

Klimowicz v Powell Dev. Corp.
2015 NY Slip Op 32758(U)
March 18, 2015
Supreme Court, Queens County
Docket Number: 16726/09
Judge: Leonard Livote
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Short Form Order

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS**

Present: Hon. Leonard Livote
Justice

IAS PART 33

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ZDZISLAW KLIMOWICZ,

Plaintiff,

- against -

Index No. 16726/09

Motion Date: 1/29/15

Motion Cal. No.: 107

Seq. #: 6

POWELL DEVELOPMENT CORP. i/s/h/a
POWELL COVE ASSOCIATES, LLC and
AVR REALTY COMPANY, LLC

Defendant.

-----X
POWELL DEVELOPMENT CORP. i/s/h/a
POWELL COVE ASSOCIATES, LLC and
AVR REALTY COMPANY, LLC

Third-Party Index No.:350029/09

Third-Party Plaintiff,

- against -

VINNY CONSTRUCTION CORP.

Third-Party Defendant.
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The following papers numbered 1 to 8 read on this order to show cause by defendant and third-party plaintiff AVR POWELL DEVELOPMENT CORP. i/s/h/a POWELL COVE ASSOCIATES, LLC and AVR REALTY COMPANY, LLC (collectively hereinafter "AVR") for an order compelling plaintiff to appear for a further examination before trial and a supplemental independent medical examination, or in the alternative, striking plaintiff's Supplemental Bill of Particulars dated September 19, 2014 and precluding plaintiff from alleging any claims contained therein.

	<u>Papers Numbered</u>
Order to Show Cause - Affidavits - Exhibits	1 - 4
Ans. Affs. - Exhibits	5 - 6
Reply Affs.	7 - 8

Upon the papers filed in support of the within order to show cause and the papers filed in opposition thereto, and both sides having appeared in the Centralized Motion Part on the return date of the motion and having been unable to resolve the issues, the motion is determined as follows:

The within action is one for personal injuries allegedly sustained by plaintiff on June 20, 2008 while working as a bricklayer for third-party defendant Vinny Construction Corp. in Queens. Plaintiff served an original Bill of Particulars alleging injuries to his right shoulder, including a rotator cuff tear and labral tear. Plaintiff appeared for a deposition and independent medical examinations (IME) by both a neurologist and an orthopedist. Thereafter, plaintiff served a Supplemental Bill of Particulars on January 13, 2012 after undergoing a second surgery. Plaintiff then appeared for a second deposition and IME.

Plaintiff filed the note of issue on July 8, 2014.¹ Plaintiff then served a second Supplemental Bill of Particulars on September 19, 2014 alleging injuries to the right shoulder including right shoulder post-surgical changes, rotator cuff tear, SLAP tear and degenerative changes. Thereafter, defendant requested authorizations and another deposition and IME. Plaintiff declined to appear for a third deposition or IME since the note of issue had been filed. The within motion ensued.

Contrary to defendants assertion, pursuant to CPLR § 3043(b), a plaintiff in a personal injury action may supplement the bill of particulars at any time where, as here, “the plaintiff seeks to allege continuing consequences of the injuries suffered and described in previous bills of particulars, rather than new and unrelated injuries.” *See, Restuccio v. Caffrey*, 114 A.D.3d 836 (2nd Dept. 2014) (holding plaintiff’s claim of surgery on her cervical spine was not a new injury but a continuing consequence of the already alleged injuries to her cervical spine); *see also, Maisonet v. New York City Housing Authority*, 276 A.D.2d 260 (1st Dept. 2000)(holding a second ankle fracture of the same foot was causally related to the injuries claimed in the original bill of particulars, specifically an initial fracture, such that it was not a new injury). Also, here, the Supplemental Bill of Particulars was sufficiently served more than 30 days prior to trial and leave of court was not required (*see* CPLR §3043[b]).

¹ The first note of issue was vacated in TSP on March 21, 2012. By so-ordered stipulation dated July 7, 2014 (CA-R, Finnegan), plaintiff was permitted to file a new note of issue.

Plaintiff has not alleged new injuries, but rather, continuing consequences of the injury to his right shoulder, as claimed in the original bill of particulars. As such, that branch of defendant's motion seeking to strike the plaintiff's Supplemental Bill of Particulars on the basis that it claimed new injuries and was served post note of issue, is denied.

Defendant also seeks to obtain an additional deposition and IME based upon the service of the Supplemental Bill of Particulars dated September 19, 2014. Based upon the service of the Supplemental Bill of Particulars, defendant is "entitled to newly exercise any and all rights of discovery" with respect to such newly alleged continuing disabilities (CPLR § 3043[b]; *see also, Brown v. Brink Elevator Corporation d/b/a Herk Elevator Co., Inc.* 125 A.D.3d 421 (1st Dept. 2015)). Plaintiff's claim that defendants have failed to demonstrate the necessity for a further deposition or IME is unavailing, as the basis for plaintiff's new disabilities were based on a 2014 MRI and occurred after the second deposition and IME were held in the fall of 2012. Furthermore, defendants are entitled to same pursuant to CPLR § 3043(b).

Accordingly, it is

ORDERED that defendant's motion is granted to the extent that the plaintiff shall appear for deposition within thirty (30) days of service of a copy of this order with notice of entry, inquiry shall be limited to the claims set forth in the Supplemental Bill of Particulars dated September 19, 2014; and it is further

ORDERED that any demands for disclosure arising out of the deposition shall be served within ten (10) days of the deposition, and shall be responded to within thirty (30) days; and it is further

ORDERED that defendant shall designate a physician to conduct the independent medical examination of the plaintiff within seven (7) days after the completion of plaintiff's deposition, with said medical examination to be completed within twenty-one (21) days of designation, and any reports referable to same to be served upon plaintiff's counsel within thirty (30) days; and it is further


ORDERED that the failure to appear for deposition or physical examination in accordance herewith shall result in the plaintiff being precluded from offering any evidence at trial with regard to the claims set forth in the Supplemental Bill of Particulars dated September 19, 2014; and it is further

ORDERED that movant shall serve a copy of this order on all parties, with Notice of Entry, within 15 days of the entry of this order.

The within matter having been scheduled on the Trial Scheduling Part calendar of this court for Tuesday, May 19, 2015, the parties herein are directed to appear in the TSP on that date to answer the calendar and proceed to trial.

The foregoing constitutes the decision and order of this court.

Date: March 18, 2015



A.J.S.C.

FILED
MAR 27 2015
COUNTY CLERK
QUEENS COUNTY