

Pressley v Crotona Estates Hous. Dev. Fund Co.

2013 NY Slip Op 32356(U)

January 22, 2013

Sup Ct, Bronx County

Docket Number: 302425/2010

Judge: Laura G. Douglas

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 11

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Jannie Pressley,

Index No. 302425/2010

Plaintiff,

- against -

DECISION/ORDER

Present:
HON. LAURA G. DOUGLAS
J.S.C.

Crotona Estates Housing Development Fund Company,
Inc., U.H.O. Management Corp., Urban Home Ownership
Corporation and U.H.O. Maintenance Corp.,
Defendants.
-----X

Motion by the defendants, Crotona Estates Housing Development Fund Company, Inc. and U.H.O. Management Corp. (herein "defendants"), for an order compelling the production of plaintiff for an IME as designated by the defendants is decided as set forth below.

This is an action seeking monetary damages for personal injuries allegedly sustained by plaintiff, when the bathroom ceiling at her residence, collapsed onto her feet, on or about March 1, 2009, eventually leading to the amputation of two toes on July 10, 2009.

Plaintiff served a bill of particulars, dated October 11, 2010, claiming, in pertinent part, as follows:

9. "...[P]laintiff suffered the following injuries: left fourth toe amputation; left fifth toe amputation debridement of necrotic tissue to the left forefoot; infection and necrosis of the anterolateral aspect of the left ankle pain; left foot swelling; difficulty ambulating; stge 2 ulceration to 1st MPJ medial aspect of the right foot; debridement of necrotic tissue of right foot; right foot pain; severe physical pain and suffering; extensive physical therapy and rehabilitation; hospitalizations; emotional distress; mental anguish; extensive medical treatment; possible future surgery; loss of enjoyment of life; precipitation of extreme anxiety reaction with nervousness, fright, upset, tension and depression associated with plaintiff's condition and extensive medical treatment."

10. " All of the injuries are permanent and require future additional surgeries. Plaintiff's prognosis is guarded and her condition will have to be managed during her entire lifetime. The injuries, disabilities, aggravations, exacerbations and involvements are associated with further bone and tissue injury, tearing, derangement and damage to the associated muscle groups, nerve groups, ligaments, bone, cartilage, tendons, organs, blood vessels and blood supply, all concomitant to the injuries with resultant pain, and possible loss of use of the injured parts, atrophy, anxiety, mental anguish, decreased life expectancy, and all have substantially prevented plaintiff from enjoying the fruits of social and economic activity."

A preliminary conference was held on November 19, 2010. The Compliance Conference Order, dated August 30, 2011, directed that the defendants were to designate the IME within 45 days, i.e. October 14, 2011. Admittedly, defendants did not perform the IME of plaintiff in that time period. Plaintiff filed a Note of Issue on June 1, 2012. Defendants' counsel telephoned plaintiff's counsel (within the 20 day period for filing a motion to vacate the note of issue) about conducting the IME and settlement discussions. In late July 2012, defendants were able to locate an appropriate specialty physician to perform the IME of plaintiff. The defendants designated a physician to conduct the IME, by letter dated July 27, 2012. The plaintiff's counsel, by letter dated July 30, 2012, responded that they would not produce the plaintiff for an IME.

In support of the motion, with respect to the nine month delay to designate the IME physician, counsel stated that "[a]lthough defendants searched for a period of months, we had difficulty locating a doctor with the proper medical specialty -- a vascular surgeon -- who is qualified to perform the examination of the plaintiff." More specifically, counsel asserted, inter alia, that "it is the defense position that the amputation of plaintiff's toes was in whole or in part related to plaintiff's pre-existing diabetes and circulation difficulties, as evidenced in her medical records from Jacobi Hospital." The "damages portion of this case involves more than just the amputation of plaintiff's toes, but the effects plaintiff's pre-existing conditions had on her injuries, as well as her leaving the hospital against medical advice five days before the toes were amputated." The moving defendants annexed

additional support, namely copies of portions of the plaintiff's medical records from Jacobi Hospital.

In opposition to the motion, plaintiff's counsel, inter alia, objected to the IME at this juncture of the litigation, based upon the following reasons: a) waiver, due to violation of two Court orders and the "over ten months" delay to designate a physician; b) failure to show any unusual or unanticipated circumstance to justify the delay/failure to designate; and c) prejudice to the plaintiff's "right to a speedy trial."

22 NYCRR § 202.21(d), provides, in pertinent part, as follows:

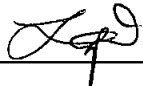
(d) Pretrial proceedings. "... Where unusual or unanticipated circumstances develop subsequent to the filing of a note of issue and certificate of readiness which require additional pretrial proceedings to prevent substantial prejudice, the court, upon motion, supported by affidavit, may grant permission to conduct such necessary proceedings.

Upon review of the record, pursuant to 22 NYCRR § 202.21(d), this Court is satisfied that the defendants have demonstrated the existence of "unusual or unanticipated" circumstances, which developed both subsequent and prior to the filing of the instant note of issue, that require the IME to be conducted to prevent substantial prejudice, including a medical examination, by the moving defendants' designating physician, to determine whether the toe amputations were related to the alleged injury herein and whether the alleged injury was a competent cause of the amputations, complications and alleged disability etc. Therefore, under the circumstances of this case, this Court determines that the defendants' motion to compel the plaintiff to appear for an IME, pursuant to their designating letter, dated July 27, 2012, is granted to the extent of directing the plaintiff to appear for the IME, within thirty (30) days after a further written designation letter by the movants served by certified mail, return receipt requested, since the IME is relevant and material to the claims alleged by the plaintiff in her bill of particulars, dated October 11, 2010.

Accordingly, the defendants' motion is granted as stated herein.

This constitutes the decision and order of this Court.

DATED: 1-22-13
Bronx, New York



Hon. Laura G. Douglas, J.S.C.