Rosenfeld v Baker
2007 NY Slip Op 33712(U)
November 5, 2007
Supreme Court, Suffolk County
Docket Number: 0000694/2004
Judge: Robert W. Doyle
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SHORT FORM ORDER

INDEX No. 04-694
CAL. No. 07-00735-MV

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 8-6-07
ADJ. DATE 8-27-07
Mot. Seq. # 002 -MD

---X
DONNA ROSENFELD,

Plaintiff,

- against -

WILBERT BAKER, III, KAMILAH A. McNEIL, JESSICA D. GOLDBERG and LAWRENCE J. GOLDBERG,

Defendants.
---X

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Upon the following papers numbered 1 to 24 read on this motion for further discovery; Notice of Motion/ Order to Show Cause and supporting papers 1 - 16 ; Notice of Cross Motion and supporting papers _; Answering Affidavits and supporting papers 17 - 24 ; Replying Affidavits and supporting papers ___; Other___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (002) by defendants, Jessica Goldberg and Lawrence Goldberg, pursuant to CPLR 3121 and 22 NYCRR §202.21 directing plaintiff to appear for a psychiatric medical examination is denied.

This action, premised upon a motor vehicle accident in which plaintiff's vehicle was struck in the rear on July 7, 2003, was commenced on January 30, 2004 by the filing of the summons and verified complaint with the County Clerk. Issue was joined by the moving Goldberg defendants by service of an unverified answer dated March 2, 2004. Plaintiff served an amended verified bill of particulars dated October 9, 2006 wherein she claims various physical injuries related to the accident, including, *inter alia*, dislocation of the right hip, right hip replacement by open reduction with resultant inequality in the lengths of her legs wherein the right leg is one inch longer than the left leg.

Upon the completion of discovery, a Note of Issue and Certificate of Readiness were filed by plaintiff on March 27, 2007.

Defendants now seek an order directing plaintiff to appear for a psychiatric examination. Defendant has conducted three physical examinations of plaintiff by specialists in neurology and orthopedics. Following plaintiff's hip surgery, a second orthopedic examination was performed of plaintiff by Dr. Craig Ordway. It is the opinion set forth in Dr. Ordway's report that gives rise to this motion.

Dr. Ordway sets forth in his report of January 10, 2007 that his history revealed plaintiff has only voiced complaints with regards to the right hip and right knee as sequella to the accident of July 7, 2003. He states he reviewed records of orthopedist Dr. Moriarty wherein plaintiff's right knee was described as bruised. Her right hip was tender and an x-ray of that hip was positive for a fracture of the pelvic ramus. She was given crutches and released. Dr. Ordway states he does not have a copy of that x-ray and does not know where the x-ray was taken. Ms. Rosenfeld returned to Dr. Moriarty on July 11, 2003 wherein he noted ecchymosis of the right hip and knee. On July 16, 2003, Dr. Moriarty found decreased swelling of the right knee and a pelvis x-ray was positive for fracture of the pubis. On July 23, 2002, Dr. Moriarty indicates the fracture of the pelvis was in good position. Dr. Ordway indicates he does not see a fracture on these films or on subsequent films.

Dr. Ordway indicates in his report that plaintiff was seen by a necrologist, but this court believes she was seen by a neurologist, Dr. Rudansky, for numbness and weakness of the right foot. Dr. Rudansky ordered an EMG, but plaintiff did not have the same done. A three phase bone scan was performed on September 12, 2003, but Dr. Ordway does not comment on the result of this test. An MRI of the right hip taken September 5, 2002 was "unremarkable." Thereafter, plaintiff began pain management with Dr. Tzou. She did not respond well to various medications and therefore, an electrical stimulator was implanted, but later removed due to infection. Plaintiff was later seen on October 15, 2002 by Dr. Scott Albert, an orthopedist. His examination of plaintiff's right knee revealed a 1+ effusion with flexion restricted to 30 degrees. Dr. Ordway states Dr. Alpert noted the MRI of the right hip and right knee were normal and the bone scan of the right lower extremity did not show any evidence of reflex dystrophy. Dr. Alpert noted on November 17, 2003 that plaintiff's right knee over the patella and proximal lateral tibia were bruised due to a fall and that plaintiff experienced "multiple falls" since her last visit. Dr. Ordway states plaintiff did not do well with pain management or physical therapy. Dr. Alpert then performed a right total knee replacement. Plaintiff continued to complain of pain in her right hip and pelvis which was unresponsive to multiple modalities. A right hip replacement was performed. The surgical record reveals degenerative arthritic changes. After the hip surgery, plaintiff experienced two dislocations which were reduced. Subsequently, a revision was performed. When plaintiff was examined by Dr. Ordway, he noted a right foot drop. He states, however, that Dr. Rudansky noted right foot drop several weeks after the accident, but Dr. Ordway does not indicate if the degree of foot drop is the same, better or worse.

Dr. Ordway opines that plaintiff's x-rays and MRI's of her hip were negative for fracture, and he does not find any causal relationship between the requirement for total hip replacement and the accident as described. Dr. Ordway assumes plaintiff had a degenerative condition in her knee as the demonstrated changes observed in her knee, he states, would have taken years to form. He further states she has had a good result from the knee replacement.

Dr. Ordway states that plaintiff has had a total of 17 procedures based upon her subjective complaints of pain. This, he states, is a classic case of Munchausen Syndrome in which a patient manipulates her treating physicians towards her personal psychological end.

Defendants have not set forth Dr. Ordway's credentials or status as an expert physician on Munchausen Syndrome, nor has Dr. Ordway. They have, however, forwarded plaintiff's medical records relative to this accident, as well as her OB/GYN records with Dr. Del Rosario, to Dr. Alberto Goldwaser, M.D. who states he is board certified in Psychiatry and Neurology and Forensic Psychiatry. Dr. Goldwaser reviewed these records and states, that although he did not have the benefit of a direct psychiatric examination and evaluation of Donna Rosenfeld, it is his opinion that Ms. Rosenfeld's clinical presentation depicts the aspects typically found in individuals with Factitious Disorder (Munchausen Syndrome). He further states, *inter alia*, that this is a woman with a psychiatric condition that pre-dates her motor vehicle accident. He also opines that she does not want to avail herself of a proper psychiatric examination, evaluation, and treatment of the this serious condition, but does not indicate his basis for this opinion. It is further noted that defendants have not supported Dr. Goldwaser's opinion with plaintiff's pertinent medical records. Nor does Dr. Goldwaser make reference to or provide any medical records for surgeries or conditions and medical care prior to this accident in support of his assertion that plaintiff's psychiatric condition pre-dates her motor vehicle accident. In fact, in opposing this motion, plaintiff has submitted an affidavit wherein she avers that since her successful surgeries for the injuries claimed in this accident, she has not sought nor received further treatment for about one year. Prior to this accident, the only surgery or "extraordinary" treatment she underwent was a tonsillectomy when she was a child. There is no other history and she had no prior injuries or history of any problems with those parts of her body claimed to have been injured in this accident.

Although the moving defendants argue that the Note of Issue need not be vacated, they have moved pursuant to 22 NYCRR §202.21. 22 NYCRR §202.21(e), in pertinent part, provides within 20 days after service of a note of issue and certificate of readiness, any party to the action...may move to vacate the note of issue, upon affidavit showing in what respects the case is not ready for trial, and the court may vacate the note of issue if it appears that a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of this section in some material respect. New York Courts have repeatedly held that a note of issue should be vacated when it is based upon a certificate of readiness that contains erroneous facts, including an incorrect statement that all discovery proceedings have been completed or waived (*See*, ***Ortiz v Arias,*** 285 AD2d 390, 727 NYS2d 879 [1st Dept 2001]). Certification Conferences scheduled by this court were adjourned on 7/28/05, 3/23/05. 5/4/06, 6/22/06, 9/21/06, 11/16/06, 1/4/07, 1/16/07, 2/21/07, and finally conducted on February 28, 2007. Dr. Ordway performed his orthopedic examination of plaintiff on January 10, 2007. The Note of Issue and Certificate of Readiness was filed with this Court on March 27, 2007. The moving defendants did not move to vacate the Note of Issue within twenty days of the service of the Note of Issue and have not demonstrated that there are erroneous facts or incorrect statement that all discovery proceedings have been completed or waived.

Defendants had their second orthopedic examination of plaintiff by Dr. Ordway on January 10, 2007, after her hip surgery. Dr. Ordway's subsequent report pertaining to that examination is dated January 10, 20007. Counsel for defendants attended the certification conference on February 28, 2007

and therefore knew, or should have known, of the results of Dr. Ordway's examination at the certification conference. It was not until June 1, 2007 that defendants sent a letter to counsel for plaintiff indicating they would like the opportunity to conduct an evaluative psychiatric IME of plaintiff and wanted to know if plaintiff would consent to the same. It was not until July 13, 2007, six months after the examination by Dr. Ordway, that the Goldberg defendants served the current order to show cause to obtain a psychiatric examination of plaintiff. It is noted, however, that plaintiff has not claimed any psychiatric injury as damages in this action.

The Uniform Rules for Trial Courts (22 NYCRR) §202.21(e) sets forth specific procedures for vacating a note of issue. Within 20 days after service of a Note of Issue/Certificate of Readiness, a party can move to vacate the Note of Issue upon a showing that Certificate of Readiness is incorrect in some material way. Pursuant to the Appellate Division, Second Department, where the defendant does not move to vacate the Note of Issue within 20 days of its filing, "the defendant is required to demonstrate that unusual or unanticipated circumstances developed subsequent to the filing of the Note of Issue and Certificate of Readiness which required additional discovery to prevent substantial prejudice (***Dragutescu v New York City Transit Authority,*** 2007 NY Misc LEXIS 4462, 237 NYLJ 117 [June 7, 2007]). When the moving party fails to proffer any unusual or unanticipated circumstances which developed subsequent to the filing of the Note of Issue and Certificate of Readiness, the second prong of the standard, "substantial prejudice" need not be addressed (***Dragutescu v New York City Transit Authority,*** supra; *see also,* ***Utica Mutual Ins. Co.*** v P.M.A. Corp, 34 AD3d 793, 826 NYS2d 138 [2nd Dept 2006]; ***Gomez v New York City Transit Authority,*** 19 AD3d 366, 795 NYS2d 909 [2nd Dept 2005]).

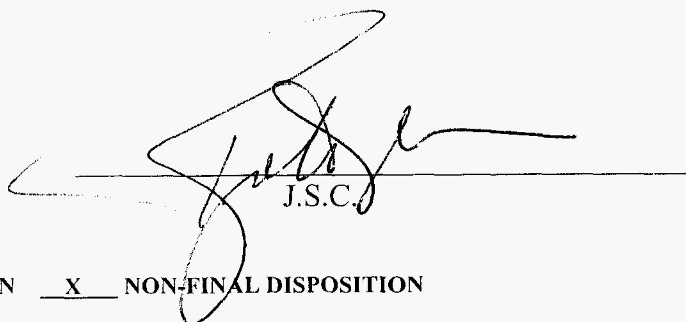
Although the moving defendants in the instant action argue that the "unusual and unanticipated findings" developed after the filing of the Note of Issue on March 28, 2007, this court notes that Dr. Ordway's report setting forth his comments about plaintiff having Munchausen Syndrome is dated January 10, 2007. The Certification Conference was conducted February 28, 2007 at which conference defendants could have requested the psychiatric examination or moved for further discovery, but failed to do so. Defendants' argument that "unusual and unanticipated findings" developed after the filing of the Note of Issue on March 28, 2007 is clearly without basis and is unsupported by the submissions and dates set forth on their own supporting papers. Defendants could have moved to strike the Note of Issue within the twenty days after it was filed based upon Dr. Ordway's report, but failed to do so. A lack of diligence in seeking discovery does not constitute a special or an extraordinary circumstance (***Melanson v Caggiano,*** 251 AD2d 1059, 672 NYS2d 829 [4th Dept 2004]).

It is further noted that plaintiff has not served a further amended bill of particulars alleging new or additional injuries, and at no time has plaintiff claimed psychological injuries arising out of this incident. Defendants have not submitted any evidence demonstrating that plaintiff's treating physicians have ever placed plaintiff's psychiatric status at issue, either. Based upon the amended bill of particulars served, defendants requested only the examination by Dr. Ordway, which examination was done. Discovery was complete when the Note of Issue was filed, and was in conformity with the prior discovery order and Certification Conference order. Therefore, it is determined that defendants have not demonstrated that the Certificate of Readiness is incorrect in some material way or that there were unusual or unanticipated circumstances which developed after the Note of Issue was filed, except for the situation which defendants created themselves in failing to timely request discovery.

Although this court need not consider the second prong of the test and decide whether or not the moving defendants will suffer substantial prejudice if the psychiatric examination is denied, it is determined defendants will not. Whether or not plaintiff has a psychiatric evaluation, it is apparent to this court that the plaintiff must demonstrate proximate cause between the accident and the injuries claimed by plaintiff to succeed in this action. (*see,* ***Sewer v Gagliardi Brothers Service,*** 51 NYS2d, 432 NYS2d 367 [1980]). Defendants may then demonstrate affirmatively that the surgeries and medical care provided to plaintiff were not medically necessary based upon the objective medical evidence, the medical records maintained by plaintiff's treating physicians, and their examining experts' reports and opinions.

Accordingly, motion (002) is denied.

Dated: NOV 0 5 2007



J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**