

<b>Apicella v VanWinkle</b>
2010 NY Slip Op 33756(U)
December 23, 2010
Supreme Court, Nassau County
Docket Number: 1373/09
Judge: F. Dana Winslow
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SUM

**SHORT FORM ORDER**

**SUPREME COURT – STATE OF NEW YORK**

**Present:**

**HON. F. DANA WINSLOW,**

**Justice**

**CHRISTINE APICELLA and ANTHONY APICELLA,**

**TRIAL/IAS, PART 5  
NASSAU COUNTY**

**Plaintiff,**

**RETURN DATE: 10/3/10**

**-against-**

**SEQUENCE NO.:002/4/5**

**CHARLES J. VANWINKLE and SYOSSET TOWING,  
INC.,**

**INDEX NO.:1373/09**

**Defendants.**

**The following papers read on this motion:**

**Defendants’ Notice of Motion pursuant to CPLR §3212..... 1**  
**Defendants’ Notice of Motion pursuant to CPLR §3043.....2**  
**Plaintiffs’ Notice of Cross Motion and Opposition to Plaintiffs’ Motions..... 3**  
**Defendants’ Reply Affirmation..... 4**

Defendants’ summary judgment motion under **CPLR §3212** to dismiss the case for failure to establish the “serious injury” under **New York Insurance Law §5102(d)**; defendants’ motion under **CPLR §3043** to strike plaintiffs’ supplemental bill of particulars or alternatively to vacate the note of issue; and plaintiffs’ cross motion under **CPLR §3025 (b)** seeking leave to amend/supplement the original bill of particulars are determined as follows.

On Oct. 23, 2008, plaintiff **CHRISTINE APICELLA** (“CHRISTINE”), a 39 year-old female, was injured by a rear end collision and transferred to Southside Hospital emergency room. A couple of hours later, after being treated for chest and knee pain, she was discharged with some medication. About a week later, she visited her primary care physician for further treatment of her neck and back pain. Allegedly, **CHRISTINE** could not work for about one week due to the need for further treatment of her injury. Plaintiffs commenced this action by filing a

summons and complaint on Jan. 26, 2009. The verified bill of particulars was served on the defendants on March 16, 2009. During the discovery, the medical doctor hired by the defendants submitted an affirmed statement on Oct. 23, 2009, confirming that CHRISTINE had recovered fully without any permanent disability from the injury. After completion of the discovery, the note of issue was filed with the certificate of readiness on June 23, 2010. Pursuant to **CPLR §3212**, the defendants filed a summary judgment motion to dismiss the complaint for failure to establish the threshold requirement of the “serious injury” under **New York Insurance Law §5102(d)**. The motion was initially submitted on July 12, 2010 with the original return date of August 3, 2010. In the mean time, allegedly unbeknownst to defense counsel, a surgical treatment was performed on CHRISTINE’s cervical spine on June 14, 2010. Thereafter, without Court’s permission, plaintiffs served a supplemental bill of particulars on August 4, 2010, almost 2 months after the note of issue was filed. The supplemental bill of particulars included five additional claims: Anterior cervical discectomy, Arthodesis C5-6, Anterior cervical plating on C5-6, Biomedical implant and Harvesting of local bone graft. In response to plaintiffs’ service of the supplemental bill of particulars on Aug. 10, 2010, defendants moved under **CPLR §3043** to strike the supplemental bill of particulars as a nullity or alternatively to vacate the note of issue seeking the time and opportunity for further discovery regarding the five added claims. Plaintiffs opposed the defendants’ motions and cross moved for leave to amend/supplement the original bill of particulars pursuant to **CPLR §3025 (b)**.

#### MOTION TO VACATE THE NOTE OF ISSUE

Regardless of the sequence of the three motions, the Court addresses the motion to vacate the note of issue first because the issue is material and determinative of the remaining issues in the summary judgment motion and the supplemental bill of particulars.

When a motion to vacate the note of issue is filed after 20 days or more from the date of service of the note of issue and certificate of readiness, the motion can be granted only where “a material fact in the certificate of readiness is incorrect” or upon “good cause shown.” *See* **22 NYCRR §202.7 (a), 202.21 (e); Ferraro v. North Babylon Union Free School Dist.**, 69 AD3d 559; **Matos v. Mira Realty**

**Mgmt. corp.**, 240 AD2d 214. The party moving to vacate the note of issue after 20 days or more from the date of service must demonstrate the existence of any special or unusual circumstance to show the adequate reason for the delay or that some unanticipated conditions developed subsequent to the filing of the note of issue, requiring additional pretrial proceedings to prevent substantial prejudice. *See Torren v. St. Vincent's Catholic Medical Centers*, 71 AD3d 873; *Utica Mut. Ins. Co. v. P.M.A. Corp.*, 34 AD3d 793; *White v. Mazella-White*, 60 AD3d 1047; *Audiovox Corp. v. Benyamini*, 265 AD2d 135; *Russell v. Bessen* 126 AD2d 716; *Arnold v. N.Y. City Hous. Auth.*, 282 AD2d 378. Particularly, the note of issue should be vacated when there was an indication that the case is not ready for trial or that the certificate of readiness was incorrect. *See Rossi v. Arnot Ogden Med. Ctr.*, 252 AD2d778. In addition, the court on its own motion may vacate the note of issue at any time, 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 for the rules in some material respect. **22 NYCRR §202.21 (e)**.

On June 8, 2010, after completion of all discoveries, plaintiffs served the note of issue on the defendants. On June 14, 2010, 6 days after service of the note of issue on the defendants, CHRISTINE's doctor performed a surgery on her cervical spine. Thereafter, the note of issue and certificate of readiness were filed with the court on June 23, 2010. The surgery was an "unusual circumstance or unanticipated condition" for both parties. Based on the affirmation in support of defendants' motion, the Court finds that the defendants showed lack of knowledge about the surgery until they were served with the supplemental bill of particulars on August 4, 2010. There was no fact suggesting that the defendants knew or should have known about the planned surgery when the note of issue was served. Defendants also denied any anticipation of surgery by asserting that CHRISTINE's symptoms were not so serious as to prevent her from doing her three jobs, one full time and two part-time jobs, except during the week immediately after the injury. Defendants' argument is further supported by the medical report from their doctor on Oct. 23, 2008, indicating CHRISTINE's full recovery and no disability from the injury regardless of the MRI report showing a herniated cervical disc. The Court determines that defendants showed good cause for the delay in their motion with the special circumstance of unanticipated surgery.

Plaintiffs opposed the defendants' motion by arguing that the surgical treatment was the normal and natural sequelae of the properly pled injury and that the plaintiffs offered the defendants an opportunity to conduct further discovery. If plaintiffs are correct in asserting that the surgery was the normal and natural sequelae of the herniated cervical disc, the Court finds that the certificate of readiness was not correct because plaintiffs knew or should have known that further discovery would be necessary after the surgery which was expected to be performed as the normal and natural sequelae of the herniated cervical disc. This finding is further supported by the fact that the surgery was performed on June 14, 2010 before the filing of the note of issue with certificate of readiness on June 23, 2010. Furthermore, plaintiffs' argument that the discovery can be conducted while the case is on the trial calendar has no merit because the defendants cannot have a "reasonable" opportunity to complete the discovery before trial by examining the medical records and current condition of CHRISTINE who is in the process of recovery from the surgery. This conclusion is further supported by the reports of Dr. Keuskamp, the surgeon who performed the operation upon CHRISTINE, stating that the complete recovery from the operation will take 6 to 9 months after the surgery. Whenever the supplemental bill of particulars is served, the other party is entitled to newly exercise any and all rights of discovery with regard to the continuing special damages and disabilities. *See CPLR §3043(b); Congregation Yetev Lev D'Satmar, Inc. v. 26 Adar N.B. Copr.*, 32 AD3d 376. Compelling the defendants to complete the discovery in a rush before the trial will substantially prejudice the defendants. *See Torren v. St. Vincent's Catholic Medical Centers, supra*. To avoid such a prejudice and to correct the possible mistakes on the certificate of readiness, the Court determines that the note of issue is to be vacated.

#### MOTION FOR SUMMARY JUDGMENT

Pursuant to **CPLR §3212**, defendants filed a summary judgment motion to dismiss the complaint for plaintiffs' failure to establish the "serious injury" as required by **New York Insurance Law §5102(d)**. The motion was initially submitted on July 12, 2010 with a return date of August 3, 2010. Defense counsel asserts that he did not know about the surgery until he was served with the supplemental bill of particulars on August 4, 2010.

Without addressing the merit of the summary judgment motion, the Court finds it is essential to discuss the procedural defects in this case. If the Courts find that some facts essential to justify an opposition may exist but cannot then be stated, the Courts may deny the summary judgment motion or may order a continuance to permit affidavits to be obtained or disclosure to be had. *See CPLR §3212(f)*. In other words, courts generally deny the summary judgment motion as premature when there was no reasonable opportunity for discovery and may grant leave to renew the motion on completion of the discovery. *See Jhonson v. Verrilli*, 139 AD2d 4978; *Hand v. Stanper Food Corp.*, 224 AD2d 54; *WPP Group USA V. Interpublic Group of Cos.*, 228 AD2d 296; *Paladino v. Staten Island Univ. Hosp.*, 245 AD2d 497; *O'Toole v. County of Sullivan*, 255 AD2d 799; *Suton v. R.H. Macy Co.*, 104AD2d 305; *Hager v. Denny's, Inc.*, 281 AD2d 921; *English v. Ski Windham Operating Corp.*, 263 AD2d 443; 181 S. Franklin Assocs. v. Y & R Assocs., 774 NYS2d 811; *American Tr. Ins. Co. v. B.O. Astr Mgt. Corp.*, 814 NYS2d 849; *Kindzierski v. Foster*, 217 AD2d 998; *Jemmott v. Aldrich, Eastman & Waltch, Inc.*, 248 AD2d 442; *Rosenthal v. Manufacturers Honover Trust Co.*, 30 AD2d 650; *Golden v. Wickhardt Co.*, 33 AD2d 652; *Hill v. New York City Transit Auth.*, 272 AD2d 521. In this case, the Court finds that the summary judgment motion is premature and determining the motion on its merit at this stage will be prejudicial to both parties. The discovery regarding the surgery and its consequence is material and significant for the determination of the issue of the "serious injury" under *New York Insurance Law §5102(d)*. On the other hand, there was no objective evidence of the "serious injury" in the record existing before the surgery except the MRI finding which is not sufficient by itself alone to defeat the summary judgment. *See Pommells v. Perez*, 4 NY3d 566; *Bleszcz v. Hiscock*, 2010 WL 323433; *Knopf v. Sinetar*, 2010 WL 190183; *Chanda v. Varughese*, 67 AD3d 947; *Ciancio v. Nolan*, 65 AD3d 1273; *Yun v. Barber*, 63 AD3d 1140; *Caraballo v. Kim*, 63 AD3d 976; *Jules v. Calderon*, 62 AD3d 958; *Ferber v. Madorran*, 60 AD3d 725; *Ponciano v. Schaefer*, 59 AD3d 605; *Pompey v. Carney*, 59 AD3d 416; *Luizzi-Schwenk v. Singh*, 58 AD3d 811; *Luna v. Mann*, 58 AD3d 699; *Joseph v. A and H Livery*, 58 AD3d 688; *Sealy v. Riteway-1, Inc.*, 54 AD3d 1018; *Kearse v. New York City Transit Authority*, 16 AD3d 45. In these circumstances, the Court determines that the summary judgment motion is dismissed with leave to make a subsequent motion, a subsequent note of issue is filed after completion of further discovery.

## MOTION TO STRIKE THE SUPPLEMENTAL BILL OF PARTICULARS

In general, the CPLR requires that the leave to amend or supplement the pleadings shall be freely given upon such terms as may be just. *See CPLR §3025(b)*. Regarding the bill of particulars, courts generally treat applications for any further bill of particulars with a degree of liberality favoring particularization. *See Guilizio v. Rios*, 14 Misc2d 513. An amended bill of particulars may include new injuries, new theories of liability or wholly new categories of special damages not previously asserted, while a supplemental bill of particulars may assert additional injuries or continuing special damages amplified and elaborated upon a theory already set forth in the original bill of particulars. *See CPLR §3043(b); Vargas v. Villa Josefa Realty Corp.*, 28 AD3d 389; *Scherrer v. Time Equities, Inc.*, 27 AD3d 208; *Barrera v. City of New York*, 265 AD2d 516; *Pines v. Muss Dev. Co.*, 172 AD2d 600. Plaintiffs' original bill of particulars, served on March 16, 2009, included 9 categories of injuries including herniated disc in cervical spine. The subsequent bill of particulars, served on August 4, 2010, included claims related to the surgery on the herniated cervical spine disc. The Court finds that the subsequent bill of particulars is a supplemental bill of particulars because the surgical treatment was the consequence of the spinal disc herniation which had been listed in the original bill of particulars. The claim based on the surgery is neither a new injury nor a new theory of liability.

A supplemental bill of particulars may be served without leave of court at any time, but not less than thirty days prior to trial. *See CPLR §3042(b)*. In addition, the court has broad discretion to grant or deny any further or different bill of particulars. *See CPLR §3042(b); Guilizio v. Rios, supra*. As long as there is no prejudice demonstrated, a supplemental bill of particulars may be permitted at the discretion of the court and the burden of proof for the prejudice is on the opposing party. *See CPLR 3025(c); Edenwald Contracting Co., Inc. v. City of N.Y.*, 60 NY 2d 957; *Dittmar Explosives v. A.E. Ottaviano, Inc.*, 20 NY2d 498; *Grande v. Peteroy*, 39 AD3d 590. Prejudice cannot be shown when the objecting party was already apprised of the fact and nature of the additional claim which arose from the same transaction or sets of facts. *See Scarangelo v. State*, 111 AD2d 798. In addition, a supplemental bill of particulars may not be denied for

unreasonable delay when the bill was promptly served as soon as the requisite knowledge was acquired. *See Bryant v. City of New York*, 188 AD2d 447; *Bell v. Toyota (01)* 64 AD2d 585; *Public Service Mut. Ins. Co. v. Flatow*, 64 AD2d 514; *Afrecan v. Caledonian Hospital of New York*, 29 AD2d 544; *Killough v. Regency Park Apartments*, 73 AD2d 734.

Plaintiffs' counsel filed the note of issue on June 23, 2010 but the case was not yet assigned a definite date for trial when the supplemental bill of particulars was served on August 4, 2010. Defendants' main argument opposing the supplemental bill of particulars is about the prejudice due to lack of discovery or by being compelled to complete the discovery in a rush before trial. This argument fails because the Court has hereby vacated the note of issue by this Order as discussed above and will allow further discovery in a timely fashion. The supplemental bill of particulars was served about 2 months after the surgery on June 14, 2010. The Court does not find the supplemental bill of particulars was served as soon as the plaintiffs' counsel knew about the surgery. Plaintiffs' counsel could have known about the planned surgery much earlier considering Dr. Keuskamp's letter dated March 24, 2010, offered as an exhibit by the defendants, stating that surgical intervention is warranted and will be scheduled. However, the Court exercises its discretion to permit the service of the supplemental bill of particulars because the delay is not prejudicial to the defendants when sufficient time and opportunity for further discovery will be permitted by this Order.

The Court finally determines that the utilization of the Note of Issue vacatur and supplementing the Bill of Particulars serves the additional purpose of promoting justified settlement discussions. The additional consideration of the effects of the surgery and the subsequent recovery, when properly understood, is the sine qua non to the ultimate effects of the injury sustained. Consideration of these factors is appropriate in this stage of action.

Accordingly, the Court determines that

- i) Defendants' motion for summary judgment pursuant to **CPLR §3212** to dismiss the complaint for failure to establish the serious injury under **New York Insurance Law §5102(d)** is **denied** with leave to renew the motion on completion of the discovery,

- ii) Defendants' motion to vacate the note of issue is **granted**,
- iii) Plaintiffs' cross motion to supplement the bill of particulars pursuant to **CPLR §3043** is **granted** and
- iv) Both parties shall proceed with further discovery limited to the issues of the surgical treatment on CHRISTINE.
- v) Both parties shall appear for a conference in this part 15 business days following service of this order after entry.

Defendant shall serve a copy of this Order on all parties, with Notice of Entry, forthwith upon receipt from any source.

This constitutes the Order of the Court.

Dated: December 23, 2010



J.S.C.

**ENTERED**  
JAN 10 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE