

Hyatt v Price Chopper Operating Co., Inc.

2011 NY Slip Op 34300(U)

May 5, 2011

Supreme Court, Rensselaer County

Docket Number: 227840

Judge: Christian F. Hummel

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK
SUPREME COURT COUNTY OF RENSSELAER

DECISION AND ORDER

RAINA HYATT,

INDEX NO.: 227840

Plaintiff,

- against -

PRICE CHOPPER OPERATING CO., INC.,

Defendant.

APPEARANCES:

SANDERS, SANDERS, BLOCK, WOYCIK,
VIENER & GROSSMAN, P.C.
(Edward J. Nitkewicz, Esq., of Counsel)
100 Herricks Road
Mineola, New York 11501
Attorneys for Plaintiff

Received
County Clerks Office
May 18, 2011 12:14P
Rensselaer County
Frank J. Merola

CARTER, CONBOY, CASE, BLACKMORE,
MALONEY & LAIRD, P.C.
(Panagiota K. Hyde, Esq., of Counsel)
20 Corporate Woods Boulevard
Albany, New York 12211
Attorneys for Defendant

HUMMEL, J.:

Plaintiff moved by Order to Show Cause for an order granting her leave to serve a "Further Supplemental Bill of Particulars" amplifying her injuries consistent with a report from a previously undisclosed medical expert, a Dr. Lawrence Shields. Plaintiff also seeks permission pursuant to CPLR 3101 (d) to disclose this expert at this time, even though the Note of Issue was filed on October 6, 2010. Defendant has cross-moved for an order pursuant to CPLR 3042 precluding any evidence or testimony at trial

Ch

with respect to the allegations raised in the untimely "Further Supplemental Verified Bill of Particulars" and precluding Plaintiff from offering the testimony and opinions of Dr. Shields. Defendant points out that this disclosure, made more than 120 days after the filing of the Note of Issue, is a violation of the Third Judicial District Expert Disclosure Rule (2002 Third Jud. Dist. Rules § 1) and preclusion of this expert's testimony is required.

Plaintiff alleges in her complaint that she was injured on March 22, 2008 in Defendant's store. At the time of her alleged injury, Plaintiff was shopping for bagels. According to her deposition testimony, Plaintiff had opened the left door on the left side of the bagel display and successfully removed some bagels. When she attempted to do the same thing by opening the right door, the door swung in and hit her hand, causing her to suffer bruising. She subsequently received a diagnosis from her treating neurologist of radiating pain syndrome which she has been advised is a permanent condition.

Three months after her alleged bagel door injury, Plaintiff slipped on water and fell in the ladies room at work, bruising her tail bone. Plaintiff's response to Defendant's Demand for a Verified Bill of Particulars dated October 30, 2009 treated the June 17, 2008 slip and fall as an injury suffered by Plaintiff "at work which resulted in an injury unrelated to the instant action." Plaintiff later submitted a Supplemental Verified Bill of Particulars on June 2, 2010, in which she alleged only the following: "exacerbation of accident related RSD (reflex sympathetic dystrophy syndrome)." Defendants argue that the only interpretation which can be drawn is that the supplemental bill's "exacerbation" must necessarily be for the right hand injury.

Defendant also argues that Plaintiff's Order to Show Cause is fatally defective in that it does not include the Further Supplemental Verified Bill of Particulars Plaintiff proposes to serve, nor does it contain the proposed expert response, and has not been verified. Also absent from the motion is any statutory or case law authority to support Plaintiff's position that she should be allowed this untimely disclosure. Plaintiff has further failed to provide any substantive argument surrounding her position that Defendant will not be prejudiced by this eleventh hour disclosure. These same arguments apply to Plaintiff's "Expert Exchange Pursuant to CPLR 3101(d)", which was served on Defendant on or about January 31, 2011. Defendant rejected the belated disclosure, giving rise to the pending motions.

Plaintiff argues that Defendant did have notice that the exacerbation of Plaintiff's regional pain syndrome involved her lower left extremities, and therefore it is not prejudiced by the disclosure of Dr. Shield as an expert witness, who will testify that there is a relationship not only between Plaintiff's right hand injury and her left leg pain but that the left leg injury may have been a causal factor in the left leg injury. In her reply affidavit, Plaintiff has attached the proposed Further Supplemental Verified Bill of Particulars and the expert disclosure response.

While leave to amend a bill of particulars is ordinarily freely granted in the absence of prejudice and surprise, when a case has already been certified as ready for trial, judicial discretion in permitting the amendment should be exercised only in the most discrete, circumspect, prudent and cautious manner (see, Yavorski v. Dewell, 288 AD2d 545 [3rd Dept., 2001]). Where there has been an inordinate delay in seeking leave to amend a bill of particulars, the plaintiff must establish a reasonable excuse for the

delay and submit an affidavit to establish the merit of the proposed amendment (see, Fuentes v. City of New York, 3 AD3d 549 [2nd Dept., 2004]). Where Plaintiff seeks to add a new injury and a new category of damages, as is the case here, an affidavit from a medical expert establishing a nexus between the newly alleged injuries and the subject accident is required (see, Fuentes v. City of New York, supra). Absence of a reasonable excuse for the delay coupled with prejudice to the opposing party justifies denial of the motion (see, Sadler v. Town of Hurley, 280 AD2d 805 [3rd Dept., 2001]).

According to Plaintiff, she saw Dr. Shields just nine days after she filed the Note of Issue, October 15, 2010. Dr. Shield's letter is dated November 9, 2010. "The Expert Exchange" and "Further Supplemental Bill of Particulars" which are at issue here were not served on Defendants until on or about January 31, 2011. At that time, the trial was scheduled for March, 2011. Plaintiff offers no excuse for this inordinate delay in coming forward with this new expert. Remarkably absent is any discussion as to what transpired in those three months between Plaintiff's receipt of Dr. Shield's report and its disclosure. Further, while Plaintiff has attached an unsworn, uncertified copy of Dr. Shield's letter, no affidavit from this doctor has been provided. Medical reports that are not affirmed and unsworn medical records submitted in support of Defendant's motion have "no probative value" (see, Hernandez v. Ramirez, 19 AD3d 192 [1st Dept., 2005]).

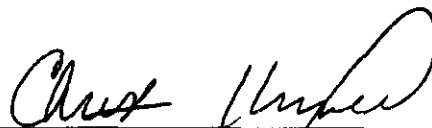
A review of the record on this motion does not support Plaintiff's argument that Defendant will suffer no prejudice with the addition of this new medical opinion. Clearly, Plaintiff did not identify her left leg pain as having been caused by anything other than her fall at work. If the Court is reading Dr. Shields report correctly, it appears that Plaintiff is now asserting that her right hand injury may have been a causal factor in her

fall, as she could not "fend it off" because of her right arm weakness. This is an entirely new injury now purported to have arisen from the subject accident.

Plaintiff's motion for leave to amend the Verified Bill of Particulars and offer the expert disclosure of Dr. Shields is denied. Defendant's cross-motion for preclusion of Dr. Shield's testimony is granted.

DATED: MAY 5, 2011

ENTER,



CHRISTIAN F. HUMMEL
ACTING SUPREME COURT JUSTICE

Received
County Clerks Office
May 18, 2011 12:14P
Rensselaer County
Frank J Merola

Papers Considered:

Order to Show Cause, dated March 8, 2011; Affirmation of Edward J. Nitkewicz, Esq., dated March 2, 2011 with attached Exhibits;

Notice of Cross-Motion, dated March 17, 2011; Affidavit of Jessica A. Desany, Esq.; Memorandum of Law; Affidavit of Panagiota K. Hyde, Esq., sworn to on March 17, 2011; with attached Exhibits;

Reply Affirmation of Edward Nitkewicz, Esq., dated March 28, 2011; with attached Exhibits;

Reply Affidavit of Panagiota K. Hyde, Esq., sworn to on April 6, 2011; Memorandum of Law.