

**McNally v Noto**

2010 NY Slip Op 32942(U)

October 6, 2010

Sup Ct, Nassau County

Docket Number: 7070/09

Judge: Karen V. Murphy

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK  
TRIAL TERM, PART 17 NASSAU COUNTY**

**PRESENT:**

**Honorable Karen V. Murphy**  
**Justice of the Supreme Court**

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**CHARLES W. MCNALLY AND CAMILLE  
MCNALLY,**

**Plaintiff(s),**

**-against-**

**MICHAEL NOTO, RYDER TRUCK AND NEW  
YORK DAILY NEWS, INC.,**

**Defendant(s).**

\_\_\_\_\_x

**Index No. 7070/09**

**Motion Submitted: 8/4/10**

**Motion Sequence: 003**

The following papers read on this motion:

- Notice of Motion/Order to Show Cause.....X
- Answering Papers.....X
- Reply.....X

Plaintiffs move this Court for an Order granting them leave to file a second Amended Verified Bill of Particulars ("second amended bill") in this motor vehicle accident case. Defendants oppose the requested relief.

The accident giving rise to this action occurred on September 30, 2007. Summary judgment on the issue of liability was granted in favor of plaintiffs by this Court's decision dated December 3, 2009. On February 22, 2010, the matter was certified for trial on the issue of damages. The Note of Issue was filed on April 1, 2010. Plaintiffs now seek to file a second amended bill to represent the full extent of plaintiff Charles McNally's injuries. On March 31, 2010 and on April 1, 2010, MRI examinations of Mr. McNally's cervical and lumbar spine areas were conducted. Mr. McNally also underwent surgery on his lumbar spine on June 16, 2010.

Defendants oppose the requested relief on the grounds that they will be financially prejudiced by the continued accrual of interest on any future damages award during the time period that will now be required to complete discovery. In their opposition papers, defendants state that they are amenable to plaintiffs filing a second amended bill, with the stipulation that interest would not accrue during the time period required for further discovery. Plaintiffs refuse to so stipulate. Defendants also assert that plaintiff has failed to provide a reasonable excuse for the delay in claiming injury to his vision as a result of the accident giving rise to this matter, and that plaintiff has failed to establish the merits of the amendment.

This matter appeared on the trial calendar on September 9, 2010. On that date, it was adjourned for trial to October 7, 2010.

The Court recognizes that the same standard used to amend pleadings, i.e., that leave to amend should be freely given absent prejudice, should be applied to motions to amend bills of particulars (*Barzaghi v. Maislin Transport*, 115 A.D.2d 679, 497 N.Y.S.2d 131 (2d Dept., 1985); *Kerlin v. Green*, 36 A.D.2d 892, 320 N.Y.S.2d 200 (4<sup>th</sup> Dept., 1971); *Ackerman v. City of New York*, 22 A.D.2d 790, 253 N.Y.S.2d 775 [2d Dept., 1964]). The Court also recognizes that it is well settled that when leave to amend a bill of particulars is sought on the eve of trial, judicial discretion should be exercised in a “discreet, circumspect, prudent and cautious” manner (*Volpe v. Good Samaritan Hospital*, 213 A.D.2d 398, 623 N.Y.S.2d 330 (2d Dept., 1995) quoting *Symphonic Electric Corp. v. Audio Devices*, 24 A.D.2d 746, 263 N.Y.S.2d 676 (1<sup>st</sup> Dept., 1965); see also *Daud v. Forest & Garden Apts. Co.*, 178 A.D.2d 578, 577 N.Y.S.2d 475 [2d Dept., 1991]).

Moreover, where there has been an inordinate delay in seeking to amend, the plaintiff must establish a reasonable excuse for the delay and submit an affidavit to establish the merits of the proposed amendment (see, *Volpe, supra*; *Simino v. St. Mary's Hosp.*, 107 A.D.2d 800, 484 N.Y.S.2d 634 [2d Dept., 1985]). The Court also notes that plaintiffs' motion is the third such amendment of the Bill of Particulars, made after the filing of the Note of Issue, and after plaintiffs moved and were granted summary judgment on the issue of liability (see *Delahaye v. Saint Anns School*, 40 A.D.3d 679, 836 N.Y.S.2d 233 (2d Dept., 2007)).

CPLR § 5002 provides in relevant part that, “interest shall be recovered upon the total sum awarded, including interest to verdict, report or decision . . . from the date the verdict was rendered or the report or decision was made to the date of entry of final judgment . . . .” In personal injury cases where a court grants summary judgment in plaintiff's favor on the issue of liability, interest begins to accrue from the date of the court's order granting plaintiff's motion for summary judgment regardless of which party is responsible for the delay in the assessment of the plaintiff's damages (*Love v. State of New York*, 78 N.Y.2d

540, 583 N.E.2d 1296, 577 N.Y.S.2d 359 (1991); *Odumbo v. Perera*, 50 A.D.3d 658, 854 N.Y.S.2d 769 (2d Dept., 2008); *Van Nostrand v. Froehlich*, 44 A.D.3d 54, 844 N.Y.S.2d 293 (2d Dept., 2007); see also *Schipani v. McLeod*, 541 F.3d 158, 165, 2008 U.S. App. LEXIS 15971 [2d Cir. 2008]). Thus, defendants' assertion that they will be "financially prejudiced" is unavailing and does not warrant the denial of plaintiffs' motion to file a second amended bill on this ground.

In the case at bar, defendants do not claim that they were led astray by plaintiffs' earlier bills of particulars, nor do defendants legitimately claim surprise, at plaintiffs' evidence regarding injuries to his shoulders, neck, and back. Indeed, defendants were on notice of Mr. McNally's injuries to his shoulders, cervical, and lumbar spine areas since on or about October 24, 2008, the date of plaintiffs' verified bill of particulars. Plaintiff could not reasonably have been in possession of the MRI reports taken at or about the time of the filing of the Note of Issue on April 1, 2010, as those reports were not approved until April 3 and April 5, 2010. It is also reasonable that plaintiff McNally did not have full representation of his back injury until he underwent surgery on June 16, 2010. Thus, this Court grants plaintiffs permission to file their second amended bill as proposed in paragraphs A through G, and J through M of their Exhibit D.

With respect to plaintiffs' proposed addition of alleged injuries to Mr. McNally's vision contained in paragraphs H and I of their proposed second amended bill, the Court finds Charles McNally's statement that he first received the 2007 and 2008 reports from the ophthalmologist on May 13, 2010 as an excuse for the delay in adding these alleged injuries to the second amended bill to be unpersuasive. Whether or not the ophthalmologist's office mailed those reports to Mr. McNally in a timely fashion, Mr. McNally was most certainly aware that he suffered from vision problems following the accident as evidenced by the fact that he sought medical attention for those problems on October 22, 2007, November 14, 2007 and on January 29, 2008.

The instant motion papers are silent as to whether or not Mr. McNally underwent an MRI of his brain as directed by Dr. Halstead-Kenny, but the ophthalmologist's November 15, 2007 report, included as plaintiffs' Exhibit C, states that Mr. McNally reported a normal MRI scan, with no evidence of skull fracture or intracranial bleeding.

The Bill of Particulars dated October 24, 2008, some nine months after Mr. McNally's last documented visit to the ophthalmologist, does not allege any injury to his vision as a result of the accident. The Supplemental Bill of Particulars dated February 25, 2009 likewise does not contain any allegation of injuries to Mr. McNally's vision as a result of the accident.

Moreover, the ophthalmologist's reports contained in plaintiffs' Exhibit C do not specifically affirm that, within a reasonable degree of medical certainty, the injuries to Mr.

McNally's vision are causally related to the September 30, 2007 accident giving rise to this case. Those reports simply state that Mr. McNally's vision difficulties are "secondary to head trauma," and "secondary to head injury," with a belated, and undated, affirmation attached thereto as a result of defendants' opposition to the instant motion. Thus, plaintiffs' motion to add the injuries specified in paragraphs H and I of their proposed second amended bill is denied (*see Kyong Hi Whoh v. County of Suffolk*, 237 A.D.2d 412, 654 N.Y.S.2d 826 [2d Dept., 1997]).

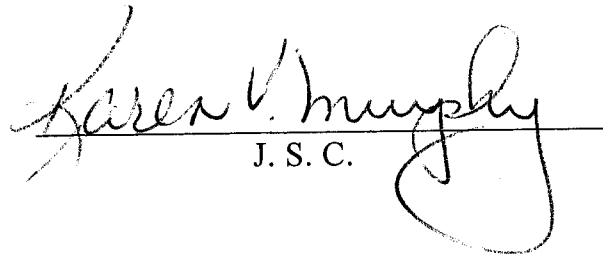
In view of the fact that the parties will require additional time to complete discovery with respect to Mr. McNally's June 16, 2010 back surgery, plus the fact that the parties are cognizant of the fact that the Note of Issue will likely be vacated, the Court hereby vacates plaintiffs' Note of Issue and strikes this matter from the trial calendar pursuant to 22 N.Y.C.R.R. § 202.21 (e).<sup>1</sup>

All discovery, including any further examinations before trial, relative to Mr. McNally's neck, back and shoulder injuries shall be completed on or before December 15, 2010. All physical examinations of the plaintiff Charles McNally shall be conducted on or before January 15, 2011.

A compliance conference shall be held on January 18, 2011, at which time a certification conference will be scheduled.

The foregoing constitutes the Order of this Court.

Dated: October 6, 2010  
Mineola, N.Y.

  
J. S. C.

**ENTERED**

**OCT 14 2010**

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**

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<sup>1</sup>Neither of the parties has specifically stated that a certificate of readiness has also been filed in connection with the Note of Issue, but any such certificate of readiness is also stricken as this matter is clearly not ready for trial.