstrated increased tracer uptake to the osseous structures of the right foot suggestive of a reflex sympathetic dystrophy.

Accordingly, defendant has demonstrated to this court that these alleged "new injuries" are actually related to the original injuries and are a sequelae or consequence arising out of the original injuries, with the exception of the claim of traumatized sclerosis liposarcoma of the right thigh.

Defendant provided a copy of the operative report for the low-grade sclerosing liposarcoma of the right thigh for which plaintiff had a tumor resection on April 4, 2006. The report states that the patient had noted a mass on her leg for many years. There were questions whether this is a traumatized lipoma or even a liposarcoma. The report does not suggest that such condition is causally related to the event of October 30, 2004.

Accordingly, that part of defendant's application to strike plaintiffs supplemental bill of particulars dated February 7, 2007 is granted to the extent that the claimed injury of traumatized sclerosis liposarcoma of the right thigh is struck unless plaintiff provides an affidavit of merit from a physician demonstrating the causal connection and meritorious cause of action with regard to this injury within thirty days of the date of this order.

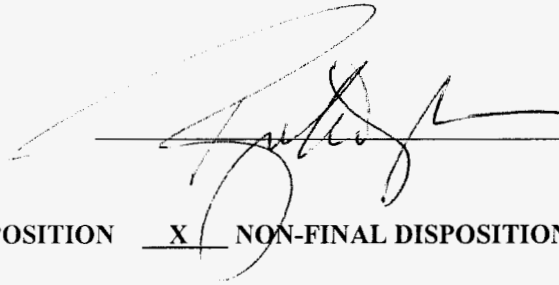
Defendant seeks discovery, deposition and independent medical examination with regard to these injuries and seeks any and all medical records relative to these injuries and any follow-up care provided. Although defendants did not provide this court with the many attachments and authorizations provided with the supplemental bills of particulars, defendant does not deny having received the same nor does defendant articulate with specificity what additional records, if any, defendant needs other than deposition and independent medical examination.

Generally, courts have allowed amendments to pleadings and bills of particulars, even at or after trial, absent proof of actual prejudice to the other party (*Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 444 NYS2d 571 [1981]; *Kurnitz v Croft*, 91 AD2d 972, 457 NYS2d 560 [1983]). A supplemental bill of particulars alleging no new injuries may be served as a matter of right up to thirty days before trial (CPLR 3043[b], *Portnow v Shelter Rock Public Library*, 125 AD2d 382, 509 NYS2d 106 [2nd Dept 1986]). Plaintiff is not seeking an amendment, but has served a supplemental bill of particulars setting forth injuries which are a sequelae to the original injuries. 22 NYCRR §202.21(d) allows additional discovery for unusual or unanticipated circumstances subsequent to the filing of the note that would otherwise cause substantial prejudices. A trial court may properly exercise its discretion in declining to strike a note of issue and supplemental bills of particulars despite plaintiffs having served the supplemental bills after filing their note of issue and certificate of readiness (*Traveras v Equitable Life Assurance Society of the United States*, 221

AD2d 166, 633 NYS2d 32 [1<sup>st</sup> Dept 1995]). Therefore, to avoid substantial prejudice to defendant, plaintiff is to be produced for further deposition and for independent orthopedic and neurologic examination with regard to the injuries, and sequelae related thereto, within forty five days of the date of this order (see. *Lopez v Reiff*, 156 AD2d 184, 548 NYS2d 228 [1<sup>st</sup> Dept 1989]). Plaintiff is further directed to provide defendant with authorizations for any health care providers who treated plaintiff for these injuries, and which authorizations have not been previously provided.

Accordingly, defendant's motion (001) is granted to the extent set forth above, and that part of the motion which seeks to strike the bills of particulars, vacate the note of issue and mark this action off the trial calendar is denied except as to the issue of traumatized sclerosis liposarcoma of the right thigh, as previously addressed.

Dated:     JUL 17 2007    

  
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J.S.C.

     FINAL DISPOSITION      X   NON-FINAL DISPOSITION