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

PRESENT: MARTIN SHULMAN J.S.C Justice PART 1

Index Number : 116419/2004
CARCANA, JAIME
VS.
HOUSING AUTHORITY
SEQUENCE NUMBER : 003
VACATE NOTE OF ISSUE/READINESS

INDEX NO. 116419/04
MOTION DATE
MOTION SEQ. NO. 003
MOTION CAL. NO.

on this motion to/for

	PAPERS NUMBERED
Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits ... A - I	1,2
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

FILED
JUN 16 2009
NEW YORK
COUNTY CLERK'S OFFICE

Dated: June 10, 2009

MARTIN SHULMAN 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):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 1

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JAIME CARCANA,

Plaintiff,

Index No. 116419/04

-against-

NEW YORK CITY HOUSING AUTHORITY, THE CITY OF NEW YORK and ALLIANCE ELEVATOR COMPANY,

Defendant.

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MARTIN SHULMAN, J. :

Mot. Seq. Nos. 003, 004 and 005 are hereby consolidated for disposition.

In Mot. Seq. No. 003, defendants New York City Housing Authority (NYCHA) and Alliance Elevator Company (Alliance) move for an order to vacate plaintiff's note of issue or, alternatively, for an order directing plaintiff to provide outstanding discovery by a date certain while the case remains on the trial calendar. In Mot. Seq. No. 004, plaintiff moves for an order extending her time to move for summary judgment on the issue of liability. NYCHA and Alliance cross-move for an order precluding plaintiff's liability expert from testifying at trial or, alternatively, for an order directing plaintiff to produce photos, notes and reports prepared by the liability expert and to make the liability expert available for them to depose. In Mot. Seq. No. 005, plaintiff moves for leave to amend her bill of particulars to include claims for loss of income, loss of Social Security Retirement income and the cost of future health care. NYCHA and Alliance cross-move for an order compelling plaintiff to appear for a further deposition and reserving the right to have plaintiff appear for a vocational rehabilitation evaluation.

In this personal injury action, plaintiff seeks damages due to an accident occurring on August 22, 2003 when plaintiff was struck by a closing elevator door in her apartment building at 950 East 4th Walk, New York, New York. Plaintiff filed the note of issue on November 21, 2008.

NYCHA and Alliance move to vacate the note of issue on the ground that to date, plaintiff has failed to respond to various discovery demands. They submit a copy of a letter dated March 19, 2007, demanding employment authorizations, and a letter dated August 6, 2007, demanding medical authorizations. They also submit copies of this court's orders dated April 4, 2007, June 17, 2008 and September 9, 2008 directing plaintiff to respond promptly to the demands. NYCHA and Alliance argue that in an action such as this, it is imperative that plaintiff provide full and complete medical and employment history information to substantiate her claims. For her alleged failure to respond, they request an order striking this case from the trial calendar. Alternatively, defendants seek an order directing plaintiff to supply discovery on a date certain prior to the trial date.

Plaintiff does not oppose this motion and accordingly, it is granted to the extent that plaintiff is directed to provide the moving defendants with the employment and medical authorizations within 30 days from service of a copy of this order with notice of entry. Upon plaintiff's failure to comply with the foregoing directive, defendants' counsel shall submit an affidavit to the court detailing the default, which shall result in the vacatur of the note of issue.

Plaintiff moves for an order extending her time for 30 days to move for summary judgment on the issue of liability. Plaintiff submits an affidavit detailing exactly how her

accident occurred. This affidavit was originally intended to be used as part of the summary judgment motion papers. Shortly after the accident occurred, plaintiff retained the services of Eugene Stiffler, a qualified elevator inspector, to inspect the elevator. As a result, Mr. Stiffler determined that the accident was caused by Alliance's failure to properly maintain the elevator.

Plaintiff has attempted to obtain an affidavit from Mr. Stiffler in his capacity as a liability expert. She states that he has since moved to Houston, Texas, and that as a result of the holidays, it has been difficult to contact him. Thus, plaintiff requests the extra 30 days in order to obtain his affidavit and make the motion.

NYCHA and Alliance oppose the motion and cross-move for an order precluding Mr. Stiffler from testifying at trial or, alternatively, for an order directing plaintiff to produce photos, notes and reports prepared by him and to make the expert available for deposition. In February 2004, defendants state that plaintiff filed a pre-suit order to show cause to compel NYCHA to allow plaintiff, her attorney and Mr. Stiffler to inspect, photograph and examine the elevator. The basis for plaintiff's prior motion was that NYCHA was then in the process of renovating the elevators at the housing development in question and plaintiff wanted to inspect the elevator in its existing condition. The moving defendants state that Alliance was not a party to plaintiff's pre-suit order and was not represented by counsel at the time of either the pre-suit motion or plaintiff's pre-suit inspection of the elevator.

In a letter dated February 28, 2005, Alliance demanded that plaintiff provide copies of all photos taken by plaintiff or on her behalf at the pre-suit elevator inspection, a copy of Mr. Stiffler's report and copies of any elevator records, accident reports and

inspection reports. NYCHA and Alliance argue that court orders also directed plaintiff to provide such information to them. Subsequently, plaintiff notified defendants that she was not in possession of any photos or reports at that time, but that she reserved the right to supplement her response upon the completion of discovery. NYCHA and Alliance contend that at no time prior to plaintiff's filing of the note of issue did plaintiff ever identify the elevator expert, serve a CPLR §3101(d) expert's disclosure statement or supplement her prior responses regarding the pre-suit elevator inspection.

NYCHA and Alliance seek to preclude Mr. Stiffler's trial testimony. Plaintiff's expert had a chance to see the elevator in its original condition and Alliance did not have that opportunity because it was not a party to the pre-suit motion. Alliance claims that it would be unfair to allow him to testify and provide information that they were unable to examine or analyze. Alternatively, NYCHA and Alliance seek an order compelling plaintiff to provide information possessed by her and Mr. Stiffler and to allow NYCHA and Alliance an opportunity to depose Mr. Stiffler before the trial.

In opposition to the motion to extend time to serve the summary judgment motion, NYCHA and Alliance argue that plaintiff has not shown good cause for granting an extension of time. They contend that plaintiff's proposed motion lacks merit because too many questions of fact remain in this case.

Plaintiff opposes the cross motion, claiming that defendants have never established a legally sufficient basis to obtain disclosure of Mr. Stiffler's report. Plaintiff states that she provided a CPLR §3101(d) Expert Response to notify them of her intention to rely upon expert testimony at the time of trial. She states that she is not in possession of any inspection photos and that any notes prepared by Mr. Stiffler

constitute material prepared for litigation and are undiscoverable absent a showing of special circumstances. She also claims that defendants are not entitled to depose Mr. Stiffler absent a showing of special circumstances.

Plaintiff argues that NYCHA, the owner of the elevator and the building in which plaintiff resided, had an opportunity to inspect the elevator prior to renovating it and failed to do so. As for Alliance, plaintiff asserts that Alliance had a maintenance contract with NYCHA and actually performed preventive maintenance on the subject elevator eight hours before the accident. Plaintiff also asserts that Alliance was back in the building inspecting the elevator within days after the accident and several months before Mr. Stiffler was permitted to inspect the elevator. Plaintiff claims that these defendants had a sufficient opportunity to inspect the elevator.

In reply to defendants' opposition to her motion to extend, plaintiff argues that NYCHA and Alliance have not demonstrated any prejudice if the motion is granted. Plaintiff avers that she has a meritorious claim and has offered a reasonable excuse in seeking a short extension of time within which to move.

Pursuant to CPLR §3101(d), plaintiff has named her expert witness who will testify at the trial, stating in reasonable detail the subject matter of the testimony, the substance of the facts and opinions, the expert's qualifications and a summary of the grounds for the expert's opinion. She has also submitted a copy of the expert witnesses' narrative report. Further disclosure of the expert's expected testimony requires a court order upon a showing of special circumstances. *See Bostrom v William Penn Life Ins. Co. of New York*, 285 AD2d 482 (2d Dept 2001). The moving

defendants have not made a showing of special circumstances and their cross-motion to preclude or alternatively to depose the expert is denied.

Pursuant to CPLR 3212(a), after issue has been joined, the court can set a deadline for filing summary judgment motions, which can be no earlier than 30 days after the filing of the note of issue. If the court does not set a date, the motion must be made within 120 days of the filing of the note of issue, except with leave of court for good cause shown. *See Carvajal v Madison*, 297 AD2d 550, 551 (1st Dept 2002). In this case, plaintiff filed the note of issue on November 21, 2008. To have her motion granted, she must demonstrate good cause.

CPLR 3212(a) requires a showing of good cause for the delay in making the motion and a satisfactory explanation for the untimeliness, rather than simply permitting meritorious, non-prejudicial filings, however tardy. *Brill v City of New York*, 2 NY3d 648, 652 (2004). Plaintiff asserts a delay in obtaining an affidavit from Mr. Stiffler, her expert. The court will allow plaintiff 45 days from service of a copy of this order with notice of entry to move for summary judgment on the issue of liability. By that time, plaintiff should have obtained the aforesaid affidavit.

Plaintiff moves for leave to amend her bill of particulars to include claims for loss of income, loss of Social Security retirement income and the cost of future health care incurred by plaintiff as a result of the accident. Plaintiff provides a copy of her proposed amended bill of particulars. At her deposition, plaintiff testified that at the time of her accident she was working at a full-time job earning $12.50 per hour. Based on this testimony, Dr. Alan Leiken, plaintiff's economic expert, determined that plaintiff incurred $2,192,030 in past and future lost earnings and that plaintiff incurred $687,747 in lost

social security retirement income. Based on a report of Dr. Leonard Bleicher, Dr. Leiken determined that plaintiff will incur future costs for healthcare in the amount of $2,275,266. Copies of these reports are submitted.

Plaintiff contends that leave to amend should be granted in the absence of prejudice to defendants. She states that the aforesaid reports have been served on them and, as such, they are aware of the basis of the proposed amendments. Plaintiff claims that they have the option of retaining their own experts to draw their own conclusions based on the existing record, should they so choose.

NYCHA and Alliance oppose the motion, claiming prejudice. They state that plaintiff's initial bill of particulars represented that plaintiff was not employed at the time of the accident. They claim that plaintiff served the economic reports after filing the note of issue and the reports for the first time raised the issue of future loss of income and benefits. They assert that if plaintiff had wanted to claim lost earnings, her time to do so was prior to filing the note of issue so that they would be on notice and could conduct discovery accordingly.

If this motion is granted, NYCHA and Alliance assert that they must be afforded the opportunity to conduct a further deposition of plaintiff with respect to her educational background, prior and subsequent work history and other matters that may be relevant to her ability to work in the future. They seek to reserve the right to have plaintiff undergo a vocational rehabilitation evaluation if warranted following the deposition.

In reply, plaintiff asserts that Dr. Leiken's report is based exclusively upon her testimony at her deposition and that defendants were already in possession of that information. She states that her prior educational background is irrelevant to the

economic calculations. She argues that defendants had an opportunity before this to request a vocational rehabilitation evaluation of her.

Generally, courts allow amendments to pleadings and bills of particulars, even at or after trial, absent proof of actual prejudice to the other party. *See Kurnitz v Croft*, 91 AD2d 972, 973 (2d Dept 1983). When leave is sought on the eve of trial, judicial discretion should be exercised in a discrete, prudent and cautious manner. *See Reape v City of New York*, 272 AD2d 533 (2d Dept 2000). This court shall allow plaintiff to serve the amended bill of particulars, provided the moving defendants are granted leave to expeditiously depose plaintiff on the issue of new lost earnings and future health care costs and thereafter to conduct a vocational rehabilitation evaluation if they so choose.

Accordingly, it is

ORDERED that NYCHA's and Alliance's motion to vacate plaintiff's note of issue is granted to the extent that plaintiff is hereby ordered to provide employment and medical authorizations to defendants within 30 days after service of a copy of this order with notice of entry, and in the event that plaintiff fails to comply with the foregoing directive, defendants' counsel may submit an affirmation detailing the default and the court shall vacate the note of issue; and it is further

ORDERED that plaintiff's motion to extend the time to move for summary judgment is granted to the extent that plaintiff shall move for summary judgment within 45 days after the service of a copy of this order with notice of entry; and it is further

ORDERED that NYCHA's and Alliance's cross motion for an order precluding plaintiff's liability expert from testifying at trial, directing plaintiff to produce photos, notes

and reports prepared by plaintiff's liability expert and to produce said liability expert for deposition is denied; and it is further

ORDERED that plaintiff's motion for leave to amend the bill of particulars is granted provided that plaintiff is made available for further deposition within 30 days after service of a copy of this order with notice of entry. The amended bill of particulars in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that NYCHA's and Alliance's cross motion to compel plaintiff to appear for a further deposition is granted, and NYCHA and Alliance are directed to depose plaintiff within 30 days after service of a copy of this order with notice of entry.

This constitutes this court's Decision and Order. Courtesy copies of this Decision and Order have been provided to counsel for the parties.

DATED: New York, New York
June 10, 2009

HON. MARTIN SHULMAN, J.S.C.