

<b>Cortes v ALN Rest., Inc.</b>
2019 NY Slip Op 32117(U)
July 19, 2019
Supreme Court, New York County
Docket Number: 158942/2012
Judge: Deborah A. Kaplan
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. DEBORAH A. KAPLAN PART 40**

*Justice*

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INDEX NO. 158942/2012

BENJAMIN CORTES,  
MOTION DATE 07/17/2019

Plaintiff,

MOTION SEQ. NO. 004

- v -

ALN RESTAURANT, INC., ALN RESTAURANT,  
INC., d/b/a GIOVANNA'S RESTAURANT and  
PB 180 HESTER STREET, LLC,

**DECISION AND ORDER**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84

were read on this motion to/for DISCOVERY

In this premises liability action, defendants ALN Restaurant, Inc., ALN Restaurant, Inc., d/b/a Giovanna's Restaurant and PB 180 Hester Street, LLC (collectively, defendants) move, by order to show cause, for an order: (1) striking plaintiff Benjamin Cortes's (plaintiff) supplemental bill of particulars (SBP) and supplemental expert witness disclosures for Dr. Cerabona (supplemental expert witness disclosure); or (2) precluding plaintiff from introducing at trial any medical evidence or testimony pertaining to the damages alleged in plaintiff's SBP and supplemental expert witness disclosure; or (3) striking this case from the trial calendar on the ground that discovery has not been completed in light of the new injuries and need for future surgery alleged in plaintiff's SBP and supplemental expert witness disclosure; or (4) alternatively, staying the trial until after defendants depose plaintiff, conduct further independent medical examination, and obtain records regarding damages alleged in plaintiff's SBP and supplemental expert witness disclosure

In the verified complaint, plaintiff alleges that, on March 22, 2010, he tripped and fell on an interior staircase at premises owned and controlled by defendants, and sustained “severe and permanent injuries” (the incident) (verified complaint, ¶¶ 45-46) (07/17/19 Maroney affirmation, exhibit A). In the verified bill of particulars dated July 29, 2013 and in the supplemental verified bill of particulars dated December 27, 2013, plaintiff, among other things, specified a number of spinal procedures and surgeries that he underwent to treat injuries that he allegedly sustained as a result of the incident (07/17/19 Maroney affirmation, exhibits C, D). The Note of Issue was filed on January 25, 2017. The parties were scheduled to appear in Part 40 on a trial calendar on June 27, 2019, but, by way of a stipulation dated June 21, 2019, they adjourned the trial date to July 23, 2019.

In the SBP dated July 16, 2019, plaintiff provides details regarding anticipated future treatment and its cost, such as “future . . . lumbar laminectomy and fusion at the adjacent levels” (projected cost - \$150,000); twice a year “orthopedic spinal surgery visits” (\$275.00 per visit); “continued pain management visits” (\$250 per visit); injections (\$2,000 per injection); physical therapy (\$150 per visit); and imaging studies (ranging between \$150 and \$300 per image) (07/17/19 Maroney affirmation, exhibit G).

Along with the SBP, plaintiff served the supplemental expert witness disclosure dated July 16, 2019 (*id.*, exhibit I). Attached to it is “Narrative Report Addendum” by Dr. Franco P. Cerabona, M.D. (Dr. Cerabona) dated July 15, 2019. In relevant part, Dr. Cerabona states that although plaintiff “had a laminectomy and fusion at L4-L5,” plaintiff “is at significant risk to develop adjacent level disease which may require surgical treatment,” and that plaintiff “has continuing pain which requires continued medical treatment” which Dr. Cerabona explains along with the associated cost per visit (*see id.*).

In a letter dated July 16, 2019, counsel for defendants wrote to plaintiff's counsel requesting "to stay this matter from the trial calendar until [defendants] have been afforded an opportunity to depose the Plaintiff, conduct further independent medical examinations and obtain all necessary records regarding the damages alleged in" SBP (07/17/19 Maroney affirmation, exhibit J). Plaintiff's counsel allegedly refused to agree to stay the trial (*see id.*, ¶ 7).

CPLR 3101(a) provides for "full disclosure of all matter material and necessary in the prosecution or defense of an action." Further, "[t]rial courts are authorized, as a matter of discretion, to permit post-note of issue discovery without vacating the notice of issue, so long as neither party will be prejudiced" (*Cabrera v Abaev*, 150 AD3d 588, 588-589 [1st Dept 2017] [internal quotation marks and citation omitted]). The court finds that additional discovery, limited to future damages that are alleged in the SBP, is warranted. Although the note of issue has been filed, the court finds that neither side would be prejudiced by permitting this limited discovery to take place. Plaintiff is directed to fully cooperate with defendants in the conduct of the limited discovery, by, among other things, providing all necessary records and appearing for a further deposition and an independent medical examination. Additional discovery shall be concluded by October 7, 2019.

Accordingly, it is hereby

**ORDERED** that the motion by defendants is granted to the following extent:

- (1) the commencement of the trial in this action is hereby stayed, and the parties are directed to conduct additional, limited discovery as explained in the foregoing decision;
- (2) the parties shall appear in Part 40 on October 7, 2019 at 9:30 a.m. on the trial ready calendar, ready to proceed to jury selection;

(3) there will be no further adjournments of this seven-year-old matter;  
and the motion is otherwise denied.

ENTER:

7/19/2019  
DATE

*Deborah Kaplan*  
DEBORAH A. KAPLAN, J.S.C.

Hon. Deborah A. Kaplan  
J.S.C.

CHECK ONE:  CASE DISPOSED  DENIED  NON-FINAL DISPOSITION

APPLICATION:  GRANTED  SETTLE ORDER  SUBMIT ORDER  OTHER

CHECK IF APPROPRIATE:  INCLUDES TRANSFER/REASSIGN  FIDUCIARY APPOINTMENT  REFERENCE