

Paschall v Jersey Boring & Drilling Co., Inc.
2016 NY Slip Op 30456(U)
February 17, 2016
Supreme Court, Bronx County
Docket Number: 311246/11
Judge: Julia I. Rodriguez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

-----X Index No. 311246/11

Tamara Paschall, as Guardian of
Gilbert Paschall, an incapacitated person,
Plaintiff,

-against-

DECISION and ORDER

Jersey Boring & Drilling Co., Inc. and
Jeffrey W. Harrison,

Present:

Defendants.

Hon. Julia I. Rodriguez
-----X Supreme Court Justice

Recitation, as required by CPLR 2219(a), of the papers considered in review of plaintiff's motion to amend the pleadings, pursuant to CPLR R 3025(b), and defendants' cross-motion for a new compliance conference and discovery schedule.

<u>Papers Submitted</u>	<u>Numbered</u>
Notice of Motion, Affirmation & Exhibits	1
3 rd Pty. Def. Pride's Affirmation in Opposition & Exhibits	2
Reply Affirmation	3
Notice of Cross-Motion, Affirmation & Exhibits	4
Pls.' Aff. In Partial Opposition to Cross-Motion	5
Progressive's Affirmation in Partial Support of Cross-Motion	6

The instant action arises out of an incident that occurred on February 3, 2011 at approximately 3 p.m. in which Plaintiff's 70-year-old decedent, Gilbert Paschall ("Gilbert"), was crossing W. 145th Street in the westerly crosswalk of its intersection with Lenox Avenue when he was struck by a truck owned by Defendant Jersey Boring Drilling and operated by Defendant Jeffrey W. Harrison. Upon being struck by defendants' vehicle, Gilbert was taken by ambulance to Harlem Hospital with severe injuries. Gilbert was ultimately discharged to Workmen's Circle Multicare Center ("Workmen's Circle") in a semi-vegetative state. He was non-verbal and was using a tracheostomy with oxygen and a feeding tube at that time. Gilbert was hospitalized and discharged to Workmen's Circle several times thereafter with various complications which arose from his condition. On September 13, 2014, Gilbert was last hospitalized and was treated for

septic shock, most likely from a urinary tract infection, and pneumonia. Gilbert remained hospitalized until his death on October 3, 2014.

Plaintiff now moves for an order, pursuant to CPLR R 3025(b), amending the Complaint to permit the substitution of Tamara Paschall as Administrator of the Estate of Gilbert Paschall, deceased, and individually, as plaintiffs and to add a cause of action for the wrongful death of Gilbert Paschall, and to restore the case to the active calendar. Defendants cross-move for a new compliance conference and discovery schedule.

In support of the motion, Plaintiff submitted, *inter alia*, the affirmation of Itzhak C. Haimovic, M.D., and certified copies of Gilbert's medical records. Dr. Haimovic examined Gilbert on May 20, 2011 and reviewed his medical records. Dr. Haimovic states that, as a result of the accident, Gilbert suffered numerous injuries including "severe traumatic brain injury with skull fractures, diffuse subarachnoid hemorrhage, bilateral subdurals, intraventricular hemorrhage and multifocal contusions . . . and other injuries, rendering him bedridden; ventilator, feeding tube and catheter dependent; and requiring multiple intervention procedures and recurrent complications including urinary tract infections, pneumonia, hematuria and cardiac stress." Dr. Haimovic also states that during his last hospital admission on September 13, 2014, Gilbert was "admitted to the ICU for management of septic shock secondary to urinary tract infection and pneumonia, respiratory failure status post tracheostomy, ventilator and feeding tube; chronic gastric erosions; acute kidney injury or chronic kidney disease. Dr. Haimovic further states that the principle diagnosis upon Gilbert's death was "cardio respiratory arrest secondary to septic shock from multidrug resistant acinetobacter and urinary tract infection." According to Dr. Haimovic, "[i]nvasive procedures such as artificial ventilation increases the incidence of nosocomial pneumonia, particularly among patients admitted to the ICU ward. Risk factors include long-term intubation and tracheal or lung aspiration. In cases of ventilator-associated pneumonia (VAP), the equipment used for artificial ventilation such as endotracheal tubes serves as an exogenous source and result in the colonization of the lower respiratory tract. UTIs caused by *A. Baumannii*, a species of acinetobacter appear to be associated with continuous catheterization as well as antibiotic therapy." Dr. Haimovic opined that the injuries suffered by

Gilbert from the accident of February 3, 2011 are “a competent producing cause of his death on October 3, 2014.”

The only opposition to the motion was submitted by Third-Party Defendant Pride Mobility Products Corp. (“Pride”). Pride does not oppose the substitution of the Administrator of the Estate of Gilbert Paschall as plaintiff but contends that the amendment of the complaint to add a wrongful death cause of action should be denied and that, if the Court should grant plaintiff’s application to amend the complaint, the action should not be restored to the active calendar because “the other parties are entitled to discovery regarding all aspects of the purported wrongful death claim.” Pride contends that Plaintiff has not established its burden of showing a causal connection between the automobile accident and the passing of the decedent over three years later because Dr. Haimovic failed to address Gilbert’s prior medical history, namely, that Gilbert had a stroke in September of 2007. As a result, Pride contends, any need for the use of a catheter “related to the significant neurological issues that pre-dated the automobile accident,” have not been ruled out. However, a review of Gilbert’s medical records does not reveal any evidence that Gilbert used or needed to use a catheter prior to the accident. Also, while Pride claims that Gilbert’s medical records indicate a history of urinary tract infections, all of the urinary tract infections to which Pride refers occurred after the accident.

Leave to amend pleadings should be freely given absent prejudice or surprise directly resulting from the delay. CPLR R 3025(b); *Fahey v. County of Ontario*, 44 N.Y.2d 934, 935 (N.Y. 1978). A motion for leave to amend a personal injury complaint to assert a cause of action for wrongful death must be supported by competent medical proof of the causal connection between the alleged negligence and the death of the original plaintiff. *See Cruz v. Brown*, 129 A.D.3d 455, 456, 111 N.Y.S.3d 33 (1st Dept. 2015). Here, contrary to Pride’s contention, Gilbert’s certified medical records and the opinions of Dr. Haimovic, based upon his examination of Gilbert in 2011 and his review of Gilbert’s medical records, constitute competent proof of the causal connection between the accident and Gilbert’s death. Nor does Pride allege any prejudice or surprise resulting from the delay.

Based on the foregoing, Plaintiff’s motion is **granted**. All stays are lifted.

The Court hereby deems the Amended Verified Complaint, attached as Exhibit B to Plaintiff's motion, served upon the named parties. Plaintiff shall serve a copy of this Order with Notice of Entry upon defendants herewith. Defendants may serve an answer to the Amended Verified Complaint within twenty days after service of the Order and Notice of Entry. R 3025(b).

Defendants' cross-motion for a new compliance conference and discovery schedule is granted to the extent that this matter shall be set down for a conference on the discovery issue **to be held on March 18, 2016 at 10:00 a.m.** in Part 27, Room 625 of the Bronx Courthouse at Grand Concourse and 161st Street in Bronx County.

The parties may adjourn the matter by stipulation on consent of all parties. Prior to adjournment, if at all, please call the Part Clerk to secure a date agreeable to the Court at: 718-618-1216; the Clerk's name is Dahlia Rivera. The Court fax number is 718-618-3522.

Dated: Bronx, New York
February 17, 2016



Hon. Julia I. Rodriguez, J.S.C.