

Zejneli v Sekons

2014 NY Slip Op 30958(U)

April 14, 2014

Sup Ct, New York County

Docket Number: 107392/2010

Judge: Joan B. Lobis

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LOBIS
Justice

PART 6

ZENNELI, NIJAZI

INDEX NO.

107392/10

MOTION DATE

1/23/14

MOTION SEQ. NO.

05

MOTION CAL. NO.

- v -
DAVID HAIM SEKORS, H.O.,
ETAL.

The following papers, numbered 1 to _____ were read on this motion to/for amend BP

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1
2
3

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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APR 16 2014

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NEW YORK

THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION
ORDER

Dated: 4/14/14

JB
JOAN B. LOBIS J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

-----X
NIJAZI ZEJNELI,

Plaintiff,

Index No. 107392/2010

-against-

Decision and Order

DAVID HAIM SEKONS, M.D., MEG BOWERS, M.D., THE
BETH ISRAEL MEDICAL GROUP AND BETH ISRAEL
HOSPITAL,

Defendants.
-----X

JOAN B. LOBIS, J.S.C.:

In this medical malpractice action, Plaintiff Nijazi Zejneli moves post-note of issue to amend his bill of particulars. The amendments include new injuries and claims for lost wages. Defendants David Haim Sekons, M.D., Meg Bowers, M.D., and the Beth Israel Medical Group and Beth Israel Hospital oppose the motion. For the following reasons, the motion is granted.

Plaintiff Nijazi Zejneli underwent a bilateral inguinal hernia repair surgery on March 9, 2010. Dr. Sekons performed the procedure at the defendant facility, Beth Israel Hospital. The surgery was performed using a laparoscope. During the procedure, meshes were secured to Mr. Zejneli's abdominal wall. Several weeks after surgery, the repairs failed, and the hernias recurred. As a result, Mr. Zejneli required several more surgeries to fix the recurrent hernias.

Plaintiff commenced this action in June 2010. In September 2010, the Plaintiff served a bill of particulars on each defendant. Plaintiff supplemented the bills of particulars on

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APR 16 2014

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December 7, 2010; February 3, 2011; June 29, 2011; and July 18, 2011. The note of issue was filed on July 29, 2011.

Between January and July 2011, the Plaintiff was examined several times for the purposes of receiving an "Excuse Slip" and for his workers compensation claims. Following a March 2011 examination, Fanny B. Kasher, M.D., stated in a letter that it was not recommended for Mr. Zejneli to return to work before July 2011. After Plaintiff filed the note of issue, he was examined by Panagiotis A. Manolas, M.D., the surgeon who performed both operations to repair the recurrent hernias. On September 6, 2011, Dr. Manolas wrote a note stating that Mr. Zejneli was totally disabled. Mr. Zejneli's pain management physician, Panagiotis Zenetos, M.D., concluded, in a medical record from October 19, 2011, that Mr. Zejneli was disabled from regular duties or work. A second note from Dr. Manolas dated November 2011 stated that Mr. Zejneli would be unable to return to work or engage in gainful employment. On September 28, 2012, Mr. Zejneli was examined by his expert physician. The expert determined that Mr. Zejneli could not stand, walk, or sit for more than 30 minutes, could not work, and that the disability was permanent. In October 2012, Dr. Manolas also concluded that Mr. Zejneli's impairment was permanent, and that he suffered from neuromas or scar contracture with nerve compression.

In the proposed amended bill of particulars, Mr. Zejneli claims new permanent injuries, including neuroma, pain and tenderness in the area of the surgeries, scar contracture, nerve compression, painful and difficult sexual intercourse, depression, multiple healing surgical scars,

neuralgia, neuritis, injuries to the ilioinguinal and genitofemoral nerves, and weakness of the abdominal muscles. He also claims loss of earnings, including future earnings, total \$3,500,000.

Plaintiff argues that under the Civil Practice Law and Rules leave to amend should be granted freely. He claims that due to the unanticipated circumstances in this case, specifically Mr. Zejneli's permanent injuries, that the Court should allow for an amendment to the bill of particulars post-note of issue. Without the amendment, Plaintiff contends he would be substantially prejudiced. He also maintains that Defendants will not suffer any prejudice since he has no objection to Defendants conducting additional discovery.

Plaintiff avers that part of the delay in making this motion is due to several changes in counsel. First, in October 2011, Plaintiff changed counsel by filing a consent to change attorney form. Saltzman & Winer, Plaintiff's first counsel, was replaced by Julien & Schlesinger, P.C. By order dated March 13, 2012, Julien & Schlesinger was relieved as counsel. The case was then marked off the calendar in June 2012. In late 2012, Bruce G. Clark and Associates took over the case. In January 8, 2013, by order and stipulation, the case was restored to the calendar. As a result, Plaintiff's current counsel was not able to meet with the medical expert until November 2012. They aver that it took until two weeks prior to the motion date to find all the medical records necessary to move to amend. Among the records they had trouble locating were those of Dr. Zenetos. Two weeks prior to the motion date, Plaintiff's counsel learned that Mr. Zejneli had copies of Dr. Zenetos's records at home.

[* 5]

In support of his motion, Plaintiff provides an expert affirmation from a board certified surgeon. The expert's name has been redacted. The expert examined Mr. Zejneli. The expert contends that Mr. Zejneli's constant pain is caused by a neuroma – a disorderly growth comprised of cells that develop slowly at the proximal end of a severed or injured nerve. The expert claims that the pain is sharp and severe. The surgeon maintains that the neuroma was caused by the open surgeries that were required following Dr. Sekon's initial repair of the hernias. The expert opines that pain from neuroma is exacerbated when pressure is applied on the neuroma, and that this is why sexual intercourse is painful and difficult for Mr. Zejneli. Plaintiff's expert avers that Mr. Zejneli also is disabled and unable to work. The expert claims that even light work is impossible as Mr. Zejneli cannot stand, walk, or sit for more than 30 minutes, and often will need to lie down. The affirmation states that the disability is permanent.

Defendants argue that Plaintiff did not include this information in the initial bill of particulars, that the facts were available to the Plaintiff prior to the note of issue, that there is no reasonable excuse for not amending, and that amending the bill of particulars so close to trial is unfair and prejudicial to the Defendants because they cannot obtain discovery. Defendants request that the motion be denied, or, in the alternative, that the Court strike the note of issue and permit Defendants to conduct further discovery, including another deposition of the Plaintiff.

In reply, Plaintiff claims that Defendants have not shown any way in which the Plaintiff could have known prior to the note of issue that there would be a claim for permanent loss of earnings or additional injuries. He contends that it would have been impossible to be aware

[* 6]

of the permanent injuries prior to the note of issue since Dr. Manolas did not make that determination until over a month after the note of issue was filed. For the same reason, Plaintiff could not have been aware that there was a nerve injury present prior to the note of issue. Plaintiff maintains that prior to amending the bill of particulars he wanted to obtain all the necessary medical records. He avers that he did not receive all of Dr. Manolas' records until 8 weeks prior to the motion date and Dr. Zenetos's records 2 weeks prior to the motion date. Plaintiff argues that Defendants have not shown any prejudice as he does not object to reopening discovery.

Under C.P.L.R. Rule 3042(b), a plaintiff has an absolute right to "amend the bill of particulars once as of course prior to the filing of a note of issue." Once the note of issue is filed, a plaintiff must seek leave of the court, but such "leave to amend the pleadings, including a bill of particulars, is to be freely given, absent prejudice or surprise" to the opposing party. Cherebin v. Empress Ambulance Serv., Inc., 43 A.D.3d 364, 365 (1st Dep't 2007); see C.P.L.R. Rule 3025(b). The burden of showing prejudice or surprise is on the opposing party. A.J. Pegno Constr. Corp. v. City of New York, 95 A.D.2d 655, 656 (1st Dep't 1983). However,

[w]hen an amendment to a pleading or a bill of particulars is sought at or on the eve of trial, judicial discretion in allowing such amendment should be discreet, circumspect, prudent and cautious, and where . . . there is an extended delay in moving to amend, an affidavit of reasonable excuse for the delay in making the motion and an affidavit of merit should be submitted in support of the motion.

Kassis v. Teacher's Ins. & Annuity Ass'n, 258 A.D.2d 271, 272 (1st Dep't 1999) (internal citations and quotation marks omitted).

Defendants have failed to show any prejudice that could not be cured by reopening of discovery for the purposes of addressing the claims in the amended bill of particulars. Plaintiff's excuse that his counsel was unable to receive all medical records, though Mr. Zejneli had some of these records at his home, is not as compelling as it could be, but "[i]n the absence of prejudice, mere delay is insufficient to defeat the amendment." Cherebin, 43 A.D.3d at 365, quoting Sheppard v. Blitman/Atlas Bldg. Corp., 288 A.D.2d 33, 34 (1st Dep't 2001). The new claims all stem from the same initial surgery. Plaintiff has included an expert affirmation that established the merit of the new claims. Accordingly, it is

ORDERED that Plaintiff's motion to amend the bill of particulars is granted; it is further

ORDERED that the note of issue is vacated and the case is stricken from the trial calendar; it is further

ORDERED that additional discovery is granted limited to the amended bill of particulars; and it is further

ORDERED that the parties appear for a status conference on May 6, 2014, in Room 345, Part 6, at 9:30am.

Dated: April 19, 2014

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ENTER:



JOAN B. LOBIS, J.S.C.