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

PRESENT: Smith Justice PART 62

Lopez, Angelina

- v -

City of New York

INDEX NO. 104601/07

MOTION DATE

MOTION SEQ. NO. 07

MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
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 annexed ~~it~~ memorandum decision and order.

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

Dated: 5/3/10

J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK - PART 62

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ANGELINA LOPEZ, an infant by her parent and natural guardian, JOSE LOPEZ and JOSE LOPEZ, individually

Plaintiffs,

Index No. 104601/02
Seq. No. 007

-against-

THE CITY OF NEW YORK and CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Defendants.

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HON. KAREN S. SMITH

Plaintiffs' motion, brought by an Order to Show Cause, to amend and supplement plaintiffs' Bill of Particulars pursuant to CPLR §§ 3025(b) and 3043(b) is denied for the reasons stated below.

This case has a long and tortuous history. The complaint in this action was filed on March 5, 2002. It appears from the Court's records that defendant City of New York served its answer prior to October 14, 2004, when plaintiffs filed their note of issue.[1] Discovery was conducted amongst the parties between October 2003 and October 2006. In October and November 2007 the case was sent to mediation and thereafter sent out for trial. The case was first scheduled for trial on November 30, 2007, but was transferred to the instant part and stayed for the appointment of a guardian *ad litem*, as counsel for Mr. Lopez felt that his client appeared to have some cognitive deficits which required a guardian to best protect his interests. The Court, by order dated December 3, 2007, required counsel for plaintiff to serve and file an Order to Show Cause for the appointment of a guardian *ad litem*, to be returnable on December 20, 2007, and further ordered the trial to be held thirty days after the appointment of a guardian. Also included in the December 3, 2007 order was a provision requiring the parties to exchange their CPLR §

[1] At the last hearing before the Court on the instant motion, on April 13, 2010, plaintiffs discontinued the action against defendant Con Edison.

3101(d) expert disclosures thirty days prior to trial. By order dated December 20, 2007 the Court appointed Robert Kruger, Esq. as a guardian for plaintiff Jose Lopez, but denied plaintiffs' motion for a further stay of the trial.

The trial was scheduled to commence for the second time on February 4, 2008. The trial was again adjourned in the trial assignment part and stayed as plaintiff Jose Lopez (hereinafter referred to as plaintiff) had not exchanged his CPLR § 3101(d) disclosure concerning the medical expert, without which plaintiff would not have been able to prove causation. The case appears to have remained dormant until plaintiff's wife sent a letter to the Court dated July 9, 2009 (not served on the Court until September 2009), with copies to all sides, informing the Court that the law firm hired to handle the case had dissolved and the lawyers to whom the case was transferred refused to represent plaintiff. The Court held a conference in or about October 2009 and determined that the law firm representing the plaintiff, which had dissolved, or was in the process of dissolving, had let the case languish, and that the guardian who had been assigned to protect the interest of Mr. Lopez failed to properly represent Mr. Lopez's interests. One of the lawyers who had been a member of the original law firm and had been assigned to handle plaintiff's case for the firm, Herbert Rodriquez, Jr., appeared at the conference, stating that he would be willing to continue representing the family. Initially, the Court questioned his ability to represent the plaintiffs as it appeared he was one of the attorneys who had failed to properly pursue the case. However, as the family was unable to find a new attorney willing to handle the case the Court, by order dated November 5, 2009, confirmed the representation of plaintiffs by attorney Rodriquez, removed the original guardian *ad litem* and replaced him with a new guardian *ad litem,* Denise Kranz, Esq. In addition the Court set dates for, 1) EBTs of plaintiff Angelina Lopez and her mother; 2) exchanges of medical records and doctor's reports; 3) an additional EBT of plaintiff, limited to his physical condition and last medical treatments since his last EBT; 4) a new medical exam to be conducted by a doctor chosen by defendant; and 5) the exchange of the CPLR § 3101(d) disclosure for thirty days prior to trial. In addition the Court set a trial date for April 19, 2010 to provide plaintiffs' attorney sufficient time to "re-create the files," hire an expert on causation, and comply with discovery. The November 5, 2009 order was amended on February 25, 2010, at plaintiffs' request, solely for the purposes of extending the

dates provided in the prior order. The date for the commencement of jury selection, April 19, 2010, remained unchanged.

By Order to Show Cause, signed on March 9, 2010, made returnable March 25, 2010, plaintiff now seeks to amend his Bill of Particulars to add new injuries and a new theory of causation. As an initial matter, plaintiffs' counsel contended at oral argument that the predicate for the relief he now seeks - adding new injuries, theories of causation, and mechanism of injury - is the following language, contained in both the November 5, 2009 order and the February 25, 2010 amended order: "This order supersedes all prior orders in relation to discovery matters, pre-trial matters, and all matters dealt with herein." This phrase, however, is nothing more than a statement used by this Court and other courts to denote a new schedule for discovery and exchange of any reports and documents prior to the commencement of trial. It was not meant, nor could it reasonably be construed at this late stage in the proceedings, as an invitation for plaintiffs' counsel to seek substantive amendments to the Bill of Particulars adding a new set of injuries and a new theory of causation. In fact, CPLR § 3043(b), the only applicable section which plaintiffs cite as the basis for the instant application, permits a party ". . . to serve a supplemental Bill of Particulars with respect to continuing special damages and disabilities without leave of court at any time, but not less than thirty days prior to trial. "**Provided however that no new . . . injury [is] claimed . . . .**" (Emphasis added.)[2] CPLR § 3043 gives the court discretion in granting or denying such an application.

In the instant case, plaintiff seeks to amend and supplement his Bill of Particulars to add a new brain injury, worsening of the L5/S1 disc, new lumbar spine injuries (specifically an injury to L4/L5 disc), and a tear of plaintiff's left meniscus, which will require laproscopic surgery.

The case involves an accident which occurred on January 30, 2001 when the car in which Mr. Lopez was driving and in which his daughter, Angelina, was passenger, drove over an allegedly unsecured metal plate which then became trapped underneath the carriage of the car, causing, *inter alia,* the car to "violently shake" and Mr. Lopez to hit his head on the roof of the car. The first Bill of Particulars, dated December 7, 2002, listed among Mr. Lopez's injuries the

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[2] CPLR § 3025(b), also cited by plaintiffs as a basis for the instant application does not apply, as it refers to amendment of a pleading, which is not what plaintiff is seeking.

following: internal derangement of his lumbar spine, including a bulging disc at L5/S1 without compromise of the thecal sac or nerve roots, decreased range of motion in the lumbar spine, internal derangement of his cervical spine at C5/C6 and C6/C7, positive foraminal compression test on the left side, ventricular dilation of 2 plus with mild cortical atrophy, cerebral concussion and post-traumatic headaches, decreases in flexion in his hip, ankle and left elbow and shoulder, and a decrease in extension in his left knee and left wrist. In his first Amended Bill of Particulars, dated September18, 2006, plaintiff sought to add, " Secondary to the brain trauma: cognitive deficits including memory attention, and concentration; irritability, emotional liability depression, seizure disorder, hearing and vision deficits, and dizziness; insomnia, sleep disorder, and mood disorder." The Court notes that there was no mention of hydrocephalus in the September 18, 2006 amendments.

In the instant application, plaintiff seeks to add as injuries, "Exacerbation of pre-existing hydrocephalus requiring a Stereotactic Endoscopic Third Ventriculostomy, and, thereafter requiring an Extracranial Shunting Procedure, Anxiety, Dementia, Cognitive Impairment, Mental Impairment, and Psychological Impairment; tear of the posterior horn medial meniscus of the left knee and hypertrophic Synovium and plica formation requiring a laproscopy, partial medial meniscectomy and plica resection, partial synovectomy; cervicalgia; mild DJD, left L5/S1 disc desiccation with annular tear approaching the left S1 root; L4/L5 bulging with bilateral ligamentous and facet hypertrophy; L4/L5 radiculopathy and neuropathic pain." In addition, plaintiff seeks to amend the Bill of Particulars to increase his special damages to represent the medical treatment he has received and will receive in the future, related to the injuries he claims he sustained as a result of the January 30, 2001 accident.

Concerned that the plaintiff, having been abandoned by his attorneys would not be able to obtain a fair hearing for his injuries caused by the accident, and based on the severity of the brain injury now complained of, the Court agreed to hold a hearing with experts on each side to determine if there was a viable claim to support plaintiff's application to amend the Bill of Particulars. While it would appear that the Court was invoking a pre-trial hearing pursuant to *Frye v. United States,* 293 F. 1013 (D.C. Cir. 1923), *Frye* only applies when a doctor is proposing to testify regarding a novel procedure, methodology or theory in order to determine if

his theories are generally accepted in the scientific community (*Marsh v. Smyth*, 12 AD3d 307 [1st Dept. 2004]; Saxe, J. concurring opinion). In fact, the purpose of the hearing was merely to determine if there was any viability to plaintiff's proposed claim involving the brain injury and the purported reason for the delay as to both it and the alleged knee and back injuries. While leave to amend is generally freely given absent prejudice to the party opposing the amendment, (*Spitzer v. Schussel*, 48 AD3d 233 [1st Dept. 2008]), a moving party making such a motion on the eve of trial has the heavy burden of showing extraordinary circumstances surrounding the delay (*Sweeney v. Purcell Construction*, 20 AD3d 872 (4th Dept 2005).

As for the amendments involving the knee and back injuries, the Court concludes that plaintiff has not met his burden of showing that there were extraordinary circumstances surrounding the delay of amending the Bill of Particulars, to the extent plaintiff is alleging new injuries, as opposed to the natural sequelae of the injuries alleged in the first Bill of Particulars. Plaintiff's counsel essentially argues that the abandonment by plaintiff's counsels constitutes the "extraordinary circumstances surrounding the delay." However, that argument ignores the fact that it was this very same attorney who represented plaintiffs then, as he does now. In effect, plaintiff's counsel is saying that his original work contained too many errors and he wants to start over again. That argument may have been given a sympathetic ear as late as February 2008 when counsel was given a second chance to obtain the appropriate expert. When this Court set a new discovery schedule in November 2009 and granted an extension in February 2010, it was explicitly to give plaintiff and defendant time to complete discovery, given plaintiff's recent surgery, and to allow plaintiff time to find an expert and provide defendants with a timely expert disclosure – not to recast the case.

As to the new brain injury alleged, the evidence is too speculative to support such an amendment and is clearly prejudicial to defendant. At the April 13, 2010 hearing, plaintiff's expert, Dr. Robert Goodman, a board certified neurologist, who has been treating plaintiff since February 2005 explained that it was his opinion that plaintiff, who may have been suffering from obstructive hydrocephalus since 1983 as a result of meningitis, developed an inflamation in his brain caused by bleeding resulting from the car accident of January 30, 2001. Dr. Goodman further opined that the inflamation caused scar tissue to develop which probably led plaintiff's

obstructive hydrocephalus to become communicating hydrocephalus, which Dr. Goodman believes is the cause of plaintiff's headaches and other cognitive and emotional impairments. Dr. Goodman's opinion is based on his observation of scar tissue in 2005 when he first operated on plaintiff to insert a stint to make room for more liquid to pass around the brain. Dr. Goodman stated, in response to questioning by the Court, that he had not linked the January 2001 car accident as the cause of the inflamation because he was not made aware of the car accident until 2007 and was not given plaintiff's record immediately proceeding the accident in which plaintiff complained of headaches, until a few months ago. Having learned of the accident and the symptomotolgy immediately proceeding the accident, Dr Goodman was able to opine that the inflamation in plaintiff's brain which caused the scar tissue to form was due to trauma (i.e., the car accident) and not to disease (i.e., the meningitis contracted in 1983), nor prior surgery. The problem with Dr. Goodman's testimony was that it was replete with speculation and unsupported by the medical records. He speculates that the scar tissue he believes he observed in plaintiff's ventricle of his brain was caused by inflamation resulting from the trauma. When asked by the Court if the inflammatory process resulting in the creation of scar tissue could have preceded the 2001 car accident, he admitted that he did not know for sure, but "that it [the trauma of the car accident] was the most likely explanation for the course of events that occurred to him." (April 13, 2010 transcript ("Transcript"), page 10, lines 14 - 24.) He repeated this uncertainty later on in the hearing, stating, "I am not a hundred percent sure. I think that this is the best explanation to what happened to him over, the, whatever, the last seven years." (Transcript, page 21, lines 15-17). Dr. Goodman admitted that in 2007 he told the plaintiffs it was unlikely that Mr. Lopez's hydrocephalus was caused by the car accident (Transcript, page 27, lines 10-13), despite the fact that the tests done in Bellevue Hospital in 2007 had already concluded that Mr. Lopez had communicating hydrocephalus and that the doctor himself had reached that diagnosis by then. (Transcript, pages 26-27, lines 2 -6 and 15-18). The doctor never fully explains to the Court's satisfaction, why, if he knew of the car accident in 2007 and had objective evidence of the existence of the communicating hydrocephalus and his own clinical conclusion was consistent with the evidence, it took until 2010 for him to draw a connection between the disease and the car accident. Dr. Goodman's explanation is that this delay was because he was not provided with

plaintiff's medical record from immediately after the accident which showed that plaintiff complained of headaches. The doctor's conclusions after being provided with the record showing that plaintiff complained of headaches after the accident, however, presupposes that the headaches were caused by a bleed, which in turn caused inflammation, which eventually lead to the formation of scar tissue in the ventricle of the brain. The problem with this explanation is that there is no objective evidence that there was ever a bleed around or into the brain, constituting mere speculation, which is insufficient to support the proposed amendment. Nor is there objective evidence that the tissue observed by Dr. Goodman was, in fact, scar tissue, as there was no laboratory testing done to confirm.

As for the prejudice to defendant City of New York, as pointed out in its papers, in 2002, plaintiff's claim was that he suffered from a concussion. In 2006, plaintiff amended the claim to allege that he suffered from a traumatic brain injury causing cognitive deficits. According to defendant City of New York, as of November 2007, when plaintiff served defendants with an expert CPLR 3101(d) exchange for a Dr. Mihai Dimancescu, the City was put on notice that plaintiff's then-expert would testify at trial that the accident of 2001 was the cause of plaintiff's cognitive deficits, not the hydrocephalus.[3] Now in 2010, only a month before the third trial was scheduled, plaintiff's new expert is prepared to testify that the accident exacerbated plaintiff's new form of hydrocephalus. While defendant argues that its last expert was prepared to opine that if plaintiff suffers from cognitive deficits, it is the result of his hydrocephalus and the City would now have to either prepare their expert to counter a new theory or be forced to hire a new expert, the testimony of their expert, Dr. Roger Bonomo, on April 19, 2010, belies that objection. Dr. Bonomo testified that, in his opinion, plaintiff does not currently suffer from any form of hydrocephalus. Despite this discrepancy, what is clear, is that until the proposed amendment, there was no indication of, nor is the City prepared to go forward on a theory that the January 30, 2001 accident exacerbated plaintiff's communicating hydrocephalus. To cause the defendant to go forward on yet another new theory at this late date would clearly unduly prejudice the City.

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[3] For the purposes of this motion it is irrelevant that the City rejected this expert's disclosure as untimely. What is important is that the disclosure put defendant on notice of plaintiff's theory of damages at that time.

Accordingly, it is

ORDERED that plaintiffs' application to amend the Bill of Particulars as proposed in Exhibit F to the motion papers, is denied **except as to** the L5/S1 amendment, which the Court finds is a natural sequelae of the earlier L5/S1 injury referred to in the original Bill of Particulars; it is further

ORDERED that the trial in this matter shall be placed on the trial calendar in the Trial Ready Part (Part 40) on July 12, 2010, for the parties to commence jury selection, and the trial may only be adjourned by order of Hon. Karen S. Smith.

This constitutes the decision and order of the Court.

Dated: May 3, 2010
New York, New York

KAREN S. SMITH, J.S.C.