

Finck v VL 10 1620 New Hwy., LLC
2018 NY Slip Op 34433(U)
December 6, 2018
Supreme Court, Nassau County
Docket Number: Index No. 603805-14
Judge: Jerome C. Murphy
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**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

**HON. JEROME C. MURPHY,
Justice.**

CHINET FINCK and JOSEPH FINCK,

Plaintiffs,

- against -

**VL 10 1620 NEW HIGHWAY, LLC and
LITTLE JOSEPH REALTY, LLC,**

Defendants.

TRIAL/IAS PART 14

Index No.: 603805-14

Motion Date: 9/10/18

Sequence No.: 002, 003

MD, MG
DECISION AND ORDER

**VL 10 1620 NEW HIGHWAY, LLC and
LITTLE JOSEPH REALTY, LLC,**

Third-Party Plaintiffs,

-against-

**ATLANTIC EXPRESS TRANSPORTATION CORP.
and K. CORR, INC.,**

Third-Party Defendants.

The following papers were read on this motion:

Motion No. 2

Notice of Motion, Affirmation and Exhibits.....	1
Affirmation in Opposition.....	2
Reply Affirmation.....	3

Motion No. 3

Notice of Motion for leave to serve Amended Answer.....	1
Affirmation in Opposition.....	2
Reply Affirmation.....	3

PRELIMINARY STATEMENT

In motion Sequence 002, Defendant brings this application for an order, pursuant to CPLR §3126 precluding the plaintiff from offering any evidence as to damages at the trial of this action, or, in the alternative, for an Order pursuant to CPLR§3124 compelling the plaintiff to provide authorizations to obtain plaintiff's medical records from certain medical providers sought in defendant's discovery demands, and for such other and further relief as this Court deems just and proper. Opposition and Reply were submitted.

In Motion Sequence No. 3, defendants move to serve an Amended Answer to include a Seventh Affirmative Defense of expiration of the Statute of limitations. Plaintiff opposes the motion based upon delay in claiming the Statute of Limitations, the plaintiff will be severely prejudiced, and the Statute of Limitations has not expired as a result of the relation back doctrine.

Defendants replies that plaintiff has not filed a Note of Issue, and defendant is entitled to amend its' Answer, that plaintiff has not been prejudiced, and plaintiff's claim of relation back involves different entities, and is not relevant.

BACKGROUND

Plaintiff commenced this action by filing a Summons and Verified Complaint on July 24, 2014 against Little Joseph Realty, LLC (Exh. "A"). Plaintiff filed a Supplemental Summons and Amended Verified Complaint adding VL 10 1620 New Highway ("VL 10") as an additional defendant on February 20, 2015 (Exh. "B"). The action involves a claim of injuries sustained by plaintiff on January 12, 2012, when, as a pedestrian, she allegedly fell on the lot owned by Little Joseph Realty, LLC. Plaintiff claims that Little Joseph Realty, LLC failed to maintain the condition of the premises, which were a parking lot.

Little Joseph and VL 10 commenced a third-party action against Atlantic Express Transportation Corp, and K. Corr, Inc., by filing a Third-Party Summons and Verified Third-Party Complaint on July 27, 2015. Atlantic Express and Corr submitted an Answer to the Third-Party Complaint on January 4, 2017 (Exh. "E"). The Third-party action was discontinued by stipulation filed on March 9, 2017 (Exh. "F"). Present counsel for Little Joseph and VL 10 were substituted as counsel by Consent to Change Attorney filed on March 9, 2017 (Exh. "F").

Plaintiffs served a Bill of Particulars as to VL 10 and Little Joseph dated May 27, 2016, a Supplemental Bill of Particulars on December 12, 2016, a Supplemental Bill of Particulars on January 31, 2018, and they Third Supplemental Bill of Particulars on April 30, 2018 (Exh. "H"). The Third Supplemental Bill of Particulars of April 30, 2018 alleges "inability to return to work" and "requires assisted ambulation with rolling walker", as well as injuries to her lumbar spine.

On March 19, 2018, plaintiff appeared for a continued deposition with respect to her subsequent surgery and damages (Exh. "I"). She testified that she underwent chemotherapy for breast cancer from the end of 2012 to the beginning of 2014 at Memorial Sloan-Kettering Hospital, continued chemotherapy from September 2014 until 2016 and had her final round of chemotherapy from 2016 two 2017 she indicated that she had masses removed from her breasts in 2012 in 2014. Her oncologist at Memorial was Dr. Caldwell.

On March 22, 2018, counsel for defendant served plaintiff's counsel with Post-EBT Notices for Discovery and Inspection ("J"). Counsel for plaintiff submitted some of the responses but objected to items "o" and "p" which requested authorizations to obtain plaintiff's medical records from Dr. Caldwell. After communications between counsel, the attorney for the plaintiff continued to insist that they were standing by their objections to authorizations for the release of medical records of Dr. Caldwell.

Defendants now moved to preclude plaintiff from offering any evidence as to damages at the trial of this action or, alternatively for an Order pursuant to CPLR § 3124, compelling plaintiff to provide authorizations for the medical records of Dr. Caldwell.

By motion originally returnable on October 5, 2018, and fully submitted on November 5, 2018, defendants moved to seek leave of court to file an Amended Answer, in which they assert the Statute of Limitations as an affirmative defense. Plaintiff testified at her deposition that she was an employee of Atlantic Express and, on January 18, 2012, at approximately 3:50 P.M., after returning to the bus yard after completing her afternoon schedule, she sustained an injury as she exited the bus and her left foot slipped out from under her on the mud on the ground.

Joseph Grillo testified that he was the Vice President of Operations for JPD United, Inc., which had been the owner of the premises at 1620 New Highway, at which plaintiff was injured, since 2009, when the property's former owner, Little Joseph Realty, Inc., was merged into JPD United 1, LLC. Little Joseph Realty, Inc. had owned the property since 1980. Thus, Little Joseph Realty, Inc., not Little Joseph Realty, LLC, owned the property until 1990.

The only party defendant which was timely served in the initial Complaint, was Little Joseph Realty, LLC. On February 20, 2015, more than three years after the accident, plaintiff filed a Supplementary Summons and Amended Verified Complaint, naming VL 10 1620 New Highway, LLC as an additional defendant. Plaintiff opposes the motion to Amend the Answer to interpose the Statute of Limitations as an Affirmative Defense.

DISCUSSION

Motion Sequence No. 2

Defendants move to preclude plaintiff from offering evidence as to physical injuries for failure to provide authorizations for the release of medical records from her oncologist regarding her condition of breast cancer, for which she has received treatment from 2012 through 2016. Alternatively, defendants call for the production of duly executed authorizations for the release of medical records of these treatments. “ ‘ It is well settled that a party must provide duly executed and acknowledged written authorizations for the release of pertinent medical records under the liberal discovery provisions of the CPLR when that party has waived the physician-patient privilege by affirmatively putting his or her physical condition in issue’ ”. (*McLeod v. Metropolitan Transp. Authority*, 47 Misc.3d 383 [Sup.Ct. NY Co. 2015] quoting *Cynthia B. v. New Rochelle Hosp. Med. Ctr.*, 60 N.Y.2d 452—456 [1983]).

In her Bill of Particulars, plaintiff alleges orthopedic injuries, including:

1. Right Lumbar Radiculopathy with L5-S1 Disc Herniation, with surgery;
2. Lumbar Stenosis Radiculopathy;
3. Pseudoarthrosis with Surgery on 9/15/2015, with description of procedures;
4. Lumbar Derangement;
5. Significant Limitation in Lumbar Spine;
6. Loss of Range of Motion in Lumbar Spine;
7. Thoracic Sprain and Strain;
8. Permanent Consequential of Limitation of the Thoracic Spine;
9. Thoracic Derangement;
10. Significant Limitation in Thoracic Spine;
11. Loss of Range of Motion in Thoracic Spine;
12. C4-C5 Disc Herniation, C5-C6 Spondylosis and Multiple Foraminal Stenosis;
13. Cervical Sprain and Strain;

14. Permanent Consequential Limitation of the Cervical Spine;
15. Cervical Derangement;
16. Significant Limitation in the Cervical Spine;
17. Loss of Range of Motion in the Cervical Spine.

Plaintiff's waiver of the physician-patient privilege is limited to those conditions affirmatively placed in controversy (*Spencer v Willard J. Price Assocs., LLC*, 155 A.D.3d 592 [1st Dept. 2017]). Plaintiff did not place in issue her entire medical condition, including her incurring of breast cancer in 2012. Plaintiff has not claimed loss of enjoyment of life, or loss of future earnings in her Bill of Particulars, or Supplemental Bill of Particulars (Exh. "H"), and her unrelated medical conditions are not thereby placed in issue (*McLeod v. Metropolitan Transp. Authority*, 47 Misc.3d 1219[A][Sup.Ct., NYCo. 2015]; *Schiavone v. Keyspan Energy Delivery NYC*, 89 A.D.3d 916, 933 [2d Dept. 2011]).

Defendants' motion to preclude plaintiff from offering testimony as to her injuries at time of trial is denied, as is the demand for alternative relief in the form of provision of authorizations for the release of medical records involving her cancer treatment by Dr. Caldwell.

Motion Sequence No. 3

Defendants seek leave to file an Amended Answer in which they plead the Statute of Limitations as an affirmative defense.

The amendment of pleadings is governed by Civil Practice Law and Rules § 3025 of the Civil Practice Law and Rules, which provides as follows:

Rule 3025. Amended and supplemental pleadings

(a) Amendments without leave. A party may amend his pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it.

(b) Amendments and supplemental pleadings by leave. A party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances.

(c) Amendment to conform to the evidence. The court may

permit pleadings to be amended before or after judgment to conform them to the evidence, upon such terms as may be just including the granting of costs and continuances.

(d) Responses to amended or supplemental pleadings. Except where otherwise prescribed by law or order of the court, there shall be an answer or reply to an amended or supplemental pleading if an answer or reply is required to the pleading being amended or supplemented. Service of such an answer or reply shall be made within twenty days after service of the amended or supplemental pleading to which it responds.

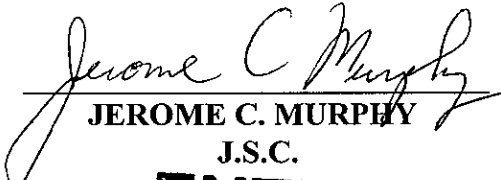
The language of the statute, and cases interpreting it, make it abundantly clear that amendment of pleadings is to be freely granted unless the proposed amendment is “palpably insufficient” to state a cause of action or defense, or it is patently devoid of merit. To the extent that prior decisions led to the conclusion that the movant was under a burden to establish the merit of the amendment, they erroneously stated the standard to be followed (*Lucido v. Mancuso*, 49 A.D.3d 220, 230 [2d Dept. 2008]). Defendants’ motion to Amend the Complaint to include an Affirmative Defense of Statute of Limitations is granted.

To the extent that requested relief has not been granted, it is expressly denied.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York
December 6, 2018

ENTER:


JEROME C. MURPHY
J.S.C.

ENTERED

DEC 10 2018

NASSAU COUNTY
COUNTY CLERK'S OFFICE