Ostrowsky v Novikoff
2018 NY Slip Op 32770(U)
October 29, 2018
Supreme Court, New York County
Docket Number: 156441/2016
Judge: Adam Silvera

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 22

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ADAM OSTROWSKY, DANIELLE SAVONA

Plaintiff,

- v -

HAROLD NOVIKOFF,

Defendant.

INDEX NO. 156441/2016

MOTION DATE 08/01/2018, 08/29/2018

MOTION SEQ. NO. 001 002

DECISION AND ORDER

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HON. ADAM SILVERA:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 42, 43, 44, 45, 46, 47, 48, 50, 51, 52, 53, 54, 55
were read on this motion to/for AMEND CAPTION/PLEADINGS

The following e-filed documents, listed by NYSCEF document number (Motion 002) 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 69, 70, 71, 72
were read on this motion to/for VACATE/STRIKE - NOTE OF ISSUE/JURY DEMAND/FROM TRIAL CALENDAR

The following Decision/Order addresses two motion sequences, plaintiffs' motion, motion sequence 001 and defendant's motion, motion sequence 002. In motion sequence 001 plaintiffs move for an Order to grant plaintiffs leave to amend the *Ad Damnum* clause of plaintiffs' Complaint to add a prayer for relief for punitive damages against defendant; to strike defendant's Answer for willful failure to appear for Examination Before Trial, or, in the alternative to preclude defendant from offering any evidence at the time of trial or an affidavit in support of substantive motion practice. In motion sequence 002, defendant moves for an Order to vacate plaintiffs' Note of Issue; to compel plaintiffs to provide all outstanding discovery; and to extend defendant's time to file a motion for summary judgment.

Background

This motor vehicle action stems from an incident which occurred on Bull Mill Road in the town of Blooming Grove, County of Orange, and State of New York on July 30, 2016, when a vehicle owned and operated by defendant Harold S. Novikoff lost control of the roadway and crossed into the southbound lane colliding with plaintiffs' vehicle and allegedly seriously injured plaintiff Adam Ostrowsky.

Motion Sequence 001

Here, plaintiffs move for leave to amend the *Ad Damnum* clause of the Complaint to add a prayer for relief for punitive damages against defendant; to strike defendant's Answer for willful failure to appear for Examination Before Trial, or, in the alternative to preclude defendant from offering any evidence at the time of trial or an affidavit in support of motion.

Leave to Amend

Leave to amend pleadings is generally freely granted, absent prejudice and surprise (*See Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983]; *Antwerpse Diamantbank N.V. v Nissel*, 27 AD3d 207, 208 [1st Dep't 2006]). To find prejudice, there must be some indication that the defendant has been hindered in the preparation of his case or prevented from taking some measure in support of his position (*See Abdelnabi v NYC Transit Authority*, 273 AD2d 114, 115 [1st Dep't 2000]). Pursuant to CPLR 3025(b) "a party may amend his or her pleading, or supplement it by setting forth addition or subsequent transactions or occurrences, at any time by leave of court." The party opposing a motion to amend must demonstrate prejudice or surprise to said party due to the proposed amendment (*Edenwald Contracting Co., Inc. v City of New York*, 60 NY2d 957 [1983]).

"In the absence of prejudice to the defendant, a motion to amend the ad damnum clause, whether made before or after the trial, should generally be granted" (Loomis v Civetta Corinno Const. Corp., 54 NY2d 18, 23 [1981]). A request to amend the *ad damnum* clause for the relief of punitive damages is limited in scope and does not constitute a separate or new cause of action, nothing more than the express demand for the addition should be required (*Rocanova v Equitable Life Assur. Soc. Of U.S.*, 83 NY2d 603 [1994]). "Punitive damages are available to vindicate a public right only where the actions of the alleged tortfeasor constitute either gross recklessness or intentional, wanton or malicious conduct aimed at the public generally, or were activated by evil or reprehensible motives" (*Rodgers v Duffy*, 95 AD3d 864, 866-867 [2012]).

Plaintiffs claim that the actions of defendant, which led to charges of speeding and failure to keep right, mount to those of a high degree of moral culpability which manifests a conscious disregard of the rights of others or conduct so reckless as to amount to such disregard. Plaintiffs point to the Certified Police Accident Report regarding the incident at issue and indicates that defendant's high speed and crossing of the dividing line constitutes the gross recklessness or intentional, wanton or malicious conduct necessary to warrant punitive damages (Mot at 4, ¶14). Further, plaintiffs highlight that defendant pled guilty to a violation of the New York Vehicle and Traffic Law Section 1212 Reckless Driving (*id.*, ¶15).

In opposition, defendant claims that plaintiffs have not offered a valid excuse as to why a punitive damages claim was not pled in its original complaint and is now being brought a year later. In response to plaintiffs' claim that defendant engaged in behavior amounting to gross recklessness or intentional, wanton or malicious conduct necessary to warrant punitive damages, defendant claims that the conduct in question alone, does not justify the imposition of punitive damages. Defendant cites to *Rodgers v Duffy*, Supra at 866-867, in which the Appellate Division

Second Department found that "evidence that defendant was driving while intoxicated is insufficient by itself to justify the imposition of punitive damages." The Court noted that other evidence was necessary to indicate that defendant acted with evil or reprehensible motives, or so recklessly or wantonly as to warrant an award of punitive damages (*id.* at 867).

Defendant argues that plaintiffs merely offer the evidence of defendant's reckless driving conviction and that while the case at bar does not involve claims of intoxication, the fact that defendant pled guilty to reckless driving should not warrant punitive damages. Defendant points to the statutory language of the New York Vehicle and Traffic Law Section 1212 which states that:

> Reckless driving shall mean driving or using any motor vehicle, motorcycle or any other vehicle propelled by any power other than muscular power or any appliance or accessory thereof in a manner which unreasonably interferes with the free and proper use of the public highway, or unreasonably endangers users of the public highway. Reckless driving is prohibited. Every person violating this provision shall be guilty of a misdemeanor.

Defendant notes that the statutory language he pled to does not require a showing of reckless intent (Aff in Op, ¶ 21). Further, defendant affirms that both the speeding and failure to keep right charges were dropped. Defendant claims that he entered into a reckless driving plea so as to avoid harsher repercussions during the criminal case associated with the underlying incident. At the time of the plea bargain, no civil causes of action for punitive damages had been filed and defendant claims that "the entire plea bargain for reckless driving may not have occurred had it been known to Defendant" that plaintiffs

insisted on a reckless driving plea in order to use it for evidence in a later punitive damages claim during the civil suit (*id.*, ¶ 30).

The Court finds that defendant has convincingly argued that it "has been deprived of taking some measures for the defense against a punitive damages claim, which would have been taken if the motion to increase the *ad damnum* clause had been timely made or contained in the original pleading" (Aff in Op, ¶ 30). Should the Court allow plaintiffs to bring a punitive damage claim, defendant's insurance carrier would be precluded from covering a punitive damage award and defendant would be forced to seek separate counsel to defend against such a claim. "It is well established that "New York public policy precludes insurance indemnification for punitive damage awards (*Zurich Ins. Co. v Shearson Lehman Hutton, Inc.*, 193 AD2d 1, 3 [1st Dep't 1993] citing *Home Insurance Company v. American Home Products Corporation*, 75 N.Y.2d 196, 200 [1990]).

At this juncture, it would be prejudicial for the Court to force defendant to seek separate counsel to defend a punitive damages claim. Absent further evidence that defendant acted in a manner that amounted to gross recklessness or intentional, wanton or malicious conduct, the branch of plaintiffs' motion for leave to amend to add a prayer for relief for punitive damages against defendant is denied.

Strike Answer/Preclusion

Under CPLR 3126, when a party refuses to obey an order to disclose or appear for deposition, the Court may issue an order precluding said party from testifying at the time of trial and/or providing affidavits as to substantive motions. The Court has discretion pursuant to CPLR §3126 to dismiss a complaint or answer for abuses of the discovery process; however, movants must show that the non compliant parties' delay in providing responses was a "willful" or

"contumacious" failure to provide discovery (*Arts4all, Ltd v Hancock*, 54 AD3d 286, 288 [1st Dep't 2008] [finding that a party's failure to comply with the Court's discovery orders on three separate occasions constituted a willful and contumacious disregard. Thus, the Appellate Division found that the IAS Court did not abuse its discretion in dismissing the complaint]).

Here, upon review of the papers the Court has determined that the facts at bar do not rise to a "willful" or "contumacious" failure to provide discovery that warrants dismissal of the Complaint. Defendant affirms that it appeared for the outstanding deposition on December 18, 2017 and attaches the deposition transcript to his opposition (Defendant Aff in Op, Exh A).Thus, the branch of plaintiff's motion requesting to strike defendant's answer or in the alternative to preclude defendant from offering any evidence at the time of trial or affidavit in support of motion is denied for the reasons mentioned above.

Motion Sequence 002

In motion sequence 002, defendant moves for an Order to vacate plaintiffs' Note of Issue on the grounds that discovery is not yet complete and that this action is not yet ready for trial; pursuant to CPLR 3124 and 3126 to compel plaintiffs to provide all outstanding discovery; and pursuant to CPLR 2004 to extend defendant's time to file a motion for summary judgment by 120 days.

Note of Issue

A Note of Issue is premature when discovery remains outstanding (*Barnett v Demian*, 207 AD2d 693 [1st Dept 1994]). A motion to vacate a Note of Issue must be granted when a Defendant has not had a reasonable opportunity to complete discovery (*Frierson v Concourse Plaza Associate*, 189 AD2d 609 [1st Dept 1993]). Absent a showing of "special, unusual or extraordinary circumstances" the Court may deny a motion to strike a plaintiffs' Note of Issue

and determine that no outstanding discovery remains (*Pannone v Silberstein*, 40 AD3d 327 [1st Dept 2007]).

Compel

Under CPLR 3124, "if a person fails to respond to or comply with any request, notice, interrogatory, demand, question or under . . . the party seeking disclosure may move to compel compliance or a response."

Here, defendant alleges that following plaintiffs' second post deposition notice to produce, plaintiffs were served and requested to provide HIPAA authorizations for prior knee surgeries and treatment from 2005 through 2009 and the present date (Defendant Mot, Exh F). Defendant's motion hinges on the alleged missing authorizations and makes no showing of "special, unusual or extraordinary circumstances" (Supra, *Pannone v Silberstein*).

In opposition, plaintiffs affirm that they served a Response to Second Post-Deposition Demand for Discovery and Inspection which provided HIPAA compliant medical unsealing authorizations for Plaintiff Ostrowsky's 2005 medical records . . . 2009 and 2016 medical records . . . and Plaintiff Ostrowsky's records from Sports Therapy & Rehabilitation" (Defendant Aff in Op, ¶ 8).

Defendant has failed to demonstrate "special, unusual or extraordinary circumstances" (Supra, *Pannone v Silberstein*). Thus, the branch of defendant's motion to strike the Note of Issue is denied. Further, the branch of defendant's motion to compel is denied. The Court remembers that during oral argument on August 29, 2018, the parties agreed that the authorizations and outstanding discovery were exchanged. Defendant has failed to submit a reply to plaintiffs' affirmation that they have provided the authorizations. Thus, the Court denies defendants motion to compel.

Extend

Pursuant to CPLR 2004, "the Court may extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown." Here, defendant seeks to extend it's time to move for summary judgment based on its claim that discovery is not complete. The Court, as noted above, has denied defendant's motion to strike the Note of Issue and finds that all discovery is in fact complete. Thus, absent good cause shown, the Court finds that defendant's motion to extend is denied.

Accordingly, it is

ORDERED that the branch of plaintiffs' motion to grant plaintiffs leave to amend the *Ad Damnum* clause of plaintiffs' Complaint to add a prayer for relief for punitive damages against defendant is denied; and it is further

ORDERED that the branch of plaintiffs' motion to strike defendant's Answer for willful failure to appear for Examination Before Trial, or, in the alternative to preclude defendant from offering any evidence at the time of trial or an affidavit in support of substantive motion practice is denied; and it is further

ORDERED that the branch of defendant's motion to vacate plaintiffs' Note of Issue is denied; and it is further

ORDERED that the branch of defendant's motion to compel plaintiffs to provide all outstanding discovery is denied; and it is further

ORDERED that the branch of defendant's motion to extend defendant's time to file a motion for summary judgment is denied; and it is further

ORDERED that defendant shall serve a copy of this order with notice of entry upon plaintiffs within 20 days of entry.

This Constitutes the Decision/Order of the Court.

10/29/18
DATE

ADAM SILVERA, J.S.C.

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