

Gonzalez v Saja Holdings, Inc.
2018 NY Slip Op 33419(U)
November 20, 2018
Supreme Court, Bronx County
Docket Number: 310540/2011
Judge: Doris M. Gonzalez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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JONATHAN GONZALEZ,

Plaintiff,

Index No. 310540/2011

v.

DECISION AND ORDER

SAJA HOLDINGS, INC.,

Defendant.

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GONZALEZ, D.:

Upon: i) the Order to Show Cause, by Jessica Montello, Esq., attorney for defendant, for an Order: 1) pursuant to CPLR Rule 2201, staying the trial of this action which is currently scheduled for December 5, 2018, for good cause shown, until such time as the within application has been decided and the additional requested discovery has been completed regarding the plaintiff's recent disclosure additional injuries in an amended medical disclosure or alternatively pursuant to Uniform Rules for New York State Trial Courts Rule 202.21, striking the above-indexed action from the trial calendar; 2) pursuant to CPLR Rule 3124, compelling the plaintiff to appear for a further deposition regarding his recent disclosure of diagnoses of early arthritis of the patellofemoral joint and scheduled loss of use of the right knee of 25%; 3) pursuant to CPLR Rule 3121, ordering the plaintiff to appear for a further independent medical examination with Dr. Alexios Apazidis, orthopedic surgeon; and 4) for such other and further relief that this Court deems just and proper; ii) the Affirmation in Opposition, dated September 18, 2018, by Matthew J. Fein, Esq., attorney for the plaintiff; and iii) the Reply Affirmation, dated September 21, 2018, by Jessica Montello, Esq.

PROCEDURAL HISTORY

The action was commenced by the filing of a Summons and Verified Complaint on November 29, 2011. Issue was joined by service of the defendant's Answer, on or about May 14, 2013. The plaintiff served a bill of particulars, on or about April 11, 2012, and a preliminary conference was held on July 16, 2012, and a compliance conference was held on December 8, 2014.

The plaintiff served a supplemental bill of particulars, on or about January 22, 2013. A compliance conference was held on February 5, 2013. The examination before trial of the plaintiff was conducted on July 8, 2013, and an independent medical examination of the plaintiff was conducted on May 29, 2014. The plaintiff served an amended bill of particulars, on or about January 26, 2015.

A note of issue and certificate of readiness was filed on January 26, 2017. On or about July 9, 2018, the plaintiff served Dr. Sheldon Manspeizer's medical report, dated July 9, 2018, which alleges the plaintiff developed arthritis and 25% loss of use of the right knee. In addition, he served an authorization to obtain his file. The defendant now moves to stay the trial, and to compel a further examination before trial and independent medical examination of the plaintiff as it relates to the arthritis and loss of use of the right knee.

This case has had multiple conferences in the Pre-Trial Part and Special Trial Part. The trial of this matter is scheduled for December 5, 2018.

FACTUAL BACKGROUND

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff arising from a slip and fall accident that occurred on February 1, 2011, at 355-357 West

36th Street, in the County, City and State of New York. It is alleged the plaintiff slipped on a defective step in the stairway at the premises.

On July 15, 2011, Dr. Manspeizer performed arthroscopic surgery on the plaintiff's right knee and again on November 17, 2011. On June 5, 2018, the plaintiff was examined by Dr. Manspeizer and it is now alleged the plaintiff developed arthritis and 25% loss of use of his right knee.

The defendant alleges these are new injuries, and moves to compel the plaintiff to appear for a further examination before trial and independent medical examination. The defendant contends that the trial of this matter should be stayed until the additional discovery is completed.

The plaintiff opposes the motion arguing that the defendant is not entitled to post-note of issue discovery since no unusual or unanticipated circumstances exist. The plaintiff contends that the arthritis and loss of use of the right knee are a natural sequelae of the plaintiff's original injuries.

DISCUSSION OF LAW

22 NYCRR 202.21 (d) permits the Court to authorize additional discovery "[w]here unusual or unanticipated circumstances develop subsequent to the filing of a note of issue and certificate of readiness" that would otherwise cause "substantial prejudice" (*Audiovox Corp.* at 140; *Dominguez v Manhattan & Bronx Surface Tr. Operating Auth.*, 168 AD2d 376 [1st Dept 1990]).

The defendant has failed to establish that there are any "unusual or unanticipated circumstances" warranting its entitlement to conduct a further examination before trial and independent medical examination of the plaintiff due to Dr. Manspeizer's report. Defendant argues a further examination before trial and independent medical examination of the plaintiff is necessary since there are new injuries alleged. It should be noted that the plaintiff's bill of particulars, dated

April 11, 2012, alleged a right knee torn meniscus confirmed by surgery and “wound sequelae...restriction and limitation of motion...possible loss of use...surgery may be required in the future...with advancing years there will be naturally and medically related complications and exacerbations.” Said bill of particulars clearly puts the defendant on notice of future issues regarding the plaintiff’s right knee. Dr. Alexios Apazidis should have been aware of the future allegations, prior to conducting the plaintiff’s independent medical examination.

It is well settled that a Court may grant “a stay of proceedings in a proper case, upon such terms as may be just” (CPLR 2201). Here, the defendant has failed to satisfy its burden in establishing that a stay is appropriate under the circumstances especially since the trial of this matter was adjourned to December 5, 2018.

ACCORDINGLY, based on the record before the Court, a review of the Court file, the applicable law, and due deliberation; it is hereby

ORDERED, that the defendant’s motion is DENIED in its entirety.

This constitutes the Decision and Order of the Court.

Dated: November 20, 2018
Bronx, New York

E N T E R:



HON. DORIS M. GONZALEZ, J.S.C.