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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 11 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

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KEENAN HAWKINS,

Plaintiff(s),

Index No. 23853/09

Motion Submitted: 11/9/11
Motion Sequence: 001, 002

-against-

BALDWIN UNION FREE SCHOOL DISTRICT and BALDWIN BOARD OF EDUCATION,

Defendant(s).

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The following papers read on this motion:

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

Plaintiff moves this Court for an Order compelling defendants to provide certain discovery and striking defendants' answer for failing to provide certain other discovery.

Defendants oppose the requested relief and cross-move for an Order precluding plaintiff from introducing evidence as to alleged psychological injuries sustained as a result of the subject incident giving rise to this action.

The incident giving rise to this action occurred on February 14, 2009, at the Baldwin Middle School, during a basketball team practice. Plaintiff was struck in the face/nose by another student and team member. The student who struck plaintiff was not charged with a crime.

The Court has held a number of status conferences of this matter. As far back as June 2011, the issue of adding psychiatric injury claims to the complaint was addressed. The psychiatric issue arose at plaintiff's deposition, but the claim was not being formally made at that time, so no further questioning on that topic occurred.

Defendants indicated to the Court during conferences of this matter that they would consent to amendment of the complaint to include plaintiff's psychiatric claims.

By Decision and Order dated September 14, 2011, the Court set a discovery and motion schedule.

In pertinent part, that Order directed plaintiff to file and serve the amended complaint, and to serve its supplemental bill of particulars on or before September 26, 2011. In that Order, the Court also recognized that the amendment of the complaint to include psychiatric claims would likely necessitate a further deposition of plaintiff, and an appropriate Independent Medical Examination ("IME").

Plaintiff has complied with the Court's Order in terms of meeting the time requirement; however, the amended complaint and the supplemental bill of particulars are verified only by plaintiff's counsel.[1]

In a letter dated March 26, 2010, defendants' counsel objected to the attorney verification of the first bill of particulars because plaintiff's counsel maintains a practice in Nassau County, and plaintiff lists a Nassau County address. Apparently, plaintiff did not verify that first bill of particulars, nor did defendants bring any motion in that regard.

On May 14, 2010, this Court issued a Preliminary Conference Stipulation and Order requiring that a bill of particulars with "client's verification" be served within thirty (30) days. Although that directive was never complied with by plaintiff, defendants did not make any further motion with respect to plaintiff's failure to personally verify the original bill of particulars. Defendants do not now move to have the original bill of particulars declared a nullity.

Defendants seek only to preclude plaintiff from introducing evidence as to psychological injuries resulting from the subject incident as alleged in the supplemental bill of particulars dated September 23, 2011.

While leave to amend pleadings "shall be freely given" absent prejudice or surprise resulting from the delay (***CPLR § 3025***, ***Northbay Construction Co., Inc. v. Bauco***

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[1]In its Order the Court did not direct that authorizations for psychiatric records be served with the amended complaint and supplemental bill of particulars although common sense dictates that such authorizations be served as soon as possible in order to move this matter forward toward settlement or trial.

Construction Corp., 275 A.D.2d 310, 711 N.Y.S.2d 510 (2d Dept., 2000); ***Sewkarran v. DeBellis,*** 11 A.D.3d 44, 782 N.Y.S.2d 758 [2d Dept., 2004]), and unless the proposed amendment is "palpably insufficient"to state a cause of action or is patently devoid of merit (***Smith-Hoy v. AMC Property Evaluations, Inc.***, 52 A.D.3d 809, 811, 862 N.Y.S.2d 513 (2d Dept., 2008) *citing* ***Lucido v. Mancuso***, 49 A.D.3d 220, 229, 851 N.Y.S.2d 238 [2d Dept., 2008]), CPLR § 3044 requires verification of a bill of particulars in a negligence action whether the pleadings are verified or not.

In this case, defendants were well aware that a psychological injury claim was being contemplated, and in fact consented to the amendment to include such an injury claim. Thus, the Court is not inclined to preclude plaintiff's psychological injury claims. The Court is, however, troubled by the fact that the complaint and amended complaint state that plaintiff is a resident of Nassau County, but that plaintiff's counsel's verifications on both the complaint amended complaint and the original and supplemental bill of particulars aver that plaintiff resides outside of the County. The attorney's verifications, or the pleadings, are either false or mistaken, and are thus improper in their present form (see CPLR § 3020 [b][3]).

Inasmuch as the same set of circumstances exists with respect to the first bill of particulars alleging physical injuries, plus the fact that defendants' counsel objected to the first bill of particulars on improper verification grounds, and the fact that the Court ordered the plaintiff himself to verify the original bill of particulars, the original bill of particulars is also in jeopardy. The Court will not ignore the requirements of CPLR § 3044.

Accordingly, plaintiff is directed to personally verify both the original and supplemental bills of particulars on or before January 27, 2012, and provide proof of same to this Court and to opposing counsel. In the event that plaintiff is not a resident of Nassau County, he shall provide an affidavit as to his residence outside the County, and provide proof of same to the Court and opposing counsel on or before January 27, 2012. If plaintiff is a Nassau County resident, he shall personally verify both the original complaint and the amended complaint, and provide proof of same to the Court and opposing counsel on or before January 27, 2012.

Should plaintiff fail to comply with this Court's directives as set forth above, the Court will consider further applications on notice with respect to the original and supplemental bills of particulars.

In anticipation of plaintiff's compliance with the Court's directive, and in the interests of judicial economy, the Court determines the remainder of the motion and cross-motion as follows:

The Court directs that authorizations for psychiatric records be served upon defendants on or before January 31, 2012, if not already done so.[2] Any further deposition of plaintiff is to be conducted on or before February 24, 2012. Any further IME shall be designated within thirty (30) days of plaintiff's further deposition. In the event that defendants do not seek to depose plaintiff further, but wish for plaintiff to submit to a psychiatric IME, such IME shall be designated within thirty (30) days of the date of this Order.

Plaintiff's request for the "school and disciplinary records of Andrew Parrish," the student who struck plaintiff, is determined as follows: any and all records related strictly to Mr. Parrish's academic performance is denied as irrelevant to the determination of this action.

Plaintiff's request for Mr. Parrish's school disciplinary records is likewise denied. Firstly, plaintiff has not served Mr. Parrish with notice of his request for the disciplinary records. Secondly, there is no evidence, or even an allegation, set forth by plaintiff that there was a history of problems between them, or that Mr. Parrish had a history of aggressive behavior toward other students. Thus, defendants never alleged in their answer that they lacked actual or constructive knowledge of any aggressive behavior exhibited by Mr. Parrish, and therefore could not have reasonably anticipated the subject incident (cf. ***Egle v. Maplebrook School***, 254 A.D.2d 388, 679 N.Y.S.2d 85 (2d Dept., 1998); ***Moores v. City of Newburgh***, 213 A.D.2d 527, 623 N.Y.S.2d 911 [2d Dept., 1995]). Although plaintiff's and Mr. Parrish's coach was deposed, plaintiff does not point to any portion of that testimony, for example, as justifying the need for Mr. Parrish's disciplinary records. Plaintiff apparently testified that he never had a problem with Mr. Parrish prior to the subject incident. Thus, it would seem that plaintiff is attempting to engage in a fishing expedition, and his request for those records cannot be granted (***Whitfield v. Board of Education of the City of Mount Vernon***, 14 A.D.3d 551, 789 N.Y.S.2d 187 [2d Dept., 2005]).

Plaintiff's request for a list of the names and addresses of plaintiff's teammates at the time of the incident is denied. Aside from stating that it is "apparent that we have no means to get this information other than through discovery, and court order," plaintiff has failed to demonstrate why he is unable to provide to his counsel the names of *his own* teammates, and that a good faith attempt to ascertain those names and addresses has been conducted but failed.

Defendants have provided plaintiff the opportunity to review the entire New York State High School Athletic Handbook, which is comprised of 216 pages, in addition to

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[2]Plaintiff has included in his reply copies of the authorizations dated September 22, 2011.

having provided to plaintiff portions of that handbook. Defendants have also stated that they will provide plaintiff with any other portions of the handbook he desires upon payment of standard copying charges. Plaintiff should avail himself of this opportunity at the earliest possible convenience.

Defendants have provided an affidavit that they were unable to locate an accident report for the subject incident. In addition, the coach who was deposed testified that he "believed" that he filled out a written incident report. The Court does not find that this set of circumstances constitutes willful and contumacious behavior warranting the striking of defendants' answer. Thus, plaintiff's request for that relief is denied.

Counsel for all parties are directed to appear for a previously scheduled conference of this matter on January 27, 2012, at 9:30 a.m.

The foregoing constitutes the Order of this Court.

Dated: January 11, 2012
Mineola, N.Y.

Karen V. Murphy
J. S. C.

ENTERED
JAN 17 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE