

Grech v HRC Corporation

2012 NY Slip Op 31127(U)

April 25, 2012

Supreme Court, Queens County

Docket Number: 12616/2006

Judge: David Elliot

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IAS Part 14

SAVIOR GRECH,
Plaintiff,

Index
No. 12616 2006

- against -

Motion
Date March 6, 2012

HRC CORPORATION, et ano.,
Defendant.

Motion
Cal. Nos. 12 & 13

Motion
Seq. Nos. 7 & 8

Conference
Date March 20, 2012

Papers
Numbered

Orders to Show Cause - Affirmation - Exhibits.....	1-9
Answering Affirmations - Exhibits.....	10-16

This is an action to recover damages for personal injuries alleged to have been sustained on February 2, 2005, by plaintiff during the course of his employment, when he slipped and fell at premises owned by defendant 12 West 31st Street Corporation and managed by defendant HRC Corporation (collectively defendants).

Both plaintiff and defendants separately move for various discovery-related relief. A review of the relevant procedural history in this matter is warranted. The summons and complaint were filed herein on June 5, 2006. After the preliminary conference and the compliance conference were held on December 13, 2006 and July 10, 2007, respectively, the note of issue was filed on November 1, 2007. On July 17, 2008, the matter was “stricken” in the Trial Scheduling Part. By order dated November 21, 2008 (Schulman, J.), the case remained “stricken,” and the parties were directed enter into a stipulation to restore the case

to the trial calendar upon completion of all discovery, and to include a date certain for trial. The matter was restored to active status by order dated October 4, 2010, after it was deemed automatically dismissed pursuant to CPLR 3404, and this court ordered further discovery. Being that the matter was restored, the case was scheduled to appear in the Trial Scheduling Part on January 26, 2012, and was, thereafter, adjourned to May 17, 2012 for trial. In the interim, copious amounts of discovery were exchanged, which form the bases for the instant motions. A brief outline of the relevant discovery documents may prove beneficial:

1. Verified bill of particulars dated January 23, 2007;
2. Amended bill of particulars dated August 15, 2007;
3. Amended/supplemental bill of particulars dated February 4, 2008;
4. Amended/supplemental bill of particulars dated October 10, 2008;
5. Stipulation, which was so-ordered on January 11, 2011, allowing for, inter alia, plaintiff to serve a supplemental bill of particulars related to his recent knee surgery/treatment;
6. Verified supplemental amended bill of particulars dated February 16, 2011;
7. Amended stipulation, which was so-ordered on May 31, 2011, allowing for, inter alia, plaintiff to serve and defendant to accept an amended bill of particulars related to erectile dysfunction and any other urological complaints;
8. Verified supplemental amended bill of particulars dated May 27, 2011;
9. Verified supplemental amended bill of particulars dated August 12, 2011.

Plaintiff moves for an order permitting him to amend his bill of particulars to add his injury and treatment for Traumatic Brain Injury, Post Concussion Syndrome, and Neuropsychological Impairment Secondary to Cerebral Dysfunction and Treatment with the Center for Cognition and Communication, as itemized in his proposed verified supplemental amended bill of particulars, dated January 6, 2012, annexed to the motion.

In support thereof, plaintiff states that, on October 7, 2011, plaintiff sought the care of Center for Cognition and Communication where he received the diagnoses, noted above. Plaintiff then exchanged the narrative report and authorization with counsel for defendants on October 26, 2011, offered defendants further EBT and IME with respect to this new treatment, and advised defendants that he planned on amending the bill of particulars to that effect. Plaintiff contends that he has, since his first amended bill of particulars dated August 15, 2007, claimed impairments regarding his memory and cognitive function under the category “head,” and that it would be prejudicial to prevent him from seeking redress for his brain injury.

In opposition to the motion, defendants aver that the request is “patently untimely” as the matter is currently on the trial calendar, and that allowing for the amendment would

severely prejudice defendants. Further, defendants state that plaintiff has failed to submit: (1) a reason for the delay in seeking the amendment; and (2) a medical affidavit showing a causal connection between the newly claimed injury and the original injuries sustained. Defendants also point out that, despite the May 27, 2011 amended so-ordered stipulation, which provided for the service of one amended bill of particulars alleging only one new injury of erectile dysfunction, plaintiff nevertheless served an additional unauthorized August 12, 2011 bill of particulars (said bill of particulars being the subject of defendants' separate motion, *inter alia*, to strike), and again attempts to submit the new proposed bill of particulars dated January 26, 2012 alleging entirely new injuries, to wit: traumatic brain injury. Defendants request that, if plaintiff's application is not denied, the matter be stricken from the trial calendar so that defendants have an opportunity to conduct further examination to address the new injuries.

Whether the claims in plaintiff's January 26, 2012 injuries regarding plaintiff's head were properly alleged depends upon how these new diagnoses/treatments are categorized. Two sections of the CPLR are instructive on this issue. CPLR 3042 (b), regarding amendments which allege new theories or new injuries, states that "[i]n any action or proceeding in a court in which a note of issue is required to be filed, a party may amend the bill of particulars once as of course prior to the filing of a note of issue." As is the case here, where the amendment is sought post-filing of the note of issue, plaintiff must show "unusual or unanticipated circumstances" and substantial prejudice (*see* 22 NYCRR 202.21[d]; *Salgado v Town Sports Intern.*, 73 AD3d 898 [2010]; *Newell v Hirsch*, 65 AD3d 1108 [2009]). Such an application must also show a reason for the delay and an affidavit of merit from a medical expert showing a causal connection between the newly alleged injury and the original injuries sustained (*see Daly-Caffrey v Licausi*, 70 AD3d 884 [2010]; *Kyong Hi Wohn v County of Suffolk*, 237 AD2d 412 [1997]). Conversely, CPLR 3043 (b), regarding supplemental bill of particulars without leave, states that "[a] party may serve a supplemental bill of particulars with respect to claims of continuing special damages and disabilities without leave of court at any time, but not less than thirty days prior to trial. Provided however that no new cause of action may be alleged or new injury claimed and that the other party shall upon seven days notice, be entitled to newly exercise any and all rights of discovery but only with respect to such continuing special damages and disabilities."

Here, the court finds that CPLR 3043 (b) is controlling. The January 26, 2012 supplemental amended bill of particulars detailing treatment and diagnosis regarding plaintiff's head "seeks to allege continuing consequences of the injuries suffered and described in previous bills of particulars, rather than new and unrelated injuries" (*Witherspoon v Surat Realty Corp.*, 82 AD3d 1087 [2011]; *see Maraviglia v Lokshina*, 68 AD3d 1066 [2009]). As the Court of Appeals has opined when confronted with a similar issue, "[r]easonably and realistically read, especially in light of the dynamics of maturing

injuries, we cannot say that the later, and therefore more definitive, statement of the hardly unanticipatable sequellae of essentially the self-same permanent injuries recited in the earlier bill could have come as a surprise. At most, it expanded on the extent of the continuing disability rather than on the nature of the injuries. All the more is this so since the service of the supplement was accompanied by plaintiff's proffer of a new physical examination . . ." (*Tate v Colabello*, 58 NY2d 84, 87 [1983] [internal citations omitted]). It is further noted that the supplemental bill was served more than 30 days before trial and, but for defendants' rejection thereof, pretrial examinations could have been conducted months earlier. The court notes, however, that any prejudice which may be felt by defendants will be cured herein by ordering plaintiff to submit to further EBT and IME with regard to this continuing disability.

Defendants separately move for relief with respect to plaintiff's supplemental amended bill of particulars dated August 12, 2011. To the extent that the motion seeks orders of preclusion, *et cetera*, with respect to the new head treatment/diagnoses, same is denied in light of the above discussion. To the extent that defendants move for that relief with respect to plaintiff's further laminectomy and additional urogenital complaints, same is also denied for the same reasons, notably: these injuries are *sequellae* of those originally claimed and are permitted (CPLR 3043 [b]).

Defendants also argue on their motion that, with respect to lost wages and special damages, plaintiff had originally made a lost earnings claim (for yearly lost wages), and had not set forth special damages other than setting forth that special damages had been paid by plaintiff's worker's compensation carrier. Defendants state that it was not until plaintiff's unauthorized bill of particulars dated August 12, 2011 wherein plaintiff, for the first time, despite the service of six prior amended bills of particulars, claimed loss of fringe benefits, loss of pension, loss of 401-k, and future losses. It was at or around that time that plaintiff also served improper expert witness exchanges as to two new experts: an economist and social worker.

It is noted that plaintiff complied with CPLR 3101 (d) exchanges as per the so-ordered stipulation dated May 31, 2011. With respect to the proposed testimony of the social worker, to the extent that the expert expects to testify as to issues that are within the purview of a derivative claim, said expert is precluded from testifying on those issues, as a derivative claim was never made. To the extent that the expert plans to testify as to plaintiff's own pain and suffering, same is clearly permissible. As to the issue of "newly claimed" lost benefits, plaintiff stated as early as his February 4, 2008 bill of particulars that plaintiff sustained special damages and lost union benefits, and "specifically reserve[d] the right to itemize [both of those] up to the time of trial." So, while the precise amount of damages may have come as a surprise to defendants, the fact that plaintiff was to claim such damages could not

have been a surprise. Defendants may have very well, in accordance with the so-ordered stipulation dated May 31, 2011, retained their own expert and exchanged their reports.

However, since there was some confusion as to whether this action was on the trial calendar, and given the numerous attempts over time to resolve the issues in the motions, which consequentially allowed for the passage of time (and the proximity to the scheduled trial date), defendants shall not be precluded from serving their 3101 (d) exchanges with respect to these issues.

Accordingly, defendants' motion is granted only to the extent that the action is hereby stricken from the trial calendar. Plaintiff's motion for an order permitting him to supplement his bill of particulars to add his injury and treatment for Traumatic Brain Injury, Post Concussion Syndrome, and Neuropsychological Impairment Secondary to Cerebral Dysfunction and Treatment with the Center of Cognition and Communication is granted, and same is deemed served *nunc pro tunc*. To that extent, plaintiff shall appear for further deposition and physical examination as to these injuries. Specifically, said deposition is to be held within 30 days after the date of entry of this order, at a place to be agreed upon by counsel. Defendants are directed to schedule an IME with respect to those injuries within 30 days after completion of plaintiff's EBT, and the IME shall be held within 30 days thereafter. If defendants fail to schedule the IME within this time period, it will be deemed waived. Plaintiff is directed to appear at the scheduled deposition and IME and failure to do so will result in preclusion with respect to the injuries alleged in the supplemental amended bill of particulars.

A copy of this order is being sent by facsimile transmission to counsel for both parties on this date.

Dated: April 25, 2012

J.S.C.