

Branis v Wruble
2018 NY Slip Op 33392(U)
December 21, 2018
Supreme Court, New York County
Docket Number: 805659/15
Judge: Joan A. Madden
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK
COUNTY**

PRESENT: HON. JOAN A. MADDEN
Justice

PART 11

CONSTANTINA BRANIS,
Plaintiff,

INDEX NO. 805659/15
MOTION DATE: 11/15/18

- v -

MOTION SEQ. NO. 005

**NATHAN D. WRUBLE, M.D. and STEINWAY
DIAGNOSTIC IMAGING P.C.,**
Defendants.

The following papers, numbered 1 to _____ were read on this motion to vacate note of issue.

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____		_____
Answering Affidavits — Exhibits _____		_____
Replying Affidavits _____		_____

Defendants move for an order pursuant to 22 NYCRR § 202.21(e) vacating plaintiff's note of issue and extending the time to move for summary judgment. Plaintiff opposes the motion, which is denied except to the extent of extending the time to move for summary judgment as directed below.

This is an action for medical malpractice arising out of allegations that the defendant doctor failed to properly interpret a breast imaging study leading to a delayed breast cancer diagnosis. On August 9, 2018, plaintiff executed a Supplemental Bill of Particulars alleging "additional permanent injuries and their sequelae as a result of the negligent acts and omissions of defendants," which was served on defendants on August 14, 2018. Plaintiff filed the note of issue on August 15, 2018.

Defendants argue that the note of issue should be vacated as the Supplemental Bill of Particulars contains new alleged injuries, and that plaintiff has not responded to their demand for 23 Arons authorizations served on August 20, 2018. Defendants argue that in light of the outstanding discovery, they will be unduly prejudiced if the note of issue is not vacated.

Plaintiff opposes the motion, asserting that defendants knew or should have known about the majority of the injuries set forth in the Supplemental Bill of Particulars, as plaintiff testified

to them at her deposition on June 14, 2016.¹ As to the remaining items, including irritability, maximum lifetime exposure to radiation, impairment of bones and joints and osteopenia and osteoporosis, plaintiff argues that such injuries are sequela of "chemotherapy and the effects thereof" alleged in the original Bill of Particulars and are based on medical records which have been provided to defendants. Plaintiff also points out the in its order dated December 17, 2017, the court permitted defendants to seek a further deposition of plaintiff after the receipt of medical records, and that they never sought such deposition.

As for the Arons authorizations, plaintiff submits proof that she provided the same 23 Arons authorizations to defendants in October 2016, and asserts that defendants apparently never interviewed the providers. Moreover, plaintiff also submits proof that plaintiff again provided the Arons authorizations for the 23 providers in September 2018.

In reply, defendants argue that plaintiff should have supplemented its Bill of Particulars following the plaintiff's deposition and defendants have been prejudiced by plaintiff's serving the Supplemental Bill of Particulars on the day before the note of issue was filed. For example, defendants assert that as a result of the delay they have not had an opportunity to consider, or to notice, a neurological IME for the newly asserted neurological injuries.²

Defendants' arguments are without merit. Pursuant to CPLR 3043(b), a plaintiff in a personal injury action may serve a supplemental bill of particulars containing "continuing special damages and disabilities," without leave of the court at any time, but not less than 30 days prior

¹Specifically, plaintiff notes that she testified as to lymphedema (Plaintiff's EBT at 147, 149); impairment of right arm (Id at 120, 149); limited sensation on right side (Id at 149); neuropathy (arm, fingers and feet)(Id at 119, 124, 125, 126, 149); right arm numbness (Id at 110, 149); limited range of motion in right arm (Id at 110, 149); impairment of sleep (Id at 121, 126); impairment of sexual function (at 150); loss of balance and falling (Id at 147); panic attacks, loss of confidence and personality changes (Id at 146); menopause (Id at 124, 125); need for ongoing surveillance with physicians (Id at 146).

²Defendants also argue that while plaintiff provided Arons authorizations, she has failed to respond to their demand for HIPAA compliant authorizations for medical records. However, in a sur-reply, which the court is considering, plaintiff submits evidence that plaintiff provided these authorizations under cover letter dated September 17, 2018.

to trial, if it alleges “no new cause of action” or claims no “new injury.” Here, the Supplemental Bill of Particulars does not allege new injuries but rather, asserts injuries that are sequela of the alleged injuries relating to the breast cancer, including the effects of radiation and chemotherapy treatments. See Tate by McMahon v. Colabello, 58 NY2d 84, 87 (1983)(rejecting that plaintiff’s proposed supplemental bill of particulars alleged “new injuries” when it “[a]t most ..expanded on the extent of [plaintiff’s] continuing disability”); see also Anderson v. Ariel Services, Inc., 93 AD3d 525, 527 (supplemental bill of particulars “which concerned ‘continuing consequences’ of [plaintiff’s] previously identified injury... did not require prior leave of court”).

As the Supplemental Bill of Particulars asserts continuing injuries alleged in the original Bill of Particulars, the motion to vacate the note of issue is denied. See Villalona v. Bronx-Lebanon Hosp Center, 261 AD2d 185, 185 (1st Dept 1999)(affirming trial court’s denial of defendants’ motion to vacate note of issue where supplemental bill of particulars did “not allege new injuries, but elaborate[d] on injuries that had been alleged in previous bills of particulars, purporting only to set forth the extent of plaintiffs’ continuing disabilities as they became more apparent over time and, in the infant plaintiff’s case, with increased age and development”). Moreover, even if it could be argued that Supplemental Bill of Particulars alleged new injuries and thus constitute an Amended Bill of Particulars, under CPLR 3042(b), plaintiff is permitted to amend the bill of particulars without leave of court once prior to the filing of the note of issue. See Mackauer v. Parikh, 148 AD3d 873, n877 (2d Dept 2017)(court may “disregard [plaintiff’s] mistake in labeling his bill of particulars as a ‘supplemental’ bill where...a substantial right of a party will not be prejudiced”).

Furthermore, defendants cannot claim prejudice as a result of the injuries alleged in the Supplemental Bill of Particulars as plaintiff testified to the majority of such injuries more than two years before the note of issue was filed, and the other alleged injuries relate to, and are a continuation of, the injuries alleged in the original Bill of Particulars. And, significantly, defendants did not seek a further deposition of plaintiff following the production of her medical records. Moreover, defendants have not established there is any outstanding discovery, and to the extent they seek a further IME of plaintiff, such IME, if permitted, can take place while the

action is on the trial calendar.³

That said, however, under the circumstances here, the court is extending defendants' time to move for summary judgment until 30 days after the e-filing of this decision and order.

In view of the above, it is

ORDERED that the motion to vacate the note of issue is denied; and it is further

ORDERED that the motion to extend the time to move for summary judgment is extended to 30 days after the e-filing of this decision and order; and it is further

ORDERED that the parties shall appear on February 21, 2019 at 11 am for a pre-trial conference to be held in Part 11, room 351, 60 Centre Street, New York, NY.

Dated: December 20, 2018

HON. JOAN A. MADDEN

J.S.C.

J.S.C.

Check One: ☐ FINAL DISPOSITION

☒ NON-FINAL DISPOSITION

³The cases relied on by defendants in support of their motion are inapposite. Thus, for example, in Pua v. Lam, 155 AD3d 487, 487 (1st Dept 2017) the Appellate Division, First Department held that the trial court erred in denying defendants' motion to vacate the note of issue and related relief based on a finding that "statements in a certificate of readiness concerning completion of discovery are incorrect or blatantly false." In Hoffman v. Biltmore 47, Associates, LLC, 130 AD3d 478 (1st Dept 2015), the note of issue was vacated so that the deposition of a third-party defendant could be taken and the granting of this relief was conditioned on the action remaining on the trial calendar. As for Lopez v. Kelly St. Realty, Inc., 106 AD3d 534, 535 (1st Dept 2013), in that case, the First Department found that the note of issue should have been stricken based on evidence of a subsequent incident and injury which impacted damages but also based on "a showing of outstanding discovery, separate and apart from that pertaining to plaintiff's subsequent accident." In contrast, here, plaintiff's alleged injuries arise out of the original act of negligence, and there is no outstanding discovery which would warrant the vacating of the note of issue.