

Mathura v Chambers
2017 NY Slip Op 32672(U)
November 20, 2017
Supreme Court, Queens County
Docket Number: 700448/2014
Judge: Pam B. Jackman-Brown
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NEW YORK SUPREME COURT - COUNTY OF QUEENS

IAS PART 19

Short Form Order

Present: Hon. Pam Jackman Brown, JSC

-----X
SUSAN MATHURA,

Plaintiff,

-against-

**JAMIA C. CHAMBERS and NASSAU COUNTY
AHRC FOUNDATION, INC.,**

Defendants.
-----X

Index No. 700448/2014

Motion Date: 08/07/17

Cal. No. 83

Mot. Seq. No.: 003

FILED
NOV 29 2017
COUNTY CLERK
QUEENS COUNTY

Recitation, as required by CPLR § 2219(a), of the following papers e-file numbered 28 to 54, 57 to 70 and 74-80 read on this motion by Defendants for an Order: (1) striking the lost earnings claim contained within Plaintiff's seventh supplemental bill of particulars; (2) precluding Plaintiff from introducing evidence at trial regarding lost earnings; and (3) for such other and further relief as this Court deems just and proper.; and Plaintiff's cross-motion for an Order: (1) pursuant to CPLR § 3025(b), granting Plaintiff leave to amend its bill of particulars to include a lost earnings claim; (2) allowing this matter to proceed with discovery; and (3) together with such other, further, and different relief as this Court may deem just and proper.

	<u>PAPERS E-FILE NUMBERED</u>	
	Papers	Exhibits
Notice of Motion - Exhibits, Affirmation(s), and Affidavit(s) Annexed	28-54	A-J
Affirmation in Opposition to Defendants' Motion - Exhibits and Affidavit(s) Annexed	41-54	A-J
Notice of Cross Motion - Exhibits, Affirmation(s), and Affidavit(s) Annexed	57-70	A-J

Affirmation in Opposition to Cross-Motion and in Further Support of Motion	74-75	A
Reply Affirmation in Support of Plaintiff's Cross-Motion for Leave to Amend its Bill of Particulars	76-80	1-3

Upon the papers listed above, this notice of motion is hereby decided in accordance with this Decision/Order.

This is an action to recover damages for personal injuries allegedly sustained by Plaintiff due to a motor vehicle accident that occurred on July 19, 2013 near the intersection of Milburn Avenue and Pacific Street in Nassau County, New York. On January 20, 2014, Plaintiff commenced this action by filing a summons and verified complaint with the Queens County Clerk's Office. On April 10, 2014, Defendant Nassau County AHRC Foundation, Inc. (hereinafter "Defendant AHRC") interposed a verified answer. On April 21, 2014, Defendant Jamia C. Chambers (hereinafter "Defendant Chambers") interposed a verified answer. On May 27, 2014, Plaintiff served a verified bill of particulars in which she alleged that she incurred injuries to her cervical spine, left and right shoulders, right hip, right knee, and right hamstring. Moreover, she asserted that Defendants' request for employment information was not applicable since she "is not making a claim for lost earnings." On June 17, 2014, Plaintiff served a supplemental verified bill of particulars in which she alleged further injuries related to her right knee, and her right and left shoulders. On October 29, 2014, Plaintiff was deposed during which she testified that she was not bringing a lost earnings claim. On February 10, 2015, Plaintiff served a second supplemental verified bill of particulars in which she alleged further out of pocket medical expenses as a result of the accident. On June 30, 2015, Plaintiff filed a note of issue and certificate of readiness indicating, *inter alia*, that all pleadings were complete but indicated that Defendant's examination before trial was outstanding. On October 30, 2015, Plaintiff served a third supplemental verified bill of particulars in which she alleged further injuries related to her right knee, left and right shoulders, and right hip. On February 10, 2016, Plaintiff served a fourth supplemental verified bill of particulars in which she alleged further injuries related to her left and right shoulders. On April 8, 2016, Plaintiff was further deposed related to the nature of her alleged injuries. By Order, dated September 15, 2016 and entered October 11, 2016, (Weinstein, J.), the Court vacated the note of issue without prejudice upon the completion of all outstanding discovery and the case being ready for trial. On October 5, 2016, Plaintiff served a fifth supplemental verified bill of particulars in which she alleged further injuries related to her right hip. On January 26, 2017, Plaintiff served a sixth supplemental verified bill of particulars in which she alleged psychological and neurological injuries including, but not limited to, depressive disorder, anxiety, post

concussional syndrome, and brain damage. On March 15, 2017, Plaintiff served a seventh supplemental verified bill of particulars in which she alleged a lost earnings claim against Defendants.

Now, upon motion, movant Defendants seek an Order: (1) striking the lost earnings claim contained within Plaintiff's seventh supplemental bill of particulars; and (2) precluding Plaintiff from introducing evidence at trial regarding lost earnings. Plaintiff opposes this motion and, upon motion, Plaintiff seeks an Order: (1) pursuant to CPLR § 3025(b), granting Plaintiff leave to amend its bill of particulars to include a lost earnings claim; (2) allowing this matter to proceed with discovery. Defendants oppose this cross-motion.

"Pursuant to CPLR § 3043(b), a party may serve a supplemental bill of particulars with respect to claims of continuing special damages and disabilities, with the proviso that "no new cause of action may be alleged or new injury claimed. Moreover, the statute provides that a supplemental bill of particulars may be served 30 days or more prior to trial without leave of court, and that the opposing party is entitled to an opportunity for further disclosure regarding the continuing damages and disabilities." (*Alicino v Rochdale Vil., Inc.*, 142 AD3d 937, 939 [2d Dept 2016]). Pursuant to CPLR § 3042, "[i]n any action in a court in which a note of issue is required to be filed, a party may amend the bill of particulars once as a matter of course prior to the filing of a note of issue" [CPLR § 3042].

"Motions to amend or supplement a bill of particulars are governed by the same standards as those applying to motions to amend pleadings" (*Koch v St. Francis Hosp.*, 112 AD2d 142, 143 [2d Dept 1985]). "Generally, in the absence of prejudice or surprise to the opposing party, leave to amend a pleading should be freely given unless the proposed amendment is palpably insufficient or patently devoid of merit" (*Tabak v Shaw Indus., Inc.*, 149 Ad3d 1132, 1133 [2d Dept 2017]). "[W]here there has been an unreasonable delay in seeking leave to amend, the plaintiff must establish a reasonable excuse for the delay, and submit an affidavit establishing the merits of the proposed amendment with respect to the new theories of liability" (*Navarette v Alexiades*, 50 Ad3d 869, 871 [2d Dept 2008]). "In exercising its discretion, the court should consider how long the party seeking the amendment was aware of the facts upon which the motion was predicated, whether a reasonable excuse for the delay was offered, and whether prejudice resulted therefrom" (*Cohen v Ho*, 38 AD3d 705, 706 [2d Dept 2007]).

Here, the self-labeled "sixth supplemental bill of particulars" alleged entirely new psychological and neurological injuries that were wholly unrelated to any previous allegations set forth in the pleadings. Therefore, Plaintiff's so-called "sixth supplemental

bill of particulars” does, in fact, constitute Plaintiff’s first amended bill of particulars. Accordingly, Plaintiff required leave to serve its so-called “seventh supplemental bill of particulars” which Plaintiff conceded is, in fact, an amended bill of particulars since it asserted a lost earnings claim, an entirely new theory of damages. Accordingly, Defendants’ application to strike the lost earnings claim is granted.

The alleged motor vehicle accident giving rise to this action occurred in 2013 and Plaintiff commenced this action in 2014. The original bills of particulars were served in 2014 and the so-called “seventh supplemental bills of particulars” alleging lost earnings were served almost three years later in 2017. Plaintiff failed to offer a reasonable excuse for her delay in seeking to add the lost earnings claim now and such delay would be prejudicial to Defendants, as Plaintiff seeks to add a new theory of recovery which is not readily discernible from the allegations in the complaint and the original bill of particulars. Plaintiff knew or should have known whether her alleged injuries would have an impact on her ability to work and earn income prior to the unreasonable delay of alleging her new theory of damages. Accordingly, Plaintiff’s application for leave to amend its bill of particulars to include a lost earnings claim is denied. Moreover, Defendant’s application to preclude Plaintiff from introducing evidence at trial regarding lost earnings is granted. In light of the foregoing and the fact that Plaintiff has since filed a note of issue asserting that discovery is complete her application to allow this action to proceed with discovery is denied.

Dated: November 20 2017
Jamaica, NY



HON. PAM JACKMAN BROWN, JSC

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