

McMore v Constantinides

2020 NY Slip Op 31696(U)

April 29, 2020

Supreme Court, New York County

Docket Number: 805042/2015

Judge: Eileen A. Rakower

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

PRESENT: Hon. EILEEN A. RAKOWER
Justice

PART 6

SHAWN McMORE,

INDEX NO. 805042/2015

Plaintiff,

MOTION DATE

- against-

MOTION SEQ. NO. 2

MOTION CAL. NO.

MINAS CONSTANTINIDES, M.D.
and MINAS CONSTANTINIDES, M.D., F.A.C.S, P.C.,

Defendants.

The following papers, numbered 1 to ____ were read on this motion for/to

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

I

Answer — Affidavits — Exhibits _____

I

Replying Affidavits

I

Cross-Motion: Yes No

This is an action for medical malpractice. The action was commenced on January 29, 2015. Plaintiff filed the Note of Issue on March 28, 2016. A trial was scheduled to commence in this case on May 23, 2020.

Plaintiff *pro se* moves for an Order (1) vacating the Note of Issue; (2) striking the matter from the court calendar without costs; (3) allowing additional time for Plaintiff to serve a supplemental bill of particulars; and (4) allowing additional time for discovery.

On August 1, 2018, Plaintiff’s former counsel was relieved as his counsel. Plaintiff states that he received the entire file from his former counsel in September 2018.

Plaintiff states that his former attorney filed the Note of Issue on his behalf in March 2016. Plaintiff states that at the time of the filing, Plaintiff was seeing other physicians regarding an additional surgery on his nose. Plaintiff states that he had an additional surgery on May 9, 2017 at Massachusetts Eye and Ear Infirmary

by Dr. David A. Shaye. Plaintiff states that “[a]t the time the Note of Issue was filed, the case was not ready for trial because my attorney knew I would be having additional surgery ... because of the negligence of the defendants and that there would need to be depositions and other discovery involving this surgery.” Plaintiff states that the “deposition never took place because Steven Epstein [his prior counsel] never gave defense counsel any of my records.” Plaintiff states that “[t]he surgery I had on May 9, 2017 directly relates to the instant matter and further discovery regarding this surgery is necessary because it is directly relevant and could lead to further crucial evidence in this case.” Plaintiff contends that there is “outstanding discovery issues such as the supplemental bill of particulars which is relevant to the issues of damages” and “authorizations about [his] surgery which has not been turned over yet.” Plaintiff states, “I think that the fact that no attorney will take my case because an expert witness has not reviewed the case is a sure sign that there is a material problem with the case and it is not trial ready at this point in time.”

Defendants oppose Plaintiff’s motion and cross move for an Order striking Plaintiff’s Expert Witness Disclosure.

Defendants contend that Plaintiff “has waived his right to supplement his Bill of Particulars to add additional injuries.” Defendants stated that “Plaintiff, nor his prior counsel, have not provided any authorizations to obtain medical records for subsequent surgeries in 2017” which was “within the plaintiffs control to do.” Defendants contend that Plaintiff’s alleged subsequent surgery was in May 2017, which was more than a year before his former attorney was relieved as counsel. Defendants contend that “no Supplemental Bill of Particulars was ever served” and “[n]o request for permission to serve a Supplemental Bill of Particulars was ever made to this Honorable Court.” Defendants contend that it would be “prejudicial to the defendants to allow the plaintiff to supplement his Bill of Particulars and allege additional damages at this late date.” Defendants contend that while they had requested an additional deposition of Plaintiff, the request was made “in anticipation that plaintiff would be supplementing his Bill of Particulars and providing authorizations to obtain subsequent medical records.” Since Plaintiff did not do so, Defendants did not pursue the additional deposition.

Lastly, Defendants contend that Plaintiff has acknowledged that he has no expert and has not had an expert review his case. Defendants therefore contend that Plaintiff’s previous 3101(d) Expert Witness Disclosure where he disclosed four possible experts is therefore inaccurate and should be stricken based on Plaintiff’s own statements.

In reply, Plaintiff states, “In my CPLR 3101(d) disclosure, I provided information about four experts that I intend to call at trial.” Plaintiff states that “[t]hese four witnesses are still on my list of witnesses.” Plaintiff contends that he “can amend or supplement my response when the response, though correct and complete when made, no longer is correct and complete.”

Pursuant to 22 NYCRR 202.21(e), a motion to vacate a note of issue must be made “[w]ithin 20 days after service of a note of issue and certificate of readiness ... upon affidavit showing in what respects the case is not ready for trial, and court may vacate the note of issue if it appears that a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of this section in some material respect.” 22 NYCRR 202.21(d) provides that “where unusual or unanticipated circumstances develop subsequent to the filing of a note of issue and certificate of readiness which require additional pretrial proceedings to prevent substantial prejudice, the court, upon motion supported by affidavit, may grant permission to conduct such necessary proceedings.”

“Leave to amend pleadings, including a bill of particulars, is to be freely given, absent prejudice or surprise.” *Cherebin v. Empress Ambulance Serv., Inc.*, 43 AD3d 364, 365 (1st Dept 2007). “Prejudice requires ‘some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position.’” (*Id.*).

Plaintiff will be permitted to amend the bill of particulars. Paragraph 10 of the original bill of particulars alleges the personal injuries that Plaintiff sustained as a result of Defendants’ negligence including the “[n]ecessity for reconstructive surgery.” Paragraph 17 states, “It is also anticipated that future medical expenses will be incurred. A supplemental bill of particulars will be served upon ascertainment of said expenses.” Plaintiff does not allege new injuries; rather, he identifies the subsequent surgery he underwent as a result of Defendants’ negligence. In the unique circumstances of the pandemic, and without a clear date when jurors will be again be available, there is no prejudice to Defendants. The trial is not imminent.

Plaintiff shall identify all subsequent medical providers and sign authorizations for the release of those medical records. Plaintiff shall appear for a further deposition to be noticed after Defendants receive these medical

records. The Note of Issue will not be stricken and will stand while the post note of issue activity proceeds.

Defendants' cross motion to strike Plaintiff's Expert Witness Disclosure is denied.

Wherefore it is hereby

ORDERED that Plaintiff's motion is granted to the extent that Plaintiff is permitted to amend the bill of particulars and such amendment shall be made within 45 days from the date of this Order; and it is further

ORDERED that Plaintiff shall identify all subsequent medical providers and sign authorizations for the release of those medical records within 15 days from the date of this Order; and it is further

ORDERED that Plaintiff shall appear for a further deposition to be noticed after Defendants receive these medical records; and it is further

ORDERED that Defendants' cross motion is denied; and it is further

ORDERED that the parties shall appear for a compliance conference on June 30, 2020 at 9:30 AM in Part 6.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: APRIL 29, 2020

ENTER: 
J.S.C.

HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION