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

PRESENT: JAFFE BARBARA JAFFE J.S.C. PART 5

Index Number : 106399/2004

TATA, JOSEPH

VS

CITY OF NEW YORK

Sequence Number : 006

VACATE

CAL # 102

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to 3 were read on this motion to/for vacate

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

FILED
OCT 13 2010
COUNTY CLERK'S OFFICE
NEW YORK

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 10/8/10
OCT 08 2010

BARBARA JAFFE J.S.C.
J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

----------x

JOSEPH TATA,

Plaintiff,

-against-

THE CITY OF NEW YORK and 129 WEST 29th ASSOCIATES,

Defendants.

----------x

Index No. 106399/04

Motion Date: 10/5/10
Motion Seq. No.: 006

DECISION AND ORDER

BARBARA JAFFE, JSC:

For plaintiff:
Jennifer J. Bock, Esq.
Dell, Little, et al.
5 Orville Dr., Ste. 100
Bohemia, NY 11716
631-913-4444

For defendant City:
Marie Bonitatibus, ACC
Michael A. Cardozo
Corporation Counsel
100 Church St.
New York, NY 10007
212-788-0521

By notice of motion dated July 19, 2010, defendant City moves pursuant to CPLR 2221(a) and 5015 for an order vacating a prior order dated June 14, 2010. Plaintiff opposes the motion.

I. PERTINENT BACKGROUND

On August 5, 2003, plaintiff was allegedly injured when he tripped on a sidewalk defect in front of 129-133 West 29th Street, after which he felt pain in his left leg. (Affirmation of Marie Bonitatibus, ACC, dated July 19, 2010 [Bonitatibus Aff.], Exh. A). On October 16, 2003, plaintiff underwent a left knee arthroscopy to repair a torn medial meniscus. (*Id.*).

On or about November 3, 2003, plaintiff served his notice of claim on City, and on or about April 14, 2004, his summons and complaint. (*Id.*, Exhs. A, B). Sometime thereafter, City

served its answer. (*Id.*, Exh. C).

On or about August 16, 2004, plaintiff served City with a verified bill of particulars in which he alleged that he sustained the following injuries: bone bruise of the medial femoral condyle; deformity with flattening and oblique tear of the posterior horn of the medical meniscus; complex tear of the medial meniscus; joint effusion; with a left knee arthroscopy, partial medial meniscectomy, chrondroplasty of the medial femoral condyle, and injection of marcane anesthetic performed on October 16, 2003. (*Id.*, Exh. D).

On June 10, 2005, plaintiff served City with a supplemental bill of particulars in which he corrected a typographical error in the original bill of particulars as to the location of his accident. (*Id.*, Exh. E).

On or about November 10, 2005, plaintiff filed a note of issue. (*Id.*, Exh. F). By decision and order dated June 7, 2006, the complaint was dismissed against defendant 129 West 29th Associates. (*Id.*, Exh. G).

In June 2006, plaintiff underwent a left femoropopliteal bypass, after which he experienced complications, resulting in the amputation of his left leg above and below his knee. (*Id.*, Exhs. K, L).

On or about May 25, 2007, plaintiff changed attorneys, and on June 23, 2008, after the parties appeared for trial, the action was stricken from the calendar. (*Id.*, Exhs. H, J). By decision and order dated September 1, 2009, plaintiff's motion to restore the action to the trial calendar was granted; plaintiff's papers in support of the motion do not mention his 2006 surgery or amputation. (*Id.*, Exhs. I, J).

On or about June 9, 2010, plaintiff served City with a second supplemental bill of

particulars in which he added the following injuries: post-operative atherosclerotic occlusive disease of the left lower extremity; idiopathic thromocytopenic purpura exacerbated by the underlying accident and prior surgery; left politeal artery thrombectomy with gore-tex patch angioplasty; left femoral distial posterior tibialis bypass; left above the knee amputation; post-operative development of gangrene requiring an amputation of the left foot and calf above the knee; severe pain, suffering and the need for a prosthetic leg; and use of walking devices such as a cane, crutches and wheelchair. (*Id.*, Exh. M). By letter dated June 11, 2010, City rejected the second supplemental verified bill of particulars. (*Id.*, Exh. N).

On June 14, 2010, following their appearance for trial in Part 40, the parties appeared before me. Upon orally deciding that plaintiff's newly served bill of particulars should be permitted on the condition that the trial be adjourned for a sufficient period of time to enable City to obtain any necessary discovery as to the new allegations, the parties agreed to enter into an agreement encompassing my oral ruling along with any other agreement between them. (*Id.*, Exh. R). Defense counsel thereupon drafted an order, signed by each counsel, whereby plaintiff would "serve a valid pleading asserting leg amputation injury within 20 days," with City reserving its right "to object to said pleading and reject same to the extent pleading not valid." Plaintiff also agreed to pay a fee for City having had to retain an expert for trial starting June 14, 2010 to the extent such fee was non-refundable, with City to provide a letter regarding the fee's status within 30 days, and the trial was adjourned to October 18, 2010. (*Id.*).

On or about June 21, 2010, plaintiff served City with a second supplemental bill of particulars identical to the prior one. (*Id.*, Exh. O). By letter dated June 29, 2010, City rejected it without explanation. (*Id.*, Exh. P).

On or about July 7, 2010, City submitted an order to show cause to preclude plaintiff from offering evidence at trial as to injuries other than those set forth in his original bill of particulars and to strike plaintiff's second supplemental bill of particulars. (*Id.*, Exh. T). I denied the order to show cause as without legal basis, observing that the June 14 stipulation permitted a new pleading.

II. CONTENTIONS

City argues that the order of June 14, 2010 should be vacated given its counsel's misunderstanding as to its meaning. Counsel affirms that having reserved the right to object to the pleading, she understood the order as providing for a time frame within which plaintiff could move for leave to serve an amended bill of particulars. Otherwise, she would have opposed it by orally advancing arguments contained within a written motion *in limine*. (Bonitatibus Aff., Exh. S). City maintains that I, too, misapprehended the order, having granted plaintiff leave to serve an amended bill of particulars absent a medical affidavit establishing the merits of the newly-alleged injuries and a reasonable excuse for the delay in not specifying the injuries between 2006 and 2010. And, without any basis for inferring that the 2006 injuries are related to plaintiff's 2003 accident, and given plaintiff's history of leg problems prior to the accident and the absence of any mention of his 2003 injuries in his 2006 medical records, City contends that plaintiff is alleging new injuries as to which he must serve an amended bill of particulars, not a supplemental one. (Bonitatibus Aff.).

City also observes that despite ongoing litigation between 2006 and March 2010, plaintiff never served, nor moved for leave to serve, an amended bill of particulars, nor did he give City notice that he would be claiming the 2006 injuries until the parties appeared for a mediation

conference on March 24, 2010, and despite alleging that the 2006 injuries are related to his 2003 accident, plaintiff failed to serve a supplemental bill of particulars until one business day before jury selection was due to begin on June 14, 2010.

City thus argues that in the interest of justice, the June 14 order should be vacated to permit the parties to litigate the issue of whether plaintiff should be given leave to amend his bill of particulars to add his 2006 injuries. City maintains that leave should not be granted absent a showing by plaintiff of a meritorious claim, consisting of a medical affidavit connecting the 2006 injuries to plaintiff's accident, and a reasonable excuse for the delay, and that it will be prejudiced as no discovery has taken place as to the new injuries, it has prepared for trial and retained an expert to address the 2003 injuries only, and documents related to plaintiff's long-standing leg problems may have been discarded.

In opposition, plaintiff asserts that the July 14 order is unequivocal and unambiguous and that as City's counsel drafted it, she is estopped from alleging that she misapprehended it. (Affirmation in Opposition of Jennifer J. Bock, Esq., dated July 29, 2010). And, absent any mention in the order of a motion or leave, plaintiff argues that it is consistent with my oral ruling granting him leave to serve a new bill of particulars. He also observes that City knew as of March 2010 of his new injuries and that he provided it in April 2010 with authorizations for medical records related to them, and that the trial was adjourned to allow the parties to conduct examinations related to the injuries. Consequently, plaintiff maintains that City has not shown any prejudice arising from the new bill of particulars.

In reply, City denies that I orally granted plaintiff leave to serve a new bill of particulars or that the parties had argued before me the issue of whether plaintiff was required to serve an

amended rather than supplemental bill of particulars, and observes that plaintiff does not explain why City had been permitted to reserve its right to object to the pleading if leave had already been granted and has not demonstrated a reasonable excuse for the delay or submitted medical evidence connecting his 2006 injuries to his accident. (Reply Affirmation, dated July 19, 2010).

III. ANALYSIS

The June 14 order permits plaintiff to serve a valid pleading. Leave to serve is thus presumed. That City reserved the right to reject an invalid pleading speaks to its contents, not to plaintiff's right to serve it, and City identifies nothing invalid in the pleading.

Thus, counsel's belief or misapprehension was neither reasonable nor supported by the order, which is unambiguous, and to the extent she alleges that she erred in drafting it, her unilateral error constitutes an insufficient basis upon which to vacate the order. (*See eg* NY Jur, Contracts § 125 [2010] ["One who enters into a plain and unambiguous contract cannot avoid his or her obligation by showing that he or she erred in his or her understanding of its terms"]; *see also ABA Consulting, LLC v Liffey Van Lines, Inc.*, 67 AD3d 401 [1st Dept 2009] [denying motion to vacate settlement agreement on ground of unilateral mistake as agreement was arms-length transaction between businessmen represented by counsel and terms of agreement were consistent with prior agreement by parties]; *Structured Asset Sales Group LLC v Freeman,* 45 AD3d 327 [1st Dept 2007] [motion to vacate stipulation properly denied as claimed unilateral mistake not supported by record]; *Arvelo v Multi Trucking, Inc.*, 194 AD2d 758 [2d Dept 1993] [plaintiff's claim of unilateral mistake both factually and legally unavailing as stipulation's plain and unequivocal terms refuted claim that person who negotiated stipulation on their behalf was mistaken as to meaning of stipulation]; *Living Arts, Inc. v Kazuko Hillyer Intern., Inc.*, 166 AD2d

284 [1st Dept 1990] [defendants' own unilateral mistake in comprehending terms of stipulation insufficient as matter of law to vacate it]).

If City's position were correct, there would have been no reason for the lengthy adjournment which was intended to afford City a sufficient opportunity to investigate the alleged new injuries, and any prejudice to it resulting from plaintiff's delay in alleging them was expected to have been ameliorated by the adjourned trial date. Moreover, absent any dispute that plaintiff provided City with medical authorizations related to the new injuries in April 2010, and as City has not shown that it unsuccessfully attempted to process them, its speculation that pertinent medical records may no longer exist is unavailing.

For all of these reasons, City has not demonstrated that the June 14 order should be vacated in the interest of justice, notwithstanding City counsel's *bona fides* in seeking the instant relief. Should City be correct in questioning the connection between plaintiff's initial injuries and his alleged new injuries, it will have a fair opportunity to litigate it at trial.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant City of New York's motion for an order vacating the June 14, 2010 order is denied.

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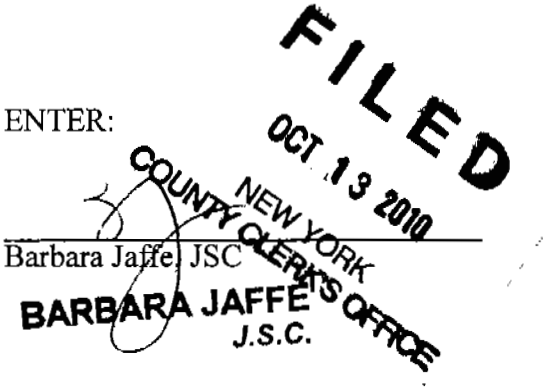

Barbara Jaffe, JSC

DATED: October 8, 2010
New York, New York

OCT 08 2010