

Rosenblum v Schoss
2016 NY Slip Op 32779(U)
November 7, 2016
Supreme Court, Nassau County
Docket Number: 600710/15
Judge: Randy Sue Marber
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

JUSTICE

TRIAL/IAS PART 10

JEFFREY M. ROSENBLUM and MERYL A.
ROSENBLUM,

X

Plaintiffs,

Index No.: 600710/15
Motion Sequence...01, 02
Motion Date...09/08/16

-against-

RONI J. SCHOSS and STEVEN J. SCHLOSS,

Defendants.

X

Papers Submitted:
Notice of Motion (Mot. Seq. 01).....x
Notice of Cross-motion (Mot. Seq. 02).....x
Affirmation in Opposition.....x
Reply Affirmation.....x

Upon the foregoing papers, the Defendants, RONI J. SCHOSS and STEVEN J. SCHLOSS' motion (Mot. Seq. 01) seeking an order vacating the Plaintiffs' Note of Issue and Certificate of Readiness for Trial and directing the Plaintiffs to comply with outstanding discovery; and the Plaintiffs' Cross-motion (Mot. Seq. 02) (1) seeking sanctions for making a frivolous motion; (2) seeking leave of court, pursuant to CPLR § 3025, to amend the complaint to add a party plaintiff, JEFFREY M. ROSENBLUM, P.C., relative to the loss of earnings claim; and (3) seeking leave of court, pursuant to CPLR § 3042, permitting the Plaintiffs to supplement their Verified Bill of Particulars, are determined as provided herein.

In this action, the Plaintiff, JEFFREY M. ROSENBLUM, seeks damages for personal injuries he claims he suffered as a result of a motor vehicle accident that occurred on May 6, 2012 allegedly as a result of the Defendants' negligence.

The instant action was commenced by the electronic filing of a summons and verified complaint on February 5, 2015. Issue was joined by the electronic filing a verified answer from the Defendants on April 29, 2015. The instant action was certified ready for trial on March 14, 2016. At that time, counsel for the parties entered into a "side stipulation" which was not So-ordered and which provided that certain outstanding discovery would be provided by the Plaintiff. A copy of this "side stipulation" is not provided by either party. According to the Defendants' counsel, the discovery items which remain outstanding consist of authorizations for tax returns for the Plaintiff, JEFFREY M. ROSENBLUM, from 2010 through the present.

The Plaintiffs first filed a Note of Issue on March 16, 2016. That Note of Issue was vacated by the So-Ordered Stipulation of the parties' counsel on March 23, 2016.

The Plaintiffs' counsel then electronically filed a new Note of Issue on May 16, 2016.

The Plaintiffs, in their Cross-motion (Mot. Seq. 02), seek sanctions against the Defendants, alleging the Defendants' motion, which seeks to vacate the Note of Issue as well as compliance with the parties' "side stipulation", is frivolous. Additionally, the Plaintiffs seek an order granting them leave of court to amend the complaint to add a new party to this

action, to wit, JEFFREY M. ROSENBLUM, P.C., the Plaintiff, JEFFREY M. ROSENBLUM's law firm. Further, the Plaintiffs seek to supplement the Verified Bill of Particulars to add a more specific statement as to the cervical spine injury suffered by the Plaintiff, JEFFREY M. ROSENBLUM.

The Plaintiffs' counsel, Stephen P. Haber, Esq., opposes the Defendants' motion claiming to have responded to the outstanding discovery demands. Specifically, counsel for the Plaintiffs claims that the Defendants' counsel has been provided with authorizations to obtain the corporate tax returns for the Plaintiff, JEFFREY M. ROSENBLUM's law firm, JEFFREY M. ROSENBLUM, P.C. He claims that since the P.C. is the Plaintiff, JEFFREY M. ROSENBLUM's sole source of income, the Defendants' counsel's discovery request was for Mr. Rosenblum's P.C.'s returns.

In opposition to the branch of the Plaintiffs' Cross-motion which opposes the Defendants' demand for authorizations for the Defendants to obtain the Plaintiff, JEFFREY M. ROSENBLUM's tax returns, the Defendants' counsel argues that providing authorizations to obtain the P.C.'s tax returns is insufficient.

22 NYCRR § 202.21 (e) provides as follows:

(e) Vacating note of issue. Within 20 days after service of a note of issue and certificate of readiness, any party to the action or special proceeding may move to vacate the note of issue, upon affidavit showing in what respects the case is not ready for trial, and the court may vacate the note of issue if it appears that a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of this section in some material respect. However, the 20-day

time limitation to make such motion shall not apply to tax assessment review proceedings. After such period, except in a tax assessment review proceeding, no such motion shall be allowed except for good cause shown. At any time, the court on its own motion may vacate a note of issue if it appears that a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of this section in some material respect. If the motion to vacate a note of issue is granted, a copy of the order vacating the note of issue shall be served upon the clerk of the trial court.

The Defendants moved to vacate the Note of Issue and Certificate of Readiness for Trial within the time prescribed for doing so pursuant to 22 NYCRR § 202.21 (e), and clearly demonstrated that the case was not ready for trial. Furthermore, since the Defendants timely moved to vacate the Note of Issue and Certificate of Readiness for Trial, they were required only to demonstrate why the case was not ready for trial, and were not required to establish that the additional discovery was necessary because unusual or unanticipated circumstances had developed subsequent to the filing of the note of issue. (*See Jacobs v. Johnston*, 97 A.D.3d 538 [2d Dept. 2012])

The Court rejects the Plaintiffs' counsel's contention that providing the corporate tax returns is sufficient. The Defendants are entitled to receive all of the individual tax returns of the Plaintiff, JEFFREY M. ROSENBLUM, to determine whether the claims made by him are supported. As such, the Plaintiffs shall have thirty (30) days from the date a copy of this Order is served upon the Plaintiffs' counsel to provide authorizations for all personal tax returns of the Plaintiff, JEFFREY M. ROSENBLUM, as demanded in the Demand for Authorizations dated November 4, 2015.

There is no merit to the branch of the Plaintiffs' Cross-motion seeking sanctions. As such, the branch of the Plaintiffs' Cross-motion seeking sanctions against the Defendants should be **DENIED**.

The Court will now turn to the branch of the Plaintiffs' Cross-motion seeking to amend the complaint to add a new party, to wit: JEFFREY M. ROSENBLUM, P.C., (hereafter the "P.C.") the Plaintiff, JEFFREY M. ROSENBLUM's law firm. In support of this request, the Plaintiffs' counsel states that adding the P.C. is for "completeness of the pleadings as to the loss of earnings claim". He argues that the loss of earnings is shared by the P.C. and the Plaintiffs. Therefore, he asserts, inclusion of the P.C. as a party plaintiff is appropriate.

In opposition to the branch of the Cross-motion seeking to add the P.C. as a plaintiff to this action, the Defendants' counsel invokes the statute of limitations claiming the time to add a cause of action has expired as the accident in this matter occurred on May 6, 2012, clearly more than three (3) years from the attempt to add a new plaintiff and assert the new cause of action. Additionally, counsel for the Defendants argues that the Plaintiffs provide no reasonable excuse for the delay in asserting a new cause of action and adding a new plaintiff.

In reply to the Defendants' opposition to their request to add the P.C. as a new party, the Plaintiffs' counsel relies upon the relation back theory. He also equates the request to add the P.C. as a plaintiff to that of adding of a spouse, who has a derivative claim, and

asserts that the Defendants will not be prejudiced as the P.C.'s claims are identical to the claims of the current Plaintiffs.

The decision whether to allow a pleading to be amended rests within the sound discretion of the court. (*Pagan v. Quinn*, 51 A.D.3d 1299 [3d Dept. 2008]; *Trataros Const. Inc. v. New York City School Const. Authority*, 46 A.D.3d 874 [2d Dept. 2007]) Leave to amend a pleading will be freely granted where the proposed amendment is not palpably insufficient or patently devoid of merit, and will not prejudice or surprise the opposing party. (*Shovak v. Long Island Commercial Bank*, 50 A.D.3d 1118, 1120 [2d Dept. 2008], *lv to appeal dismissed in part, denied in part* 11 N.Y.3d 762 [2008]; *Lucido v. Mancuso*, 49 A.D.3d 220, 245 [2d Dept. 2008]; *Bolanowski v. Trustees of Columbia University in City of New York*, 21 A.D.3d 340 [2d Dept. 2005]) Further, “the merits of a proposed amendment will not be examined on the motion to amend – unless the insufficiency or lack of merit is clear and free from doubt. (*Norman v. Ferrara*, 107 A.D.2d 739 [2d Dept. 1985])

The Plaintiffs request to amend the complaint to include a cause of action by the Plaintiff, JEFFREY M. ROSENBLUM's corporation and to add it as a party cannot be supported. The corporation has no colorable claim against the Defendants for negligence. While the P.C. may have suffered economic loss in a manner similar to Plaintiff, JEFFREY M. ROSENBLUM, the Plaintiff has alleged no viable theory in which a corporate entity may sue derivatively for economic loss resulting from personal injury to its employee. An employer has no right to recover damages sustained when one of its employees is injured in

consequence of the negligence of a third party. (See *Ferguson v. Green Is. Contr. Corp.*, 36 N.Y.2d 742 [1975])

The Defendants do not oppose the Plaintiffs request to supplement it Bill of Particulars to add a more specific statement as to the cervical spine injury suffered by the Plaintiff, JEFFREY M. ROSENBLUM, so long as the Note of Issue is vacated and the Defendants are permitted further discovery concerning the Plaintiffs' claim. Inasmuch as the Note of Issue is being vacated, and in light of the inclusion of the addition of the claim as to the cervical spine, the Defendants may very well be entitled to conduct further discovery. In order to determine what, if any, further discovery is necessary, counsel for the parties shall appear for a conference before this Court on November 28, 2016 at 9:30 a.m.

Accordingly, it is hereby

ORDERED, that the Defendants' motion (Mot. Seq. 01) seeking an order vacating the Note of Issue is **GRANTED**; and it is further

ORDERED, that the Plaintiffs shall, within thirty (30) days from the date a copy of this Order is served upon the Plaintiffs' counsel, provide authorizations for all personal tax returns of the Plaintiff, JEFFREY M. ROSENBLUM, as demanded in the the Defendants' Demand for Authorizations dated November 4, 2015; and it is further

ORDERED, that the branch of the Plaintiffs' Cross-motion (Mot. Seq. 02) seeking an order pursuant to CPLR § 3025, to amend the complaint to add a party plaintiff, JEFFREY M. ROSENBLUM, P.C., is **DENIED**; and it is further

ORDERED, that the branch of the Plaintiff's Cross-motion (Mot. Seq. 02) seeking leave of court, pursuant to CPLR § 3042, permitting the Plaintiffs to supplement their Verified Bill of Particulars is **GRANTED**; and it is further

ORDERED, that counsel for the parties shall appear in this Part 10 for a conference to schedule the further discovery necessitated by the supplementing of the Plaintiffs' Bill of Particulars on **November 28, 2016 at 9:30 a.m.**; and it is further

ORDERED, that the Defendants' counsel shall serve a copy of this Order with Notice of Entry upon the Plaintiffs' counsel pursuant to CPLR § 2103 (b) 2 within ten (10) days of the date of the entry of this Order. **PROOF OF SERVICE MUST BE FILED WITH THE COURT PRIOR TO NOVEMBER 28, 2016.**

This constitutes the decision and order of this court.

DATED: Mineola, New York
November 7, 2016



Hon. Randy Sue Marber, J.S.C.

ENTERED
NOV 10 2016
NASSAU COUNTY
COUNTY CLERK'S OFFICE