

<b>Hapij v Colossal Media, Inc.</b>
2019 NY Slip Op 33274(U)
October 23, 2019
Supreme Court, New York County
Docket Number: 156076/2015
Judge: John J. Kelley
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 56

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MARTA HAPIJ and ADAM HAPIJ,

Plaintiff,

Index No. 156076/2015

v

DECISION AND ORDER

COLOSSAL MEDIA, INC., NIKOLAS G. KONTOS, and  
CONSOLIDATED EDISON COMPANY OF NEW YORK,  
INC.,

Defendant.

-----X

JOHN J. KELLEY, J.:

In this action to recover damages for personal injuries arising from a trip-and-fall accident, the defendants Colossal Media, Inc., and Nikolas G. Kontos (hereinafter together the Colossal defendants) move in limine to preclude the plaintiff, Marta Hapij (hereinafter Hapij), from adducing expert testimony that she will likely need to undergo knee-replacement surgery. The plaintiffs oppose the motion. The motion is denied.

In their bill of particulars, the plaintiffs asserted that, as a consequence of the subject motor vehicle accident, Hapij sustained the following injuries to her right leg, and underwent the following treatments:

- Meniscocapsular separation involving the posterior horn/body of the right medial meniscus.
- Partial thickness chondral defect of the right patella and the right medial femoral condyle.
- Tear of the right medial meniscus.
- Arthroscopy of the right knee on June 17, 2015.
- Medial meniscus repair.

Chondroplasty of the medial femoral condyle of the right knee.

Free edge radial tear at junction of the posterior horn of the medial meniscus of the right knee.

Horizontal cleavage propagating from the posterior horn into the body segment of the medial meniscus of the right knee.

Extrusion of the body segment under the medial joint capsule of the medial meniscus of the right knee.

Thickness loss affecting the posterior medial aspect of the medial femoral condyle with full thickness fissuring of the right knee.

Deep chondral fissuring affecting the medial and lateral patellar facet of the right knee.

Grade 4 flap chondral fragment extending to the median ridge from the medial facet of the right knee measuring 1.5 cm.

High-grade thickness defect of the lateral facet propagating from the medial ridge of the right knee measuring 1,4 cm.

Partial thickness loss involving the deep femoral trochlea of the right knee.

Grade 3 chondral injury of the medial femoral condyle of the right knee.

Quadriceps atrophy.

Crepitus in the right knee.

Positive McMurray

Buckling of the right knee.

Post-traumatic remodeling of the right medial malleolus involving the anterior colliculus at the origin of the superficial deltoid tendon.

Punctate ossifications embedded within the deep fibers of the right deltoid ligament complex (deep tibiotalar component).

Thickening and irregularity at the origin of the right superficial components of the deltoid ligament complex including the tibionavicular, tibial spring and tibial calcaneal ligaments.

Marrow edema about the right medial malleolus projecting in the anteromedial recess with impingement.

Right posterior tibial tenosynovitis.

Lateral collateral ligamentous sprain with thickening of the right anterior talofibular, calcaneofibular and posterior talofibular ligaments.

Right peroneal tenosynovitis.

Fusiform thickening of the Achilles tendon.

Right ankle and posterior subtalar joint effusions with fluid extending into the flexor hallucis longus tendon sheath.

Right deltoid ligament sprain.

Post-traumatic deformity of the right medial malleolus.

Intraligamentous ossifications with reactive right medial malleolar edema.

Bony spurs arising from the right anteromedial talus and the anterior medial malleolus resulting in anteromedial impingement.

Right tibial tenosynovitis.

Atrophy of the right calf.

Antalgic gait.

Restriction of motions of the right knee.

Post-traumatic arthritis.

The bill of particulars, however, did not expressly assert that she was likely to need knee-replacement surgery.

In the medical records exchanged by the plaintiffs pursuant to 22 NYCRR 202.17(h), however, one of Hapij's treating physicians indicated that she was a candidate for knee surgery, although the physician did not specify the nature or extent of the surgery that might be indicated.

The Colossal defendants now seek to preclude the plaintiffs from adducing expert testimony that Hapij is likely to need knee-replacement surgery in the future.

In the first instance, there is no merit to the Colossal defendants' contention that knee-replacement surgery constitutes a "new injury" that would have required the plaintiffs to have obtained leave to serve an amended bill of particulars or that, in the absence of such leave, evidence with respect to that treatment must be precluded. The need for future surgery constitutes a sequela to existing injuries, not a new injury (*see Olivo v Nazario*, 154 AD3d 624, 624 [1st Dept 2017]; *Sisemore v Leffler*, 125 AD3d 1374, 1375 [4th Dept 2015]).

Where neither a bill of particulars, nor a CPLR 3101(d) expert disclosure statement, nor a medical exchange under 22 NYCRR 202.17(h) includes any mention at all of the need for future surgery, the plaintiff will be precluded from adducing testimony at trial that such surgery is indeed necessary (*see Thomas v 14 Rollins St. Realty Corp.*, 25 AD3d 317 [1st Dept 2006]; *see also Floyd v 1710 Realty, LLC*, 145 AD3d 961, 963 [2d Dept 2016]; *Smith v Sheehy*, 45 AD3d 670, 671 [2d Dept 2007]). Where, however, the need for such surgery is disclosed either in the pleadings or in the medical exchange, it would not be an improvident exercise of discretion for the court to permit the plaintiff to elicit expert testimony at trial with respect to this issue, even if the claim were omitted from one of those documents (*see Taylor v Daniels*, 244 AD2d 176 [1st Dept 1997] [omitted from medical exchange]; *see also Banks v City of New York*, 92 AD3d 591 [1st Dept 2012] [Supreme Court properly allowed plaintiff's treating orthopedic surgeon to testify as to need for future knee-replacement surgery, despite her noncompliance with medical exchange rule]; *Han Soo Lee v Riverhead Bay Motors*, 57 AD3d 283 [1st Dept 2008]; *Holshek v Stokes*, 122 AD2d 777, 778-779 [2d Dept 1986]). Even where the need for future surgery is disclosed only in general terms, preclusion of expert testimony with respect thereto is not warranted (*see Hammond v Welsh*, 29 AD3d 518 [2d Dept 2006]) since, at the very least, possible future symptoms, degenerations, and treatments are relevant to the severity of the injuries at the time of trial (*see Holshek v Stokes*, 122 AD2d at 779).

Inasmuch as the Colossal defendants were placed on notice by the plaintiffs' medical exchange of Hapij's likely need for future knee surgery, which logically could include knee-replacement surgery, the court concludes that the plaintiffs may adduce expert testimony concerning that issue.

Accordingly, it is

ORDERED that the Colossal defendants' motion in limine to preclude the plaintiffs from adducing evidence of the need for future knee-replacement surgery is denied.

This constitutes the Decision and Order of the court.

Dated: October 23, 2019

Enter:



**HON. JOHN J. KELLEY  
J.S.C.**