

Stewart v Fellingner
2020 NY Slip Op 34754(U)
August 19, 2020
Supreme Court, Dutchess County
Docket Number: Index No. 51378/2017
Judge: Hal B. Greenwald
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At the term of the Supreme Court of the State of New York, held in and for the County of Dutchess, at 10 Market Street, Poughkeepsie, 12601 on August 19, 2020.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

-----X
NOEL STEWART

Plaintiff,

Index No.: 51378/2017

-against-

DECISION AND ORDER
(Motion Sequences 3 and 4)

ERICKA FELLINGER

Defendant

-----X
Greenwald, J.

The following documents were reviewed by the Court in rendering its Decision.

NYSCEF Doc. Nos. 1,3, 23, 28, 40, 50, 59-71, 73-77, 78-80

RELEVANT BACKGROUND

Plaintiff NOEL STEWART (STEWART) commenced an action of negligence against his landlord Defendant, ERICKA FELLINGER (FELLINGER) seeking damages. Plaintiff alleges that on or about June 25, 2015 he fell at the bottom of an interior stairway at 132 Montgomery Street, Poughkeepsie, New York where he rented a room on the second floor. STEWART says he returned home from shopping, carrying two grocery bags, fell at the bottom of the stairs going up the stairs because it was dark, and the light was not on. He claims the light switch was taped up by the Defendant and had been that way for the past two years. He claimed further that he had told the landlord/Defendant about it, and even removed the tape once. Plaintiff claimed FELLINGER told him not to remove the tape and taped up the light switch again. Plaintiff is seeking damages due to his injuries purportedly caused by Defendant’s negligence.

MOTION TO STRIKE

On March 6, 2020 Defendant filed its motion to Strike Plaintiff’s proposed “Supplemental Bill of Particulars”. In response Plaintiff filed its Cross Motion on June 12, 2020 pursuant to CPLR 3025 seeking leave of the Court to Amend his Bill of Particulars. By seeking leave to amend, Defendant’s aforesaid Motion to Strike is rendered moot, as Plaintiff will not be filing a “Supplemental Bill of Particulars”, and is seeking, instead to file an “Amended Bill of Particulars”.

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MOTION TO AMEND

Rather than filing opposition, Plaintiff in effect “abandoned” its Motion to Strike the Supplemental Bill of Particulars, and instead on June 12, 2020, filed a Cross Motion for Leave to Amend his Bill of Particulars to allege a new injury. Amending a Bill of Particulars is governed by CPLR 4042(b) which states:

(b) Amendment. In any action or proceeding in a court in which a note of issue is required to be filed, a party may amend the bill of particulars once as of course prior to the filing of the note of issue.

DISCUSSION

As set forth in *Lazzari v Qualcon Construction, LLC*, 62 Misc.3d 1082 (Sup. Ct. Bronx, 2019), “[p]rejudice (or the lack thereof) is the critical consideration in determining whether leave to amend is appropriate”, under CPLR 3025(b).

Plaintiff’s argument is that Defendant’s expert, Dr. Robert Hendler is the proponent of this lumbar spine injury, and accordingly, the Court is being asked to allow the Bill of Particulars to be amended to include this injury. The supporting Affirmation of Plaintiff’s counsel (NYSCEF Doc. No. 74 at paragraph 6 comments repeatedly that Hendler examined Plaintiff’s lumbar spine, took x-rays of the lumbar spine, and remarked on Plaintiff’s difficulty walking. Further counsel for Plaintiff states, without any corroboration, that Defendant’s expert:

“Robert Hendler, MD then attributed Plaintiff’s present difficulty walking, which was claimed in the Plaintiff’s Bill of Particulars, to the lumbar spine.” (Exhibit 2, Report Page 3). While Robert Hendler MD then claimed that the limitations were due to prior degenerative changes, Robert Hendler, MD conceded that these prior degenerative changes may have been exacerbated by the Plaintiff’s accident. (Exhibit 2, Page 3).

Plaintiff’s counsel again attributes the need for the proposed “Amended Bill of Particulars” to Defendant’s expert, Robert Hendler, MD. To reiterate, Plaintiff’s counsel states at paragraph 9:

9. The entire basis for the Amended Bill of Particulars is to incorporate the findings by the Defendant’s expert [Robert Hendler, MD], and confirmed by Plaintiff’s expert, that the Plaintiff suffered an exacerbation of the prior existing lumbar spine condition as a result of his accident (Exhibit 2)(NYSCEF DOC.NO.66).

Plaintiff cites various cases, none of which are particularly persuasive to convince the court that leave should be given to file the proposed “Amended Bill of Particulars”, including the following: *Cardy v. Frey*, 86 A.D.2d 968 (4th Dep’t, 1982) a diagnosis of epilepsy was provided to the defendant immediately so no prejudice to allow amended papers; *Boxhorn v. Alliance Imaging, Inc.*, 74 A.D.3d 1735 (4th Dep’t, 2010) complaint amended to add strict inability based on the same transaction; *Tabak v. Shaw Indus. Inc.*, 149 A.D.3d 1132 (2nd Dep’t, 2017) convoluted

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proceedings, complaint dismissed; *Edenwald Contracting Co., Inc. v. City of New York*, 60 N.Y.2d 957 (1983) street paving contract, affirmative defense of waiver and consent amended after witness located; *St. Paul Fire & Marine Ins. Co. v. Town of Hempstead*, 291 A.D.2d 488 (2nd Dep't, 2002) failed to show amended answer would be prejudicial; *Lazzari, Supra* prior claims was recognized by the Court and bill of particulars allowed to be amended due there being no surprise.

OPPOSITION TO LEAVE TO AMEND

The Affirmation of Defendant's counsel deflects Plaintiff's assertion that by reason that the Bill of Particulars contained language that plaintiff reserved , "the right to claim **each and every injury contained in the medical report** which have or will be forwarded to defendants pursuant to the rules governing the exchange of medical information", Plaintiff should be allowed to amend and add an injury. However, since no such medical records concerning Plaintiff's lumbar spine were forwarded, then, according to the Defendant, Plaintiff is precluded from amending its Bill of Particulars to add an exacerbation claim concerning Plaintiff's lumbar spine (emphasis added).

Defendant refutes plaintiff's claim that Dr. Hendler was specifically retained to conduct Plaintiff's IME due to some concern about plaintiff's lumbar spine. Defendant includes its retention letter to Dr. Hendler which does not contain any specifics about Plaintiff's lumbar spine. Plaintiff's deposition testimony reveals nothing asserted about his lumbar spine, only the broken ribs on his left side. Defendant's counsel at paragraph 11 of his Affirmation reviews all the medical records provided and establishes that none of the records provided refer to Plaintiff's lumbar spine.

Next, Defendant avers that Plaintiff fails to show any reasonable excuse for the inordinate delay in seeking leave to amend the Bill of Particulars. The time between the filing of the Note of Issue and the pending Cross Motion to Amend is between 14-17 months. No excuse has been proffered. No affidavit of merit attesting to the merit of the application for leave has been filed.

Defendant refers to several cases relating to bills of particulars and what they contain. In *D'Onofrio v. Davis*, 14 A.D.2d 960 (3rd Dep't, 1961) in response to a demand for a statement of injuries, instead of describing the injures, plaintiff referred defendant to a medical report. Court granted a further bill of particulars. In *Bass v. Kansas*. 198 A.D.2d 693 (3rd Dep't, 1993) Plaintiff provided 500 pages of medical bills and the court ordered a further bill of particulars with specific information; *Rodgers v. New York City Tr. Auth.*, 109 A.D.3d 535 (2nd Dep't, 2013) reversed a trial court that had charged the jury with instructions based upon plaintiff's increased susceptibility to injury notwithstanding this was not claimed in the bill of particulars. *Fuentes v. City of New York*, 3 A.D.3d 549 (2nd Dep't, 2004) trial court reversed and denied amended bill of particulars as no satisfactory explanation provided for delay; *Canals v. Lai*, 132 A.D.3d 626 (2nd Dep't, 2015) 2 year delay, no reasonable excuse, leave to amend denied. *Mercado v. Moss*, 35 A.D.3d 553 (2nd Dep't, 2006) no reasonable excuse for delay for second amended bill of particulars, denied; and *Haddad v. New York City Tr. Auth.*, 5 A.D.3d 255 (1st Dep't, 2004) no reasonable delay.

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Defendant further asserts that there is nothing to support any causality between the accident and the “amended” claim of lumbar spine injury. Plaintiff has not provided an affidavit of merit attesting to the proposal that the amended bill of particulars is meritorious. Defendant cites several cases that discuss the time between an accident and treatment, which often supports causality (*Molesky v. Marra*, 130 A.D.3d 1274 [3rd Dep’t, 2015]). Plaintiff had extensive prior injuries, causation not demonstrated; *Sferra v. McGregor*, 69 A.D.3d 1200 (3rd Dep’t, 2010) prior treatment, no serious injury, causation questioned; *Shelley v. McCutcheon*, 121 A.D.3d 1243 (3rd Dep’t, 2014) pre-existing injuries, serious injury, 90/180 day category; *Henchy v. VAS Express Corp.*, 115 A.D.3d 478 (1st dep’t, 2014) Plaintiff failed to show merit of proposed amended claim; *Rosa v. Mejia*. 95 A.D.3d 402 (1st Dep’t, 2012) no contemporary treatment, no causation. Certain cases cited dealt with amended pleadings and their timeliness, others hinged more on causation. The key factor is that in the matter before the court, no affidavit proclaiming the merit of what plaintiff is proposing, an amended bill of particulars with a new injury, was offered. For the court to grant leave to allow Plaintiff to file its proposed “Amended Bill of Particulars” containing a new injury is deemed, by this court to be prejudicial and leave is denied

By reason of all the foregoing it is

ORDERED, that the motion by Defendant ERICKA FELLINGER to strike Plaintiff NOEL STEWART’S proposed “Supplemental Bill of Particulars” is **denied** as moot; and it is further

ORDERED that the cross motion by Plaintiff NOEL STEWART seeking leave of the Court to file an “Amended Bill of Particulars” is **denied**; and it is further

ORDERED, that parties and counsel shall appear for a virtual status conference on **October 16, 2020 at 10:00 A.M.** An email providing both the virtual link to participate as well as a telephone number will be forthcoming, please ensure this Court has email addresses for all parties.

Any relief not specifically granted herein is denied.

The foregoing constitutes the decision and order of this Court.

Dated: August 19, 2020
Poughkeepsie, New York

ENTER:



Hon. Hal B. Greenwald, J.S.C.

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CPLR Section 5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.

When submitting motion papers to the Honorable Hal B. Greenwald's Chambers, please do not submit any copies. Please submit only the original papers.