

Matias v West 16th Realty LLC
2020 NY Slip Op 32117(U)
June 29, 2020
Supreme Court, New York County
Docket Number: 156142/2015
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. NANCY M. BANNON PART IAS MOTION 42EFM

Justice

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JOSE MATIAS,

Plaintiff,

- v -

WEST 16TH REALTY LLC, GREY DOG CHELSEA INC.,
D/B/A THE GREY DOG RESTAURANT

Defendant.

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INDEX NO. 156142/2015

MOTION DATE 4/1/2020
4/1/2020

MOTION SEQ. NO. 004 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 184, 185

were read on this motion to/for DISCOVERY

The following e-filed documents, listed by NYSCEF document number (Motion 005) 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 182, 183

were read on this motion to/for STRIKE PLEADINGS

In this personal injury action, defendant West 16th Realty, LLC (West 16th) moves to strike the plaintiff's Supplement Bills of Particulars dated July 29, 2019 and January 20, 2020, or in the alternative, compel the plaintiff to submit to an additional deposition and independent medical examination. The plaintiff opposes the motion and cross-moves to vacate the Note of Issue (MOT SEQ 004). Defendant Grey Dog Chelsea Inc. d/b/a The Grey Dog Restaurant (Grey Dog) moves for the same relief as West 16th, with the plaintiff again opposing and cross-moving to vacate the Note of Issue (MOT SEQ 005).

The plaintiff alleges that, on February 19, 2015, he was delivering linen to Grey Dog and was instructed to deliver the linen to the basement through a cellar door. While walking up the stairs to leave the cellar, the plaintiff claims that one of the metal doors to the cellar entrance slammed shut, striking him in the head and knocking him unconscious. One June 18, 2015 the plaintiff filed a complaint sounding in negligence against the defendants. On August 2, 2015 Grey Dog served its verified answer to the complaint. On October 12, 2015, the plaintiff served

his verified Bill of Particulars alleging as damages: cerebral concussion, post-concussion syndrome, cervical spine sprain or strain, spinal disc herniation, and exacerbation of carpal tunnel syndrome, cervical pain, and herniated disc. Thereafter, on November 3, 2015, West 16th served its verified answer to the complaint.

On October 16, 2017 the plaintiff filed his Note of Issue certifying that this matter was ready for trial. Almost two years after serving his Note of Issue, and almost four years after serving his initial Bill of Particulars, on July 29, 2019, the plaintiff served a purported Supplemental Verified Bill of Particulars alleging: traumatic bilateral optic atrophy and neuropathy causing partial vision loss and future total vision loss, sensory ataxia, hearing loss and tinnitus, adjustment disorder with depressed mood and permanent psychiatric impairment, and an inability to work for the rest of his life. Thereafter, on September 23, 2019, the defendants served the plaintiff with a notice of deposition for October 16, 2019 based upon the plaintiff's alleged additional injuries. The plaintiff did not appear for a deposition on October 16, 2019, and on November 8, 2019 the defendants wrote to the plaintiff's counsel regarding the need for an additional deposition and independent medical and vocational examinations.

On December 17, 2019 at a conference concerning an appeal of this court's June 11, 2019 order, the plaintiff, who was personally present at the conference, represented that had recently begun a number of different therapies, including speech therapy, occupational therapy, physical therapy and counselling at Hackensack Meridian Health. At a subsequent conference on January 17, 2020 the plaintiff provided the defendants a copy of a neuropsychological evaluation conducted on the plaintiff and discussed the possibilities of vacating the Note of Issue to conduct the outstanding discovery related to the plaintiff's additional injuries. On January 20, 2020 the plaintiff filed a second Supplemental Verified Bill of Particulars alleging: frontal lobe/executive dysfunction, neurological impairment, and mood dysfunction. The defendants then filed the two instant motions.

It is well settled that a plaintiff labeling a Bill of Particulars as 'supplemental' does not control the reality of the pleadings. Where a Bill of Particulars seeks to add new injuries and damages, it is an Amended Bill of Particulars, which requires leave of court to file after the Note of Issue has been filed. See Wolfer v 184 Fifth Ave. LLC, 27 AD3d 280 (1st Dept. 2006); Licht v Trans Care NY, Inc., 3 AD3d 325 (1st Dept. 2004); Kirk v Nahon, 160 AD3d 823 (2nd Dept. 2018); Fuentes v City of New York, 3 AD3d 549 (2nd Dept. 2004); CPLR 3025; CPLR 3042(b).

The defendants correctly argue that the plaintiff's July 29, 2019 and January 20, 2020 Supplemental Bill of Particulars assert new injuries and damages than those initially claimed in the plaintiff's October 12, 2015 Bill of Particulars inasmuch as the initial Bill of Particulars only sought to recover for injuries relating to a concussion, post-concussion syndrome, disc herniations and related cervical complications. The plaintiff's July 29, 2019 and January 20, 2020 Supplemental Bill of Particulars allege optic atrophy leading to complete vision loss, sensory ataxia, hearing loss, psychiatric impairment, and an inability to work for the rest of his life, well beyond the scope of the injuries claimed in the first Bill of Particulars. The plaintiff's argument that the 'supplemental' Bills of Particulars are in fact supplemental, as the plaintiff 'always claimed a head injury' is without merit, as the new alleged injuries are clearly beyond the scope of injuries that could be reasonably contemplated from the initial claims of concussion and post-concussion syndrome. See *Wolfer v 184 Fifth Ave. LLC*, supra.

Furthermore, as the plaintiff had already filed his Note of Issue, the plaintiff was required to move for leave to amend his Bill of Particulars. Id. Despite the plaintiff's failure to do so, the plaintiff now argues that it should be permitted leave to amend his Bill of Particulars to allege the injuries discussed in the 'supplemental' Bills of Particulars. However, it is well settled that while leave to amend a Bill of Particulars should ordinarily be freely granted in the absence of prejudice and surprise, when leave to amend is sought on the eve of trial, judicial discretion should be exercised in a "discreet, circumspect, prudent and cautious manner." Smith v Plaza Transp. Ambulance Serv., 243 AD2d 555, 556 (2nd Dept. 1997); see *Wolfer v 184 Fifth Ave. LLC*, supra *Licht v Transp. Care NY*, supra; *Kassis v Teacher's Insurance & Annuity Assoc.*, 258 AD2d 271 (1st Dept. 1999). Here, the defendants would clearly be prejudiced by permitting the plaintiff to serve an Amended Bill of Particulars as trial in this matter was scheduled to begin in Spring 2020, and the Note of Issue was filed approximately three-and-a-half years prior to the plaintiff seeking to amend or supplement his Bill of Particulars.

Moreover, where, as here, there has been an inordinate delay in seeking leave to amend a Bill of Particulars, a plaintiff must establish a reasonable excuse for the delay and submit an affidavit to establish the merits of any proposed amendment. See *Fuentes v City of New York*, 3 AD3d 549 (2nd Dept. 2004). The plaintiff, however, fails to offer any reasonable explanation for waiting until the eve of trial, approximately three-and-a-half years after the filing of the Note of Issue, before alleging an array of new injuries and economic damages. Additionally, the plaintiff

fails to submit any affidavit sufficient to establish the merits of any proposed amendment. The affidavit of the plaintiff's attorney, Darlene Miloski, only avers that, based upon the December 17, 2019 conference that the plaintiff attended, she became aware that the plaintiff had begun speech therapy, occupational therapy, and physical therapy at Hackensack Meridian Health. Under the circumstances, the plaintiff should not be permitted to amend his Bill of Particulars and is precluded at trial from introducing into evidence or relying upon any of the information contain in either the July 29, 2019 and January 20, 2020 'Supplemental' Bill of Particulars.

Based upon this determination, the portion of the plaintiff's cross-motion seeking to vacate the Note of Issue is denied.

Accordingly, it is hereby,


ORDERED that the motion of defendant West 16th Realty, LLC to strike the plaintiff's Supplement Bills of Particulars dated July 29, 2019 and January 20, 2020, is granted, and the plaintiff's cross-motion to vacate the Note of Issue is denied (MOT SEQ 004); and it is further,

ORDERED that the motion of defendant Grey Dog Chelsea Inc. d/b/a The Grey Dog Restaurant to strike the plaintiff's Supplement Bills of Particulars dated July 29, 2019 and January 20, 2020 is likewise granted, and the plaintiff's cross-motion to vacate the Note of Issue is denied (MOT SEQ 005); and it is further,

ORDERED that the parties shall contact chambers on or before August 31, 2020 to schedule a settlement conference.

This constitutes the Decision and Order of the court.

6/29/2020
DATE


NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART