| **Morocho v 740 Corp.** |
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| 2018 NY Slip Op 32511(U) |
| October 3, 2018 |
| Supreme Court, New York County |
| Docket Number: 155004/2017 |
| Judge: Gerald Lebovits |
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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** HON. GERALD LEBOVITS **PART** IAS MOTION 7EFM

*Justice*

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**INDEX NO.** 155004/2017

FAUSTO MOROCHO,

**MOTION DATE** 07/19/2018

Plaintiff,

**MOTION SEQ. NO.** 001

- v -

THE 740 CORPORATION, BROWN HARRIS STEVENS RESIDENTIAL MANAGEMENT LLC, BAUHAUS CONSTRUCTION CORPORATION, GREG LOGISTICS LLC

**DECISION AND ORDER**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29

were read on this motion to/for AMEND CAPTION/PLEADINGS.

Plaintiff, Fausto Morocho, moves for leave to amend his Verified Bill of Particulars to include claims for a low back injury, a neck injury, and other associated injuries.

On May 31, 2017, plaintiff commenced this action against defendants The 740 Corporation (740), Brown Harris Stevens Residential Management LLC (Brown Harris Stevens), Bauhaus Construction Corporation (Bauhaus), and Greg Logistics LLC (Greg Logistics). Plaintiff asserted four different causes of action: (i) defendants' failure to provide him with a safe workplace; (ii) defendants' failure to comply with Labor Law § 240; (iii) defendants' failure to comply with Labor Law § 241; and (iv) defendants' failure to comply with Labor Law § 200. Plaintiff alleges he has suffered personal injuries, pain and mental anguish, loss of enjoyment of life, disability, and economic damage as a consequence of an accident he allegedly sustained in his workplace.

According to the complaint, on August 8, 2016, plaintiff was lawfully working with construction, demolition, excavation, erection, repairing, altering, painting and/or other work at a job site located at 740 Park Avenue, unit 12A, New York, New York, when he fell off a ladder due to defendants' negligence and violations of the Labor Law, sustaining severe and permanent personal injuries.

Plaintiff alleges that defendants, their agents, servants or employees were negligent, reckless, and careless in committing several acts and omissions: (a) failing to provide plaintiff with a safe place to work; (b) causing and/or permitting unsafe, dangerous, and hazardous conditions to exist at the job site; (c) failing to take necessary measures to protect the life and the safety of plaintiff; (d) causing plaintiff to work and be employed in an unsafe, dangerous, and hazardous place without the benefit of adequate and appropriate protection; (e) providing plaintiff with an inadequate work station; (f) failing to furnish and provide adequate safety

devices for plaintiff during the performance of his duties; (g) failing to furnish and/or provide safe and proper scaffolds, ladders, aerial baskets, and other devices necessary to give proper protection to plaintiff in the performance of his duties; (h) failing to properly and adequately secure the elevated work station on which plaintiff was working; (i) failing to construct, shore, equip, place, guard, arrange, and maintain the job site so as to give proper protection to plaintiff; (j) violating pertinent codes, rules, statutes, promulgations, ordinances, and regulations of the City and State of New York, including but not limited to Labor Law §§ 200, 240 and 241; (k) failing to give warning or notice to plaintiff of the unsafe, dangerous, hazardous conditions existing at the job site, all of which defendants, agents, servants and/or employees had actual and constructive notice of; (l) failing to adequately and properly inspect the job site; (m) failing to provide plaintiff with proper, adequate and competent supervision; and (n) being otherwise reckless, careless, and negligent in operating, equipping, arranging, guarding, constructing, and maintaining the job site.

Plaintiff alleges that as a result of the incident, he suffered severe and permanent personal injuries, pain suffering, mental anguish, loss of enjoyment of life, and disability, as well as serious economic damage by reason of loss of employment and income. Plaintiff also argues that all these damages are expected to continue in the future.

Plaintiff argues his motion for leave to amend should be granted because (i) the medical evidence demonstrates that plaintiff's injury was caused by the workplace accident at issue; (ii) the injury is significant; (iii) there is no prejudice to defendants, because discovery is still in the early stages and they have been provided with authorizations to obtain plaintiff's workers' compensation records, which include references to these injuries; (iv) additional discovery can be scheduled; and (v) plaintiff will be deprived the opportunity to prove a legitimate claim if the motion is denied. Plaintiff asserts he is seeking only to "amplify" and "clarify" already existing allegations contained in his claim for damages, and not to add causes of action. Finally, plaintiff alleges that the stipulation made by his attorney during his deposition — that he was not making a claim for the neck and back injuries sustained as a result of the accident —, while imprudent, does not preclude him from now making such claim because (i) discovery is still in its infancy; and (ii) plaintiff's counsel had not been apprised of plaintiff's medical records relating to such injuries, and mistakenly agreed with defense counsel that there was no such claim. Plaintiff also maintains that, although the request is made a few months into discovery, it should not require a lengthy adjournment, and the discovery it may prompt should not be significant or time consuming.

On May 22, 2018, the action was discontinued with prejudice as to Greg Logistics. (NYSCEF document no. 30.)

Defendants 740, Brown Harris Stevens, and Bauhaus oppose the plaintiff's motion to amend the complaint to allege new and additional injuries.

**I. Plaintiff's Motion for Leave to Amend**

Plaintiff's motion for leave to amend the bill of particulars to assert new injuries is denied. Under CPLR 3042 (b), "in any action or proceeding in a court in which a note of issue is required to be filed, a party may amend the bill of particulars once as of course prior to the filing

of a note of issue." The standard governing amendments or supplemental bills of particulars is the same applicable to motions to amend pleadings under CPLR 3025 (b.) (*Cepeda v. Hertz Corp.*, 141 AD2d 394, 295 [1st Dept 1988]; *Bossert v Jay Dee Transp.*, 114 AD2d 833, 833 [2d Dept 1985].)

On March 6, 2018, plaintiff served defendants a supplemental bill of particulars (Supplemental Verified Bill of Particulars – Plaintiff's Exhibit E). Plaintiff seeks to amend the bill of particulars once again, and for this reason he asks this court for leave.

CPLR 3025 (b) provides that parties may amend their pleadings and that courts shall freely grant leave. The First Department has established that motions for leave to amend should be freely granted "unless the proposed amendment is palpably insufficient or patently devoid of merit." (*MBIA Ins. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010].) The court may deny a motion to amend if the proposed amendment will prejudice or surprise the opposing party. (*Aurora Loan Servs. LLC v Thomas*, 70 AD3d 986, 987 [2d Dept 2010] [finding no prejudice or surprise from a delay to amend an answer when the movant relied on documents obtained during disclosure].) Prejudice, however, does not exist when an amendment "merely adds a new theory of recovery or defense arising out a transaction or occurrence already in litigation." (*Duffy v Horton Mem. Hosp.*, 66 NY2d 473, 477 [1985], *accord Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 23 [1981] [finding that an amendment that exposes a defendant to greater liability does not constitute prejudice].)

The issue, however, is not whether leave to amend the Bill of Particulars should be granted, as suggested by plaintiff. The case entails a different analysis, that is, whether the stipulation entered into by plaintiff's counsel should be set aside, allowing plaintiff to assert the new claims.

On April 25, 2018, during plaintiff's deposition, when inquired about his intention to supplement or amend his Bill of Particulars, plaintiff's attorney represented that he would not make any claims related to Fausto's neck or back injuries. The waiver of any such claims was made on the record and corroborated twice by plaintiff's lawyer. (*See* Fausto Morocho's Deposition - Exhibit G, at 140, 141.)

This statement amounts to a stipulation that plaintiff would not make any claims concerning those injuries. Plaintiff must move to vacate the stipulation before requesting leave to amend the Bill of Particulars. But even if a request to do that had been made, the motion to vacate the stipulation would be denied, as discussed below.

## II. Standard for Vacating a Stipulation

Under CPLR 2104, "an agreement between parties or their attorneys, relating to any matter in any action, other than one made between counsel in open court, is not binding upon a party unless it is in a writing subscribed by him or his attorney or reduced to the form of an order and entered." Stipulations of settlement should not be lightly cast aside. (*Hallock v State of New York*, 64 NY2d 224, 230 [1984]; *Matter of Galasso*, 35 NY2d 319 [1974]; *Charlop v A.O. Smith Water Products*, 64 AD3d 486, 486 [1st Dept 2009].) Stipulations are "generally binding on parties that have legal capacity to negotiate, do in fact freely negotiate their agreement[s] and

either reduce their stipulation[s] to a properly subscribed writing or enter the stipulation[s] orally on the record in open court." (*McCoy v Feinman*, 99 NY2d 295, 302 [2002].) When these requirements are met, a stipulation should be construed as an independent contract. (*Id.*) However, "[w]hile it is true that, in all that properly relates to the conduct of a trial, the attorney represents the party, and is his authorized agent, and the attorney's agreement and stipulation, within the boundaries of that authority, is the agreement and stipulation of the client, and binds the latter as if he himself had personally made it. . . , it is also true that the courts have the power to relieve parties of their stipulations, and orders entered thereon, in proper cases." (*Humphries v Shapiro*, 187 AD 96, 98 [1st Dept 1919] [citation omitted].)

A party is relieved from the consequences of a stipulation made during litigation only where there is cause sufficient to invalidate a contract – such as fraud, collusion, mistake, or accident (*Matter of Frutiger*, 29 NY2d 143, 149 [1971]; *Campbell v Bussing*, 82 NYS2d 616, 617 [1948].) A stipulation is considered binding, even where a client is absent when it is entered and when the attorney does not have actual authority, if counsel's actions indicate he has "apparent authority" to act on the client's behalf. (*Matter of Silicone Breast Implant Litig.*, 306 AD2d 82, 84 [1st Dept 2003]; *Stoll v Port Auth. of N.Y. and N.J.*, 268 AD2d 379, 380 [1st Dept 2000].)

In the case at issue, plaintiff's lawyer voluntarily stipulated that he would not pursue any claims with respect to neck and back injuries, and the waiver was entered into the record by the stenographic reporter. Plaintiff was present and assisted by an interpreter when his attorney waived the claim; he made no opposition to it. Additionally, plaintiff did not prove that any of the causes that would allow the invalidation of a contract, such as fraud, mistake, collusion, or accident, are present. Absent a showing of good cause, that the stipulation was made by the party's attorney without authorization, or is unduly harsh, the stipulation must be adhered to. (*Wilson v Wilson*, 44 AD2d 667, 667 [1st Dept 1974].)

Plaintiff argues unpersuasively that the statement made on the record did not constitute any kind of agreement, waiver, or stipulation and, thus, does not bar the assertion of additional claims in a later Amended Bill of Particulars. Plaintiff also argues that, were the court to conclude that it is a stipulation, there is sufficient cause to invalidate the agreement, either on the ground of mistake – because plaintiff's counsel had not seen the records relating to the neck and back injuries and believed that there was no claim available – or by accident. (Reply Affirmation.)

Counsel's statement on the record must be construed as a stipulation that any claims referring to the neck and back injuries arguably sustained by the plaintiff are waived. Although it was not made in open court, it was made in the presence of and recorded by a stenographic reporter. The statement was not made under duress, and there was no fraud, collusion, mistake, or accident. Furthermore, the statement was volunteered by plaintiff's attorney when he was asked about his intention to supplement or amend the Bill of Particulars. The statement was clear. It caused the opposing party to rely on it. It should not be set aside.

On August 29, 2018, this court e-mailed the parties' attorneys to inquire whether the plaintiff's deposition had been signed or transmitted for signature. On August 30, 2018, John

Rafter, defendants' counselor, informed the court that the transcript was transmitted to plaintiff's counsel for signature on June 6, 2018 and that an executed transcript was not returned.

Absent a showing of sufficient grounds for vacatur, on-the-record oral stipulations are binding and strictly enforceable. (*See Shoretz v Shoretz,* 186 AD2d 370, 372 [1st Dept 1992].) Despite being unsigned, the deposition transcripts submitted in support of the motion are admissible because certified by the reporter and plaintiff does not challenge its accuracy. (*Tsai Chung Chao v Chao*, 161 AD3d 564, 564 [1st Dept 2018]; *accord Sass v TMT Restoration Consultants Ltd.*, 100 AD3d 443, 443 [1st Dept 2012]; *Bennett v Berger*, 283 AD2d 374, 375 [1st Dept 2001].) Furthermore, because the unsigned deposition transcript was submitted by the party deponent himself, it was adopted as accurate by plaintiff (*Franco v Rolling Frito-Lay Sales. Ltd.*, 103 AD3d 543, 543 [1st Dept 2013]; *Rodriguez v Ryder Truck, Inc.*, 91 AD3d 935, 936 [2d Dept 2012]; *Ashif v Won Ok Lee*, 57 AD3d 700, 700 [2d Dept 2008].) Plaintiff also implicitly ratified the stipulation by failing to make any formal objections to it in over five months. (*See Friedman v Garey*, 8 AD3d 129, 129 [1st Dept 2004]; *Broadmass Assoc. v McDonald's Corp.*, 286 AD2d 409, 410 [2d Dept 2001].)

Finally, there are no sufficient grounds to invalidate the stipulation. The medical report to which plaintiff refers (Progress Note - Exhibit I) indicates that information regarding the back and neck injuries was available to plaintiff much sooner than he represents in his motion. The Progress Note shows that plaintiff's initial visit was on September 19, 2016, and that a follow-up took place on October 12, 2016 – over a year before the deposition in which plaintiff's lawyer waived the claim for the neck and back injuries. Plaintiff had plenty of time to assess these documents and evaluate whether the claim should be waived.

Plaintiff has not moved to vacate the stipulation or established sufficient cause for the stipulation to be set aside. Plaintiff's motion for leave to amend his bill of particulars is denied.

Accordingly, it is hereby

ORDERED that plaintiffs' motion is denied in its entirety; and it is further

ORDERED that the parties appear for a status conference on January 23, 2019, at 10:00 a.m., in Part 7, room 345, at 60 Centre Street.

10/3/2018
DATE

J.S.C.

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|---|---|---|---|---|---|---|---|
| CHECK ONE: | ☐ | CASE DISPOSED | | X | NON-FINAL DISPOSITION | | |
| | ☐ | GRANTED | X DENIED | ☐ | GRANTED IN PART | ☐ | OTHER |
| APPLICATION: | ☐ | SETTLE ORDER | | ☐ | SUBMIT ORDER | | |
| CHECK IF APPROPRIATE: | ☐ | INCLUDES TRANSFER/REASSIGN | | ☐ | FIDUCIARY APPOINTMENT | ☐ | REFERENCE |