

**Torres v Park Ave. Christian Church A New
Religious Group**

2021 NY Slip Op 30402(U)

February 9, 2021

Supreme Court, New York County

Docket Number: 157476/2017

Judge: Margaret A. Chan

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. MARGARET A. CHAN PART IAS MOTION 33EFM

Justice

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INDEX NO. 157476/2017

CHRISTIAN TORRES,

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 001

- v -

PARK AVENUE CHRISTIAN CHURCH A NEW RELIGIOUS
GROUP, PA ACQUISITIONS (NY) LLC, GILBANE
RESIDENTIAL CONSTRUCTION, GILBANE BUILDING
COMPANY, and GILBANE, INC.,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document numbers 24, 25, 26, 27, 28, 29, 30, 31, 32,33,34,35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51.

were read on this motion to DISCOVERY/VACATE STIPULATION.

Plaintiff moves for an order (i) deeming a stipulation to withdraw his lost earnings claim dated March 5, 2019 as having withdrawn his claims without prejudice pursuant to CPLR 3217(c), (ii) vacating the stipulation pursuant to CPLR 2104, (iii) deeming plaintiff's Third Supplemental Bill of Particulars dated June 23, 2020 properly served pursuant to CPLR 3043(b), and (iv) granting plaintiff leave to serve a supplemental bill of particulars pursuant to CPLR 3043(c). Defendants oppose the motion.

Background

This action asserts claims for negligence and violations of New York's Labor Law arising out of an August 7, 2017 incident within a construction site located at 1010 Park Avenue, New York, NY ("the premises"). Specifically, plaintiff, who at the time of the incident, was a 29-year-old carpenter employed by non-party Forthill Construction Corp. ("Forthill") alleges that he was injured when he fell off an A-frame ladder while erecting forms and beams on the 14th floor of the premises. It is alleged that as a result of the incident, plaintiff suffered severe personal injuries including to his right wrist, cervical spine, lumbar spine, which required multiple surgeries.

At the time of the incident, the premises were owned by defendant PA Acquisitions (NY) LLC which acquired the land from defendant Park Avenue Christian Church ("the Church"). PA Acquisitions contracted with defendant

Gilbane Residential Construction (“Gilbane”) to serve as Construction Manager, and Gilbane hired Forthill as a subcontractor to perform certain duties at the premises, including framework.

The complaint alleges that as a result of incident, plaintiff is disabled and unable to work (NYSCEF # 26, ¶ 62). The Bill of Particulars asserted a claim for loss of earnings of approximately \$1.8 million (NYSCEF # 28, ¶ 18). By demand dated November 2, 2017, defendants sought authorizations for employment records for five years prior to accident to date and income tax information from 2010 to date (NYSCEF # 43). On January 16, 2018, plaintiff provided authorizations for plaintiff’s workers’ compensation records and his employment records from Forthill, where he had been employed for four months before the accident (NYSCEF # 29).

By preliminary conference order dated April 10, 2018 (NYSCEF # 9), plaintiff was directed to furnish authorizations for employment records from 2012 to the date of preliminary conference. Plaintiff was again directed to produce these records by compliance conference orders dated August 15, 2018 and November 28, 2018 (NYSCEF #11, 12). Plaintiff did not comply with these orders. By stipulation dated March 5, 2019 (“the Stipulation”), signed by counsel for the parties, it was agreed that “plaintiff’s claims for loss of earnings, both past and future, be and the same are withdrawn” (NYSCEF #30). Thereafter, plaintiff was deposed on April 3, 2019, April 26, 2019, and May 15, 2019. On May 22, 2019, plaintiff serve a Verified Supplemental Bill of Particulars (NYSCEF # 31) setting forth additional medical procedures and disabilities arising out of plaintiff’s injuries. On August 2, 2019, plaintiff served a Second Supplemental Bill of Particulars (NYSCEF # 32) to include that plaintiff had undergone additional surgeries and, at various discovery conferences, defendants reserved their right to take further depositions of plaintiff based upon the additional treatment alleged in the supplemental bills of particulars. In the meantime, defendants’ depositions were taken and completed in December 2019. By order dated May 28, 2020 (NYSCEF # 33), the court directed that plaintiff’s continued deposition take place by July 13, 2020, limited to issues as to plaintiff’s neck surgery and medical records.

Following a mediation on June 18, 2020, plaintiff’s counsel advised defendants’ counsel of plaintiff’s intent to reassert his loss of earnings claim. On June 23, 2020, plaintiff served a Third Supplemental Bill of Particulars (NYSCEF # 34) to include allegations of injuries to plaintiff’s shoulder that would require surgery and to reinstate plaintiff’s loss of earnings claim. The cover letter stated:

Enclosed please find plaintiff’s Third Supplemental Bill of Particulars. Please note that although previously withdrawn by Stipulation, this reinstates plaintiff’s claim for loss of earnings pursuant to CPLR 3043. Given the Court Order dated May 28, 2020 providing for a further deposition on or before July 13, 2020, you will have an opportunity to

ask any necessary questions concerning this claim. Given that the Workers' Compensation records and documents defendants produced in discovery confirm that plaintiff was employed, including the First Report of Injury which states Mr. Torres last worked on August 7, 2017 (incident date) and his average weekly gross wage was \$1,000.00, and that Mr. Torres continues to receive indemnity benefits in his Worker's Compensation case, it is clear that there is no prejudice to the defendants and that the lost earnings claim is meritorious. Please advise as to your availability to depose Mr. Torres, who is generally available.

By email dated July 8, 2020, defendants stated that "[i]t is our position that plaintiff cannot reinstate the claim for loss of earnings without leave of the court. CPLR 3043 does not provide any avenue or recourse regarding the rescission of a duty executed stipulation."

On August 7, 2020, plaintiff made this motion, and also filed new action arising out of the same incident against the same defendants and included a claim for loss of earnings (*Torres v Park Avenue Christian Church*; Index No. 156164/2020) (NYSCEF # 49). While this motion was pending, plaintiff efiled a Fourth Supplemental Bill of Particulars which, like the Third Supplemental Bill of Particulars, includes a claim for loss of earnings; it also supplemented damages to allege additional surgeries plaintiff had undergone.

Plaintiff's Motion

Plaintiff moves for an order permitting it to reassert his loss of earnings claim, and granting leave to a supplemental its bill of particulars to reinstate his loss of earnings claim. Plaintiff notes the Stipulation did not specifically state that the withdrawal of the loss of earnings claim was with prejudice and thus, under CPLR 3217, the stipulation was without prejudice to reassertion of the claim. Plaintiff further argues that the Stipulation should be vacated under CPLR 2104 on the grounds of mistake, unconscionability and as contrary to public policy, which favors resolution of dispute on their merits. In this connection, plaintiff asserts that the reinstatement of the loss of earnings claim would not prejudice defendants as discovery is not complete, and defendants are on notice of the substance of plaintiff's loss of earnings claim as plaintiff continues to receive workers' compensation benefits for lost earnings paid by AIG, which is the workers' compensation and liability carrier for defendants.

Defendants oppose the motion arguing that they will be prejudiced by plaintiff's attempt to reassert his loss of earnings claim. Specifically, defendants argue that as the claim was withdrawn, they did not attempt to obtain employment records, did not consult with, or retain, a vocational expert, and did not account for

the loss of earnings claim in preparing for, and taking, plaintiff's deposition. Defendants further argue that plaintiff is bound by the Stipulation, which is not against public policy or unconscionable since it resulted from plaintiff's decision as to how to proceed with the litigation. Moreover, defendants argue that although the Stipulation did not specifically state that the loss of earnings claim was withdrawn with prejudice, the conduct of the parties, and the elapse of a year and a half since it was entered, evinces an intent to permanently withdraw the claim.

CPLR 3217(c) provides in relevant part that, "unless otherwise stated in the notice, stipulation or order of discontinuance, the discontinuance is without prejudice...." (*see Matter of AutoOne Ins. Co. v Valentine*, 72 AD3d 953, 955 [2d Dept 2010] [a discontinuance without prejudice is not adjudication on the merits]; Siegel, NY Practice § 298 Effect of Discontinuance ([6th Ed. Dec 2020 Update])). Here, as the Stipulation did not state that it was with prejudice, plaintiff is not precluded from reasserting loss of earnings claim (*see Phoenix Assur. Co. v Stark Mobile Home*, 39 AD2d 514, 515 [1st Dept 1972] [vacating stipulation of discontinuance noting that it was without prejudice and did not constitute a contract of settlement]; *see also Wilson v St Vincent's Hosp.*, 172 AD2d 310 [1st Dept 1991] [vacating stipulation of discontinuance against hospital where records subpoenaed for trial revealed that employees of the hospital were present at the surgery providing the basis for the malpractice claim]).

Moreover, defendants have not established that they would be prejudiced by the vacatur of the Stipulation and the reassertion of plaintiff's lost earnings claim. Although defendants did not initially depose plaintiff regarding his loss of earnings, discovery is not complete and plaintiff's continued deposition was previously directed after plaintiff received further medical treatment. Furthermore, with regard to defendants' assertion that they have not retained a vocational expert, as discovery is continuing, such an expert may be retained and, if deemed necessary, a further physical examination of plaintiff may be conducted. And, to the extent plaintiff fails to furnish discovery to support his loss of earnings claim, various remedies may be sought under the CPLR short of precluding any claim for loss of earnings. In this connection, as plaintiff notes, he has provided defendants with authorizations for the workers' compensation file for his employer at that time of the accident to support the claim, and defendants are aware of the amount of workers' compensation being received by plaintiff. Accordingly, the Stipulation is vacated and plaintiff is permitted to pursue his loss of earnings claim

As for plaintiff's request for leave to serve a supplemental bill of particulars to include a loss of earnings claim, such request is granted since defendants have not established that they will be prejudiced as a result (*see Sahdala v New York City Health and Hosp. Corp.*, 251 AD2d 70, 70-71 [1st Dept 1998]) [concluding that trial court properly exercised discretion in granting plaintiff leave to amend bill of particulars to include a lost earnings claim where any prejudice to defendants

caused by its late addition was mitigated by granting defendants leave to conduct further discovery]; *Kirschner v Tindel*, 155 AD2d 289, 289-290 [1st Dept 1989][noting that “[i]n the absence of prejudice amendments and supplements to bills of particulars are to be liberally granted”]).

Conclusion

In view of the above, it is

ORDERED that plaintiff’s motion is granted and the Stipulation is vacated; and it is further

ORDERED that plaintiff is granted leave to serve the Fourth Supplemental Bill of Particulars; and it is further

ORDERED that a status conference shall be held on March 4, 2021 at 10:00 am with the call in information to be provided by the court.

2/9/2021

DATE


MARGARET A. CHAN, J.S.C.

MARGARET A. CHAN, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: