

<b>Severino v Brookset Hous. Dev. Fund Corp.</b>
2013 NY Slip Op 33314(U)
March 29, 2013
Sup Ct, Bronx County
Docket Number: 20597-04
Judge: Robert E. Torres
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NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 29

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX:

Case Disposed	<input type="checkbox"/>
Settle Order	<input type="checkbox"/>
Schedule Appearance	<input checked="" type="checkbox"/>

CARLOS SEVELINO X

Index No. 20597/04

-against-  
Brookset HOUSING Dev. Fund X

Hon. ROBERTA TORRES

Justice.

The following papers numbered 1 to \_\_\_\_\_ Read on this motion,  
Noticed on \_\_\_\_\_ and duly submitted as No. \_\_\_\_\_ on the Motion Calendar of \_\_\_\_\_

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this

MOTION IS RESOLVED IN ACCORDANCE WITH THE  
ATTACHED MEMORANDUM DECISION.

Motion is Respectfully Referred to:  
Justice:  
Dated:

Dated: 3/29/13

Hon. [Signature]  
J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX IAS PART 29 X  
CARLOS SEVERINO,

Plaintiff,

- against -

Index No. 20597-04

BROOKSET HOUSING DEVELOPMENT FUND CORP.,  
SETTLEMENT HOUSING FUND, INC., 1615  
ST. JOHNS PLACE L.P., 1615 ST. JOHNS  
INC., RESHEFF INC. and HERBERT L. MANDEL,  
P.C.,

Defendants.

X

SETTLEMENT HOUSING FUND, INC., 1615  
ST. JOHNS PLACE L.P., 1615 ST. JOHNS  
INC., RESHEFF INC. and HERBERT L. MANDEL  
P.C.,

Third-Party Plaintiffs,

-against-

TP Index No.: 85035-06

MC&O CONSTRUCTION INC.,

Third-Party Defendant.

X

BROOKSET HOUSING DEVELOPMENT FUND  
CORPORATION,

Second third-Party Plaintiff,

-against-

2<sup>nd</sup> TP Index No.: 85039-06

MC & O CONSTRUCTION INC.,

Second third-Party Defendant.

X

**TORRES, ROBERT E., J.:**

**Motion Seq. 13 and Motion Seq. 15 have been consolidated for decision.**

The defendants/third-party plaintiffs Settlement Housing Fund Inc., 1615 St. Johns Place L.P., 1615 St. Johns Place Inc., Resheff, Inc., and Herbert L. Mandel P.C. (collectively, The Settlement Defendants) have moved for leave to renew a prior cross-motion brought by third-party defendant/second-party defendant MC & O Construction Inc. (MCO) for partial summary judgment in favor of MCO, and upon renewal, denying MCO's cross-motion seeking dismissal of the Settlement Defendants' common law indemnification claims, and reinstating said claims, on the grounds that newly-disclosed expert reports, medical records and supplemental bill of particulars raise a triable issue of fact as to whether the plaintiff Carlos Severino (Severino or the plaintiff) sustained a "grave injury," pursuant to New York Worker's Compensation Law Section 11, and for other relief.

The defendant/second third-party plaintiff Brookset Housing Development Fund Corporation (Brookset) has also moved, by Order to Show Cause, dated September 28, 2012, for leave to renew a prior cross-motion brought by third-party defendant/second-party defendant MCO for partial summary judgment in favor of MCO, and upon renewal, denying MCO's cross-motion seeking dismissal of

Brookset's common law indemnification claims, and reinstating said claims, on the same grounds.

In this personal injury action, the plaintiff seeks damages for injuries allegedly suffered when a scaffolding on which he was standing collapsed. The accident occurred on March 31, 2003 at 1615 St. Johns Place, Brooklyn, New York, where a new six-story building was being constructed. The plaintiff allegedly sustained the following injuries: closed head traumatic brain injury, head trauma with subdural and epidural hematomas and hemorrhage, anosmia, ageusia and otic injury involving hearing and balance, seizure disorder, loss of smell function, vertebral compression fractures of T9 through T12, and other injuries.

The focus of these two renewal motions is this Court's decision, dated May 30, 2012, in which the Court, in part, granted the cross-motions brought by MCO for summary judgment dismissing the common law indemnification claims brought by the Settlement Defendants and by Brookset, holding that the burden of demonstrating that the plaintiff had sustained a "grave injury" had not been met, as the plaintiff failed to demonstrate that he was incapable of employment in any capacity. The court's decision regarding the "grave injury" issue turned on the fact that no defendant had produced a sworn statement from a doctor attesting to the findings of permanency and unemployability of Severino.

Workers' Compensation Law Section 11 defines a "grave injury" as including:

"Death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability."

In *Rubeis v The Aqua Club Inc.* (3 NY 3d 408 [2004]), the New York Court of Appeals held that a brain injury results in "permanent total disability" only when the evidence establishes that the worker is not employable in any capacity. Then, as now, MCO argues that proof in admissible form has not been furnished which would establish that the plaintiff is totally incapacitated from employment in any field.

In reaching its prior determination, this court placed some reliance on the opinions of the experts retained by the Settlement Defendants, who had concluded that the plaintiff was a malingerer who was capable of employment in vocations which were not physically demanding. The plaintiff's expert, Dr. Peter C. Kwan M.D., a neurologist, had issued an unsworn report stating that the plaintiff was permanently and totally disabled, that he exhibited occasional aggressiveness, anti-social behavior and visual disturbance, that he had not been working due to back pain, anti-seizure medication, and loss of higher and complex

cerebral functions. Notably, there was no affidavit from Dr. Kwan, or any other expert, alleging that the plaintiff was permanently incapacitated from employment in any field. The court was also informed that the plaintiff had a valid driver's license, had been able to drive and take public transportation since the accident, as well as to read books, and that he had even taught himself English in the years following the accident.

In asserting that the plaintiff's injury was not "grave" within the meaning of the statute, MCO offered the opinion of its vocational rehabilitation expert, Dr. Charles Kincaid, who averred that the plaintiff was capable of sustaining gainful employment, concluding that "the plaintiff's impairments have to a reasonable degree of vocational certainty, not limited his access to the competitive labor market or limited his future vocational options." Dr. Kincaid stated that the plaintiff had skills equal to approximately 365 separate job titles. Linda Stein, a vocational guidance counselor, opined on behalf of MCO, that the plaintiff was fit for employment in vocations that are not physically demanding.

The court noted that the Settlement Defendants and Brookset had had ample opportunity to examine the plaintiff, and to elicit evidence in support of their position on this issue, but had failed to do so.

Those prior motions were submitted on June 4, 2010. The moving defendants contend that the passage of time, coupled with the plaintiff's claim that his condition has deteriorated, as well as the new medical proofs disclosed by the plaintiff after submission of the earlier set of motions, constitute "new facts" which justify renewal, and upon renewal, a ruling by this court that the issue of whether a grave injury was sustained by the plaintiff should be presented to the jury as the trier of fact (see *Lazier v Strickland Avenue Corp.*, 50 AD3d 641 [2<sup>nd</sup> Dept 2008]).

With respect to these new medical proofs, on January 10, 2013, Justice Barry Salman, of this court, issued a Decision and Order denying the motion by the defendants/third-party plaintiffs to vacate the Note of Issue, holding, in pertinent part, that the "plaintiff's August 13, 2012 Supplemental Bill of Particulars simply amplifies and further particularizes the injuries already claimed by the plaintiff. The plaintiff does not set forth any new allegations that would warrant re-opening discovery at this time. This matter is trial ready."

#### DISCUSSION

"[R]enewal 'is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation'" (*Rubinstein v. Goldman*, 225 AD2d 328, 328-329 [1st Dept 1996], quoting *Matter of Bieny*, 132 AD2d 190,

210 [1st Dept 1987]; *Chelsea Piers Management v Forest Electric Corporation*, 281 AD2d 252, 252 [1st Dept 2001]). A motion for renewal pursuant to CPLR Section 2212 (e) must be premised on "new facts not offered on the prior motion that would change the prior determination." It must also contain a "reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221 [e]; see also *Jordan v Yardeny*, 84 AD3d 1172 [2<sup>nd</sup> Dept 2011]). Such a motion is addressed to the sound discretion of the court, which may also under appropriate circumstances excuse the failure to submit additional evidence that was available at the time that the original motion was submitted (see *Holguin v Howard*, 248 AD2d 152 [1<sup>st</sup> Dept 1998]).

The "new facts" submitted by both the Settlement Defendants and Brookset consist of a supplemental bill of particulars, newly-disclosed expert reports, and medical records.

MCO argues that the new materials are not new facts that would have changed the prior determination of the court, but are merely cumulative of claims that were alleged previously. The report of plaintiff's expert, Dr Kwan, was in the record before. Moreover, a reargument of the prior motions would be time-barred, and MCO contends that these motions are merely an attempt to circumvent the CPLR.

The plaintiff takes pains to point out that his claim of total incapacity from employment has remained unchanged from the

inception of this action, and that his claims of injury are not "new facts." The plaintiff has continuously supplemented his bill of particulars, and most recently alleged, in a supplemental bill of particulars, dated May 17, 2012, that he was "unable to attend to any employment since the date of the accident." He also contends that the defendants had access to his Workers' Compensation progress reports prior to the time the earlier motions were submitted, and that these records contained a finding of "total disability."

However, the court making a determination on a motion for summary judgment must rely on evidentiary proof in admissible form, not on unsworn reports, or on contentions in a bill of particulars. Even if the plaintiff's contentions are unchanged, the focus of the court must be on the type of evidentiary proof that was available before, and the type which is available for use at trial.

On June 20, 2012, a Neuropsychological Evaluation was conducted by Kim Buschio, Ph.D, a neuro-psychologist, and Jason Brown, M.D., a Clinical Professor of Neurology (ret.). In this report, which was issued more than nine years after the accident, and after the initial set of motions was submitted to this court, these experts opine that: (1) the plaintiff will remain totally disabled for the rest of his life; (2) he will require a home health aide for eight hours per day, five days per week; and (3)

although his seizures have ceased, he makes delusional statements and suffers from severe depression, as well as substantial deficits in his cognitive functioning. These expert findings are affirmed by the two doctors. Also recently disclosed by the plaintiff is the affirmed report of Robert G. Peyster, M.D., dated August 9, 2012, an expert radiologist, who opines that the plaintiff sustained extensive permanent brain damage. The unsworn follow-up reports of Dr. Peter Kwan have also been furnished, which contain the plaintiff's treating physician's opinion that the plaintiff is "permanently and totally disabled."

None of these materials were available at the time that the initial set of motions were submitted to the court. A trier of fact could reasonably conclude, based on such evidence, especially the sworn evidence, that the plaintiff is totally incapacitated from work in any field, and that this condition is permanent. Under these circumstances, the court finds that there is a triable issue of fact raised by the evidentiary materials recently disclosed by the plaintiff, and that such "new materials" justify renewal of the prior cross-motions by MCO, and upon renewal, that the claims against MCO for common law indemnification by the Settlement Defendants and Brookset must be reinstated.

It would be inequitable to permit the plaintiff to go forward with these proofs at trial to establish permanent and

total disability as against the defendants without permitting the defendants to employ the same proofs to support a claim of common law indemnification. As there is now evidentiary proof in admissible form which supports the claim of permanent disability, the motion for renewal by the Settlement Defendants and the motion by Brookset must be granted in all respects.

**CONCLUSION**

Based on the foregoing, it is hereby

**ORDERED** that the motion by the Settlement Defendants and the motion by Brookset, pursuant to CPLR 2221 (e), is granted to the extent of granting renewal; and it is further

**ORDERED** that upon renewal, the cross-motions by MCO for dismissal of the common law indemnification claims against MCO are denied, and said common law indemnification claims are reinstated; and it is further

**ORDERED** that counsel for Brookset shall serve a copy of this order with notice of entry within twenty days of entry on all counsel; and it is further

**ORDERED** that the action shall continue.

Dated: March 29, 2013

ENTER:

  
\_\_\_\_\_

ROBERT E. TORRES J.S.C.