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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 15 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).

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Index No. 7070/09

Motion Submitted: 5/23/11
Motion Sequence: 004

The following papers read on this motion:

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

Plaintiffs move this Court for an Order granting renewal "and/or" reargument of their motion to permit plaintiffs to serve a second amended verified bill of particulars, which was granted in part and denied in part. Specifically, plaintiffs seek to renew "and/or" reargue that portion of their motion relative to Charles W. McNally's eye injuries, which was denied by the Court in its October 6, 2010 decision. Defendants oppose the requested relief.[1]

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[1]All claims against defendant Ryder Truck were dismissed by order of the Court (Weinstein, J., Supreme Court, Queens County), on March 2, 2009, based upon the "Graves Amendment." Venue was transferred from Queens County to Nassau County on March 10, 2009 (Weinstein, J.).

With respect to the motion to renew, there are simply no new facts offered by plaintiffs on the instant motion, nor has plaintiff demonstrated that there has been a change in the law that would change the prior determination (*see* **CPLR § 2221 [e]**).

Accordingly, plaintiff's motion to renew is denied.

The Court now turns to plaintiff's motion to reargue. It is settled that "[m]otions for reargument are addressed to the sound discretion of the court which decided the prior motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or for some [other] reason mistakenly arrived at its earlier decision" ***(Carrillo v. PM Realty Group***, 16 A.D.3d 611, 793 N.Y.S.2d 69 (2d Dept., 2005); *see* ***CPLR 2221[d][2]***; ***Barnett v. Smith***, 64 A.D.3d 669, 883 N.Y.S.2d 573 (2d Dept., 2009); ***Frisenda v. X-Large Enterprises***, 280 A.D.2d 514, 720 N.Y.S.2d 187 (2d Dept., 2001); ***William P. Pahl Corp. v. Kassis***, 182 A.D.2d 22, 588 N.Y.S.2d 8 (1st Dept., 1992); *see also* ***Foley v. Roche***, 68 A.D.2d 558, 418 N.Y.S.2d 588 [1st Dept., 1979]).

Upon review of plaintiffs' motion for reargument, this Court has determined that it would be a provident exercise of its discretion to grant that motion relative to the denial of the proposed second amended bill of particulars to include plaintiff's eye injuries, based on the finding that this Court overlooked or misapprehended matters of fact or law related to the issue of notice of those injuries to defendants (*see* ***Matter of Bastien v. Motor Veh. Acc. Indem. Corp.***, 62 A.D.3d 791, 877 N.Y.S.2d 905 (2d Dept., 2009); ***Barrett v. Jeannot***, 18 A.D.3d 679, 795 N.Y.S.2d 727 [2d Dept., 2005]). Thus, plaintiffs' motion to reargue is granted in that limited respect.

In its earlier Order, the Court denied plaintiffs' motion to add the eye injuries specified in paragraphs H and I of their proposed second amended bill of particulars. The eye injuries proposed to be added are as follows: "H. Esotropia, *photophobia* and diplopia; I. Double vision and crossed eyes" (emphasis added).

In the course of deciding plaintiffs' original motion, which was vague as to the eye injury(ies) to be added to the proposed second amended bill, the Court overlooked plaintiffs' amended verified bill of particulars dated April 21, 2009, which is included in the prior motion as part of plaintiffs' Exhibit A. In that amended verified bill, plaintiffs listed the injuries to Charles W. McNally's eyes as being "H. Esotropia and diplopia; I. Double vision and crossed eyes." Thus, the bill of particulars has already been amended to include those four eye conditions since April 21, 2009. Furthermore, defendants have been on notice of those four eye injuries since April 21, 2009, and have not denied receiving that amended verified bill of particulars.

Accordingly, the Court vacates that portion of its October 6, 2010 Decision and Order denying plaintiffs permission to add the aforementioned eye injuries (esotropia, diplopia, double vision and crossed eyes), as that issue is moot, notice having been given to defendants more than two years ago.

What is at issue is whether this Court will grant plaintiffs permission to include photophobia as an additional injury in its proposed second amended bill of particulars, which the Court will now address.

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 (4th 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 (1st 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 original bill of particulars, and is made after the filing of the Note of Issue (*see* ***Delahaye v. Saint Anns School***, 40 A.D.3d 679, 836 N.Y.S.2d 233 [2d Dept. 2008]). The Note of Issue was ultimately vacated by the Court in its October 6, 2010 Decision and Order, and the matter was stricken from the trial calendar. The matter is presently scheduled for a conference before this Court on July 26, 2011.

Plaintiff claims that he did not receive copies of Dr. Pomeranz's reports documenting his eye injuries until May 2010. Despite this Court's previous determination that Mr. McNally's excuse is unpersuasive, there is no evidence presented to contradict his statement. Thus, the Court is constrained to accept Mr. McNally's excuse, as this Court cannot determine credibility issues on the instant motion, and Mr. McNally's excuse is not so outlandish as to be incredible as a matter of law.

In addition, Dr. Pomeranz has affirmed that, in his opthamologic opinion, the accident is the "competent producing cause" of the eye injuries sustained by plaintiff, including

photophobia. The photophobia disorder is documented, along with the other aforementioned eye injuries, in Dr. Pomeranz's November 15, 2007 and January 29, 2008 reports as being secondary to the head trauma sustained by plaintiff. Thus, as a practical matter, the Court finds that defendants cannot legitimately claim surprise as to this particular injury.

Moreover, defendants' brief opposition to the instant motion completely fails to mention, acknowledge, or address the existence of plaintiff's April 21, 2009 amended bill, which notice four eye injuries. Also, on February 18, 2011, in the interests of efficiency and judicial economy, defendants were advised by the Court to depose plaintiff Charles McNally regarding his eye injuries although such injuries were the subject of the instant renewal motion.

As this action is no longer on the trial calendar, and plaintiff seeks to formally add an eye injury (photophobia) documented some time ago, plus the fact that defendants have been on notice that plaintiff Charles McNally allegedly suffers from multiple eye injuries as a result of the accident, the Court grants plaintiffs permission to serve the second amended verified bill of particulars regarding the addition of photophobia.

Except as provided above, the remainder of the Court's October 6, 2010 Decision and Order remains undisturbed.

Counsel for all parties shall appear before this Court on July 26, 2011, at 9:30 a.m., for a conference of this matter, at which time an expedited discovery schedule will be set, if necessary.

The foregoing constitutes the Order of this Court.

Dated: July 20, 2011
Mineola, New York

Karen V. Murphy
J.S.C.